TRAPS FOR THE UNWARY ADMINISTRATIVE LAWYER

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State Bar of Texas
17TH ANNUAL ADVANCED ADMINISTRATIVE LAW COURSE
September 22-23, 2005
Austin

CHAPTER 11

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TRAPS FOR THE UNWARY ADMINISTRATIVE LAWYER

I. INTRODUCTION

The modern era in Texas administrative law began on January 1, 1976 when the Texas Administrative Procedure and Texas Register Act (APTRA) took effect after its 1975 passage during the 64th legislative session.[1] Since that time, a vast litany of litigation has ensued and further statutory promulgations have been enacted, all of which have—to a large extent—settled much of the original ambiguities hidden within the APTRA,[2] but many yet remain. The scope of this article aims to identify and elucidate several, but by no means all, of the areas of administrative law practice that remain potentially hazardous for an administrative lawyer not intimately familiar with them.

II. BRIEF HISTORY

The movement towards the enactment of an administrative procedure act for Texas began as early as 1953,[3] but the advocates of such an act would have to wait another twenty-two years until the Legislature finally passed the APTRA in 1975.[4] The APTRA was, in large part, based upon and, in many instances, drawn verbatim from the Revised Model State Administrative Procedure Act of 1961,[5] which itself was built upon its predecessor—the Model State Administrative Procedure Act of 1946,[6] as well as other administrative procedure acts, both state and federal.[7] In addition to its primary purpose of "provid[ing] minimum standards of uniform practice and procedure for state agencies,"[8] the APTRA required the Secretary of State (SOS) to compile, index, and publish all proposed, adopted, withdrawn, and emergency rules in the *Texas Register*.[9] After the interceding biennium, the Legislature passed the Texas Administrative Code Act,[10] which added the publication of the Texas Administrative Code (TAC) to the SOS's administrative law duties; directing the SOS to codify all rules adopted by the various state agencies already published in the *Texas Register* in the TAC.[11]

Thirty-two years after the APTRA was first promulgated, the 73rd Legislature removed its provisions from the Revised Civil Statutes in 1993,[12] and codified the APTRA in the Texas Government Code under the new moniker; the Administrative Procedure Act (APA),[13] where it may be currently found today in Chapter 2001.[14] The portion of the APTRA concerning the Texas Register was transferred to Chapter 2002 as well.[15] One of the most significant changes that came about as a result of the APA's codification in 1993 was the creation of the State Office of Administrative Hearings (SOAH), which detached the majority of the administrative law judges from many of the state's agencies.[16]

III. CONSTITUTIONAL UNDERPINNINGS OF AND INTERPLAY BETWEEN STATUTES AND ADMINISTRATIVE RULES

The myriad of statutes, rules, and decisions that comprise the sibylline framework of administrative law lies at the heart of this article. Accordingly, at the

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1 *See* Ron Beal, *The APA and Rulemaking: Lack of Uniformity Within a Uniform System*, 56 BAYLOR L. REV. 1, 1 (2004) [hereinafter *APA & Rulemaking*]; *see also* Administrative Procedure and Texas Register Act, 64th Leg., R.S., ch. 61, 1975 Tex. Gen. Laws 136; *Tex. Dept. of Protective and Reg. Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 172, 182-83 (Tex. 2004).

2 Larry J. Craddock, *A History of Texas Administrative Law*, *in* NUTS & BOLTS OF ADMINISTRATIVE LAW SEMINAR 2 (Travis County Bar Assoc. 2004).

3 *See Administrative Procedure Act*, 16 TEX. B.J. 14, 14-15, 45-49 (1953).

4 *APA & Rulemaking*, *supra* note 1, at 2; *see* Tex. S.B. 81, 63d Leg., R.S. (1973); Tex. H.B. 248, 63d Leg., R.S. (1973); Tex. S.B. 16, 62d Leg., R.S. (1971); Tex. H.B. 761, 62d Leg., R.S. (1971); *see also* TEXAS CIVIL JUDICIAL COUNCIL, ADMINISTRATIVE PROCEDURE LAWS IN THE UNITED STATES: A COMPARATIVE STUDY (1957); George W. Terry, Comment, *The Proposed Texas Administrative Procedure Act*, 33 TEX. L. REV. 499 (1955).

5 *See* Craddock, *supra* note 2, at 2; *APA & Rulemaking*, *supra* note 1, at 2; Hon. Bob E. Shannon & James B. Ewbank, *The Texas Administrative Procedure and Texas Register Act Since 1976—Selected Problems*, 33 BAYLOR L. REV. 393, 393 (1981); *see also* REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1961), 15 U.L.A. 184 (2000).

6 MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1946), 9C U.L.A. 179 (1957).

7 *See* Craddock, *supra* note 2, at 1-2.

8 TEX. GOV'T CODE ANN. § 2001.001(1) (Vernon 2000).

9 Susan K. Durso & Judith L. Kennison, *State Agency Rulemaking Process*, *in* ADVANCED ADMINISTRATIVE LAW COURSE 2004 ch. 6, 2 (Texas Bar CLE 2004).

10 Texas Administrative Code Act, 71st Leg., R.S., ch. 678, 1977 Tex. Gen. Laws 1703.

11 *See* Durso & Kennison, *supra* note 9, at 2.

12 *See* Pamela M. Giblin & Derek R. McDonald, *Rulemaking: Challenges to Agency Rules*, *in* ADVANCED ADMINISTRATIVE LAW COURSE 2002 ch. 5, 1 n.1 (Texas Bar CLE 2002).

13 Administrative Procedure Act, 73rd Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 583, 735; *see also Tex. Dept. of Protective and Reg. Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 172, 190 (Tex. 2004); *APA & Rulemaking*, *supra* note 1, at 2.

14 TEX. GOV'T CODE ANN. §§ 2001.001-.902 (Vernon 2000 & Supp. 2004-05).

15 *Mega Child*, 145 S.W.3d at 172.

16 Craddock, *supra* note 2, at 2.

outset of this discussion, a short review of the different categories of rules and statutes—and more importantly—how they interact with and complement one another is necessary.

There are currently one-hundred and eighty-four statutory provisions contained in eight chapters of the Government Code that govern administrative law practice in Texas.[17] By comparison, in 2001 there were nearly one-hundred and seventy state agencies empowered with rulemaking authority,[18] and close to eighteen thousand rules were proposed or adopted throughout the course of that year.[19] In 2004, the sheer volume of rulemaking activity required over twelve thousand pages to detail in the Texas Register.[20]

Article III, Section 1 of the Texas Constitution directs "[t]he Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled 'The Legislature of the State of Texas.'"[21] Additionally, Article II, Section 1 provides for the separation of state powers among the legislative, executive, and judicial branches.[22]

Under its legislative power, any statute passed by the Legislature is presumed to be constitutional.[23] This is in stark contrast to rules promulgated under the APA, which are defined as "state agency statement[s] of general applicability that implement[] or prescribe[] law or policy, [or describe the procedure or practice requirements of a state agency] that include[] the amendment or repeal of a prior rule."[24] State agencies, however, "lack any inherent, constitutional power to affect the rights, duties, and obligations of [the] Texas citizenry,"[25] and instead derive their constitutional authority from the legislative powers delegated them in Article II, Section 1 and Article III, Section 1.[26] The parameters of the legislative powers granted to state agencies are circumscribed by statute,[27] both by the enabling act of the specific agency and other statutes that might bear on the agency's exercise of its powers.[28] In addition to "clear and unmistakable" statutory grants of power,[29] the Texas Supreme Court has held that administrative agencies possess "implied powers necessary to accomplish the express duties that the Legislature gives to [them]."[30]

These two constitutional provisions enable administrative agencies to enact both substantive rules—expressed as either legislative or ad hoc rules—and nonsubstantive policy statements, also termed "nonlegislative rules."[31] Nonlegislative "rules" primarily differ from substantive rules in that they are not actually "rules" under the APA definition of "statements of general applicability."[32] They are instead interpretive policy statements,[33] usually issued in the form of "letters, guidelines, . . . reports, and . . . briefs,"[34] that are "effective only upon and within the agency's internal management and organization,"[35] which "*do not affect* private rights or procedures."[36] These nonsubstantive policy statements are made pursuant to the implied powers granted administrative agencies by the Legislature.

By comparison, substantive rules are ones that do affect "individual rights and obligations,"[37] and which bear the full "force and effect of legislation."[38] Of the two types of substantive rules, legislative rules (so called because they are substantive rules that should have been promulgated legislatively)[39] are most clearly derived from the Article III, Section 1 legislative

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17 *See* §§ 2001.001-2006.016; 2008.001-2009.055.

