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THE GROWTH AND DEVELOPMENT OF A CENTRALIZED ADMINISTRATIVE HEARINGS PROCESS IN TEXAS

Shelia Bailey Taylor*

I. INTRODUCTION

The State Office of Administrative Hearings (SOAH or the Office) has been, to date, a continually evolving entity. SOAH has not been the same size or had the same structure for any year of the Office's existence. The discussion in this article addresses SOAH's creation, various changes that have occurred since then, and general practices and procedures before the Office. The most significant changes to SOAH that have been fully implemented at the time of this writing include: (1) the addition of the Administrative License Revocation (ALR) program; and (2) the statutorily mandated addition of the Utility and Natural Resource divisions. These additions had a dramatic impact on the Office and are discussed in section II, *infra*. Briefly, however, it is noted that the implementation of the ALR program brought into the administrative law arena certain issues, standards and procedures traditionally raised in criminal court proceedings. Because of this program's uniqueness in terms of the administrative process, the final section of this article is devoted to a discussion of ALR proceedings. Special recognition and thanks to Josh Henslee and Deborah L. Ingraham, Administrative Law Judges (ALJs) from SOAH's San Antonio office, for their contributions and assistance in the preparation of this section.

II. HISTORY, JURISDICTION AND DUTIES

The State Office of Administrative Hearings was created in 1991 by the 72nd Texas Legislature pursuant to Senate Bill (S.B.) 884. The primary reasons for SOAH's creation were to provide increased

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independence, quality, and cost efficiency for administrative hearings process. SOAH's mission, in this regard, is to assure that hearings in contested cases are conducted fairly, objectively, promptly and efficiently, and result in quality and timely decisions. The Chief Administrative Law Judge, the head of the agency, is appointed by the Governor for a two year term. SOAH's first Chief ALJ, Steven L. Martin, was appointed in December 1991, by then Governor Ann Richards, and began serving in January 1992. He was re-appointed to another two year term in April 1994. In May 1996, Governor George W. Bush appointed the author as SOAH's second Chief ALJ.

SOAH's organic statute, codified at V.T.C.A., Government Code (Gov't. Code), ch. 2003 (*formerly Tex. Rev. Civ. Stat. Ann., art. 6252-13f*), provides in pertinent part:

* * *

Section 2003.021. Office

(b) The Office shall conduct all administrative hearings in contested cases under Chapter 2001 [formerly Tex. Rev. Civ. Stat. Ann. art. 6252-13a, Administrative Procedure and Texas Register Act ("APTRA")] that are before a state agency that does not employ an individual whose only duty is to preside as a hearings officer over matters related to contested cases before the agency.

* * *

Additional duties and responsibilities of SOAH and the state agencies for whom the Office conducts hearings are set forth in § 2001.058, Gov't Code, (*formerly § 13(j) of APTRA, Article 6252-13a, V.T.C.A.*), which provides as follows:

(a) This section applies only to an administrative law judge employed by the State Office of Administrative Hearings.

(b) an administrative law judge who conducts a contested case hearing shall consider applicable agency rules or policies in conducting the hearing, but the state agency deciding the

case may not supervise the administrative law judge.

(c) A state agency shall provide the administrative law judge with a written statement of applicable rules or policies.

(d) A state agency may not attempt to influence the findings of facts or the administrative law judge's application of the law in a contested case except by proper evidence and legal argument.

(e) A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative law judge, only for reasons of policy. The agency shall state in writing the reason and legal basis for a change made under this subsection.

SOAH's procedural rules can be found at 1 Texas Administrative Code (TAC) Sections 155, 157, 159, 161, and 163 et seq. The Office provides independent ALJs to conduct hearings and handle all related prehearing and post-hearing matters, to issue proposals for decision (PFDs), and in some instances to enter final decisions. Further, at the request of a state agency, an ALJ will include a proposed order with the PFD; however, SOAH is not responsible for preparing an agency final order which differs from the proposed order submitted by the ALJ.

Prior to the creation of SOAH, state agencies that did not employ their own hearings examiners or ALJs contracted with private attorneys to serve as ALJs, or relied upon their board members or commissioners to hear and decide contested cases. Upon SOAH's establishment, responsibility for conducting all administrative hearings under the APA for those agencies automatically fell within the Office's jurisdiction. This meant that, for the first time in the state's history, administrative hearing for certain agencies would be conducted by a central independent agency.

SOAH began conducting hearings on April 15, 1992, with a staff of six ALJs, including the Chief ALJ. SOAH's original jurisdiction covered approximately 56 "referring" agencies, which included many professional and business licensing agencies, certain government retirement systems, and financial regulatory agencies. The

ALJs responsible for hearing these type of cases are referred to as the Central Hearings Panel (CHP).

In order for SOAH to begin operations, the Legislative Budget Board approved an initial appropriation of \$100,000, along with a rider which provided for additional funding via transfer of referring agency funds through budget execution. However, the Governor's Office of Budget and Planning determined that in lieu of budget execution transfers, the use of a billing mechanism would be more efficient and fair to SOAH and the agencies for which it provides services. Accordingly, SOAH enters into an interagency contract with each state agency whose hearings are conducted by the Office. Most contracts provide for SOAH's services to be compensated on the basis of an hourly rate billing system. Other contracts provide for an initial lump sum payment, of which is negotiated by the head of the referring agency and the Chief ALJ of SOAH. The method of providing compensation to SOAH, is generally a matter of choice, unless specified otherwise by statute.

