The Texas State Office of Administrative Hearings: Establishing Independent Adjudicators in Contested Case Proceedings While Preserving the Power of Institutional Decision-Making

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The Texas State Office of Administrative Hearings: Establishing Independent Adjudicators in Contested Case Proceedings While Preserving the Power of Institutional Decision-Making

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I. INTRODUCTION: INSTITUTIONAL DECISION-MAKING OF
ADMINISTRATIVE AGENCIES – STATE AND FEDERAL

Justice John Powers, in his manual for the training of Texas ALJs, stated that the most significant concept one must master in administrative law is that the rendering of a contested case order is an "institutional decision."¹ Professor Richard Pierce, in commenting upon the federal agency adjudicatory process, states:

The administrative process builds on the principle that is used by a large medical clinic which often can provide medical services superior to that any individual physician can provide by bringing many kinds of specialists into an organization that is planned so as to provide a maximum of effectiveness to the aptitudes of each individual. The institutional mind has insights that are as profound as those of any individual and may be much more comprehensive, for the appropriate specialists collaborate by considering the judgment of each other, each contributing his or her own particular knowledge and skills.²

The state and federal administrative systems reject the concept of a lay decision-maker and replace a jury with the combined intelligence and analysis of expertly trained personnel. Professor Pierce notes that the critics of the administrative justice system have long used the strict separation of powers concept as a paradigm for criticism of the fairness of the administrative adjudications conducted by the typical multi-function agency. He responds by finding that this paradigm is the most costly and inefficient structure, which can possibly be justified in our criminal justice system to reduce the risk of erroneously incarcerating persons, but it does not necessarily follow such a burden as is necessary in the civil administrative system. Separation of functions can be implemented at the level of

individuals rather than at the agency level.\textsuperscript{3}

The federal APA takes great pains to insulate federal ALJs from undue influence within the agency for which they work. Although most ALJs work for, and within, particular administrative agencies, they are not subject to the direct control of the agency policymakers. Instead, they conduct hearings and execute their judicial duties independent of the policymaking, investigative, and prosecutorial functions of the office.\textsuperscript{4} Thus, the federal APA placed the adjudicative process within the agency but removed the ALJs from the agency's control. It has been noted that one of the great achievements of the federal APA was this institutional independence of the federal ALJs.\textsuperscript{5} Yet, the federal ALJ does not gain decisional independence unless delegated that power by the agency, for on appeal from an initial decision of the federal ALJ, the APA provides the agency secretary or board with all of the powers which it would have had in making the initial decision.\textsuperscript{6} This format allows for initial impartial decision-making by a fact-finder but maintains the concept that a final decision should be a result of the use of the collective skills and expertise of the agency as a whole.

Arguably, this same policy approach influenced the structure of state agencies which relegated the state ALJ to a fact-gatherer. The contested case hearing process was merely considered a first step in ultimately formulating an institutional decision issued by the agency.\textsuperscript{7} In Texas, the Austin Court of Appeals has held that an ALJ who is an employee of the agency has no power to bind an agency by the mere issuance of a proposal for a decision.\textsuperscript{8} By definition, a

\textsuperscript{3} Id. at Vol. 2, § 9.9, 679-71.


\textsuperscript{5} James F. Flanagan, Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review, 54 ADMIN. L. REV. 1355, 1363-64 (Fall 2002).

\textsuperscript{6} Id.

\textsuperscript{7} Id. at 1364-65.

proposal for decision connotes a tentative and preliminary decision which lacks finality and is merely a preliminary finding for consideration and review by the agency.\(^9\) Therefore, the agency is free to reject such proposal for decision without any direct reference to it and/or explanation of why the agency agreed or disagreed with its findings.\(^10\) Logically, the agency members should give the proposal for decision serious consideration because the ALJ saw and heard the witnesses, as well as all of the arguments of counsel, and has weighed and evaluated the evidence based on the applicable burden of proof. However, the ultimate decision is made by the agency as to the findings of fact and conclusions of law.\(^11\)

Many states, like Texas, adopted the federal approach authorizing agencies to exercise *de novo* review. After delegating power to an ALJ to conduct the initial hearing, the agency board or commissioner has virtually unrestricted powers to review and modify the ALJ’s findings.\(^12\) However, as long ago as 1945, California began a movement to create the establishment of central hearings panel systems.\(^13\) The movement continues to gain strength\(^14\) and more than one-half of the states have adopted some form of a central hearing panel.\(^15\) Generally, a central hearings panel system creates an independent corps of ALJs to preside over agency proceedings at the request of administrative agencies.\(^16\) The basic purpose is to give the ALJs a certain amount of independence from the agencies over whose proceedings they preside.\(^17\)

The main argument in favor of central hearings panels is the

\(9\). *Ross*, 770 S.W.2d at 642; *see also* Sabine River Auth. of Tex. v. McNatt, 342 S.W.2d 741, 744 (Tex. 1961).

\(10\). *Aetna*, 898 S.W.2d at 935-36.


\(12\). James F. Flanagan, *supra* note 5, at 1364-65.

\(13\). *Id.* at 1357.


\(17\). *Id.*
concept of the appearance of fairness. The lay public is familiar with
the criminal process where the judge and the prosecutor are totally
independent. If an ALJ is an employee of the agency bringing an
enforcement action, the concern is that there will be at a minimum
the appearance of bias or actual undue influence since the ALJ will
be imbued with the agency’s culture and theoretically, his or her
career advancement may be impacted by a decision that the agency
members or senior staff dislike.18 As one senior ALJ has stated:
“The central panel structure, especially the free-standing central
panel, is the preferred structure from the standpoint of adjudicatory
professionalism, public confidence, and the judicial/decisional
independence of ALJs.”19

The key issue that remains is whether to delegate to these
independent ALJs the power to finally determine contested case
proceedings, or whether there remains the need for institutionalized
decision-making. The key point: should the referring agency have
the power to modify and/or amend the findings and ultimate order of
the ALJ? Up until the early 1990s, most states permitted the
referring agency to amend the ALJ’s findings of fact and conclusions
of law, but there has been a recent movement to place final decision-
making authority in the ALJ.20 To some, this demise of
institutionalized decision-making has not been justified on its own
merits.21

This article will explore the Texas approach of creating a central
hearings panel and how Texas has struggled with the degree of
independence it should vest in the ALJ decision-maker. The Texas
system was originally described as taking a “minimal approach,” but
today it is seen as a comprehensive system which decides the
overwhelming majority of contested case orders within the state of
Texas.22 The central hearings panel approach has been adopted in
some form in at least half the states and it is anticipated that there
will be a real surge in the establishment of central hearings panels in

19. Judge Edwin L. Felter, Jr., Special Problems of State Administrative Law
20. Flanagan, supra note 5, at 1373-82.
21. Id. at 1362.
22. Hoberg, supra note 14, at 242-44.
the remainder of the states in the near future. Since the central hearings panel's approach potentially threatens the continuing viability of the concept of institutional decision-making, it is appropriate to analyze that potential impact in a state, such as Texas, that has a comprehensive central hearings panel system.

II. THE JUSTIFICATION OR NEED FOR A CENTRAL HEARINGS PANEL IN TEXAS

The Texas House of Representatives commissioned a study of the possible advantages and disadvantages of creating a central hearings panel of administrative law judges in 1986. The report stated that the fundamental problem with the existing hearing officer's system that utilized employees of the agency with jurisdiction over the contested case proceeding was the appearance of unfairness. It alluded to the potential procedural due process problems, but it focused and relied upon the generally accepted perception that a hearing officer's main function is to protect those who deal with state agencies from arbitrary or unwise action, by providing the agency and the judiciary with an impartial assessment of the merits of the issues of the contested case proceeding. The report focused on the fact-finding function of the hearing officer and clearly noted that the agency would continue to have the duty and power to dictate which relevant statutes or rules were applicable, as well as the meaning of those standards as the board had previously or presently construed them. The report concluded that an independent hearing officer system would introduce and guarantee minimum standards of due process to the contested case hearing, but limiting agency heads to reviewing proposals for decisions "for reasons of policy" would still allow the agency members to remain "quite free" to implement policy and overrule specific decisions.