18 Justin Lannen, *Nonlegislative Rulemaking: Is Texas Moving Toward the Federal Courts' Perspective on Agency Policy Statements and Interpretive Rules?*, 4 TEX. TECH J. TEX. ADMIN. L. 111, 111-12 (2003); *see* Susan Henricks, *Statutory Limits on Agency Rulemaking*, *in* NUTS & BOLTS OF ADMINISTRATIVE LAW SEMINAR 1 (Travis County Bar Assoc. 2004).

19 Lannen, *supra* note 18, at 111-12.

20 29 Tex. Reg. 1-12,366 (2004).

21 TEX. CONST. art. III, § 1.

22 *Id*. art. II, § 1.

23 *Nootsie, Ltd. v. Williamson County Appraisal Dist*., 925 S.W.2d 659, 662 (Tex. 1996).

24 *APA & Rulemaking*, *supra* note 1, at 8; TEX. GOV'T CODE ANN. §§ 2001.003(6)(A)(i)-(B) (Vernon 2000).

25 *APA & Rulemaking*, *supra* note 1, at 8.

26 *Brown v. Humble Oil & Refining Co*., 126 Tex. 296, 306, 83 S.W.2d 935, 940-41 (1935).

27 *Cities of Austin, Dallas, Ft. Worth and Hereford v. S.W. Bell Tel. Co*. 92 S.W.3d 434, 441 (Tex. 2002); *APA & Rulemaking*, note 1, at 8.

28 *See* Durso & Kennison, *supra* note 9, at 3.

29 *Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 315-16 (Tex. 2001).

30 *Cities*, 92 S.W.3d at 441.

31 *See* Lannen, *supra* note 18, at 113, 115, 119.

32 *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 443 (Tex. 1994). Even though informal agency policy statements are not termed "rules" under the provisions of the APA, we refer to them as such in accordance with the literature. *See, e.g., APA & Rulemaking*, *supra* note 1, *passim*; Lannen, *supra* note 18, *passim*; *Ad Hoc Rulemaking*, *infra* note 40, *passim.*

33 *See* Lannen, *supra* note 18, at 119.

34 *Brinkley v. Texas Lottery Comm'n*, 986 S.W.2d 764, 769 (Tex. App.—Austin 1999, no pet.).

35 *Id*. at 770.

36 *Id*; *see also* TEX. GOV'T CODE ANN. § 2001.003(6)(C) (Vernon 2000 & Supp. 2004-05).

37 *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979).

38 *Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307, 310 (Tex. 1976); *see* Lannen, *supra* note 18, at 113.

39 *See Am. Mining Cong. v. Mine Safety and Health Admin*., 995 F.2d 1106, 1109-13 (D.C. Cir. 1993); Lannen, *supra* note 18, at 113.

delegation of power. Legislative rules are made pursuant to a notice and comment rulemaking procedures, which "culminate[] in a written agency justification for the rule adopted that is subject to immediate judicial review"[40] to ensure that the rule adopted is "reasonable and not inconsistent with . . . statute."[41]

As a "dwindling few" still refer to them,[42] ad hoc rules (or "ad hoc adjudication" as some commentators argue is the more precise terminology)[43]—more specifically contested case orders,[44] result from legislatively-authorized "proceeding[s] . . . in which the legal rights, duties, or privileges of a party are . . . determined by a state agency after an opportunity for an adjudicative hearing."[45] Contested case proceedings call on the agency adjudicating the matter "to decide specific controversies of law and fact between individuals or entities or between individuals and entities and the state agency arising out of a regulatory scheme."[46] While, on its face, the act of adjudicating anything would appear to be a judicial, rather than a legislative power, the Texas Supreme Court settled any confusion between the two almost a century ago.[47] In *Missouri, K. & T. Railway v. Shannon*, the Court explained that an "executive officer, who in the exercise of his functions[,] is required to pass upon facts and determine his action by the facts found" is performing a "'quasi-judicial' function."[48] These quasi-judicial powers are distinguished from the purely judicial powers referred to under Article II, Section 1, and specifically enumerated and confined to the judicial branch in Article V, Section 1 of the Texas Constitution.[49] Therefore, the quasi-judicial powers of an administrative agency and the ad hoc rules that are promulgated under those powers, are derived from legislative grants of power, just as are legislative rules.[50] Agencies that wield both adjudicatory and legislative authority have discretion, subject to judicial review, over which authority to employ in a given matter.[51]

IV. LIKELY AVENUES OF AGITA

A. Proceedings at SOAH

1. Brief Historical Overview

The SOAH was created in 1991[52] in order to "serve as an independent forum for the conduct of adjudicative hearings in the executive branch of state government . . . [and which could] separate the adjudicative function from the investigative, prosecutorial, and policymaking functions in the executive branch in relation to hearings that the office is authorized to conduct."[53] The APA specifically clarifies that the type of "adjudicative hearings" SOAH's administrative law judges ("ALJs") are authorized to preside over are contested case hearings.[54] The central role of the SOAH ALJ is to act as the factfinder for the particular agency board or commission over whose contested case the ALJ is presiding.[55] This is by design to ensure the ALJ's role as an independent arbiter,[56] and as such, the involved agency is charged with providing the applicable rules or policies in writing to the ALJ so that he or she may formulate the findings of fact and conclusions of law to create a proposal for decision ("PFD").[57] It is then left to the agency's board or commission to issue its final order after examining the record and the SOAH ALJ's PFD.[58] The agency is permitted to change a finding of fact or conclusion of law, and to modify or vacate the PFD under certain criteria as well.[59] In some license revocation matters, the agency may issue a rule empowering the SOAH ALJ to make the final

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40 Ron Beal, *Ad Hoc Rulemaking in Texas: The Scope of Judicial Review*, 42 BAYLOR L. REV. 459, 462 (1990) [hereinafter *Ad Hoc Rulemaking*].

41 *Cities of Austin, Dallas, Ft. Worth and Hereford v. S.W. Bell Tel. Co.* 92 S.W.3d 434, 442 (Tex. 2002).

42 Don Walker, *Agency Rule—How Do You Sue, Agency Standard of Review*, *in* ADVANCED ADMINISTRATIVE LAW COURSE 2003 ch. 3, 1 (Texas Bar CLE 2003).

43 *Id*.

44 *See APA & Rulemaking*, note 1, at 10.

45 TEX. GOV'T CODE ANN. § 2001.003(1) (Vernon 2000) (defining "contested case").

46 *APA & Rulemaking*, note 1, at 11.

47 *See Missouri, K. & T. Ry. v. Shannon*, 100 Tex. 379, 389, 100 S.W. 138, 141 (1907).

48 *Id*.

49 *See* TEX. CONST. arts. II, § 1; V, § 1; *see also Board of Water Eng'rs v. McKnight*, 111 Tex. 82, 92, 229 S.W. 301, 304 (1921).

50 *See APA & Rulemaking*, note 1, at 11.

51 *See R.R. Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 688-89 (Tex. 1992) (citing *St. Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 799 (Tex. App.—Austin 1982, writ ref'd n.r.e.)); Henricks, *supra* note 18, at 6.

52 Act of May 27th, 1991, 72d Leg., R.S., ch. 591, 1991 Tex. Gen. Laws 2127. However, the SOAH didn't begin to conduct contested case hearings until January 1, 1992. Act of May 27th, 1991, 72d Leg., R.S., ch. 591, § 6(b), 1991 Tex. Gen. Laws 2127, 2128.

53 TEX. GOV'T CODE ANN. § 2003.021(a) (Vernon 2000 & Supp. 2004-05); *see also* Nancy L. Harlan, *Which Way is the Scale Tipped Now? The Shifting Balance of Power Between the Authority of Administrative Agencies and the State Office of Administrative Hearings Regarding Rulings in Contested Cases*, 4 TEX. TECH J. TEX. ADMIN. L. 227, 230 (2003).

54 § 2001.058(b); *see* Harlan, *supra* note 53, at 230.

55 Harlan, *supra* note 53, at 231-32.

56 *See* § 2003.051.

57 *Id*.; *see also* § 2003.042(a)(6).

58 § 2003.062.