SOAH's initial billing rate was \$80.00 per hour for time expended by the ALJ on a particular case or matter referred. However, after the first year and a half of operation, Chief ALJ Martin determined that the increasing efficiency associated with economies of scale would allow reduction of the hourly billing rate to \$70.00 per hour without jeopardizing the Office's ability to meet its operating costs or the quality of its services. As of the time of this writing, SOAH's billing rate remains \$70.00 per hour plus necessary expenses incurred in the performance of duties under the contract.

Since its creation in 1991, the responsibility of the Office has continued to expand. On September 1, 1992, SOAH began conducting hearings for Texas Alcoholic Beverage Commission (TABC) pursuant to a *voluntary* interagency contract. Likewise on April 1, 1993, also pursuant to a *voluntary* contract, SOAH began conducting hearings for the Texas Department of Insurance (TDI), excluding rate cases. Thereafter, during the 73rd Legislative session, the transfer of these two agencies' hearings responsibilities was mandated by statute as follows: TABC in H.B. 1445, effective September 1, 1993, and TDI in H.B. 1461, effective January 1, 1994.

H.B. 1445 transferred to SOAH authority to conduct any

hearing authorized by the Alcoholic Beverage Code except for a hearing held under Section 61.32 of that code concerning a hearing on the adoption of commission rules, or a hearing on an employment matter. (*See, Alcoholic Beverage Code, § 5.43*). Additionally, this bill also amended Chapter 11 of the Alcoholic Beverage Code to add the requirement that certain hearings held on or after September 1, 1993, be conducted only in the county in which the licensed premise is located. This significantly increased the travel requirements for SOAH ALJs.

The transfer of authority to conduct TDI hearings under H.B. 1461 included the authority to hear rate cases. However, certain hearings or proceedings relating to rate review of rating manuals, rule promulgation, policy forms and endorsements, plans of operation for insurance entities were expressly excluded by an amendment adding Article 1.33B of the Insurance Code, which reads in pertinent part as follows:

Art. 1.33B. Certain Hearings Held by State Office of Administrative Hearings

- (a) *This article does not apply to a hearing or proceeding:*
- (1) *relating to the approval or review of rates or rating manuals filed by individual companies, unless they are contested;*
 - (2) *relating to the promulgation of rules;*
 - (3) *relating to the promulgation or approval of a policy form or policy form endorsement;*
 - (4) *relating to the adoption or approval of a plan of operation for an organization subject to the jurisdiction of the department; or*
 - (5) *conducted in accordance with Article 1.04D of this code.*

Additionally, although H.B. 1461 did not specifically amend the APA, it did, through further amendment of the Insurance Code, expressly authorize the commissioner of insurance to amend the SOAH ALJ's proposal for decision (PFD) in rate promulgation proceedings. This amendment represented the first exception to the provision in

Section 2001.058 of the Government Code authorizing agencies to change a SOAH ALJ's findings of fact and conclusions of law "only for reasons of policy." Article 1.33B.(c)(5) reads in pertinent part:

The commissioner may amend the proposal for decision, including any finding of fact, but any such amendment thereto and the order of the commissioner promulgating the rate shall be based solely upon the record made before the administrative law judge. Any such amendment by the commissioner shall be accompanied by an explanation of the basis of the amendment. The commissioner may also refer the matter back to the administrative law judge to reconsider findings and conclusions set forth in the proposal for decision or to take additional evidence or to make additional findings of fact or conclusions of law.

Also in 1993, the Legislature transferred to SOAH the hearings functions of four intragency departments of the Texas Department of Health (TDH). Those departments include the Board of Examiners of Perfusionists, the Board of Social Worker Examiners, the State Board of Examiners of Professional Counselors and the State Board of Marriage and Family Therapists. These transfers were dictated by H.B. 1835, S.B. 1426, H.B. 2741 and S.B. 1425, respectively, effective January 1, 1994. Further, during FY (fiscal year) 1994, SOAH began conducting hearings for the Texas Lottery Commission, the Texas Ethics Commission and the General Services Commission.

The most significant change for SOAH, enacted by the 73rd Legislature, was the passage of S.B. 1. This bill implemented and placed under SOAH's jurisdiction, a statewide administrative driver's license revocation program (ALR Program), which began operations on January 1, 1995. The ALR law is codified in Chapters 524 and 724 of the Transportation Code. (Prior to September 1, 1995, the ALR law was located in Tex. Civ. Stats., Arts. 6687b-1 and 67011-5, respectively). The ALR program significantly increased SOAH's demand for space, personnel, furniture, equipment and information resources technology,

and resulted in a second division of ALJs within the Office.

A more detailed description of the ALR Program is set forth in Section VI, *infra*. Briefly, however, under the ALR program, SOAH conducts hearings that are requested by persons who receive notices of driver's license suspensions based on charges of driving while intoxicated. The implementation of this program made it necessary for SOAH to expand and create four regional and nine field offices, strategically placed in locations around the State of Texas. The ALR hearings are conducted by administrative law judges working out of these 13 offices, including the Austin office, and traveling to various remote sites to cover the State. In general, an ALR hearing must be conducted in the county of arrest or within 75 miles of the county seat of the county of arrest. ALJs hearing these cases issue final decisions which are appealable directly to the county courts.