23. Id. at 244.
25. Id. at 98.
26. Id. at 81-83.
27. Id. at 100.
The tenor of the House Report, read as a whole, indicated a clear concern for providing an impartial decision-maker to determine the basic findings of fact as to who did or did not do something, where it happened, when it happened, how it happened, and all other factual disputes regarding a particular licensee, applicant, or regulated party. However, the report did not assert any need to totally remove decision-making power from the agency, nor restrict it to a mere "appellate" type of review allowing reversal by the agency only upon a finding of reversible error. It is undisputed that the report proposed that the agency remain the ultimate decision-maker with the specific power to define the meaning of the relevant statutes and rules applicable to the case, as well as the power to substitute judgment as to the application or implementation of those standards to the basic findings of underlying facts as set forth by the independent hearing’s examiner.28

The Texas Legislature struggled from the beginning with whether to preserve the concept of institutional decision-making within the creation of a central hearings panel. It found compelling that the citizens of the State of Texas viewed the existing administrative system as basically unfair when the decision-maker was an employee of the agency where the dispute arose. The Legislature was concerned that the present system in Texas potentially violated due process. The report saw the need to not only create a central hearings panel, but to accord certain independence to the ALJs to determine the basic, or underlying, facts in a dispute. In other words, the report presumed that disputes between an agency and a citizen did not go to trial or hearing unless there was a fundamental disagreement as to who did what, where, when, how, and possibly why. The concern was that citizens did not believe they got a "fair shake" if the accuser (i.e., the agency) ultimately determined what did or did not occur. Thus, there was a need for an independent decision-maker to determine those underlying facts. However, the report did not see a threat to the appearance of fairness to allow the agency to continue to have the final determination as to the meaning of the law and its application to those underlying facts.29

It has been established in section I that the federal administrative

28. Id.
29. Id. at 83-100.
system takes the approach that administrative law judges may be afforded a degree of institutional independence, even while being physically and legally a part of a particular regulatory agency. As Professor Pierce noted, separation of functions can be implemented at the level of the individuals rather than at the agency level. However, the Texas study concluded that the average lay citizen could not believe they had been accorded a fair hearing when the administrative law judge was physically and legally a part of the regulatory agency. Therefore, the report strongly recommended that to preserve the integrity of the administrative system, it was necessary to physically and legally separate the administrative law judge from the regulatory agency. Yet it still found it critical to the overall workings of administrative agencies that the ultimate decision in a case be determined by the regulatory agency.

III. THE CREATION OF SOAH: THE TEXAS STATE OFFICE OF ADMINISTRATIVE HEARINGS – AN INDEPENDENT AGENCY TO CONDUCT CONTESTED CASE HEARINGS

In 1991, the Texas Legislature created a state agency named the State Office of Administrative Hearings (SOAH). It was comprised of "independent" hearing officers to be utilized by all state agencies that did not employ at least one individual whose only duty was to preside as a hearing officer over matters related to contested case, hearings before the agency, or any agency otherwise required by law, or arranged by contract, to refer contested cases to SOAH. SOAH started with only six ALJs and three support staff in August of 1992, but has now grown substantially to over sixty ALJs and sixty support staff members with its jurisdiction greatly enhanced. Over the last twelve years, the Texas Legislature has enlarged the jurisdiction of SOAH by transferring, by statute, the contested case proceedings of many major regulatory agencies. Specifically, the Texas Legislature transferred the contested cases of the Public Utility Commission and

30. See supra, notes 2-3 and accompanying text.
the Texas Commission on Environmental Quality to SOAH. SOAH's jurisdiction was clearly established in 1993 by an attorney general opinion that held an agency could not forego the services of an SOAH ALJ by a quorum of the members sitting as the presiding officer at a contested case hearing. The Attorney General held that the legislative intent was to create an administrative judiciary independent of the agency who could objectively hear administrative disputes. The opinion is bolstered by the fact that the statutory language states that SOAH "shall conduct all administrative hearings in contested cases" of an agency subject to its jurisdiction. Therefore, in the State of Texas today, SOAH hears and determines the overwhelming majority of contested case hearings of administrative agencies.

35. Id. at 1-3.
37. SOAH's current jurisdiction, mandatory and voluntary, is as follows: (A) Mandatory: Appraisers Licensing and Certification Board (Texas Real Estate Commission), Board of Acupuncture Examiners, Board of Medical Examiners, Board of Nurse Examiners, Board of Physician Assisted Examiners, Board Examiners of Psychologists, Board of Tax Professional Examiners, Board of Registration of Professional Engineers, Board of Veterinary Medical Examiners, Board of Vocational Nurse Examiners, Commission on Human Services, Commission on Law Enforcement Officer Standards and Education, Commission on Private Security, Credit Union Department, Department of Mental Health and Mental Retardation, Department of Protective and Regulatory Services, Department of Public Safety, Employees Retirement System, Executive Council of Physical Therapy and Occupational Therapy Examiners, Firefighter's Pension Commission, Funeral Service Commission, Health and Human Services Commission, Human Rights Commission, Optometry Board, Public Utility Commission of Texas, Real Estate Commission, Secretary of State, State Board of Plumbing Examiners, State Securities Board, State Soil and Water Conservation Board, Teacher Retirement System, Texas Alcoholic Beverage Commission, Texas Animal Health Commission, Texas Board of Land Surveying, Texas Commission on Alcohol and Drug Abuse, Texas Commission for the Blind, Texas Commission on Fire Protection, Texas Cosmetology Commission, Texas Department on Aging, Texas Department of Agriculture, Texas Department of Health, Texas Department of Housing and Community Affairs, Texas Department of Insurance, Texas Department of Transportation, Texas Higher Education Coordinating Board, Texas Lottery Commission, Texas Environmental Quality Commission, Texas Parks and Wildlife Department, Texas Racing Commission, Texas State Board of
An SOAH ALJ is directly accountable to the chief administrative law judge. SOAH is divided into seven teams. A natural resources team holds contested case proceedings for the Texas Commission on Environmental Quality (TCEQ). A utilities team hears contested cases on behalf of the Public Utility Commission (PUC). Finally, what was formally called the Central Hearings Panel is now divided into five teams: (1) the Economic Team, (2) the Licensing and Enforcement Team, (3) the Medical Team, (4) the Administrative License Revocation & Field Enforcement Team, and (5) the Alternative Dispute Resolution Team. The chief ALJ may also appoint senior or master ALJs to perform duties on his or her behalf.

SOAH has adopted rules that establish the application procedure to be followed by an agency when requesting an ALJ. SOAH selects the ALJ to preside at the hearing. Rules have been adopted providing for an ALJ to excuse or disqualify himself or herself in a particular case as well as to provide for a substitute ALJ in the event of a conflict. The ALJ conducting the proceeding acts independently of the agency and the agency is expressly prohibited from attempting to influence the findings of fact or the application of law by the ALJ except by the formal presentation of evidence and

Architectural Examiners, Texas State Board of Barber Examiners, Texas State Board of Chiropractic Examiners, Texas State Board of Dental Examiners, Texas State Board of Pharmacy, Texas State Board of Podiatric Medical Examiners, Texas State Board of Public Accountancy, Texas Structural Pest Control Board, Texas Water Development Board, Texas Workers' Compensation Commission, and Texas Work Force Commission; (B) Voluntary Contracts: Attorney General's Office, Department of Information Resources, Edwards Aquifer Authority, Evergreen Underground Water Conservation Commission, General Land Office, Interagency Council on Early Childhood Intervention, Texas Southern University, State Board for Educators Certification, Texas County and District Retirement System, Texas Ethics Commission, Texas Municipal Retirement System, Texas Youth Commission, and Uvalde County Underground Water Conservation District; (C) Contract Claims on Individual Basis: Texas A & M University, Texas Tech University, and The University of Houston.

38. TEX. GOV'T CODE ANN. § 2003.022(a) (Vernon 2004).
40. § 2003.049.
41. § 2003.046(a)-(b).
42. § 2003.0411.
43. 1 TEX. ADMIN. CODE §§ 155.9(a)(2), 155.9(c) (West 2005).
44. § 155.17(a)-(e).
legal argument. However, prior to the hearing, the agency is required to provide the ALJ with a written statement of applicable rules or policies. The independence of SOAH judges is ensured by the statutory requirements that all training, evaluation, discipline and promotion is vested in the administrative division of SOAH and not the agencies that actually utilize the services of the ALJ.