59 § 2001.058(e).

determination in the contested case hearing,[60] subject to judicial review.[61]

SOAH's jurisdiction spans presiding over administrative hearings for all state agencies that do not have at least one employee whose duties include serving as a hearing officer,[62] to the Texas Department of Transportation,[63] to the Employees Retirement System (ERS),[64] and up until this past regular session,[65] the Texas Workers' Compensation Commission (TWCC), among many others.[66] In 1995, the 74th Legislature created two divisions within SOAH to conduct contested case hearings for the Texas Commission on Environmental Quality (TCEQ),[67] and the Public Utility Commission (PUC).[68] However, the abolition of the TWCC should significantly decrease SOAH's overall workload as a substantial portion of SOAH's docket was comprised of TWCC referrals.[69]

Despite the creation of SOAH, "many agencies are statutorily authorized to employ [ALJs] or Hearing Officers to conduct contested case proceedings"[70] themselves. The main, and perhaps only, difference in powers between agency and SOAH ALJs is that "most agencies provide by rule that the board or officer *may* adopt the ALJ findings in whole or in part,"[71] while a board or officer is bound to accept a SOAH ALJ's findings unless it or they "can articulate in writing the reason and legal basis for a modification of the same."[72]

2. Evidentiary Matters

Most of the evidentiary rules that govern proceedings in district court govern proceedings at the SOAH as well. However, there are a few differences, which can present problems to an unwary or unprepared practitioner.

Section 2001.081 of the APA provides that the Texas Rules of Evidence (TRE) apply in adjudicative hearings at SOAH as they do in any nonjury civil trial in district court except that inadmissible evidence under the TRE may be admissible in SOAH proceedings if: "(1) necessary to ascertain facts not reasonably susceptible of proof under those rules; (2) not precluded by statute; and (3) of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs."[73] The TRE provide for instances such as this provision in the APA, by expressly recognizing that the TRE apply "except as otherwise provided by statute."[74] Although this exception would appear to grant ALJs extremely broad powers over what evidence they may deem admissible that district court judges can not, the exception is apparently rarely used successfully, and usually only when the proper predicate facts have been satisfactorily demonstrated.[75]

Another area of difference of between SOAH evidentiary practice and its counterpart at the trial court deals with judicial notice.[76] By virtue of section 2001.081 of the APA,[77] TRE 201-204 apply equally in administrative proceedings,[78] but section 2001.090 allows ALJs to uniquely take "official notice" of "all facts that are judicially cognizable," and "generally recognized facts within the area of the state agency's specialized knowledge."[79] The common categories of judicial notice common in all proceedings are: (1) adjudicative facts; (2) legislative facts; and (3) the text

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60 § 2001.058(f).

61 § 2001.058(f)(5).

62 § 2003.021(b)(1).

63 Harlan, *supra* note 53, at 231.

64 *Id*.

65 House Bill 7 abolished the TWCC as part of its sunset review process, and reassigned its former functions to the Workers' Compensation Division and the Office of Public Insurance Counsel, both parts of the Texas Department of Insurance. *See* Tex. H.B. 7, 79th Leg., R.S. (2005); Don Walker, *Legislative Update: Workers' Compensation*, *in* ADVANCED ADMINISTRATIVE LAW SEMINAR 1 (Austin Bar Assoc. 2005).

66 Harlan, *supra* note 53, at 231.

67 TEX. GOV'T CODE ANN. § 2003.047 (Vernon 2000); *see* Act of May 4th, 1995, 75th Leg., R.S., ch. 106, 1995 Tex. Gen. Laws 898.

68 § 2003.049; *see* Act of May 27th, 1995, 75th Leg., R.S., ch. 765, 1995 Tex. Gen. Laws 3972; Harlan, *supra* note 53, at 230.

69 Hon. Sheila Bailey Taylor, *SOAH Update*, *in* ADVANCED ADMINISTRATIVE LAW SEMINAR ch. F, 1 (Austin Bar Assoc. 2005).

70 Ron Beal, *Issuing a Proposal for Decision: An Analysis of the Power of an Administrative Law Judge in Rendering Proposed Findings in a Contested Case Proceeding*, 2 TEX. TECH J. TEX. ADMIN. L. 209, 211 (2001) [hereinafter *Proposal for Decision*]; *see, e.g.,* TEX. FIN. CODE ANN. § 31.201(b) (Vernon 1998 & Supp. 2004-05); TEX. REV. CIV. STATS. ANN. art. 6519a (Vernon Supp. 2004-05).

71 *Proposal for Decision*, *supra* note 70, at 217 (emphasis added); *see, e.g.,* 7 TEX. ADMIN. CODE § 9.34(b) (2005) (Fin. Comm'n. of Tex.; Post-hearing Proceedings); 16 TEX. ADMIN. CODE § 1.143 (2005) (R.R. Comm'n of Tex.; Commission Action); 34 TEX. ADMIN. CODE § 67.91(b) (2005) (Employees Ret. Sys. of Tex.; Form, Content, and Service of Orders).

72 *Proposal for Decision*, *supra* note 70, at 217; TEX. GOV'T CODE ANN. § 2003.058(e) (Vernon 2000).

73 § 2001.081; Thomas B. Hudson, Jr., *Evidence Issues at SOAH*, *in* ADVANCED ADMINISTRATIVE LAW COURSE 2003 ch. 8, 1 (Texas Bar CLE 2003).

74 TEX. R. EVID. 101(b).

75 Hudson, *supra* note 73, at 1.

76 *Id*. at 2.

77 § 2001.081.

78 TEX. R. EVID. 201-04.

79 § 2001.090; Hudson, *supra* note 73, at 2.

of statutes and regulations (i.e. law).[80] The difference between findings of adjudicative facts and findings of legislative facts have been explained by describing adjudicative facts as "'basic or underlying fact[s],'"[81] and describing legislative facts as "ultimate finding[s] of fact."[82] An agency has the most discretion to change or reject a SOAH ALJ's: conclusions of law, somewhat less discretion to alter findings of legislative facts, and the least discretion to alter findings of adjudicative facts.[83]

Interlocutory appeals of evidentiary matters are one area in particular where an administrative lawyer should trod with care, as such appeals are governed by the individual agency's administrative provisions contained in the TAC, and vary from one agency to another, although most are silent on the issue.[84] For example, interlocutory evidentiary appeals are expressly disallowed in TCEQ proceedings.[85]

3. Open Records Restrictions

Generally, it is the "policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees."[86] However, there are several exceptions to this maxim, the most notable of which for administrative lawyers is found in section 552.141 of the Government Code.[87] This provision exempts all:

> working papers of an [ALJ] at the [SOAH] are excepted from the requirements of Section 552.021:
>
> (1) notes recording the observations, thoughts, or impressions of an administrative law judge;
> (2) drafts of a proposal for decision;
> (3) drafts of orders made in connection with conducting contested case hearings; and
> (4) drafts of orders made in connection with conducting alternative dispute resolution procedures.[88]

B. Agency Powers to Modify or Vacate SOAH PFDs

Perhaps no other area in administrative law practice is more fraught with procedural pitfalls than which set of rules govern and control an agency's review of a SOAH PFD. The APA, as well as each agency's enabling statute and governing set of rules in the TAC together govern such reviews in concert with one another; and determining which set of regulations governs in any one instance can often be a daunting task.

1. Statutory Provisions

As mentioned above,[89] section 2003.058(e) (".058(e)") of the APA provides that an agency may issue a final order that modifies or vacates the SOAH's PFD, or changes the SOAH ALJ's findings of fact and conclusions of law, only if the agency determines that:

> (1) that the [ALJ] did not properly apply or interpret applicable law, agency rules, written policies . . . or prior administrative decisions;
> (2) that a prior administrative decision on which the [ALJ] relied is incorrect or should be changed; or
> (3) that a technical error in a finding of fact should be changed.[90]

However, the individual enabling acts of various agencies—including some unique provisions within the APA itself[91]—have, over time, been amended to include provisions that supercede the APA's general mandates,[92] and some of them are explored below.

a. TCEQ and PUC

When the 74th Legislature created separate divisions within SOAH in 1995 solely dedicated to presiding over contested case matters originating from

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80 Hudson, *supra* note 73, at 2; Harlan, *supra* note 53, at 233.

81 Harlan, *supra* note 53, at 232 (quoting RONALD L. BEAL, 1 TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE § 8.3.2(a), p. 8-29.0 (Supp. 1999)) [hereinafter ADMIN. PRAC. & PROC.].

82 Harlan, *supra* note 53, at 232 (citing ADMIN. PRAC. & PROC § 8.3.2(a), p. 8-29.0).

83 Harlan, *supra* note 53, at 233.

84 Hudson, *supra* note 73, at 2.

85 *See* 30 TEX. ADMIN. CODE §§ 80.127, 80.131 (2005) (TCEQ; Evidence, Interlocutory Appeals and Certified Questions).