During the 74th Legislative session, SOAH's jurisdiction was again expanded. Specifically, S.B. 12 transferred the hearings functions of the Texas Natural Resource Conservation Commission (TNRCC) to SOAH. Likewise, S.B. 373 transferred the hearings functions of the Public Utility Commission of Texas (PUC) to SOAH. Both bills were effective September 1, 1995. These bills required the creation of two new divisions within SOAH--Natural Resources and Utility--and that hearings in contested cases referred to SOAH by the TNRCC and the PUC only be conducted by ALJs in the Natural Resources Division and Utility Division, respectively, SOAH may, however, transfer ALJs to these two divisions on a permanent or temporary basis, and may contract with qualified individuals to serve as temporary ALJs as necessary.

The PUC Commissioners retained authority under S.B. 373 to conduct hearings in cases before that agency; however, the bill mandated that hearings in contested cases not conducted by one or more PUC Commissioners be conducted by the Utility Division of SOAH. The PUC may also delegate to the Utility Division of SOAH the authority to make a final decision and to issue findings of fact, conclusions of law, and other necessary orders in a proceeding in which there is no contested issue of fact or law; and must provide the Utility Division access to its computer systems, databases, and library resources.

Additionally, Senate Bills 12 and 373 both amended SOAH's enabling statute, Chapter 2003, Gov't. Code, by adding § 2003.047 to provide, among other things, authority to TNRCC and the PUC to modify an ALJ's findings and conclusions. Specifically, with respect to TNRCC, Gov't. Code, § 2003.047 provides in pertinent part that:

The commission may amend the proposal for decision, including any finding of fact, but any such amendment thereto and order shall be based solely on the record made before the administrative law judge. Any such amendment by the commission shall be accompanied by an explanation of the basis of the amendment. The commission may also refer the matter back to the administrative law judge to reconsider any findings and conclusions set forth in the proposal for decision or take additional evidence or to make additional findings of fact or conclusions of law.

This language is similar to that adopted in the Insurance Code for TDI except, unlike that provision, the authority granted TNRCC to change an ALJ's proposed findings of fact or conclusions of law is not limited in application to any particular type of hearing or proceeding. (The exception granted in the Insurance Code relates to rate promulgation proceedings only.) S.B. 12 also added subsection (g) to §362.0832 of the Health and Safety Code, expressly providing that in the event of a conflict between Gov't. Code §2001.058(e) [A state agency may change a finding of fact or conclusion of law made by a SOAH ALJ only for reasons of policy] and §361.0832, the latter controls.

With respect to the PUC, Gov't. Code, §2003.047 reads as follows:

- (g) *Notwithstanding Section 2001.058, the commission may change a finding of fact or conclusion of law made by the administrative law judge or vacate or modify an order issued by the administrative law judge only if the commission:*

- (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.*
- (h) *The commission shall state in writing the specific reason and legal basis for its determination under Subsection (g).*

In addition, S.B. 373 gives the PUC authority to impose administrative penalties on a person regulated under the Public Utility Regulatory Act (PURA or the Act) who violates the Act or a rule or order adopted under the Act. Hearings for administrative penalties are to be held by SOAH. Senate Bill 373 also gives the PUC authority to, by rule, delegate to SOAH the responsibility to hear any other matter before the commission if consistent with the utility division's duties and responsibilities.

Further amendments to PURA provided for by S.B. 373 include, among other things, the following prohibitions or requirements:

1. *Commission or SOAH employees involved in hearing utility cases may not, within one year after cessation of their employment by the commission or SOAH, be employed by a public utility which was in the scope of the employee's official responsibilities while employed by the commission or SOAH. (PURA, §1.025(a)).*
2. *During the time that a SOAH employee is involved in hearing utility cases or at any time after, the employee may not represent a person, corporation, or other business entity before the PUC or SOAH or a court in a matter in which the employee was personally involved while associated with SOAH. (PURA, §1.025(b)).*
3. *The PUC is required to adopt rules governing practice*

and procedure before the utility division of SOAH. Any rule adopted after September 1, 1995, governing the practice and procedure before the Utility Division of SOAH must be jointly adopted by SOAH and the PUC. The PUC is also required to adopt rules authorizing an ALJ to impose certain limitations on the proceedings or requirements on the parties. (PURA, §1.101(b)), as further discussed in Section III, infra.

4. *SOAH and the PUC are required to jointly adopt rules providing for certification to the commission of an issue that 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 commission by law. The rules must address, at a minimum, the issues that are appropriate for certification and the procedure to be used in certifying the issue. Each agency must publish the jointly adopted rules. (Gov't. Code, §2003.047(f)).*

Senate Bill 3 transferred certain transportation regulation from the Texas Railroad Commission (whose hearings are not conducted by SOAH) to the Texas Department of Transportation (TxDOT) and the Department of Public Safety (DPS), both of for whom SOAH already conducted hearings. Senate Bill 3, required SOAH to conduct administrative penalty and registration suspension/revocation hearings for these agencies effective September 1, 1995. Also effective on September 1, 1995 was S.B. 366, which authorized SOAH to conduct disciplinary hearings initiated against persons holding certificates issued by the Texas State Library and Archives Commission. Senate Bill 366 further prohibited the commission from adopting rules applicable to the proceeding for a disciplinary action which conflicted with rules adopted by SOAH.