In 1999, the Legislature amended the statute governing SOAH, adding provisions to bolster the independence of the agency. The new provisions expressly state that SOAH was created to serve as an independent forum for the conduct of contested cases, and that the purpose of SOAH was to separate the adjudicative function from the investigative, prosecutorial, and policy-making functions exercised by regulatory agencies. It specifically provided that an ALJ was neither responsible to nor subject to the supervision, direction, or indirect influence of, any person other than the chief administrative law judge. In particular, the ALJ was not responsible to or subject to the supervision, direction, or indirect influence of an officer, employee, or agent of another state agency who performed investigative, prosecutorial, or advisory functions for the other agency.

The Legislature has statutorily achieved the goal of wholly separating the hearing process from the regulatory agency that has commenced the contested case proceeding. The ALJ is truly independent, not subject to the direct or indirect influence of the referring agency, and is solely responsible to the chief administrative law judge. Therefore, not only is there the appearance of impartiality, there is impartiality in fact. It is this author’s opinion that the chief administrative law judge, all the SOAH ALJs and the practicing bar would agree that from the inception of the agency, SOAH has maintained an independent status and the culture of the agency is without doubt that the ALJs are independent quasi-judicial
officers who are employed to conduct fair hearings without regard to which particular agency has commenced the contested case proceeding.

A. The Powers of an SOAH ALJ

In a contested case proceeding to be administered by an SOAH ALJ, the case shall be commenced by the agency itself, or the appropriate pleadings or forms shall be filed by a person at the agency that has appropriate jurisdiction over the subject matter. The SOAH ALJ acquires jurisdiction over the contested case matter when the agency files a Request to Docket Case form with SOAH. The ALJ must conform his or her conduct to the applicable provisions of the Texas Administrative Procedure Act (APA). The ALJ is required to follow SOAH’s procedural rules unless those rules incorporate by reference the procedural rules of the state agency for which the hearing is conducted.

The ALJ has the power to oversee discovery prior to the hearing, including the power to issue an order setting forth a discovery control plan. As to the issuance of subpoenas and commissions related to discovery, a party must apply directly to the agency with jurisdiction for their issuance. However, SOAH has adopted rules allowing for a party to file objections or seek a protective order from the ALJ. Prior to September 1, 1997, ALJ discovery orders were subject to review by the referring agency, however, the review provision has been eliminated by the Legislature.

The ALJ is vested with discretion to determine if one or more pre-hearing conferences shall be held. The subject matter of such conferences may be restricted solely to discovery matters and pre-hearing motions, or it may also include settlement discussions, the order of presentation of the evidence at the hearing, a determination

52. 1 TEX. ADMIN. CODE §§ 155.7(a), 155.9(a)-(f) (West 2004).
53. § 155.7(b)-(c).
54. TEX. GOV'T CODE ANN. § 2003.050(a)-(b) (Vernon 2004).
55. 1 TEX. ADMIN. CODE § 155.31(g) (West 2004).
56. § 155.31(e).
57. § 155.31(e), (i), (j), (l), (m).
59. 1 TEX. ADMIN. CODE § 155.33(a) (West 2004).
of the controlling and disputed factual and legal issues, and such other matters that will promote the orderly and prompt conduct of the hearing. The ALJ may order the consolidation of dockets or joint hearings on dockets if there are common issues of law or fact and consolidation or if a joint hearing will aid in the fair and efficient handling of the contested matters. The ALJ may also order severance of issues if separate hearings on such issues will aid the fair and efficient handling of a contested matter.\textsuperscript{60} The ALJ may also mandate that the parties prepare a pre-hearing statement of the case.\textsuperscript{61} Settlement conferences solely for the purpose of exploring the settlement of a case may be held at the discretion of the ALJ or at the request of a party.\textsuperscript{62} The ALJ may order referral of a contested case to a mediated settlement conference or other appropriate alternative dispute resolution (ADR) procedure.\textsuperscript{63} However, a party may object to the ADR process and a request that the ADR referral be reviewed by the ADR Team Leader.\textsuperscript{64}

SOAH has adopted rules providing the specific requirements for all motions a party may desire to file regarding the pending case. Specific forms and deadlines are set forth in the rules that must be complied with by all parties.\textsuperscript{65} The motions that may be considered by the ALJ are: (1) discovery motions, (2) motions to intervene, (3) continuances, and (4) motions for summary disposition, including failure to state a claim upon which relief may be granted, lack of subject matter jurisdiction, mootness, failure to prosecute, and unnecessary duplication of proceedings.\textsuperscript{66}

The agency has the ultimate responsibility to provide notice to all parties of the pending case proceeding, but the ALJ has the power to provide notice of the specific time, date and place for the hearing.\textsuperscript{67} The ALJ has the full authority and duty to impose all reasonable requirements upon the parties in order to maintain order, avoid

\textsuperscript{60} § 155.33(c).
\textsuperscript{61} §§ 155.15(b)(4)-(5), 155.33(a).
\textsuperscript{62} § 155.37.
\textsuperscript{63} § 155.33(d).
\textsuperscript{64} § 155.37.
\textsuperscript{65} § 155.29(b)-(g), (i).
\textsuperscript{66} §§ 155.29(e)-(f), 155.31(g), (i)-(m), 155.56, 155.57.
\textsuperscript{67} § 155.27(a)-(b).
unnecessary delay, and to conduct a full, fair, and impartial hearing.\textsuperscript{68} The ALJ regulates the course of the proceeding and has the power to: (1) administer oaths; (2) take testimony, including the power to question witnesses; (3) rule on questions of evidence; (4) rule on discovery issues; (5) issue orders relating to pre-hearing and hearing matters, including orders imposing sanctions; (6) admit or deny party status; (7) limit irrelevant, immaterial, or unduly repetitious testimony and reasonably limit the time for evidentiary presentations; (8) rule on motions of parties (or the ALJ's own motions), including granting or denying a continuance; (9) request parties to submit legal memoranda and propose findings of fact and conclusions of law; and (10) issue proposals for decision and where authorized, final decisions.

For contested cases referred by an agency, the ALJ may impose appropriate sanctions against a party or its representative for: (A) filing a motion or pleading that is groundless and brought in bad faith for purposes of harassment, or for any other improper purpose, such as to cause unnecessary delay or needless increase in the cost of the proceeding; (B) abuse of the discovery process in seeking, making or resisting discovery; or (C) failure to obey an applicable rule or an order of the ALJ or of the state agency on behalf of which the hearing is being conducted. In addition, where appropriate and justified by a party or representative's behavior described above, and after notice and opportunity for hearing, an ALJ may issue an order: (A) disallowing further discovery of any kind or of a particular kind by the offending party; (B) charging all or any party of the expense of discovery against the offending party or its representatives; (C) holding that designated facts be considered admitted for purposes of the proceeding; (D) refusing to allow the offending party to support or oppose a designated claim or defense or prohibiting the party from introducing designated matters in evidence; (E) disallowing in whole or in part requests for relief by the offending party and excluding evidence in support of those requests; and (F) striking pleadings or testimony or both, in whole or in part.\textsuperscript{69}

At the conclusion of the testimony, it is within the discretion of

\textsuperscript{68} §§ 155.15(a)-(b), 155.31(m), 155.41(a).

the ALJ to request that the parties submit legal memoranda on disputed issues and to prepare and submit proposed findings of fact and conclusions of law.\textsuperscript{70} After analyzing the evidence and legal arguments of the parties, the ALJ shall issue a proposal for decision that includes findings of facts and conclusions of law.\textsuperscript{71} The parties may submit any exceptions, objections, or other response to the proposal for decision to the agency that possesses final decision-making authority in the case (the referring agency). Any replies to the exceptions, objections, or other responses may also be filed with the referring agency. Copies of all the aforementioned documents must be served on SOAH and directed to the ALJ who rendered the decision. The ALJ shall review the documents filed and notify the referring agency that the documents have been reviewed and set forth any changes to the proposal for decision that the ALJ recommends, including any correction of clerical errors.\textsuperscript{72}

