

Administrative Hearings

Basic Concepts

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ADMINISTRATIVE HEARINGS

I. Introduction

The focus of this paper is to provide some background and useful hints regarding administrative hearings/actions. The most common administrative actions that our clients handle, without assistance of counsel, are unemployment claims and TCOLE (TCLEOSE) F-5 appeals, so I am dealing more specifically with those. The concepts discussed in this paper, however, are also largely applicable to other types of administrative procedures such as internal grievances and appeals, and EEOC responses.

II. Establish Your Ultimate Goal.

The primary concern in any administrative action is to establish a goal for the process and adhere to that goal. Depending on the circumstances, you may seek one or more of the following:

- Winning.
- Information Gathering.
- Establishing a Consistent Defense.
- Locking in Testimony and Allegations.
- Getting a Preview of Plaintiff's Strategy.
- Avoiding Controversy.
- Keeping Matters Confidential.
- Keeping in Mind the Big Picture.

III. Learn to Play the Game.

In order to succeed in any administrative hearing you must know the rules and the parameters of your rules before you enter the game.

F-5

- BOP is on the City.
- Hearing can be moved to Houston but you must move for transfer.
- Both sides can subpoena witnesses and documents.
- Discovery is becoming more common.
- Treated like a mini trial.
- TCOLE washes its hands of the appeal.
- New legislation allows TCOLE to sign F-5 revision if ordered to change.

[Title 37 TAC Section 217.8]

(e) If the alleged misconduct is not supported by a preponderance of the evidence, the administrative law judge **shall order the commission to change the report**. The commission shall send the changed report to the law enforcement agency that prepared the original employment termination report. The law enforcement agency shall replace the original employment termination report with the changed report.

TWC

- The Initial Response Must be Consistent with Later Defense.
- Do Not Ignore Deadlines.
- Standard is whether or not employee violated established policy.
- BOP on the Employer Seems to be More than Preponderance of Evidence.
- TWC Precedents:

- <http://www.twc.state.tx.us/ui/appl/unemployment-benefits-appeals-policy-precedent-manual.html#precedentDecisions>.
- Medical Problems or Incompetence Do Not Equal a Policy Violation.
 - Except: Lying on Application Is a Policy Violation.
- When in doubt, employee wins.

IV. Trying Your Case.

Make your case with your best witnesses and keep it simple and succinct. Limit testimony and witnesses to those needed to establish your points. You control the witnesses unless the employee issues subpoenas. Employee groups are starting to utilize subpoenas in F-5 hearing and informally in TWC hearings. They are also using this forum for free discovery and for establishing a cause of action.

TWC

- TWC hearings are set for an hour.
- Sufficient time if you have prepared your witnesses/good examiner.
- Send all documents to the TWC and the employee before the hearing.
- Last minute documents can be faxed to TWC.
- Hand-deliver or overnight late documents to the former employee.
- Call in timely for the hearing/ thirty minutes prior to start.
- Provide the operator with a good return call phone number.
- Wait for the Examiner to call you back for the hearing.
- TWC will initiate the hearing by establishing background on the action.
- Background such as “fired or quit,” “pay rate,” and last day at work.
- Witnesses sworn in and the Examiner will take testimony.

- Examiners normally start with the decision-maker.
- Examiners push for a “final event” that caused the termination.
- Be careful on how you frame your answer.
- Examiners will allow both sides to question witnesses.
- Examiners generally do the majority of the examination.
- Examiners will not let the employee testify until it is their turn.
- You sometimes need to object to improper questions.
- Listen carefully to the Examiner’s questions and the answers.
- Follow-up with any issues that are necessary to your defense.
- Examiner may have a different focus but you want to make a good record.

F-5 Appeal

- This process is very much like a mini-trial.
- City goes first and the burden of proof is on the City.
- First-hand testimony is important so you can’t just rely on investigator.
- Missing witnesses will be held against the City.
- Officers are generally given the benefit of the doubt if no eyewitnesses.
- Rules of evidence are loosely followed in most hearings.
- Parties are generally given an opportunity for closing arguments.

V. The Appeal Process.

Both the TWC process and the F-5 decision can be appealed past if the hearing decision is adverse. The TWC appeal is to a Commission consisting of one Labor representative, one employee representative and one neutral. This panel will issue a

decision based upon your appeal brief outlining the basis for reversal and citing evidence and TWC precedent for the request. The appeal step after this is to District Court. An F-5 decision can be appealed to District Court.

ATTACHMENTS

1. Appeal of an Initial Decision.
2. Appeal of TWC Examiner's Decision to Panel.
3. New F-5 Form.
4. New TCOLE procedure