Effective January 1, 1996, H.B. 1089 transferred the Texas Workers' Compensation Commission's (TWCC) APA hearings (but not the non-APA benefit hearings) to SOAH. APA hearings include revocation of certificates to self-insure, determinations related to the extra-hazardous employee program, review of medical services charges that deviate from fee guidelines or treatment policies, and administrative violations. In certain hearings the ALJ enters a final

decision (i.e., cases under §§411.049, 413.031, or 415.034 of the Labor Code), while in other cases the ALJ issues a proposal for decision, (i.e., cases under §§402.072, 407.046, or 408.023). This bill also amended SOAH's statute (*Chapter 2003, of the Gov't. Code*), to include TWCC in the definition of "state agency" to the extent provided by Title 5 of the Labor Code, and required SOAH to consider the applicable TWCC substantive rules and policies. Further, in proceedings to revoke a certificate of authority to self-insure, H.B. 1089 amended the Labor Code to require SOAH to notify the certified self-insurer of the hearing and grounds not later than the 30th day before the scheduled hearing date. (§407.046(c), *Labor Code*). [Generally, the agency with subject matter jurisdiction has the responsibility for providing proper notice in a case.]

Also effective January 1, 1996, S.B. 372 transferred the hearings functions of the Department of Agriculture to SOAH. The department or the commissioner retained the authority to determine whether the ALJ conducting the hearing enters a final decision or issues a PFD. Although the bill did not specifically amend the APA, for administrative penalty cases, it did authorize the commissioner to change a finding of fact or conclusion of law made by an ALJ if the commissioner determined that: *the ALJ failed to properly apply or interpret applicable law, department rules or policies, or prior administrative decisions; the ALJ issued a finding of fact that is not supported by a preponderance of the evidence; or that a policy or prior decision on which the ALJ relied is incorrect or should be changed.*

Additionally, effective January 1, 1996, H.B. 2644 provided for the option of arbitration of disputes, between licensed nursing facilities and the Department of Human Services (DHS), about license renewal, suspension, or revocation and assessment of penalties. Under H.B. 2644, if arbitration is selected instead of a contested case proceeding (which still would be conducted by a DHS ALJ) or a judicial proceeding, the arbitration is to be conducted, and the arbitrator appointed, in accordance with the rules adopted by SOAH. In this regard, SOAH is authorized to contract with a "nationally recognized association that performs arbitration services" to conduct the arbitrations.

To date no licensing home enforcement case has been referred

to SOAH for arbitration. However, the implementation of a process for handling these cases established the foundation for the development of SOAH's Alternative Dispute Resolution (ADR) program. This program, which is still in the early stages of development and implementation, is directed by an ADR Coordinator.

Among other things, the ADR Coordinator's responsibilities include: working with other state agencies to identify the type of cases which may be appropriate for arbitration or mediation services; identifying non-contested case disputes (e.g., grievance proceedings and negotiated rulemaking) which might benefit from the use of an ADR process; and providing required mediator, arbitrator, or facilitator services as needed.

As of January 1997, 12 of SOAH's ALJs had been trained as mediators, as well a 7 trained to perform arbitrations under the above-referenced DHS rules. Preceding the implementation of SOAH's ADR program, the Office began providing mediators for TNRCC in September 1995, pursuant to an interagency contract. (Prior to the transfer of the TNRCC's hearings functions to SOAH TNRCC's in-house ALJ's performed these mediation services). Approximately 79 percent of the mediations SOAH ALJs have performed for the TNRCC have successfully resolved the disputes in those cases.

Many state agencies are seeking ways to resolve disputes without the higher costs and adversary tone associated with contested case hearings. While some agencies have naturally turned to in-house neutrals as the most economical way to obtain the benefit of ADR processes, utilizing a third-party neutral provided by SOAH is perceived by many agencies and participants as giving greater credibility to the process.

ADR processes have been hailed around the country as efficient and economical ways of resolving a variety of disputes without subjecting either the agencies or the parties to the time or cost of a formal hearing. SOAH seeks to keep abreast of the nation-wide trend toward increased reliance on ADR by having trained, skilled, experienced, competent staff available to serve as ADR neutrals.

The last change to SOAH resulting from acts of the 74th Texas Legislature was the passage of S.B. 1 (the education bill). This bill provided for the State Board of Education, in consultation with SOAH,

to establish by rule criteria for the certification of hearing examiners eligible to conduct hearings under Subchapter F of the Education Code. S.B. 1 also provided for SOAH to conduct administrative penalty hearings for the Texas Employment Commission (TEC) in cases involving the operation of a proprietary school¹ without a certificate of approval issued by TEC.

The 75th Texas Legislative session is nearing an end, and once again SOAH faces the possibility of substantial change. As of the time of this writing, all proposed legislation which would have an impact on SOAH remain pending. Examples of pending legislation include proposals to: (1) transfer the hearings function of additional agencies to SOAH (e.g., Protective and Regulatory Services, Texas Workers' Compensation Commission non-APA hearings); (2) grant authority to SOAH to handle cases involving claims against the state for breach of construction contracts; (3) place under SOAH's jurisdiction cases involving agency attempts to debar a contractor or subcontractor from contracting with the state or subcontracting under state contract; (4) expand SOAH's jurisdiction to include administrative review of property tax appeals; (5) grant authority to SOAH to issue final orders in licensing cases; (6) have SOAH provide various ADR and ADR-related services; and more. The actual impact on SOAH, of currently filed bills will not be known until the end of the session after passage of the bills, if any.