Thus, the SOAH ALJ is invested with all necessary powers to conduct a fair and impartial hearing. At the close of the evidence, the ALJ has the power to set forth findings of fact. The ALJ must base his or her findings exclusively on the evidence submitted into the hearing record and that which has been officially noticed.\textsuperscript{73} A finding of fact may be inferred only upon a determination that the evidence preponderates in favor of its existence.\textsuperscript{74} Such findings, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting them.\textsuperscript{75} If the ALJ allows the parties to submit proposed findings, the order shall include a ruling on each.\textsuperscript{76} The proposal for decision must recommend a result and contain a statement of the reasons for the proposed decision, including each finding of fact and conclusion of law necessary to the proposed decision. It is not to be a neutral,
detailed reflection of the record, but rather a summary of the presented evidence and the ALJ’s recommendation regarding the just result of the dispute.\textsuperscript{77}

As to issues of law, the APA provides that a state agency may not attempt to influence the ALJ’s application of the law in a contested case except by proper legal argument.\textsuperscript{78} However, the APA also provides that a state agency must provide the ALJ with a written statement of applicable rules or policies.\textsuperscript{79}

Read together, these statutory provisions imply that the ALJ has the power to initially determine what law is applicable to the proceeding, the meaning of the law, and how it should be applied to the facts of the particular case. Even though the agency may advise the ALJ of the applicable law, there is no indication within these statutes that such advice is binding. This lack of binding effect is clearly implied by the fact that the agency is prohibited from attempting to influence the ALJ except by proper legal argument. If the agency’s directive as to what law applied was binding, there would be no need for legal argument. Thus, the ALJ may initially and independently determine the applicability and meaning of the relevant statutes and rules.\textsuperscript{80} Thus, the ALJ clearly acts as an impartial, independent decision-maker as to all issues of fact and law.

This independence is insured by the fact that the APA prohibits \textit{ex parte} communications between a member or employee of a state agency who is assigned to render a decision or to make findings of facts and conclusions of law in a contested case and any person, party, state agency or representative of those entities.\textsuperscript{81} This prohibition has been recognized to be a codification of the constitutional procedural due process guarantee that a person may not be subjected to an agency order that relies on evidence not introduced, or made part of, the record.\textsuperscript{82}

\begin{flushleft}
\textsuperscript{78} TEX. GOV'T CODE ANN. § 2001.058(d) (Vernon 2004).
\textsuperscript{79} § 2001.058(c).
\textsuperscript{81} TEX. GOV'T CODE ANN. § 2001.061(a) (Vernon 2004).
\textsuperscript{82} Smith v. Houston Chem. Servs., Inc., 872 S.W.2d 252, 278 (Tex. App.}
\end{flushleft}
provision is to preclude "litigious facts" from coming before the
decision-maker without becoming a part of the record in the
contested case. A related matter is when the ex parte contact is not
to supply evidence that is material to the forthcoming contested case
proceeding, but to improperly influence the decision-maker based on
non-evidentiary grounds. There is a presumption of the honesty and
integrity of agency officials, however, that presumption is rebuttable.
The burden is a heavy one, for a party must demonstrate the contact
rendered the decision-maker's mind to be irrevocably closed on the
matter in issue or that the official's actions were corrupt in its
inception. The judiciary has held that the overall theme of the APA
is to separate decision-makers in an adversary hearing from
extraneous influences that will discredit the administrative process
and undermine the public confidence in government. The
administrative law judge should consider the position as one
analogous to a judge in the constitutional court system. Their duty is
to be charged with the solemn trust to act fairly and impartially in
fulfilling their vested duties. Each act performed must be done with
genuine even-handedness, compelled by a firm desire to provide to
everyone their due. The overriding goal should be to shun any action
or conduct that would tend to undermine the faith and confidence of
the parties and the public. Therefore, the chief protection against
the scourge of ex parte communications will always be the morality
and good judgment of the decision-makers.

There are two exceptions, or defenses, to the allegation that a
prohibited ex parte communication has occurred. First, a member or
employee of an agency may communicate ex parte with an agency

1994); Coalition Advocating a Safe Env't v. Tex. Water Comm'n, 798 S.W.2d 639,
84. Tex. State Bd. of Examiners in Optometry v. Carp, 388 S.W.2d 409, 414-
16 (Tex. 1965).
85. County of Galveston v. Tex. Dep't of Health, 724 S.W.2d 115, 123 (Tex.
App. 1987).
1972).
87. Galveston, 724 S.W.2d at 123 n.5.
employee who has not participated in the hearing for purposes of using the special skills or knowledge of the agency and its staff in evaluating the evidence.\textsuperscript{88} One interpretation of this exception is that it is only applicable after the close of the hearing, when the hearing officer is evaluating the evidence. It could be argued, however, that a hearing officer may need such technical advice immediately before or during the hearing if a particular issue of material fact is so complex or confusing that the officer cannot reasonably follow the evidence or argument of counsel on a particular issue. This would be particularly necessary if the hearing officer was faced with a motion similar to a motion for summary judgment prior to the hearing or a directed or instructed verdict during the pendency of the case. The better view would be to construe the exception as allowing such \textit{ex parte} communications to aid the hearing officer in making an informed decision on the facts. The hearing officer would be well advised to give notice of the contents of the communication and an opportunity to all parties to rebut the advice, but such procedures are not required.\textsuperscript{89}

The APA is ambiguous as to whether such technical advice is required to be placed in the contested case record. The APA expressly requires that all staff memoranda or data submitted to or considered by the ALJ be placed in the record.\textsuperscript{90} This implies that oral communications need not be included. However, to avoid any constitutional procedural due process concerns, an ALJ should require that the staff member reduce his or her comments to writing and have it placed in the record.

This exception is not applicable to an SOAH ALJ. An agency is prohibited from communicating with an ALJ to influence findings of fact "except by proper evidence."\textsuperscript{91} The meaning of this phrase must undoubtedly restrict all agency member or employee communications to the formal presentation of evidence during the contested case hearing. Reading these provisions as a whole, thus allowing an SOAH ALJ to utilize this \textit{ex parte} communication exception, would frustrate the overriding goal of creating an

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88. TEX. GOV'T CODE ANN. § 2001.061(c) (Vernon 2004).
89. \textit{Galveston}, 724 S.W.2d at 122.
91. § 2001.058(d).
\end{flushright}
independent hearing officer agency.

The second exception relates to communications regarding issues of law. Since the express exception analyzed above solely applies to communications with staff related to questions of fact, it could be argued that this clearly implies the Legislature did not intend an exception for issues of law. The Austin Court of Appeals has rejected this construction for a number of reasons: (1) legal problems, powers, procedures and methods pervade and dominate the administrative process generally, and in contested cases particularly; and (2) agency members or commissioners need not be legally trained. This implies the Legislature intended that they should have the independent advice of a legally trained person who did not participate in the proceeding when necessary to discharge the responsibilities under the regulatory scheme. The court did not solely rely on necessary implication, but held the exception fell into the general exception set forth at the beginning of the *ex parte* section in the APA that provided “[u]nless required for the disposition of an *ex parte* matter authorized by law.” Finally, the court believed that without the necessary legal advice, contested case proceedings would be a charade that would result in absurd consequences to the detriment of public and private interests.

This exception would clearly not apply to SOAH ALJs. The APA expressly provides that an agency shall supply the ALJ with a written statement of applicable rules or policies, but it expressly prohibits any attempt to influence the ALJ’s application of the law. This specific prohibition would clearly supersede the general exception to *ex parte* communications since it is specifically tailored to the overall goal of insulating SOAH ALJs from agency influence to ensure the order is rendered by an impartial tribunal.

A realistic twist on the *ex parte* communication prohibition is the issue of whether an SOAH ALJ may communicate *ex parte* on issues of fact or law with another member of SOAH. The *ex parte* provision allows communications with “agency employees” of a state

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94. *Galveston*, 724 S.W.2d at 124.
95. TEX. GOV’T CODE ANN. § 2001.058(c) (Vernon 2004).
96. § 2001.058(d).
SOAH statutory language expressly provides that it is a "state agency." If an SOAH ALJ needs some impartial advice as to a question of law or fact, the plain language of the statute appears to allow such communications.