86 TEX. GOV'T CODE ANN. § 552.001(a) (Vernon 2004); *see also* § 552.021.

87 § 552.141. It should be noted that there are currently three provisions in the Government Code, all of which are codified at § 552.141. *See id.*; Act of May 24th, 2003, 78th Leg., R.S., ch. 1215, § 1, 2003 Tex. Gen. Laws 3444, 3444. The provision dealing with ALJs is found on page 164 of volume **X** of the Government Code. § 552.141.

88 § 552.141.

89 *See* discussion *supra* Part IV.A.1.

90 TEX. GOV'T CODE ANN. § 2003.058(e) (Vernon 2000).

91 §§ 2003.047, .049.

92 *See* Harlan, *supra* note 53, at 236; *see also* Hon. Barbara C. Marquardt, *Issuing the PFD (Proposal for Decision), in* NUTS & BOLTS OF ADMINISTRATIVE LAW SEMINAR ch. C, 2 n.7 (Travis County Bar Assoc. 2004).

the TCEQ and the PUC,[93] the Legislature also superseded, to some extent, the agency review provision in .058(e).[94]

Specifically, section 2003.047(m) generally rephrases the provisos of .058(e), allowing the TCEQ to "amend the proposal for decision, including any finding of fact."[95] However, subsection (m) expressly incorporates section 361.0832 of the Health and Safety Code, which specifies the standard of review that the TCEQ may employ in reviewing SOAH findings of fact, conclusions of law, and PFDs; providing that:

> (c) The [TCEQ] may overturn an underlying finding of fact that serves as the basis for a decision in a contested case only if the [TCEQ] finds that the finding was not supported by the great weight of the evidence.
> (d) The [TCEQ] may overturn a conclusion of law in a contested case only on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules.
> (e) If a decision in a contested case involves an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgment of the [TCEQ] by law, the [TCEQ] may reject a proposal for decision as to the ultimate finding for reasons of policy only.[96]

Sections 361.0832(c)-(e) and .058(e) were examined at length in 1995 by the Austin Court of Appeals.[97] Therein, Justice Kidd explained that subsection (c) operated to limit TCEQ's "discretion to reverse [only] those findings that do not find support in the 'great weight' of the evidence in the record."[98] This interpretation seems to comport with the traditional view of adjudicative findings of fact, oft-defined as "underlying fact[s],"[99] as being the type of finding least susceptible to agency modification.[100] The court went on to uphold subsection (d), which imposes a "clearly erroneous" standard of review to SOAH conclusions of law, because "[f]orcing the [TCEQ] to accept the hearing examiners' conclusions of law, if reasonable, would destroy the [TCEQ]'s discretion to interpret the rules that the [TCEQ] itself has promulgated."[101] The court supported its conclusion by reasoning that the "'clearly erroneous' standard is generally considered to give the reviewing body broader authority than is allowed under a 'substantial evidence' review because a decision may be overturned despite its theoretical reasonableness."[102] Last, the court examined subsection (e) and held that, because "ultimate findings invariably involve conclusions of law or mixed questions of law and fact, it was not improper for the [TCEQ] to rely upon both policy and factual grounds in concluding that the examiners' PFD should be rejected."[103] This interpretation also seems to compliment the view of legislative findings of fact and conclusions of law being more susceptible to agency scrutiny.[104]

Section 2003.049(g), which governs PUC review of SOAH findings, conclusions, and PFDs, alters the general provisions of .058(e) somewhat as well, stating that the PUC may change same only if the PUC:

> (1) determines that the administrative law judge:
>
> (A) did not properly apply or interpret applicable law, commission rules or policies, or prior administrative decisions; or
> (B) issued a finding of fact that is not supported by a preponderance of the evidence; or
>
> (2) determines that a commission policy or a prior administrative decision on which the administrative law judge relied is incorrect or should be changed.[105]

The material differences between this provision and the general mandates of .058(e) are that findings of fact (presumably legislative or adjudicative) may be changed either because of technical errors in the

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93 *See* § 2003.047; Act of May 4th, 1995, 75th Leg., R.S., ch. 106, 1995 Tex. Gen. Laws 898 (creating a SOAH division to exclusively hear TCEQ cases); § 2003.049; Act of May 27th, 1995, 75th Leg., R.S., ch. 765, 1995 Tex. Gen. Laws 3972 (creating a SOAH division to exclusively hear PUC cases).

94 § 2003.058(e).

95 § 2003.047(m).

96 TEX. HEALTH & SAFETY CODE ANN. § 361.0832(c)-(e) (Vernon 2001).

97 *Hunter Indus. Facilities, Inc. v. Tex. Nat. Res. Conservation Comm'n*, 910 S.W.2d 96 (Tex. App.—Austin 1995, pet. denied).

98 *Id*. at 103.

99 *See* Harlan, *supra* note 53, at 232 (quoting ADMIN. PRAC. & PROC § 8.3.2(a), p. 8-29.0).

100 Harlan, *supra* note 53, at 233.

101 *Hunter*, 910 S.W.2d at 104.

102 *Id*.

103 *Id*. at 105.

104 Harlan, *supra* note 53, at 233.

105 TEX. GOV'T CODE ANN. § 2003.049(g) (Vernon 2000); *see S.W. Pub. Serv. Co. v. Pub. Util. Comm'n*, 962 S.W.2d 207, 212 (Tex. App.—Austin 1998, pet. denied).

findings,[106] or because of a lack of preponderance of the evidence supporting the findings.[107]

The Austin Court of Appeals was called upon to construe these two provisions in 1998, and in *Southwest Public Service Co. v. Public Utility Commission*, it held that section 2003.049(g)(1)(B) gave the PUC the authority to "assume an original fact-finding role," and "evaluate the evidence put before the ALJ," in order to supplant the ALJ's findings."[108] How this decision comports with the stated purpose of SOAH[109] to provide an "independent forum . . . separate . . . [from] the policymaking functions in the executive branch" is unclear however.[110]

b. ERS

In 1999, the 76th Legislature amended the Government Code,[111] by inserting language that generally rephrased the text of .058(e), in part, allowing "[t]he board of trustees [to] in its sole discretion make a final decision on a contested case under this section."[112] The next portion of subsection (d) goes somewhat further than .058(e) however, explicitly allowing the ERS to not only "change" SOAH findings of fact and conclusions of law, but to "refuse to accept" or "delete" such findings and conclusions as well.[113] Additionally, and apparently in contradiction to the Legislature's stated purpose in creating SOAH,[114] subsection (d) allows the ERS to substitute its own findings of fact and conclusions of law for those made by a SOAH ALJ.[115]

Several Austin Court of Appeals decisions have addressed ERS review of SOAH PFDs over the last few years.[116] Most notable among these was *Flores v. Employees Retirement System of Texas*,[117] wherein the court seemed to disagree with its earlier view of agency autonomy in reviewing adjudicative findings of fact that it put forward in *Southwest Public Service Co.*[118] Specifically, the court held that an ALJ "is better suited to make such determinations than is an agency head or board reviewing the [ALJ]'s proposed decision because the [ALJ] has heard the evidence and has observed the demeanor of the witnesses."[119] In *Flores v. Employees Retirement System of Texas*, the court further concluded that "an ALJ with . . . SOAH . . . and not employed by the agency is a 'disinterested hearings officer,'"[120] which was purportedly one of the central legislative purposes in creating SOAH in 1991, so that "fairness concerns[,] raised by the fact that hearing examiners employed by the interested agency were directly accountable to it and, thus, did not have the appearance of disinterested hearings officers," would be allayed.[121]

c. State Board of Education

Section 21.259 of the Education Code sets forth the criteria under which the State Board of Education (the "Board") or its designate may "adopt, reject, or change" SOAH findings of fact, conclusions of law, or PFDs.[122] Subsection (c) expressly requires that, in order for the Board to "reject or change" a SOAH finding of fact, it must determine that the finding was not supported by substantial evidence in the SOAH record.[123]

In reviewing the substantial evidence standard for the Third Court of Appeals in 1995,[124] Justice Kidd concluded that it was a much more relaxed standard than is found in other statutes, which impose a "great weight and preponderance" standard.[125] The court explained that, under substantial evidence, the "agency's action will be sustained if reasonable minds could reach the conclusion that the agency must have reached in order to justify its action."[126]

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106 § 2003.058(e)(3).

107 § 2003.049(g)(1)(B).

108 *S.W. Pub. Serv. Co.*, 962 S.W.2d at 213.

109 *See* Harlan, *supra* note 53, at 231-32; *Montgomery Indep. Sch. Dist. vs. Davis*, 34 S.W.3d 559, 564 (Tex. 2000).