Additionally, during this session SOAH is seeking a modification in its current method of funding. Specifically, rather than relying solely on lump sum and hourly billing contracts (and an hourly rate that was implemented several years ago), SOAH seeks partial general revenue funding and partial cost recovery through interagency

¹Section 132.001(1) of the Texas Education Code defines "proprietary school" as follows:
... any business enterprise operated for a profit or on a nonprofit basis, that maintains a place of business within this state, or solicits business within this state, and that is not specifically exempted by this chapter and:

- (A) that offers or maintains a course or courses of instruction or study; or
- (B) at which place of business such a course or courses of instruction or study is available through classroom instruction or by correspondence, or both, to a person for the purpose of training or preparing the person for a field of endeavor in a business, trade, technical, or industrial occupation, or for avocational or personal improvement.

contracts. This change would allow SOAH to: (1) maintain adequate resources for hearings support services without raising its hourly billing rate; (2) maintain some flexibility in responding to changing agency workloads and new hearings responsibilities; and (3) provide increased stability for the Office and its employees.

III. SOAH ADMINISTRATIVE LAW JUDGES

A. Employment of ALJs

As previously referenced, SOAH began operations with a staff of six ALJs. The number of ALJs employed by SOAH has since increased in conjunction with the Office's expansion of jurisdiction and responsibilities. By June of 1996, SOAH employed a total of 62 ALJs, including the ALJ directors of the Central Hearings Panel, Natural Resources, Utility, and ALR Divisions--28 in the ALR division, 12 in the CHP division, 11 in the NRD and 11 in the Utility division.

In addition to employing ALJs, SOAH has the authority to contract with qualified individuals to serve as temporary ALJs when such becomes necessary, that is, if at anytime an ALJ employed by the Office is not available to hear a case within a reasonable time. (*See, Gov't. Code, §2003.043(a)*). To date, however, ALJs employed by SOAH have been available to timely hear all cases that have been referred to SOAH.

B. Eligibility for Employment

In general, to be eligible for employment with SOAH as an ALJ, an individual must be licensed to practice law in the state of Texas and meet other requirements prescribed by the Chief ALJ. (*See, Gov't. Code, §2003.041(b)*). Additional eligibility requirements have been established, however, in conjunction with the transfer of certain agencies' hearings functions to SOAH. Specifically, S.B. 12, which amended the SOAH statute, required that a SOAH ALJ presiding over a TNRCC case, regardless of the ALJ's temporary or permanent status, not only be licensed to practice law in Texas, but also "have the expertise necessary to conduct hearings regarding technical or other

specialized subjects that may come before the commission." (*Gov't. Code, §2003.047(d)*). Likewise, S.B. 373 amended the SOAH statute to require that a SOAH ALJ presiding over a PUC case, regardless of the ALJ's temporary or permanent status, in addition to being licensed to practice law in Texas, also have not less than five years of general experience or three years of experience in utility regulatory law. (*Id.*)

C. Authority of ALJs

The statutory authority granted SOAH ALJs in general is set forth in §2003.042, *Gov't. Code*, and reads as follows:

An administrative law judge may:

- (1) *administer an oath;*
- (2) *take testimony;*
- (3) *rule on a question of evidence;*
- (4) *subject to review by the state agency before which the contested case is brought, issue an order relating to discovery or another hearing or prehearing matter, including an order imposing a sanction that the agency may impose; and*
- (5) *issue a proposal for decision that includes findings of fact and conclusions of law.*

Further, Section 2003.0421 provides that:

(a) An administrative law judge employed by the office or a temporary administrative law judge, on the judge's own motion or on motion of a party and after notice and an opportunity for a hearing, may impose appropriate sanctions as provided by Subsection (b) against a party or its representative for:

(1) filing a motion or pleading that is groundless and brought:

- (A) in bad faith;
- (B) for the purpose of harassment; or

(C) for any other improper purpose, such as to cause unnecessary delay or needless increase in the cost of the proceeding;

(2) abuse of the discovery process in seeking, making, or resisting discovery; or

(3) failure to obey an order of the administrative law judge or of the state agency on behalf of which the hearing is being conducted.

(b) A sanction imposed under Subsection (a) may include, as appropriate and justified, issuance of an order:

(1) disallowing further discovery of any kind or of a particular kind by the offending party;

(2) charging all or any part of the expenses of discovery against the offending party or its representatives;

(3) holding that designated facts be considered admitted for purposes of the proceeding;

(4) 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;

(5) disallowing in whole or in part requests for relief by the offending party and excluding evidence in support of those requests; and

(6) striking pleadings or testimony, or both, in whole or in part.

In some instances, the legislation that transferred a specific agency's hearing functions to SOAH also included an express statement of the ALJs authority in conducting hearings for that agency. For

example, S.B. 372 amended §14.003 of the Agriculture Code to set forth the ALJ's authority in conducting hearings for the Agriculture Commission, and reads as follows:

(b) In any hearing conducted under this subchapter, the State Office of Administrative Hearings may:

- (1) examine under oath any person and examine books and records of any licensee;*
- (2) hear testimony and gather evidence for the discharge of duties under this subchapter;*
- (3) administer oaths; and*
- (4) issue subpoenas, effective in any part of this state, and require attendance of witnesses and the production of books.*

Additionally, for cases heard for TNRCC and the PUC, S.B. 12 and 323 amended the SOAH statute to add Section 2003.047 which delineates the ALJ's authority with respect to the imposition of sanctions in cases heard for TNRCC and the PUC, respectively. This sanction authority is the same as that identified in Section 2003.0421 above, with one exception. In cases heard for the PUC, ALJs were given the additional authority to:

- (1) punish the offending party or its representative for contempt to the same extent as a district court;*
- (2) require the offending party or its representative to pay, at the time ordered by the administrative law judge, the reasonable expenses, including attorney's fees, incurred by other parties because of the sanctionable behavior; and*
- (3) stay further proceedings until the order is obeyed.*

* * *

(g) An administrative law judge hearing a case on behalf of the commission, on the judge's own motion or on motion of a party and after notice and an opportunity for a hearing, may

impose appropriate sanctions as provided by Subsection (h) against a party or its representative for:

(1) filing a motion or pleading that is groundless and brought:

(A) in bad faith;

(B) for the purpose of harassment; or

(C) for any other improper purpose, such as to cause unnecessary delay or needless increase in the cost of the proceeding;

(2) abuse of the discovery process in seeking, making, or resisting discovery; or

(3) failure to obey an order of the administrative law judge or the commission.

(h) A sanction imposed under Subsection (g) may include, as appropriate and justified, issuance of an order:

(1) disallowing further discovery of any kind or of a particular kind by the offending party;

(2) charging all or any part of the expenses of discovery against the offending party or its representatives;

(3) holding that designated facts be considered admitted for purposes of the proceeding;

(4) 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;

(5) disallowing in whole or in part requests for relief by the offending party and excluding evidence in support of those requests; and

(6) striking pleadings or testimony, or both, in whole or in part.

Further, S.B. 373 directed the Public Utility Commission to adopt rules authorizing an ALJ to:

(1) limit the amount of time that a party may have to present its case;

(2) limit the number of requests for information that a party

may make in a contested case;

(3) require a party to a contested case to identify contested issues and facts before the hearing begins and to limit cross-examination to only those issues and facts and to any new issues that may arise as a result of the discovery process; and

(4) group parties, other than the Office of Public Utility Counsel, that have the same position on an issue to facilitate cross-examination on that issue, provided that each party in a group is entitled to present that party's witnesses for cross-examination during the hearing. (Tx Civ. St. Art. 1446C-O §1.101(b))

IV. GENERAL INFORMATION

A. Location

SOAH is headquartered in Austin, Texas (officed at 15th and Lavaca, William P. Clements building) with field offices in Waco, Bryan, Lubbock, El Paso, Abilene, Ft. Worth, Houston, Dallas, Tyler, Corpus Christi, McAllen, and San Antonio. The remote sites, in which SOAH does not have offices, but ALJs travel to routinely in order to conduct regularly scheduled ALR hearings include: San Angelo, Bryan, Fredricksburg, Lampasas, Lufkin, Victoria, Wichita Falls, Paris, Van Horn, Alpine, Vernon, Conroe, Galveston, Amarillo, Borger, Tulia, Brownsville, Fort Stockton, Laredo, Uvalde, New Boston, Midland and Beaumont.²

B. Structure

The organizational structure of SOAH continually transforms to meet the Office's ever changing needs due to growth and additional responsibilities. Nonetheless, one of the key reasons for the Office's existence, that is, independence, remains an inherent aspect of SOAH's general structure. Specifically, neither the Chief ALJ nor any other

²Midland and Beaumont were field office locations but were converted to remote sites on January 1, 1997, because the offices case loads did not fiscally justify SOAH's full time presence there.

ALJ employed by SOAH is hired by or in any way under the supervisory control of any agency for which hearings are conducted. This structure not only carries the perception of fairness by allowing SOAH's ALJs to convey the image of impartial fact finders, it is also fair in fact because SOAH ALJs are removed from agency pressures (actual and/or perceived) and have greater decisional independence. Organizationally, the Chief Administrative Law Judge directs the Office, assisted by the Deputy Chief Administrative Law Judge and the Director of Administrative Services. SOAH's current structure includes four legal divisions--Central Hearings Panel (CHP), Administrative Licensing Revocation (ALR), Natural Resource Conservation (NRC) and Utility; an Alternative Dispute Resolution Coordinator; a docketing division; and various administrative and support sections (accounting, budgeting, human resources, information resources, and purchasing); all necessary for the efficient and effective operation of the Office.

C. Transfer of Cases to SOAH

SOAH acquires jurisdiction over a case when the agency with subject matter jurisdiction refers the case to the Office. For cases heard by ALJs in the CHP division are referred using either a Request for Setting of Hearing form or Request for Assignment of Administrative Law Judge form. A request is considered filed on the day received by SOAH and should be accompanied by pertinent documents, including the complaint, petition, application, or other document describing the action or issues giving rise to the contested case. Only the agency with subject matter jurisdiction may refer a matter to SOAH. Once a case has been referred to SOAH and docketed, any party may move for appropriate relief including, but not limited to, discovery and evidentiary rulings, dismissal, continuances, prehearing conferences, etc.

Cases heard by ALJs in the ALR division are transferred from the Department of Public Safety (DPS) to SOAH via computer, with the hearing dates already set. To accomplish this, SOAH identifies in advance the dates, times and locations when ALJs will be available to conduct hearings, including telephonic hearings, and DPS uses that information to perform the scheduling function provided for in the ALR

statute.

D. Location of Hearings

In general, agency hearings that are conducted by SOAH ALJs are held in SOAH's facilities or a site designated by the Office in accordance with applicable law. (1 TAC, §155.13). Often the designated location is Austin, Texas, although some agencies' rules allow an authorized person (e.g., the executive director) to designate a different location. Additionally, some agencies' rules and/or controlling statutes provide for local or regional hearings.