Therefore, the current statutory framework and legal interpretation thereof guarantees that SOAH is an independent central hearings panel. It fulfills the appearance of propriety and impartiality in the decision-making process. It guarantees significant involvement by the referring agency as to all issues of law and fact, but vests the ultimate decision-making power in the ALJ in issuing an order at the end of the proceeding. However, as set forth above, the Texas Legislature did not choose to give complete, final decision-making authority to SOAH ALJs in the regulatory sphere. Unless the statute provides otherwise, the SOAH ALJ merely issues a proposal for decision, with the final decision being issued by the referring agency. It will be established below, however, that the proposal for decision issued by the SOAH ALJ has dramatic impact upon the ultimate order issued by the referring agency.

IV. THE INTERRELATIONSHIP OF THE SOAH PFD AND THE AGENCY FINAL ORDER – TWO APPROACHES TO MAINTAINING INSTITUTIONAL DECISION-MAKING

The APA provides that the agency board may issue a final order in a contested case proceeding that must be based solely on the evidence or those matters officially noticed within the record. There is no requirement that the agency members have heard the evidence and, in certain situations, the decision or order may be rendered without a majority of the members reading the entirety of the record. The APA provides that a decision or order of an agency board that is adverse to a party in a contested case proceeding must be in writing or stated in the record, and it must include

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97. § 2001.061(c).
98. § 2003.021(a).
99. § 2001.141(b)-(c).
100. § 2001.062.
findings of fact and conclusions of law separately stated.  The APA does not set forth the exact format of the order, but if the findings of fact are set forth in statutory language, those findings must be accompanied by a concise and explicit statement of the underlying facts that support them.  Finally, the APA provides that if an agency has adopted a rule granting a right to the parties to submit proposed findings of fact, the decision shall include a ruling on each proposed finding.

It has been established that prior to the creation of SOAH, and for any current ALJ that is an employee of the agency conducting the contested case hearing, the ALJ has no power to bind an agency by the mere issuance of a proposal for decision.  The agency is free to reject the ALJ’s proposal for decision even without direct reference to it or an explanation of why the agency disagreed with its findings. Thus, the ALJ proposal for decision is merely an informed suggestion or proposal for the agency to consider. If the status quo remained after the creation of SOAH, the only “change” in the Texas administrative system would have been that the “fact gatherer” would “independently create a record for decision” for the agency officials vested with issuing the final order. Therefore, even though the initial decision-maker was insulated from undue agency influence as to the meaning of the applicable law, the determination of the basic or underlying facts and the ultimate determination of the holding in the case by the application of law to the facts, the agency could wholly disregard with impunity those carefully crafted findings. It would be fair to say that the Texas citizen was provided an “appearance of independent decision-making,” but the critical findings of the order could be rendered without any deference to the one who heard the evidence and viewed the witnesses subject to direct and cross examination.

The Texas Legislature, however, fundamentally changed the status quo by making the SOAH ALJ proposal for decision as the focal point of the agency’s analysis in formulating its final order.

102. § 2001.141(b).
103. § 2001.141(d).
104. § 2001.141(e).
105. See supra, notes 7-10 and accompanying text.
106. Hunter, 910 S.W.2d at 102; Aetna, 898 S.W.2d at 935-36.
The manner in which this was accomplished was by universally requiring an agency to justify its change or modification of the findings set forth within the SOAH ALJ’s proposal for decision.

A. Modification of the SOAH ALJ PFD: Justify It

The APA was modified at the time that SOAH was created to provide that if an agency board modifies an SOAH ALJ’s proposal for decision, the agency must set forth in writing the reason and legal basis for the change in its final order.107 In a series of decisions, agency orders have been reversed and remanded by the judiciary solely because the agencies involved did not comply with this procedural requirement.108 These decisions emphasized that the written explanation must state the reason and legal basis for the change made. The court defined “legal basis” as the source from which the policy is derived; the term “reasoned” requires the agency to articulate a rational connection between the stated policy and the change ordered by the agency.109 An ambiguous, logically inconsistent or cursory statement will not suffice,110 nor will a generically stated boilerplate statement that globally justifies in conclusory terms multiple, specific changes made by the board reviewing the ALJ’s proposal for decision.111

It can be argued that this “pen to paper” requirement would alone have preserved the concept of “institutional decision-making” but would also have achieved the new legislative goal of the agency process having the appearance of fairness and a lack of impropriety. When an agency must articulate a rational justification within an order as to why it changed either the findings of fact or conclusions of law of an ALJ which is subject to review by the constitutional judiciary based on the record evidence developed before the ALJ, a party is clearly entitled to a meaningful hearing. Not only must an

109. Levy, 966 S.W.2d at 815-16; McKillip, 956 S.W.2d at 800-01.
110. McKillip, 956 S.W.2d at 801-02.
111. Levy, 966 S.W.2d at 816.
agency board justify the rationality of its finding based on the record’s evidence, it must also rationally justify why the ALJ’s analysis of that evidence or law was misguided. An impartial constitutional judiciary may then review the rationality of that analysis in light of the record before them and the specific findings and justifications of the ALJ as set forth within the PFD. The Texas Legislature chose to impose this pen to paper requirement in two different contexts: (1) where the agency may modify all findings of facts and conclusions of law of the SOAH ALJ; and (2) where the agency may only modify mixed application of law to fact finding and conclusions of law of the SOAH ALJ. Each statutory scenario will now be analyzed to determine the impact of requiring that an agency rationally respond to the proposed findings of the SOAH ALJ.

B. Approach One: All Findings of Fact and Conclusions of Law are Subject to Agency Modification

The Legislature has chosen to allow certain agencies complete authority to modify the SOAH ALJ’s proposal for decision. SOAH ALJs who conduct contested case hearings for the Public Utility Commission (PUC) work within the Utility Division of SOAH.112 The PUC may change any finding of fact or conclusion of law made by the SOAH ALJ.113 Likewise, a special Natural Resource Division has been created within SOAH to conduct contested case hearings for the Texas Commission on Environmental Quality (TCEQ).114 The TCEQ has all power to amend the proposal for decision including any findings of fact.115 Finally, even though a special division was not created for the Texas Employees Retirement System (ERS), any proposal for decision issued by SOAH within the jurisdiction of the ERS is subject to modification as to all findings of facts and conclusions of law.116 However, all three agencies are required to comply with the APA requirement set forth above that every change in the proposal for decision must be justified in writing within the

112. TEX. GOV’T CODE ANN. § 2003.049(a) (Vernon 2004).
113. § 2003.049(g).
114. § 2003.047(a).
115. § 2003.047(m).
116. § 815.511(d) (Vernon 2004).
As to findings of fact, even though the agencies may substitute their judgment for that of the SOAH ALJ, it does not give the agency carte blanche to begin anew based on the raw record. The judiciary has held that the resolution of conflicting evidence that relates to findings of fact often requires making credibility determinations. The SOAH ALJ is better suited to make such determinations than is an agency board reviewing the proposal for decision of the ALJ who has heard the evidence and observed the demeanor of the witnesses. Further, the SOAH ALJ position has been created to make such determinations as a "disinterested hearings officer." Thereby, the agency acts arbitrarily and capriciously by failing to provide an explanation for changes in the fact-finding, or by merely holding that an ALJ fact-finding is "an erroneous conclusion" without more, for such analysis gives the appearance that the agency is simply arriving at a pre-determined result. If a board merely establishes new findings of fact to support its holding, irrespective of the facts as determined by the ALJ, such an order is irrational because the basic purpose of requiring findings of fact is to ensure that the agency decision comes after, not before, a careful consideration of the evidence. Thus, the order should justify in writing that the agency conclusions follow from its serious appraisal of the facts, and not merely the ultimate result desired by the agency in the case.