110 *See* § 2003.021(a).

111 Act of May 29th, 1999, 76th Leg., R.S., ch. 1541, § 29, 1999 Tex. Gen. Laws 5292, 5299.

112 TEX. GOV'T CODE ANN. § 815.511(d). (Vernon 2004).

113 *Id*.

114 TEX. GOV'T CODE ANN. § 2003.021(a) (Vernon 2000 & Supp. 2004-05) (stating that SOAH was created in order to provide an "independent forum . . . separate . . . [from] the policymaking functions in the executive branch.").

115 § 815.511(d); *see Flores v. Employees Ret. Sys. of Tex.*, 74 S.W.3d 532, 539 (Tex. App.—Austin 2002, pet. denied).

116 *See Flores*, 74 S.W.3d at 532; *Employees Ret. Sys. of Tex. v. McKillip*, 956 S.W.2d 795, 799-802 (Tex. App.—Austin 1997, no pet.), *disapproved on other grounds by Tex. Nat. Res. Conservation Comm'n v. Sierra Club*, 70 S.W.3d 809, 814-15 (2002).

117 74 S.W.3d 532 (Tex. App.—Austin 2002, pet. denied).

118 *S.W. Pub. Serv. Co. v. Pub. Util. Comm'n*, 962 S.W.2d 207, 212-13 (Tex. App.—Austin 1998, pet. denied).

119 *Flores*, 74 S.W.3d at 539; *see* Marquardt, *supra* note 92, at 3-4; Hon. F. Scott McCown & Monica Leo, *When Can an Agency Change the Findings or Conclusions of an ALJ?: Part Two*, 51 BAYLOR L. REV. 63, 76 (1999).

120 *Flores*, 74 S.W.3d at 539.

121 *Id*. at 540.

122 TEX. EDUC. CODE ANN. §§ 21.259(b)-(c) (Vernon 1996).

123 *Id*. § 21.259(c).

124 *See Hunter Indus. Facilities, Inc. v. Tex. Nat. Res. Conservation Comm'n*, 910 S.W.2d 96, 103 (Tex. App.—Austin 1995, pet. denied).

125 *See* discussion *supra* Part. IV.B.1.a.; *see also* TEX. HEALTH & SAFETY CODE ANN. §§ 361.0832(c)-(e) (Vernon 2001).

126 *Hunter*, 910 S.W.2d at 103 (citing *Tex. Health Facilities Comm'n v. Charter Medical—Dallas, Inc.*, 665 S.W.2d 446, 453 (Tex.1984)).

The Texas Supreme Court reviewed section 21.259 in 2000, and rejected the Board's independent findings of fact made in contravention of a hearing examiner's findings, reasoning that "[I]f a board could find additional facts, resolving conflicts in the evidence and credibility disputes, it would then be serving as its own factfinder despite delegating the factfinding role to a hearing examiner, and the process of using an independent factfinder would be meaningless."[127]

d. Texas Department of Agriculture

Section 12.020(t) of the Agriculture Code is identical to section 2003.049(g) of the APA governing PUC review of SOAH PFDs.[128] This provision empowers the agency to change the findings of fact or conclusions of law as determined by a SOAH ALJ if the Commissioner:

> (1) determines that the administrative law judge:
>
> (A) did not properly apply or interpret applicable law, department rules or policies, or prior administrative decisions; or
> (B) issued a finding of fact that is not supported by a preponderance of the evidence; or
>
> (2) determines that a department policy or a prior administrative decision on which the administrative law judge relied is incorrect or should be changed.[129]

Just as with section 2003.049(g), subsection (t)(1)(B) adds the preponderance of evidence standard to the "technical error" justification from .058(e)(3) for overturning SOAH findings of fact.[130]

e. Texas Department of Insurance

Section 40.059 of the Insurance Code allows for parties to a contested case hearing referred from the Texas Department of Insurance (TDI) to file exceptions to and briefs concerning a SOAH PFD.[131] This provision explains that the Commissioner shall base his or her final decision after taking into account both the PFD, and the parties' exceptions and briefs.[132] Like a similar ERS provision,[133] section 40.059 allows the TDI to "amend" the SOAH PFD, "including any finding of fact,"[134] but also provides that the Commissioner may "refer the matter back to the administrative law judge to "reconsider findings and conclusions in the proposal for decision; . . . take additional evidence; or . . . make additional findings of fact or conclusions of law."[135]

Again, this provision seems to run afoul of the Austin Court of Appeals recent decision in *Flores*, where it expressly ascribed the adjudicative fact-finding function to the SOAH over individual agencies.[136]

f. Texas Department of Public Safety

Section 548.407 of the Transportation Code governs agency review of SOAH PFDs concerning contested certifications of inspection stations.[137] Subsection (k) provides the same general statement of agency discretion in reviewing PFDs,[138] but subsection (l) goes much farther.[139] Under this subsection, the agency can mandate the content of the PFD.[140] Specifically, subsection (l) states that "[i]f . . . the [PFD] supports the position of the department, . . . the [PFD] may recommend a denial of an application or a revocation or suspension of a certificate only . . . [and] may not recommend a reprimand or a probated or otherwise deferred disposition of the denial, revocation, or suspension."[141] This statute again seems to fly in the face of the APA provisions describing the purpose of the creation of SOAH being to provide an "independent forum" . . . separate . . . [from] the policymaking functions in the executive branch."[142]

2. Other Statutory Provisions

There are several other statutes that contain provisions conflicting with or modifying .058(e), but to detail all of them here is beyond the scope of this article.[143]

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127 *Montgomery Indep. Sch. Dist. vs. Davis*, 34 S.W.3d 559, 564 (Tex. 2000).

128 *See* discussion *supra* Part. IV.B.1.a.

129 TEX. AGRIC. CODE ANN. § 12.020(t) (Vernon 2004 & Supp. 2004-05).

130 *See* McCown & Leo, *supra* note 119, at 78.

131 TEX. INS. CODE ANN. § 40.059 (Vernon Pamphlet 2004-05).

132 § 40.059(b).

133 *See* discussion *supra* Part IV.B.1.b.

134 § 40.059(c).

135 § 40.059(d).

136 *Flores v. Employees Ret. Sys. of Tex.*, 74 S.W.3d 532, 539 (Tex. App.—Austin 2002, pet. denied).

137 TEX. TRANSP. CODE ANN. § 548.407 (Vernon 1999 & Supp. 2004-05).

138 § 548.047(k).

139 *See* § 548.047(l).

140 *See id*.

141 *Id*.

142 TEX. GOV'T CODE ANN. § 2003.021(a) (Vernon 2000 & Supp. 2004-05).

143 *See, e.g.* TEX. GOV'T CODE ANN. § 571.132(a) (Vernon 2004) (providing for review of SOAH PFDs, findings of fact, and conclusions of law by the Texas Ethics Commission); TEX. HEALTH & SAFETY CODE ANN. § 401.239 (Vernon 2001 & Supp. 2004-05) (providing for

3. TAC Rules

The administrative rules outlining the policy rationales for an agency to modify, or wholly disregard a SOAH PFD and its underlying findings and conclusions are legion.[144] There are a few discernible patterns in the multitude of rule provisions however, whereby several agencies have adhered to similar formulations of their SOAH review rules.[145] The vast majority of agencies, however, do not seem to adhere to any particular pattern of formulation at all.[146] As succinctly as possible, we will attempt to catalog and summarize some of the different approaches found in the TAC.

a. 2001.058(e) Formulation

The most prominent formulation of agency rules governing their review of SOAH matters appears to track the wording used in .058(e), quoted above,[147] almost verbatim.[148] The agencies following this textual approach include the Board of Nurse Examiners,[149] the State Board of Dental Examiners,[150] the Teacher Retirement System of Texas,[151] the Texas Board of Architectural Examiners: Architects,[152] the Texas Board of Architectural Examiners: Interior Designers,[153] the Texas Board of Architectural Examiners: Landscape Architects,[154] and the Texas State Board of Pharmacy.[155]

b. Public Interest Formulation

There are at least three agencies that follow nearly identical approaches to amending SOAH findings of fact, conclusions of law, and PFDs, each of which frame the policy reason for their final adjudicatory powers as necessary to protect the public interest.

