
 Council on Licensure,
Enforcement and Regulation


**Session Title: All About
the UAPA**



2010 Annual Educational Conference - September 23-25


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Promoting Regulatory Excellence

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Summary

This program provides an introduction to and overview of contested cases under the UAPA. The program will cover: agency complaint investigations, contested case hearings, and appeals of board decisions. The program will also consider efficient use of available resources.

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Overview

- Contested Cases
 - Governed by the Uniform Administrative Procedures Act
 - Tenn. Code Ann. § 4-5-301 et seq.
 - Most states have adopted some version of this model

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Definition


- “Contested case” means a proceeding, including a declaratory proceeding, in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing....Tenn. Code Ann. § 4-5-102(3)

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Applicability


- Examples in this program are based on board proceedings specific to the State of Tennessee; however, the general principles are applicable to all UAPA proceedings.
- Some hearings are before boards sitting as a whole in the presence of an administrative judge or hearing officer.
- Others are before administrative judges or hearing officers sitting alone.

Tenn. Code Ann. § 4-5-301(a)


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Hearings before Boards


- When a case is heard before a board with an administrative judge present the judge presides over the hearing, rules on procedural questions of law and the admissibility of evidence, and advises the board as to the applicable law. The board makes factual determinations, conclusions of law and imposes sanctions as appropriate. Tenn. Code Ann. § 4-5-301(b)


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Hearings before Administrative Judges		
<ul style="list-style-type: none"> • When a contested case is heard by an administrative judge sitting alone the judge presides over all aspects of the hearing and issues an initial order containing findings of fact and conclusions of law. Tenn. Code Ann. § 4-5-314(b). • The initial order will become a final order unless reviewed in accordance with Tenn. Code Ann. § 4-5-315. 		


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Cf. ALJ Hearings and Board Hearings		
<ul style="list-style-type: none"> • Multi-day hearings <ul style="list-style-type: none"> - Quorum issues - Memories fade - "paper cases" vs. "conduct cases" • Board members typically like to hear the proof "live" and question witnesses 		

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Use of Technology		
<ul style="list-style-type: none"> • Use of video depositions in lieu of live testimony • Pros and cons of video conferencing <ul style="list-style-type: none"> - Consider witness' physical proximity to hearing location - May depend on whether case is before ALJ or Board - Cost may be a factor 		

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<h3>Investigation</h3>		
<ul style="list-style-type: none"> • Complaint Intake <ul style="list-style-type: none"> - Written complaints preferred - Will accept complaints over the telephone with sufficiently detailed information - Will accept anonymous complaints, if appear to have credible information 		


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<h3>First Review</h3>		
<ul style="list-style-type: none"> • Complaint received in Bureau of Investigations • Investigations staff opens complaint file tied to respective board (Medical Examiners, Nursing, etc.) • Board Consultant and Board Staff Attorney review Complaint and any documentation submitted 		

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<h3>First Review - Consultant</h3>		
<ul style="list-style-type: none"> • Board Consultant is always a licensee of the profession for which complaint is being reviewed • Board Consultant is often a former Board member • Familiarity with Board • Consistency in review of complaints 		

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Standard at First Review

- If true, is the conduct alleged grounds for formal disciplinary action pursuant to Board statute?
 - If "No," closure with no violation found; or
 - Closure with letter of concern or warning (not considered "disciplinary action")
 - If "Yes," staff attorney completes request for investigation, and complaint is referred to one of 20 field investigators for investigation

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Investigation

- Investigator:
 - Interviews complainant
 - Interviews other witnesses having knowledge of events leading to complaint
 - Obtains relevant documents, specifically medical records

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Confidentiality


- Investigation not public until formal charges filed against a health care provider (licensed, registered, certified or permitted health care professionals, establishments or facilities)
 - Tenn. Code Ann. § 63-1-117(f)
 - Check your state's public records laws

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Second Review


- Board Consultant and board Staff Attorney review investigative file
 - Same standard of review as in first review:

- Do facts warrant formal disciplinary action or some other informal action?

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Referral for Disciplinary Action

- Unless complaint is closed with no violation of law having been substantiated or with a lesser violation (warranting a letter of concern or warning), complaint is referred to Office of General Counsel for further action

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Exceptional Remedy

- Summary Suspension
 - Authorized by UAPA- Tenn. Code Ann. § 4-5-320(c)
 - Constitutes taking of property interest prior to providing due process
 - Use sparingly!
 - Only when "public health, safety, or welfare imperatively requires emergency action"

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Exceptional Remedy, cont'd

- Key is to file Notice of Charges contemporaneously or within very short period after entry of Order of Summary Suspension
- Contested case proceedings must be "promptly instituted and determined."