This holding demonstrates the significant departure from the ALJ being a mere fact gatherer whose preliminary decision is given no deference. By placing the focus of the validity of the agency order, not only on whether there is evidence in the record to support the agency finding of fact, but by also requiring that the agency refute the logic and justification of the ALJ's findings of fact in a rational manner, this establishes that the power of the agency is not one of mere substitution of judgment, but a heightened standard of a rational change in facts with specific reasons that logically and cogently reject the reasoning of the ALJ who was the only one able to determine the testimonial credibility of the witnesses that appeared

117. Id.
118. Flores, 74 S.W.3d at 539.
119. Id. at 542.
120. Id.
before him/her.

Prior to the imposition of a justification for a change of finding, the reviewing court’s only power was to determine under a substantial evidence challenge of whether some reasonable basis existed in the record for the action taken by the agency.\textsuperscript{121} Now the “reasonable basis” must meet the additional standard of reasonableness in light of the contrary findings of the independent decision-maker – the SOAH ALJ. The agency is now confronted with a highly refined evidentiary record due to the analysis of the ALJ. It is no longer sufficient for the agency to merely point to evidence in the raw record to justify its findings of fact.

As for the application of the law to the underlying fact findings, this also necessitates that before the agency may change an ALJ finding, it must articulate a rational connection between the policy it relied on and the changes it made. This requires specific findings by the agency that would support its own application of the law in light of the basic or underlying findings set forth in the order.\textsuperscript{122} Finally, to reverse the ALJ as to a pure question of law, as to the meaning or interpretation of the relevant law, also demands a rational or reasoned explanation in light of the language of the statute, prior precedent of the agency, and specific reasons by the agency as to why the ALJ misinterpreted the language of the law.\textsuperscript{123}

This approach maximizes institutional decision-making by allowing the agency to utilize the expertise of agency staff for the analysis of the basic, underlying fact, and to utilize the expertise of its general counsel for the interpretation and application of the law. Therefore, the board members may apply their expertise and, if necessary, substitute judgment for the ALJ’s finding of fact and conclusions of law as long as there is a serious appraisal of the evidence in the record and a rational explanation for a change of the findings. Thus, the decision of the independent ALJ is critical and material to the citizen-party, for such determination cannot be set aside by the agency absent a rational explanation in law and/or fact.

It can be argued, however, that a citizen is not truly offered a fair

\textsuperscript{121} R.R. Comm’n of Tex. v. Torch Operating Co., 912 S.W.2d 790, 792 (Tex. 1995).
\textsuperscript{122} Flores, 74 S.W.3d at 542-43.
\textsuperscript{123} Id. at 545-52.
hearing if the agency can modify basic, underlying facts without being present at the hearing, for the board will have a total lack of knowledge of the testimonial credibility of the witnesses. As to issues of law and applying the law to the facts, such issues may be determined based on a written record, but the critical issues of who did what, when, where and how should only be determined by the trier of fact who was present at the hearing. Furthermore, if a citizen is willing to proceed to a hearing, the most likely reason is that there is bona fide dispute between the parties as to the underlying, basic facts. Thus, the argument concludes that a citizen will only truly have a “fair hearing” by the use of an independent decision-maker, if such person has the final determination as to the basic, underlying facts. The Texas Legislature accepted this basic argument for all agencies subject to the APA, which constitutes the overwhelming majority of the agencies who must refer their contested cases to SOAH.124

C. Approach Two: Basic Finding of Fact – The ALJ is the Final Decision-Maker

Originally, the APA provided that a finding of fact or conclusion of law could only be modified “for reasons of policy.”125 The Legislature did not define the meaning of this phrase or term. During the period of time that this statutory provision was applicable, the Texas Supreme Court did not address the meaning of this term. The Austin Court of Appeals did hold generally that the word “policy,” as used in the APA, meant “a matter involving the public interest, such a right, duty, or expectation of the community at large derived, for example, from a statute administered by the agency, a constitutional provision or other source of law.”126 Even though the use of the undefined phrase “for reasons of policy” may appear to be ambiguous, it will be established that it has a fairly discernable meaning in light of the APA as a whole and in the context of the administrative process.

Initially, it appears undisputed that in contrast to ALJs within the

124. See supra, notes 28-36 and accompanying text.
126. McKillip, 956 S.W.2d at 800.
resource or utility divisions, the legislature intended to modify an agency's power to substitute judgment on all issues of fact and/or law contained within the proposal for decision. This provision was added simultaneously with the creation of SOAH and the legislative history clearly indicated that the goal of the legislature was to create a modern administrative system where a citizen of Texas would believe in and actually receive a fair hearing on the disputed facts in a particular case. However, that same legislative history indicated a strong desire on behalf of the Legislature to retain the benefits of institutionalized decision-making whereby no one person, but a collection of skilled persons, would be involved in the ultimate determination of the case. This amendment must also be construed in light of the APA as a whole. Since the agency retained the ultimate authority to issue a final contested case order, it is that order and not the proposal for decision issued by the SOAH ALJ that must withstand judicial scrutiny upon a proper challenge filed in the court system. The judiciary reviews the validity of the agency order based on the record developed before the ALJ. The judiciary has the power to affirm or reverse and remand, if it determines that the order is based on an erroneous interpretation of the law. The court will substitute judgment if it finds that the agency has misinterpreted a relevant statutory or rule provision, but in recent years the construction of a statute by an administrative agency charged with its enforcement is entitled to serious consideration and deference so long as it is reasonable and does not contravene the plain language of the statute. Therefore, viewing these amendments in light of the administrative process as a whole, the legislature intended for the agency board to remain the final decision-maker as to the meaning and applicability of the law to ensure consistency in decision-making within the regulatory scheme. This would also allow the agency to continue to receive substantial deference by the judiciary of its interpretation and application of the law and the agency would not be

127. See supra, notes 23-27 and accompanying text.
131. See e.g., State v. P.U.C. of Tex., 883 S.W.2d 190, 195-96 (Tex. 1994); Dodd v. Meno, 870 S.W.2d 4, 7 (Tex. 1994).
required to defer to an interpretation of the SOAH ALJ.

The ordinary legal meaning of "policy" is defined as the general principles by which a government is guided in its management of the public welfare.\textsuperscript{132} In this context, it seems undisputed that since the defining of public policy in a regulatory context is vested in the administrative agency and accorded substantial deference by the courts, the agency has the power to substitute judgment for that of an ALJ in defining what a particular statute or rule prohibits or allows. It would border on the absurd to hold that the Legislature intends that an ALJ, who is not an expert in a particular regulatory area, could bind the agency and subsequently the judiciary as to the meaning of the law. This construction is bolstered by the fact that the APA provides that prior to the holding of the contested case proceeding, the agency shall provide the ALJ with a written statement of applicable rules or policy.\textsuperscript{133} If the ALJ misinterprets these statements or addresses a new, unanticipated legal issue, then clearly the agency may substitute judgment for that of the ALJ on the basis of "reasons of policy." The hazier meaning of "reasons of policy" relates to the finding of underlying fact and the subsequent application of the law to those facts resulting in findings of ultimate fact.

Generally, the judiciary reviews findings of facts under the substantial evidence review.\textsuperscript{134} The Texas Supreme Court has held that under this test, the agency action will be sustained if the evidence is such that reasonable minds could have reached the conclusions set forth by the agency.\textsuperscript{135} The Austin Court of Appeals has applied this standard to a contested case order by stating that there is substantial evidence to support an agency order if (1) the agency's findings of basic fact or reasonable conclusions are fairly based on evidence adduced at the hearing, (2) the agency's findings of ultimate fact are reasonable conclusions from the basic facts, and (3) the agency's final decision is a reasonable conclusion from the

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\item \textsuperscript{132} BLACK'S LAW DICTIONARY 1157 (6th ed. 1990).
\item \textsuperscript{133} TEX. GOV'T CODE ANN. § 2001.058(c) (Vernon 2004).
\item \textsuperscript{134} § 2001.174(2)(E).
\end{itemize}
agency's finding of ultimate fact.136 Thus, since it is the agency's final order that will be subject to such judicial scrutiny, it appears undisputed that the agency has the express or implied power to review an ALJ's findings of fact to at least determine that it would survive substantial evidence review. Therefore, as an aspect of "reasons of policy" or in addition to this provision, it would border on the absurd that an agency would be bound by either an underlying fact or an ultimate finding of the ALJ that could not survive a substantial evidence review.