Most hearings conducted by the CHP Division are held in Austin; one exception being certain cases heard for the Texas Alcoholic Beverage Commission under the Alcoholic Beverage Code. Section 11.015 of the Alcoholic Beverage Code provides as follows regarding the hearing location:

Notwithstanding any other provision of this code, except for a hearing required to be conducted by a county judge, a hearing related to the issuance, renewal, cancellation, or suspension of a permit under this subtitle may be conducted only in the county in which the premises is located.

Likewise, it is anticipated that most, if not all, of the hearings held by SOAH ALJs in the Utility Division will be conducted in Austin. However, S.B. 373 requires that the hearings conducted for the PUC by SOAH's Utility division be conducted in hearing rooms provided by the PUC. Hearings conducted by SOAH ALJs in the Natural Resource Conservation Division will be held primarily in Austin, but a substantial number of hearings are held, all or in part, outside of the city of Austin. Finally, as previously noted, ALR hearings are conducted in various cities throughout the state. Additionally, a substantial amount of ALR hearings are conducted by telephone as authorized by statute.

V. PROCEDURES

SOAH's hearings, including prehearing conferences, are conducted in accordance with the APA, each agency's controlling

statute and rules, and SOAH's rules. Where there is a conflict between SOAH's rules of procedure and the procedural rules of an agency for which a hearing is being conducted, the agency's rules control unless otherwise specifically stated in SOAH's rules or precluded by statutory or other controlling law, including SOAH's organic statute. It is noted that, in ALR proceedings, the APA is applicable to the extent consistent with Chapter 524 of the Transportation Code. That Chapter also provides that SOAH "may adopt a rule that conflicts with Chapter 2001, Government Code, [the APA], if a conflict is necessary to expedite the hearing process within the time required by this Chapter and applicable federal funding guidelines." (Chapter 524, §524.002(c), Transportation Code). Following is an overview of the contested case process before SOAH.

A. Prehearing Procedures

1. PREHEARING CONFERENCES

The APA does not expressly address the conduct of prehearing conferences, but the conduct of such proceedings is usually addressed in an agency's rules, including the rules of the State Office of Administrative Hearings.

a. Timing

At the ALJ's discretion a prehearing conference may be held upon the request of any party, or whenever such a proceeding is deemed appropriate by the ALJ to resolve matters preliminary to the hearing. Under some agencies' rules, parties are entitled to have ruling on motions made at prehearing conferences, absent the agreement of the parties that rulings may be made based upon the pleadings filed. For example, the rules of procedure of the Texas State Board of Medical Examiners state that motions filed with that agency are to be ruled on by the presiding officer at a prehearing conference or the hearing. See, 22 TAC, §187.21(a) (6).

b. Purpose

The overall purpose of prehearing conferences is to simplify and shorten the hearing process, to promote the orderly conduct of the

hearing, and to provide a means of prompt consideration of matters requiring resolution preliminary to the hearing. Specific matters which may be addressed at prehearing conferences include, but are not limited to, the following:

(1) the scheduling of the date, time and place of the hearing, any settlement conference(s), or additional prehearing conferences;

(2) the identification of the parties;

(3) the establishment of procedural deadlines governing events leading to the hearing;

(4) the necessity or desirability of amendments to the application or pleading which initiated the proceeding;

(5) the determination of the legal issues involved in the case and the factual issues to be litigated;

(6) the possibility of stipulating to undisputed facts or to the authenticity of documents so as to avoid the unnecessary introduction of proof at the hearing regarding such matters;

(7) the consideration and/or resolution of any motions, discovery disputes or requests for issuance of subpoenas or the taking of official notice;

(8) the admissibility of evidence;

(9) the identification and exchange of documentary evidence;

(10) the identification and qualification of witnesses;

(11) the order of presentation and cross-examination;

(12) the consideration of requests for interim/temporary relief;

and

(13) the consideration of any other matters which may aid in the simplification of the proceedings, and the disposition of the matters in controversy, including the taking of evidence and the settlement of all matters in dispute.

c. Recording

Agencies for whom SOAH conducts hearings differ regarding the issue of whether, and if so how, prehearing conferences are required to be recorded. Agency rules which expressly address this issue usually require either of the following:

- (1) that all prehearing conferences be transcribed or tape-recorded in their entirety;
- (2) that action taken at the prehearing conference be recorded in an appropriate manner by the ALJ, unless the parties enter into a written agreement approved by the ALJ; or
- (3) that all or part of the prehearing conference be recorded at the discretion of the ALJ.

Note: Where agencies' rules are silent regarding whether prehearing conferences are to be recorded in whole or in part, or where the rules provide for such recording at the discretion of the ALJ, the requirement is usually included that the ALJ record all action taken at the prehearing conference in a prehearing order.

d. Prehearing Orders

Except as noted above, the issuance of prehearing orders summarizing the events which transpired and the action taken at a prehearing conference is generally within the discretion of the ALJ.