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Contested Case

- Commenced with notification to Respondent of the facts or conduct that warrant disciplinary action and opportunity for Respondent to show compliance with lawful requirements for retention of license and filing of charges
- Tenn. Code Ann. § 4-5-320(c)

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Timeline of Contested Cases

1. T.C.A. § 4-5-320(c)
 2. Tenn. Code Ann. § 4-5-320(c)
 3. T.C.A. § 4-5-320(c)
 4. T.C.A. § 4-5-320(c)
 5. T.C.A. § 4-5-320(c)
 6. T.C.A. § 4-5-320(c)
 7. Tennessee County Local Rule 18

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Conduct of Contested Case Hearings

- Conflicts of interest/Ex parte communication:
 - Ex parte communications with administrative judge, hearing officer or agency member serving in the contested case proceeding are prohibited, unless specifically authorized by statute.
 - Tenn. Code Ann. § 4-5-304

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Disqualification

- Administrative judge, hearing officer or agency member is subject to disqualification for bias, prejudice, interest or any other cause provided in the UAPA or for any cause for which a judge may be disqualified.
 - Tenn. Code Ann. § 4-5-302
 - *Cobble v. Tennessee Department of Health, et al.*, Davidson Chancery, No. 95-3493-II (January 10, 1996)

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Pre-Hearing Motions

- Judge rules on procedural questions of law, including issues of discovery and TRCP
 - Tenn. Code Ann. §§ 4-5-301(b), 306 and 311
 - Rules 1360-04-01-.09 and 1360-04-01-.11

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Pre-Hearing Motions cont'd

- Interlocutory review of judge's rulings to agency by permission
 - Rule 1360-04-01-.09(7)
 - Discovery related motions not subject to interlocutory review. Rule 1360-04-01-.09(1)
- Motions for summary judgment

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Default

- Party may be held in default
 - Tenn. Code Ann. § 4-5-309
 - Rule 1360-04-01-.06(2)(a)-(d)
- Judge rules on notice; Board decides
- Lack of actual service
 - *Johnson v. Tennessee Board of Nursing, 2007 WL 624353 (Tenn. Ct. App. 2007)*

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Roles of attorneys, judge, Board

- Attorneys as advisors to board
 - *Martin v. Sizemore, 78 S.2.3d 249 (Tenn. Ct. App. 2001)*
 - Dual role for attorney is permissible
 - Attorney cannot advise and prosecute on same case at same time

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Roles of attorneys, judge, Board, cont'd

- Judge decides issues of law
- Board
 - Acts as jury (can ask questions)
 - Interprets own statutes and rules
 - Even when expert testimony is presented, may have to articulate standard of care
 - In Tennessee, deliberates in open meeting

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Note on Board Composition


- Two Tennessee boards (Medical Examiners and Nursing) have statutory authorization to break into panels of three to hear contested cases
- Can be a good way to manage large case-load


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Motion to Dismiss

- Motion to dismiss at close of Petitioner/State's proof
 - *St. Francis Hospital, Inc. v. Tennessee Health Facilities Commission, et al.*, Davidson Chancery, No. 87-1111-III (December 1, 1987)

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<h3>Interlocutory Review</h3>		
<ul style="list-style-type: none"> • A party may petition for interlocutory review by chancery court <ul style="list-style-type: none"> - Tenn. Code Ann. § 4-5-322(a) 		


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<h3>Final Order</h3>		
<ul style="list-style-type: none"> • Findings of Fact <ul style="list-style-type: none"> - <i>Levy v. State Board of Examiners in Speech Pathology and Audiology</i>, 553 S.W. 2d 909 (Tenn. 1977) - Use Notice of Charges - Possible proposed orders from parties 		

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<h3>Final Order cont'd</h3>		
<ul style="list-style-type: none"> • Conclusions of Law <ul style="list-style-type: none"> - Violations of statutes, rules - Relation to facts <ul style="list-style-type: none"> • <i>Golladay v. Tennessee Board of Dentistry</i>, Davidson Chancery, No. 01-1642-III (November 21, 2001) - Scope limited to Notice 		

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Final Order cont'd

- Penalty, remedy, discipline
 - Must be within scope of statutory or regulatory authority
 - Past actions of board
- Policy reasons for decision

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Civil Penalties

- May be assessed administratively
- Don't overuse - not a substitute for meaningful disciplinary action

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Civil Penalties, cont'd

- Board must consider:
 - Whether amount is substantial economic deterrent to violator
 - Circumstances
 - Severity and risk of harm to the public
 - Economic benefit gained by noncompliance
 - Interest of the public

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Respondent options after Board votes

- After board renders decision orally, Respondent can ask for a Motion to Stay from board
- Can Petition board (in writing) for Stay
- Can Petition board to reconsider after entry of written Final Order

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Judicial Review

- When to File Petition for Judicial Review
 - Within 60 days after entry of agency's final order (Tenn. Code Ann. § 4-5-322(b)(1)(A))
 - In Tennessee, file with Chancery Court of Davidson County ("home" of all state agencies unless otherwise directed by statute)

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Petition for Judicial Review

- Sets out factual and legal grounds for relief sought from reviewing court
- Should track statutory bases for reversal or modification under Tenn. Code Ann. § 4-5-322(h)
 - The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

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Petition for Judicial Review cont'd

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (5) Unsupported by evidence that is both substantial and material in the light of the entire record.

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Judicial Review misc.

- State agency usually represented by attorney general
- Decision on the record, not *de novo*

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Questions?



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<h3>Contact Information</h3>		
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