The substantial evidence review standard as applied by the judiciary, however, is very narrow in scope. Although the evidence supporting the finding must be more than a scintilla, the contrary evidence may actually preponderate against the findings in the view of the judiciary, but it will be upheld, for the true test is not whether the agency reached the correct conclusion, but whether there is some reasonable basis that exists to support the finding.137 In the context of an agency reviewing an underlying or basic finding of an ALJ, this test would apparently be modified so that the agency could set aside any finding of the ALJ that lacked a minimal basis of rationality in light of the record as a whole. This clearly includes a finding that lacks any credible evidence to support it, i.e., no evidence. However, if the agency merely disagrees with the ALJ's weighing of the credible evidence in light of the burden of proof, i.e., there is evidence to support either a negative or affirmative finding, the Board could not substitute judgment for that of the ALJ. In this context, the agency could reverse the ALJ only if it concluded the evaluation of the weight of the evidence had no basis in rationality.

It should be cautioned, however, that this analysis applies to findings of basic or underlying fact that are defined as findings that do not purport to be declarations of norms or standards, but merely establish the factual circumstances to a particular case.138 Thus, such findings do not rise to a "policy" level for they do not consider whether the action is consistent with or injurious to the public

137. Tex. Health Facilities, 665 S.W.2d at 452-53.
welfare. Austin Court of Appeals held that such factual findings do not determine if a person or entity has conformed to a right, duty or expectation of the community at large, but such findings merely determine what did or did not happen or what did or did not exist in a specific scenario.\textsuperscript{139} The agency’s scope of review appears to be broader or more meaningful when it comes to ultimate findings of fact. Such findings are defined as the most general factual determinations the agency is called upon to make when it exercises its quasi-judicial power under a statute, for while these findings are phrased in factual language, these broad postulates are seen as conclusions relative to legal standards for they apply specific legal norms or “criteria” which are applicable in all similar cases, viz., a determination that is a mixed question of law and fact.\textsuperscript{140}

Therefore, ultimate findings involve the determination of whether in light of the statutory or rule standards the public welfare is enhanced or such conduct is injurious or inconsistent with the stated legal principles. For example, in the application of a liquor license from the Texas Alcoholic Beverage Commission, the relevant statute and rules required that an applicant’s place and manner of business shall not “endanger the public safety.”\textsuperscript{141} The findings as to where the business is located, the layout of the roadways and exits and entrances, the volume of traffic, \textit{et cetera}, are underlying findings that are made by the ALJ and, in most cases, absent a lack of rational basis are binding on the agency. The determination, however, of whether such conditions expose the public to a dangerous condition is subject to the substitution of judgment of the agency board for the ALJ’s determination.\textsuperscript{142} Thus, the agency could substitute judgment on ultimate findings in order to be able to implement policy of the agency in a particular case. This would also be consistent with the institutionalized decision-making approach where only the agency, and not an independent ALJ, would have the knowledge of all previous cases of like or substantially similar facts to render a decision that is consistent with the overall administration of the

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\textsuperscript{139} McKillip, 956 S.W.2d at 800.
\textsuperscript{140} Charter Med., 656 S.W.2d at 934.
\textsuperscript{142} Id. at 689.
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statutory scheme.

In 1997, the legislature removed the language of “for reasons of policy” from the APA.143 The amendments replaced the standard with the following:

A state agency may change a finding of fact or a conclusion of law made by the administrative law judge, only if the agency determines:

1. That the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided [to the ALJ by the agency] or prior administrative decisions;
2. That the prior administrative decision on which the administrative law judge relied is incorrect or should be changed, or
3. That a technical error in a finding of fact should be changed.144

Consistent with the previous analysis, the new standard expressly codifies the right of an agency board to substitute judgment for that of the ALJ in defining what a particular statute or rule prohibits or allows. This standard makes it clear that the legislature intends that pure issues of law, e.g., construction of the meaning of the statute or rule, are exclusively vested in the agency to determine its ultimate meaning. This is consistent with the modern approach of the courts to award substantial deference to an agency’s interpretation of the law when challenged in a court of law, for it is the agency, not the ALJ, that is charged with duty to consistently and uniformly interpret and apply what is the public policy of the state.145

It appears equally clear that the Legislature intended to vest the agency with substitution of judgment power as to an ALJ finding that is a determination which constitutes a mixed question of law and fact. The new provision allows the agency to substitute judgment if the

145. See P.U.C. of Tex., 883 S.W.2d at 195-96. See also Dodd, 870 S.W.2d at 7; Tarrant Co. Appraisal Dist. v. Moore, 845 S.W.3d 820, 823 (Tex. 1993).
ALJ “did not properly apply . . . applicable law, [and] agency rules.”146 “Apply” means “to put, use, or refer, as suitable or relative; to coordinate language with a particular subject matter; as to apply the words of a statute to a particular state of facts.”147 Thus, when the ALJ applies the statutory or rule based criteria to the findings of underlying fact, then the agency may substitute judgment if it can set forth specific reasons and a legal basis as to why it is incorrect. The judiciary will uphold the agency’s action as long as the agency articulates a rational connection between the stated policy and the change in findings.148

This conclusion is bolstered by the statutory provision allowing reversal if the ALJ does not properly interpret or apply “prior administrative decisions.”149 A prior contested case order would be cited by an ALJ as precedent for a proper application of the law to a state of facts that are identical or substantially similar to the case at hand.150 Allowing an agency to ensure that its prior cases are properly interpreted is consistent with the concept that it is the agency who is charged with administering the regulatory program because all like cases involving similar facts in law are decided in a manner consistent with the overall administrative scheme. This is further bolstered by the second basis for reversal – when an agency desires to overrule a prior decision relied upon by the ALJ.151 The legislature clearly desires to continue to vest in the agency board the power to consistently interpret and apply the statutes and rules within its jurisdiction.

As to ALJ findings of the underlying facts, the new standard appears to be clear that the agency is no longer free to substitute judgment when the board merely disagrees with how the ALJ weighed the evidence. Since the standard restricts reversal of a finding of fact to technical errors only,152 this would clearly imply that this is the sole basis for reversal of an underlying finding of fact.

148. See generally Levy, 966 S.W.2d 813; McKillip, 956 S.W.2d 795.
152. § 2001.058(e)(3).
The key issue is the meaning of technical error. "Technical" is ordinarily defined as "immaterial, not affecting substantial rights, without substance."\textsuperscript{153} "Technical error" is ordinarily defined as "errors committed in the course of trial which would have not prejudiced the party and hence are not grounds for reversal."\textsuperscript{154} Thus, the only findings of fact that can be changed are findings of fact that would not affect the substantive rights of the parties.

The difficulty with this interpretation, viewed in isolation, is that it fails to take into account the APA process reviewed as a whole. If the ultimate agency order is appealed to the constitutional court system, the findings of fact will be reviewed under a substantial evidence standard of review.\textsuperscript{155} As stated above, the substantial evidence test requires, at a minimum, that there be more than a scintilla of evidence which an agency could have reasonably relied upon to support a finding of basic fact.\textsuperscript{156} This standard would allow reversal if a finding of fact lacked any credible evidence to support it, i.e., had no evidence.\textsuperscript{157} It would be absurd to hold that the board could not reverse an ALJ finding of basic fact if it lacked sufficient evidence in the record upon which a reasonable person could so rely. This is particularly evident since the agency would be required to defend this defective finding in the constitutional courts.

The significant impact of the new standard is that it will be a rare case in which a finding of an ALJ has no evidence to support it, and the common issue asserted before the agency will be that the ALJ incorrectly assessed the weight of the evidence. It seems undisputed that the legislature no longer desires that the agency board have the power to reverse such a finding merely because it disagrees with how the ALJ weighed the evidence. Thus, in most contested cases, the ALJ will be the sole trier of fact as to the basic underlying facts as to the relevant and material issues involved in the dispute. The citizens of Texas will now truly have the right to an impartial decision-maker in determining the weight of the evidence as to the basic underlying facts.

