

ENVIRONMENTAL HEARINGS BEFORE ADMINISTRATIVE LAW JUDGES

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Tenn. Code Ann. § 4-5-301. Conduct of contested cases.

(a) In the hearing of any contested case, the proceedings or any part thereof shall be conducted:

(1) In the presence of the requisite number of members of the agency as prescribed by law and in the presence of an administrative judge or hearing officer; or

(2) By an administrative judge or hearing officer sitting alone.

Tenn. Code Ann. § 69-3-110. Hearings.

(a) Any hearing brought before the board pursuant to § 69-3-105(i), § 69-3-109, § 69-3-115, § 69-3-116, or § 69-3-118 shall be conducted as a contested case. **The hearing shall be heard before an administrative judge sitting alone pursuant to §§ 4-5-301(a)(2) and 4-5-314(b), unless settled by the parties.** The administrative judge to whom the case has been assigned shall convene the parties for a **scheduling conference** within thirty (30) days of the date the petition is filed. The scheduling order for the contested case issued by the administrative judge shall establish a schedule that results in a **hearing being completed within one hundred eighty (180) days of the scheduling conference**, unless the parties agree to a longer time or the administrative judge allows otherwise for good cause shown, and an initial order being issued within sixty (60) days of completion of the record of the hearing....

Appeal Petition

- Example: Tenn. Code Ann. § 69-3-115(a)(2)(B): Any person against whom an assessment has been issued may secure a review of such assessment by **filing with the commissioner a written petition setting forth the grounds and reasons for the objections, and asking for a hearing** in the matter involved before the board.
- For an artificial person, the petition should be drafted and signed by an attorney because it initiates a formal contested case hearing. *TEC v. WQCB* (“*Tosh Farms*”), 254 S.W.3d 396 (Tenn. Ct. App. 2007).

Appeal Petition

Recent order dismissed a petition for declaratory ruling for (among other reasons) failure to allege sufficient facts:

“To survive a Motion to Dismiss, a Petition or Complaint must not be devoid of factual allegations. *Webb v. Nashville Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). For ‘stated facts’ or ‘factual allegations’ contained in a Complaint or Petition to give rise to a claim, **the Complaint must contain ‘direct allegations on every material point necessary to sustain a recovery on any legal theory.’** *Leach v. Taylor*, 124 F.3d 87, 92 (Tenn. 2004). Courts are not required to accept as true statements that are merely legal arguments or legal conclusions. *Riggs v. Burson*, 941 S.W. 2d 44, 47-48 (Tenn. 1997). *See also* Rule 8(a)(2), TENN. R. CIV. P.”

Scheduling Conference/Order

- OGC will docket the appeal with APD.
- APD will assign an ALJ, who will convene a scheduling conference within 30 days of the filing of the petition.
 - Mandatory provision.
- Best practices:
 - Propose an agreed scheduling order setting a hearing date and all interim dates (*i.e.*, discovery, expert discovery, motions, witness & exhibit lists, trial brief, etc.).
 - The dates should be realistic.

Discovery

Tenn. Code Ann. § 4-5-311.

(a) The administrative judge or hearing officer, at the request of any party, shall issue subpoenas, effect discovery, and issue protective orders, in accordance with the Tennessee Rules of Civil Procedure, except that service in contested cases may be by certified mail in addition to means of service provided by the Tennessee Rules of Civil Procedure. The administrative judge or hearing officer shall decide any objection relating to discovery under this chapter or the Tennessee Rules of Civil Procedure....

Scope of Review

- APA deference does not apply to the conduct of contested case proceedings.
 - Such deference attaches on appeal of a final agency order (i.e., the board, or the board through an ALJ). Tenn. Code Ann. § 4-5-322(h) (judicial review).

Burden of Proof

- Tenn. Comp. R. & Regs. 1360-04-01-.02. The “petitioner” in a contested case proceeding is the “moving” party, i.e., the **party who has initiated the proceedings**. The petitioner usually bears the ultimate burden of proof and will therefore present his or her proof first at the hearing....
 - Permit appeals vs. enforcement orders
- Tenn. Comp. R. & Regs. 1360-04-01-.02. The “burden of proof” discussed in the definition of “petitioner” above refers to the duty of a party to present evidence on and to show, by a **preponderance of the evidence**, that an allegation is true or that an issue should be resolved in favor of that party.

Retention/Use of Expert Witnesses

- Must be helpful to the trier of fact (i.e., the ALJ).
- Department witnesses:
 - May testify as fact and/or expert witnesses.
 - Affects scope of discovery.
 - Legal conclusions.
- If it is a complex case, the parties may choose to consent to expert discovery through reports akin to the federal rules.
- *Daubert* motions.

Motion Practice

- An ALJ sitting with a Board may decide “procedural questions of law” but may not “take part in the determination of a question of fact.” Tenn. Code Ann. § 4-5-301(b).
- But, an ALJ sitting alone decides all matters, so such cases are more amenable to dispositive (or partially dispositive) motions.
 - Narrowing of issues vs. disclosing your argument
 - Any appeals are on the record after an ALJ decision (exhibits/ court reporter)

Hearings

- Trial briefs
- Stipulations (pre-marked exhibits, facts)
- Opening/Closing Arguments
- Objections
- Findings of Fact/Conclusions of Law
 - Citations to the record (i.e., exhibits, hearing transcript)
 - Sufficiently detailed to be used in the order
 - Final opportunity for persuasion