(1) Employees Retirement System of Texas

> (b) Acting in its capacity as fiduciary of the employee benefit plans for which it serves as trustee, the board may, in its discretion, modify or delete any proposed finding of fact or conclusion of law, or make alternative findings of fact or conclusions of law, if it determines that the proposal for decision submitted by the examiner, or a proposed finding of fact or conclusion of law contained therein, is:
>
> (1) clearly erroneous or illogical;
> (2) is against the weight of the evidence;
> (3) is based on misapplication of the rules of evidence or insufficient review of the evidence;
> (4) is inconsistent with the terms or intent, as determined by the board, of benefit plan or insurance policy provisions; or
> (5) is not sufficient to protect the public interest, the interests of the plans and programs for which the board is trustee, or the interests, as a group, of the participants covered by such plans and programs. The order shall contain a written statement of the reason and legal basis for each change made based on the foregoing policy reasons.[156]

SOAH review of contested applications for low-level radioactive waste disposal); TEX. INS. CODE ANN. § 83.054(d) (Vernon Pamphlet 2004-05) (providing for a final decision by the Texas Department of Insurance after receipt of a SOAH PFD concerning a contested emergency cease and desist orders); TEX. OCC. CODE ANN. § 203.456(a) (Vernon 2004 & Supp. 2004-05) (providing for a final decision by the Midwifery Board following the receipt of a SOAH PFD) TEX. OCC. CODE ANN. § 246.006 (Vernon 2004) (providing for a final decision by the State Board of Dental Examiners following the receipt of a SOAH PFD); TEX. OCC. CODE ANN. § 301.506 (Vernon 2004) (providing for a final decision by the Board of Nurse Examiners following the receipt of a SOAH PFD); TEX. OCC. CODE ANN. § 351.556 (Vernon 2004) (providing for a final decision by the Texas Optometry Board following the receipt of a SOAH PFD); TEX. OCC. CODE ANN. § 504.306 (Vernon 2004) (providing for a final decision by the Texas Commission on Alcohol and Drug Abuse following the receipt of a SOAH PFD).

144 *See* Harlan, *supra* note 53, at 239.

145 *Id*.

146 *Id*. at 242.

147 *See* discussion *supra* Part IV.B.1.

148 *See* Harlan, *supra* note 53, at 239-241.

149 22 TEX. ADMIN. CODE § 213.23(d) (2005) (Bd. of Nurse Exam'rs; Decision of the Board).

150 *Id*. § 107.51(a) (2005) (St. Bd. of Dental Exam'rs; Findings of Fact and Conclusions of Law).

151 34 TEX. ADMIN. CODE § 43.45(f) (2005) (Teacher Ret. Sys.; Proposals for Decision, Exceptions, and Appeals to the Board of Trustees) (adding subsection (4) allowing the Board to change findings and conclusions if the "change is pursuant to a fiduciary responsibility").

152 22 TEX. ADMIN. CODE § 1.232(f) (2005) (Tex. Bd. of Architecture Exam'rs: Architects; Board Responsibilities).

153 *Id*. § 5.242(f) (2005) (Tex. Bd. of Architecture Exam'rs: Interior Designers; Board Responsibilities).

154 *Id*. § 3.232(f) (2005) (Tex. Bd. of Architecture Exam'rs: Landscape Architects; Board Responsibilities).

155 *Id*. § 281.37(c) (2005) (Tex. St. Bd. of Pharmacy; Hearing Conducted by the State Office of Administrative Hearings).

156 34 TEX. ADMIN. CODE § 67.91(b) (2005) (Employees Ret. Sys. of Tex.; Form, Content, and Service of Orders).

(2) Texas State Board of Examiners of Professional Counselors

> (2) To protect the public interest and to ensure that appropriate principles govern the decisions of the board, it is the policy of the board to change a finding of fact or conclusion of law or to modify the proposed order of an ALJ when the board determines that the proposed order is:
>
> (A) against the weight of the evidence;
> (B) based on misapplication or misinterpretation of laws, rules, or policies;
> (C) based on insufficient review of the evidence;
> (D) not sufficient to protect the public interest with respect to the recommended disciplinary action; or
> (E) not appropriate recognition of whether or not rehabilitation of the licensee or applicant has occurred with respect to the recommended disciplinary action.[157]

(3) Texas State Board of Social Worker Examiners

> (3) To protect the public interest and to ensure that appropriate principles govern the decisions of the board, it is the policy of the board to change a finding of fact of conclusion of law or to modify a proposed order of an ALJ when the proposed order is:
>
> (A) erroneous;
> (B) against the weight of the evidence;
> (C) based on a misapplication or misinterpretation of laws, rules, or standards;
> (D) based on an insufficient review of the evidence;
> (E) not sufficient to protect the public interest; or
> (F) no appropriate recognition of whether or not rehabilitation of the licensee or application has occurred.[158]

c. Patternless Anarchy

The following agencies do not seem to adhere to a common expression of their SOAH review mandates, but because a practitioner would be wise to be aware of these variances, we examine them here.

(1) Department of State Health Services

> (d) Final orders or decisions.
>
> (1) The final order or decision of the department will be rendered by the commissioner or by the authorized designee of the commissioner.
> (2) All final orders or decisions shall be in writing and shall set forth the findings of fact and conclusions required by law, either in the body of the order, by attachment, or by reference to an ALJ's proposal for decision.
> (3) Unless otherwise permitted by statute or by these sections, all final orders shall be signed by the commissioner, or his designee; however, interim orders may be issued by the ALJ.[159]

(2) Finance Commission of Texas

> (b) After the administrative law judge has circulated the proposal for decision and proposed order to the parties and the parties have had an opportunity to file exceptions and briefs in the manner provided in subsection (a) of this section, the administrative law judge shall submit the proposal for decision and proposed order together with all materials listed in Government Code, §2001.060, to the agency head(s) for review. No additional briefs may be submitted after the case is under submission to the agency head(s) for decision unless requested by the agency head(s). The agency head(s) may:
>
> (1) adopt the proposal for decision and proposed final order, in whole or in part;
> (2) modify and adopt the proposal for decision and proposed final order, in whole or in part;
> (3) decline to adopt the proposal for decision and proposed final order, in whole or in part;
> (4) remand the proceeding for further examination by the administrative law judge, including for the limited purpose of receiving additional briefing or evidence from the parties on specific issues; or

[157] 22 TEX. ADMIN. CODE § 681.184(c)(2) (2005) (Tex. St. Bd. of Exam'rs of Prof'l Couns.; Action After the Hearing).

[158] *Id*. § 781.707(c)(3) (2005) (Tex. St. Bd. of Soc. Worker Exam'rs; Action After the Hearing).

[159] 25 TEX. ADMIN. CODE § 1.27(d) (2005) (Dep't of St. Health Servs.; Action After the Hearing).

(5) take another lawful and appropriate action with regard to the case.[160]

(3) Railroad Commission of Texas

The commission may adopt or decline to adopt the examiner's proposed findings of fact and conclusions of law in whole or in part. The commission may remand the proceeding for further consideration by the same examiner or a different examiner. The commission may direct the examiner to further consider the case with or without reopening the hearing. If, on remand by the commission, additional evidence is received which results in a substantial change of the examiner's recommendation for final action, an amended proposal for decision shall be prepared and circulated to the parties, unless a majority of the commission has held the hearing or read the record. If an amended proposal for decision is prepared, all parties of record shall have the right to file exceptions, replies, and briefs. The commission is not limited to the specific types of actions outlined in this section and may take any other action it deems to be just and reasonable, as permitted by law.[161]

(4) Texas Department of Criminal Justice

(i) Final Decision.

(1) The administrative law judge shall draft and recommend to the Texas Board of Criminal Justice a proposed final decision based solely on the record which addresses all matters presented at the hearing. The proposed decision shall include findings of fact and conclusions of law, separately stated. The draft and recommendation shall be forwarded to the Board with a copy sent to each party and referred to the subcommittee for division affairs for review.

(2) After examination of the draft and recommendation and review of the record of the hearing, the subcommittee shall indicate whether it will accept or reject the recommendation of the administrative law judge. A copy of the proposed decision shall be served on all parties and an opportunity shall be afforded to the party adversely affected by the proposed decision to file exceptions and present a brief to the board. Said exceptions and brief shall be filed within 10 days after the date of service of the proposed decision of the subcommittee with a copy served on the opposing party. Replies to such exceptions shall be filed within 10 days after the date for filing of such exceptions with a copy served on the opposing party.

(3) The Board and subcommittee shall base their decision solely on the record. The Board and subcommittee shall not substitute their judgment for that of the division. The Board and subcommittee shall affirm the proposed action of the division unless they find that the proposed action is unlawful, arbitrary, or not supported by substantial evidence in the record.