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\item[153.] BLACK'S LAW DICTIONARY 1460 (6th ed. 1990).
\item[154.] Id.
\item[156.] Dunn, 665 S.W.3d at 452-53.
\item[157.] Tomlinson v. Jones, 677 S.W.2d 490, 294 (Tex. 1984).
\end{enumerate}
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This analysis was recently confirmed in a memorandum opinion of the Austin Court of Appeals in *Texas State Board of Medical Examiners v. Dunn.*\(^{158}\) In *Dunn*, a hearing was held to determine if a physician’s license that had been suspended should be reinstated. The critical, basic, underlying fact findings of the ALJ that supported the ALJ’s ultimate conclusion that the physician should be allowed to return to practice under certain conditions were: “[1] before Dunn began abusing drugs, he was clinically competent [and is] [2] physically, mentally and otherwise competent to safely practice medicine contingent on remaining in recovery.”\(^{159}\) These were in fact basic findings, for no statutory or rule-based criteria were utilized by the physician or the board to prove or disprove either issue of competency, but the physician utilized expert testimony to prove his competency.\(^{160}\) The board failed to present any expert testimony at the hearing as to the competency of the physician either before his license was suspended or at the time of his application for his reinstatement.\(^{161}\) However, the board rejected the ALJ’s finding set forth above because, among other reasons, the ALJ findings were not supported by substantial evidence.\(^{162}\) The *Dunn* holding is a case of first impression where the court was willing to review the record to determine if substantial evidence existed as to those basic, underlying facts of competency.\(^{163}\)

Even though the court did not acknowledge what they were doing or expressly hold that it was legitimate for the board to attempt to reject an ALJ’s basic, underlying fact on the basis of a lack of substantial evidence, they were correct in entertaining such an argument if one views the APA as a whole. In excruciating detail, the court sifted through the evidence to establish there was no evidence to support the board’s change of the basic competency findings, but there was sufficient credible evidence to support the ALJ’s findings, and thus, the board was powerless to modify the

159. Id.
160. Id. at 13-14
161. Id.
162. Id.
163. Id. at 10-11.
findings of competency.\textsuperscript{164} This decision is significant because it confirms that an agency may review an ALJ’s basic, underlying findings of fact to determine if there is substantial evidence to support them and, if there is not, the board may substitute proper findings. However, if the board’s dispute with the ALJ’s findings merely goes to the weight of the evidence, the board is powerless to modify the same.\textsuperscript{165}

In Dunn the board also rejected the ALJ’s finding as to ultimate or mixed application of law to fact findings.\textsuperscript{166} The board rejected the ALJ’s ultimate finding that it was in the “public interest” and the “physician’s interest” to allow reinstatement.\textsuperscript{167} This is exactly the type of finding the meets the definition of an ultimate fact finding for while these findings are: “phrased in factual language, these broad postulates are seen easily as conclusions relative to legal standards for they purport to apply in a specific case legal norms or ‘criteria’ which are applicable in all similar cases.”\textsuperscript{168} These findings of “public interest” will be the key, critical mixed application of law to fact findings that will determine whether a physician is entitled to reinstatement in all like-kind cases.

Even though the agency has the power to modify such ultimate findings, the APA requires that the agency shall state in writing the specific reasons and legal basis for the change made.\textsuperscript{169} The Austin Court of Appeals has previously held, as set forth above, that “legal basis” is the source from which the policy is derived and the term “reason” requires the agency to articulate a rational connection between the stated policy and the change ordered by the agency.\textsuperscript{170} In Dunn, the court held that a justification is not sufficient or rational if the agency merely concluded that the ALJ’s findings lacked substantial evidence when the record established to the contrary. In addition, the justification for a change of findings was not rational when the board held the ALJ should have considered the applicant’s

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\item \textsuperscript{164} Id. at 17-22.
\item \textsuperscript{165} Id.
\item \textsuperscript{166} Id. at 30.
\item \textsuperscript{167} Id.
\item \textsuperscript{168} Charter Med., 656 S.W.2d at 934.
\item \textsuperscript{169} TEX. GOV’T CODE ANN. § 2001.058(e)(3) (Vernon 2004).
\item \textsuperscript{170} See, e.g., Flores, 74 S.W.3d at 539-45; Levy, 966 S.W.2d at 815-16; McKillip, 956 S.W.2d at 800-01.
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failure to prove fulfilling certain conditions that were impossible to meet under the restrictions of his probation period.\textsuperscript{171}

In a second decision,\textsuperscript{172} the Texas Department of Insurance did successfully defend its modification of an ALJ’s ultimate finding of fact. The finding was the ultimate finding of whether the applicant was “fit for licensure” which required the fact finder to apply certain statutory criteria.\textsuperscript{173} The Commission modified the ALJ’s ultimate finding of fitness on the basis that the ALJ failed to properly apply and interpret certain rules related to the particular underlying or basic findings that were not in dispute.\textsuperscript{174} The court held the Commission had the power to modify the finding because it involved the interpretation and application of agency rules and the commission had rationally set forth the source of the policy and demonstrated a rational basis for the change in light of the proper legal interpretation being applied to the basic or underlying facts.\textsuperscript{175}

These two decisions send a clear message to agencies that if the basic, underlying facts are critical to the determination of the contested case proceeding, the agency must establish its position of those fact issues by the counsel for the agency presenting to the SOAH ALJ sworn testimony of witnesses and other admissible evidence at the time of the contested case hearing. The board may not simply sit back and choose to reevaluate the evidence upon review of the proposal for decision. If the ALJ’s basic, underlying facts are supported by substantial evidence, the agency simply may not re-weigh and re-analyze the evidence and substitute its judgment for that of the ALJ. The board will be bound by the basic, underlying findings. Finally, the agency may in fact modify ultimate findings that involve the application of legal standards to the basic underlying facts, but it must set forth a legal and rational basis to do so. In addition, such rationale will not be held to be a substitute for actual evidence in the record. The rationale must justify the change in ultimate findings based upon the basic, underlying facts of the SOAH ALJ, unless such findings are not supported by substantial evidence.

\textsuperscript{173} Id. at 5101-02.
\textsuperscript{174} Id. at 5102.
\textsuperscript{175} Id.
Therefore, the APA mandated deference to the SOAH ALJ’s PFD strikes a balance between the need for an “institutional decision” and the need for an impartial decision-maker as to the underlying facts. This accommodation appears to best fulfill the overall purpose of agencies which is to gain the necessary expertise in the regulatory area and to apply that expertise in a consistent and uniform manner. However, it allows the citizens of the state of Texas to believe that they received a fair trial as to the factual disputes within the contested case proceeding.

V. CONCLUSION

Texas administrative law has always been predicated on the fundamental notion that a regulatory agency was created to be or to become an expert body in a particular field, to which they will then apply such expertise in a uniform and consistent manner. It has also been perceived that this goal must be achieved by “in house” adjudicators who merely aid the agency board in rendering a contested case order. However, modern perceptions mandate that such contested case proceedings have the rudiments of fair play which necessitates an impartial decision-maker. Such a goal could seriously undermine the ability of an agency to engage in “institutional decision-making” whereby it may call on the expertise of its employees to reach an informed, consistent result in all contested case proceedings. The modern Texas model has demonstrated that independent decision-makers can in fact be utilized without threatening or abolishing the institutional decision-making approach.

The critical or fundamental change was to require that the agency not solely focus on the hearing record when rendering a final decision, but to force the agency to focus on that record and the analysis of that record as set forth by the ALJ within his or her proposal for decision. By changing the focus and requiring that an agency justify in writing within the final order the reason and legal basis for each and every change made to the SOAH ALJ’s proposal for decision, the initial decision of the ALJ, who literally has no responsibility to, nor is directly accountable to, the agency board, becomes the presumptive basis for the final decision absent a rational explanation to the contrary. Therefore, even if the agency board may substitute judgment on all findings of fact and conclusions of law, the
citizen-party is ensured a rational, objective decision based on a known record.

The second fundamental aspect of the Texas system is to take this “ALJ deference standard” one more step by providing that an ALJ’s findings as to basic, underlying fact are binding upon the agency as long as there is reasonable evidentiary support within the record. For those who believe the “rudiments of fair play” are not present unless an independent decision-maker has the power to ultimately decide who did or did not do what, when, where and how, this second approach clearly fulfills this requirement. It has been established that even with this fundamental change, the agency is quite free to apply its expertise and utilize the expertise of its employees, while ultimately being able to ensure consistent, rational application of legislative policy. Thereby, the need for a central hearings panel which is vested with ultimate decision-making authority on all issues of law and fact is not necessary to ensure a fair hearing and a fair result in agency contested case proceedings.