(4) The Texas Board of Criminal Justice shall render a decision within 60 days after the draft and recommendation of the administrative law judge is served on all parties. The decision must be in writing, and each board member joining in the decision must sign it. A party in a contested case shall be notified of any decision of the Board and a copy of the decision shall be forwarded to all parties by registered or certified mail, return receipt requested within five days after the final signature. A copy of the decision shall also be forwarded to the attorney of record, if any, for the party in a contested case. The agency shall keep a copy of the decision and shall keep an appropriate record of the mailing.

(5) A decision in a contested case is final: on the expiration of the period for filing a motion for rehearing if a motion for rehearing is not filed in time; on the date the order overruling the motion for rehearing is rendered or the motion is overruled by operation of law if a motion for rehearing is filed on time; or on the date the decision is rendered if the agency finds that an imminent peril to the public health, safety, or welfare requires immediate effect of a decision. If a decision becomes final on the date the decision is rendered, the decision

[160] 7 TEX. ADMIN. CODE § 9.34(b) (2005) (Fin. Comm'n. of Tex.; Post-hearing Proceedings).

[161] 16 TEX. ADMIN. CODE § 1.143 (2005) (R.R. Comm'n of Tex.; Commission Action).

> must recite a finding that an imminent peril to the public health, safety, and welfare requires immediate effect of the decision and the fact that the decision is final and effective on the date rendered.[162]

(5) Texas Department of Housing and Community Affairs

> (f) Final Order. The Department's Board of Directors shall consider the final Proposal for Decision and decide whether to accept the recommended findings of fact and conclusion of law and the sanction to be imposed. The Department's Board of Directors adopts and incorporates the accepted findings of fact and conclusion of law in the written Final Order.[163]

(6) Texas State Board of Medical Examiners

> (d) . . . [I]t shall hereafter be the policy of the board to change a finding of fact or conclusion of law or to vacate or modify any proposed order of an ALJ when the board determines that the proposed order:
>
> (1) fails to properly apply or interpret applicable law, board rules, written policies, or prior administrative decisions;
> (2) is not supported by substantial evidence;
> (3) is based on unsound medical principles; or
> (4) includes the ALJ's recommendation for the appropriate sanction in a finding of fact or conclusion of law.
>
> (e) Changes to proposed order. If the board modifies, amends, or changes the ALJ's proposed findings of fact or conclusions of law, an order shall be prepared reflecting the board's changes, the board's justification(s) for the changes, and recorded in the minutes of the meeting.[164]

[162] 37 TEX. ADMIN. CODE § 163.47(i) (2005) (Tex. Dep't of Crim. Just.; Contested Matters).

[163] 10 TEX. ADMIN. CODE § 1.12(f) (2005) (Tex. Dep't Hous. & Cmty. Aff.; Administrative Hearings).

[164] 22 TEX. ADMIN. CODE § 187.37(d)-(e) (2005) (Tex. St. Bd. of Med. Exam'rs; Final Decisions and Orders).

C. Judicial Review of Agency Actions

1. Judicial Review of Contested Cases

a. Post-Hearing Procedure

Unlike in district court, a timely-filed motion for rehearing is a prerequisite to judicial review of an agency's final order,[165] and therefore, being acutely aware of the post-hearing timeline becomes imperative for the administrative lawyer. The motion must be sufficiently definite by identifying each finding of fact or conclusion of law the appellant wishes to address on appeal,[166] or risk waiver of the claims for lack of being sufficiently raised.[167] The deadline for filing a motion for rehearing is twenty days after the aggrieved party is notified of the decision or order,[168] however, if an agency is the filing party, it can extend this period for up to ninety days.[169] The deadline governing the response to the motion for rehearing runs not from the date that the motion itself is filed, but from the date of rendition of the order,[170] and thirty days are all that is allowed.[171]

After the appellant has filed a motion for rehearing, what happens next largely depends on which agency is considering the motion.[172] The agency can simply wait for the motion to be overruled by operation of law, or it may—although this happens less frequently—formally deny (or grant) the motion.[173] In addition, a second motion for rehearing may be required in some instances; usually when the "agency grants the first motion for rehearing and subsequently

[165] *See* TEX. GOV'T CODE ANN. § 2001.145 (Vernon 2000 & Supp. 2004-05); *see also* Lino Mendiola III, *Obtaining Judicial Review of Agency Decisions*, *in* 2005 ADMINISTRATIVE LAW 2 (UTCLE 2005); Chris Kadas, *Post Hearing Appeals*, *in* NUTS & BOLTS OF ADMINISTRATIVE LAW SEMINAR 1 (Travis County Bar Assoc. 2004); Kristin Hay O'Neal & Hon. Andrew Weber, *Procedural Problems Under the Texas Administrative Procedure Act When Seeking Judicial Review of Contested Case Decisions or Orders*, 48 BAYLOR L. REV. 883, 885 (1996).

[166] *See Morgan v. Employees Ret. Sys. of Tex.*, 872 S.W.2d 819, 821 (Tex. App.—Austin 1994, writ denied); *Hamamcy v. Tex. State Bd. of Med. Exam'rs*, 900 S.W.2d 423, 424 (Tex. App.—Austin 1995, writ denied); Mendiola, *supra* note 165, at 3.

[167] *Lone Star R.V. Sales, Inc. v. Motor Vehicle Bd. of the Tex. Dep't of Transp.*, 49 S.W.3d 492, 502 (Tex. App.—Austin 2001, no pet.); Kadas, *supra* note 165, at 4.

[168] § 2001.146(a); Mendiola, *supra* note 165, at 3; Kadas, *supra* note 165, at 2; O'Neal & Weber, *supra* note 165, at 886.

[169] Mendiola, *supra* note 165, at 3; Kadas, *supra* note 165, at 2.

[170] Mendiola, *supra* note 165, at 3.

[171] § 2001.146(b).

[172] Kadas, *supra* note 165, at 2.

[173] *Id*. at 3.

issues an order that significantly changes the original order."[174]

Only final orders are subject to appeal in Article V courts.[175] Absent a timely-filed motion for rehearing, and taking into account the three-day presumption for mail delivery,[176] an agency's final order or decision truly becomes "final" twenty-three days after the parties are notified the final, and not interlocutory,[177] order has been handed down.[178] If a timely motion for rehearing is filed but the agency does not rule on it, the motion is overruled by operation of law forty-five days after rendition of the final order.[179]

Once the agency order has become final, the appellant has thirty days in which to file a petition for judicial review.[180] Again however, there are agency-specific prerequisites that must be followed when filing a petition for judicial review, such as forwarding the penalty assessed to the agency for deposit in escrow, or providing a supersedeas bond for the amount of the penalty.[181] Failure to comply with these requirements may result in an Article V court asserting it does not have jurisdiction to hear the appeal.[182]

b. Venue

Venue in contested case petitions for judicial review will always be in Travis County district court, unless otherwise provided by statute.[183] Once properly before the district court, either party or the court, *sua sponte*, may move that the case be transferred to the Austin Court of Appeals.[184]

c. Standard of Review

The Texas Supreme Court has established two standards of judicial review in contested case proceedings: de novo and substantial evidence.[185] Which standard of review applies to a certain contested case appeal is determined by the governing agency's organic statute and applicable caselaw construing administrative appeals in that agency.[186]

(1) De Novo

While the APA requires that—in appeals subject to de novo review—both fact and legal issues are held up to equal scrutiny, a reviewing court will give "serious consideration" of an agency's interpretation of its own statute, "so long as the construction is reasonable and does not contradict the plain language of the statute."[187]

(2) Substantial Evidence

The Supreme Court of Texas described the substantial evidence standard of review as "[a]t its core, . . . a reasonableness test or a rational basis test."[188] As such, it is, "by far . . . [t]he toughest standard of review for challenging an agency's decision."[189] Substantial evidence review of a contested case order "will involve review of the record as a whole and a determination of whether some reasonable basis in the record exists [to support] the action taken by the agency."[190] One commentator went as far as to state that "substantial evidence points rarely succeed" in overturning an agency's decision.[191] This is chiefly because the entire purpose of the substantial evidentiary review standard "is to let the agencies, rather than the courts, administer regulatory statutes."[192]

The wording in the substantial review provision of the APA refers to other standards of review,[193] which act to inform and in concert with the substantial evidence standard to create a "catch-all" standard that has potentially limitless application.[194] Among these additional, underlying review standards are "arbitrary and capricious," "abuse of discretion," and "clearly unwarranted."[195] By way of example, the Austin Court of Appeals found that when a commission failed to follow its own regulations, "the [c]ommission's action was arbitrary and capricious," and therefore did not

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174 *See* O'Neal & Weber, *supra* note 165, at 893 n. 60.

175 O'Neal & Weber, *supra* note 165, at 887; *see* TEX. CONST. art. V, § 1.

176 § 2001.142(c); Kadas, *supra* note 165, at 2; O'Neal & Weber, *supra* note 165, at 886.

177 O'Neal & Weber, *supra* note 165, at 887.

178 Kadas, *supra* note 165, at 4.

179 § 2001.146(c); Mendiola, *supra* note 165, at 3; Kadas, *supra* note 165, at 4.

180 § 2001.175; Kadas, *supra* note 165, at 5.

181 *See, e.g.*, TEX. OCC. CODE ANN. § 51.307 (Vernon 2004); *see also* Kadas, *supra* note 165, at 5.

182 Kadas, *supra* note 165, at 5; *see* TEX. CONST. art. V, § 1.

183 TEX. GOV'T CODE ANN. § 2001.176(b)(1) (Vernon 2000); Kadas, *supra* note 165, at 5.

184 Kadas, *supra* note 165, at 5; Hon. Margaret A. Cooper & Rachel V. Dennis, *in* ADVANCED ADMINISTRATIVE LAW COURSE 2000 ch. 4, 23 (Texas Bar CLE 2000).

185 *Tex. Dept. of Protective and Reg. Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 184-85 (Tex. 2004) (quoting *S.W. Bell Tel. v. Pub. Util. Comm'n*, 571 S.W.2d 503, 508-09 (Tex. 1978)); Mendiola, *supra* note 165, at 10.

186 *See Mirelas v. Tex. Dep't of Pub. Safety*, 9 S.W.3d 128, 131 (Tex. 1999).

187 § 2001.173(a); *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993); Mendiola, *supra* note 165, at 10-11.

188 *R.R. Comm'n v. Pend Oreille Oil & Gas Co.*, 817 S.W.2d 36, 41 (Tex. 1991); Mendiola, *supra* note 165, at 11.

189 J. Bruce Bennett, *The Top Five Points of Error*, 4 TEX. TECH J. TEX. ADMIN. L. 55, 56 (2003).

190 Mendiola, *supra* note 165, at 11.

191 Bennett, *supra* note 189, at 67.

192 *Id*.

193 TEX. GOV'T CODE ANN. § 2001.174 (Vernon 2000).

194 Mendiola, *supra* note 165, at 12.

195 *See* § 2001.174(2)(F).

meet the substantial evidence test.[196] However, some practitioners feel that the arbitrary and capricious and substantial evidence standards are distinct, and should not be combined.[197] As support for this view, they point out that it is only the Austin Court of Appeals—and not the Texas Supreme Court—that has adopted this construction of section 2001.174.

2. Judicial Review of Agency Rulemaking

The usual and customary avenue of challenging an agency rule is to seek declaratory relief under section 2001.038 of the APA.[198]

a. Declaratory Judgments Under the APA

Under section 2001.038, the Legislature expressly waived sovereign immunity in order to permit judicial review of agency rules.[199] The provision also expressly grants a private right of action and standing to sue if the rule in question—or even just its threatened application—"impairs a legal right or privilege of [a] person."[200] Because declaratory judgments have been held to be appropriate "when the fact situation manifests the presence of 'ripening seeds of a controversy'"[201] foretold by "threatened litigation in the immediate future which seems unavoidable, even though the differences between the parties as to their legal rights have not yet reached the state of an actual controversy,"[202] meeting the requirement of ripeness as an element of subject matter jurisdiction is fairly noncontroversial.[203]

The permissible grounds for the rule challenge include showing that: (1) the agency did not have statutory authority to promulgate the rule in question; (2) the challenged rule was not promulgated pursuant to proper procedures; or (3) the rule in question is unconstitutional.[204] The most common challenge falls under proper procedural prong,[205] and section 2001.035(c) of the APA determines procedural compliance under a "substantial compliance" standard, as measured by the "reasoned justification" for the rule's existence.[206]

b. Declaratory Judgments Under the UDJA

The Uniform Declaratory Judgment Act (UDJA)[207] is very similar in purpose and in operation to the APA's declaratory judgment provisions.[208] However, where the APA version's purpose is to provide for challenges to the validity of rules, the UDJA's purpose is to provide for challenges to the validity of statutes.[209] As with section 2001.038, "[t]he UDJA does not confer any additional subject matter jurisdiction on a court, but is merely a procedural device for deciding cases already within the court's jurisdiction."[210] A declaratory judgment proceeding under the UDJA is merely "an additional, alternative remedy that does not replace any existing remedy."[211]

Necessary parties under UDJA actions include "[a]ll persons who have or claim any interest that would be affected by a declaration,"[212] including municipalities when the validity of a municipal ordinance is being challenged, as is the Attorney General when a statute is being similarly challenged.[213]

Even if all the necessary parties are joined in the declaration, the judgment proceeding itself can only move forward when "there is a justiciable controversy between the parties such that a declaration will afford relief from uncertainty and insecurity with respect to the rights of the parties."[214]

c. Primary Jurisdiction

There is some debate in the literature as to the vagaries of whether the principle of primary jurisdiction applies in the context of a rule challenge.[215] However, most commentators and courts agree that

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196 *Sam Houston Elec. Coop. v. Pub. Util. Comm'n*, 733 S.W.2d 905, 913 (Tex. App.—Austin 1987, no writ); Mendiola, *supra* note 165, at 12.

197 Walker, *supra* note 42, at 3.

198 § 2001.038; *see* Mendiola, *supra* note 165, at 4; Walker, *supra* note 42, at 1.

199 § 2001.038; *see* Mendiola, *supra* note 165, at 4; Walker, *supra* note 42, at 1.

200 Walker, *supra* note 42, at 1; *see* § 2001.038; Mendiola, *supra* note 165, at 4.

201 *Tex. Dep't of Banking v. Mount Olivet Cemetery Ass'n*, 27 S.W.3d 276, 281 (Tex. App.—Austin 2000, pet. denied).

202 *Id*.

203 Walker, *supra* note 42, at 2.

204 *See Helle v. Hightower*, 735 S.W.2d 650, 654 (Tex. App.—Austin 1987, writ denied); Walker, *supra* note 42, at 2.

205 *See* Walker, *supra* note 42, at 2.

206 *See* §§ 2001.033(a)(1); .035(c); *see also* Walker, *supra* note 42, at 2.

207 TEX. CIV. PRAC. & REM. CODE ANN. § 37.003 (Vernon 1997 & Supp. 2004-05).

208 *See* Kathy L. Ellett, *Everything You Need to Know About the UDJA*, *in* ADVANCED ADMINISTRATIVE LAW COURSE 2003 ch. 14, 1 (Texas Bar CLE 2003).

209 *Id*.

210 *Id*.; *see Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996).

211 Ellett, *supra* note 208, at 1; *Cobb v. Harrington*, 144 Tex. 360, 368, 190 S.W.2d 709, 713 (1945).

212 § 37.003(a); Ellett, *supra* note 208, at 4.

213 §37.003(b); *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994); Ellett, *supra* note 208, at 4.

214 *City of Waco v. T.N.R.C.C.*, 83 S.W.3d 169, 177 (Tex. App.—Austin 2002, pet. denied); Ellett, *supra* note 208, at 2.

215 *See* Mendiola, *supra* note 165, at 4; *see, c.f.*, Walker, *supra* note 42, at 1; Brian D. Shannon, *Declaratory Judgments Under the Texas Administrative Procedure and Texas Register Act: An Underutilized Weapon*, 41 BAYLOR L. REV. 601, 619 (1989).

primary jurisdiction does not apply generally in the rule challenge context.[216]

V. CONCLUSION

The accretive and disjointed development of administrative law over the last thirty years has created many nooks and crannies in which an unwary administrative lawyer could easily lose his or her footing. Hopefully, this article has provided some insight and foresight into what some of these potential traps might be, and how best to avoid them altogether.

[216] *See* Mendiola, *supra* note 165, at 4; *see, c.f.*, Walker, *supra* note 42, at 1; Shannon, *supra* note 215, at 619; *see also Tex. R.R. Comm'n v. ARCO Oil and Gas Co.*, 876 S.W.2d 473, 478 (Tex. App.—Austin 1994, writ denied), *superceded by statute on other grounds as stated in Lower Laguna Madre Found., Inc. v. Tex. Nat. Res. Conservation Comm'n*, 4 S.W.3d 419, 425 (Tex. App.—Austin, 1999, no pet.).