2. CONTINUANCES

a. The APA envisions that on occasion the continuance of a hearing may be appropriate. Specifically, Gov't. Code, §2001.057 states in pertinent part that: "*[t]he agency may continue a hearing in a contested case from time to time and from place to place.*"

b. Generally, it is within the discretion of the ALJ whether to grant or deny a motion for continuance of a properly noticed hearing. *Gibraltar Sav. Ass'n v. Franklin Sav. Ass'n.*, 617 S.W.2d 322 (Tex. Civ. App. --Austin 1981, writ ref'd n.r.e.). In some instances, however, parties may have a statutory right to a continuance in certain specific circumstances. (See Chapter 524, §524.032, Transportation Code relating to ALR proceedings).

c. Once a case has actually proceeded to a hearing some agency rules expressly prohibit the presiding officer from postponing or continuing a properly noticed hearing absent the consent of all parties of record. (Others prohibit postponement or continuance at such time absent good cause shown.)

d. The authority to grant a continuance may be somewhat restricted in proceedings where there is a statutory deadline by which the agency must act on the matter before it.

3. DISCOVERY

a. In General

Parties in a contested case proceeding being conducted by SOAH are entitled to the discovery rights provided in the APA and the agency's statute and rules; and may also engage in any form of voluntary discovery even that which might not otherwise be compellable.

b. Agency Rules and Controlling Statutes

The rules and/or controlling statutes of an agency normally provide for discovery consistent with that authorized under APA and/or the Rules of Civil Procedure. Additionally, an agency's controlling statute may authorize particular methods of discovery (for use in carrying out the agency's responsibilities) which are available only to the agency; for example, the authority to conduct specific inspections, examinations or tests and/or to have various reports filed with the agency.

c. The APA

The forms and scope of discovery authorized under APA are set forth in Gov't. Code, §§2001.089, 2001.091, 2001.092, 2001.093 and 2001.094 incorporates by reference limitations on discovery of the kind provided for under the Rules of Civil Procedure; however, the APA does not totally incorporate the forms and scope of discovery permissible under the Rules of Civil Procedure.

(1) APA, §§2001.089 and 2001.094 authorize respectively the issuance of subpoenas to require the attendance of witnesses and the production of books, records, papers, or other objects at a proceeding upon a showing of good cause; and commissions for the taking of depositions. [The good cause requirement does not appear in §2001.094].

(2) APA, §2001.091 provides that subject to such limitations of the kind provided for discovery under the Rules of Civil Procedure, a party

may be ordered to:

(a) produce and permit the inspection and copying or photographing by or on behalf of the moving party any of the following which are in his possession, custody, or control: any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain, or are reasonably calculated to lead to the discovery of, evidence material to any matter involved in the action. (*APA, §2001.091(a)(1)*); and

(b) permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon which may be material to any matter involved in the action. (*APA, §2001.091(a)(2)*).

(3) APA, §2001.092 permits a party to obtain the identity and location of any potential party or witness from a communication or other paper in the possession, custody, or control of a party; and also authorizes the ordered production of reports (for inspection and copying), including factual observations and opinions, of an expert who will be called as a witness.

(4) APA, §2001.093 authorizes any person, whether or not a party, to obtain, upon request, a copy of any statement that he has previously made concerning the action or its subject matter which is in the possession, custody, or control and any party.

(5) The APA does not provide for written interrogatories to a party, requests for admission of facts and the genuineness or identity of documents or things, or motions for a mental or physical examination of a party or person under the legal control of a party; and does not expressly provide for written depositions, although arguably such are authorized by implication.

d. The scope of discovery in ALR proceedings is more narrowly defined than that authorized under the APA. For example, depositions are not permitted in ALR proceedings. (*See, 1 TAC, §159.13*).

4. INFORMAL DISPOSITION

APA, §2001.056 provides for the informal disposition of any

contested case by stipulation, agreed settlement, consent order, or default, unless precluded by law. The informal disposition of a contested case being conducted by SOAH resolves *all* matters in controversy. The case is withdrawn or dismissed from the SOAH docket and returned to the agency for consideration of the agreement and entry of a final order.

a. With the exception of defaults (where disposition is made based on the failure to appear or the failure to take some required action) if there is less than complete agreement by all parties on all issues, then the formal disposition of the case is required not only when all matters are in dispute but also when:

- (1) the proposed resolution of all issues is agreed upon by some (but not all) of the parties;
- (2) the proposed resolution of some (but not all) of the issues is agreed upon by all of the parties; and
- (3) the proposed resolution of some (but not all) of the issues is agreed upon by some (but not all) of the parties.

b. As long as there remain disputed issues in a contested case proceeding all requirements of due process and a fair hearing are required.

5. DISMISSAL WITHOUT HEARING

a. Agency rules usually specify when and under what circumstances dismissals are appropriate, and such rules generally provide that a contested case proceeding may be dismissed without a hearing for any of the following reasons:

- (1) Failure to prosecute;
- (2) moot questions or obsolete petitions;
- (3) lack of jurisdiction;
- (4) unnecessary duplication of proceedings;
- (5) res judicata; or
- (6) withdrawal.

b. Normally, where a case is dismissed other than on its merits, the dismissal is without prejudice to the refile of the same.

c. Unless the ALJ is authorized to issue a final decision in the case or on the matter, the decision to dismiss a case without a hearing would be submitted to the agency in the form of a recommendation or proposal for decision.

B. Hearing Procedures

1. IN GENERAL

a. Contested case hearings held by SOAH may be simple (e.g., they are short in duration (a day or less), involve few issues and parties, and require few, if any, prehearing procedures); or complex (e.g., they are lengthy (lasting more than a day), involve numerous issues and/or parties, and may require significant prehearing procedures). Regardless of whether the hearing is simple or complex, the principal elements of fairness, impartiality and completeness of the record apply.

b. In any contested case hearing conducted by SOAH parties are entitled to: call witnesses; offer evidence and respond to any objections to it; cross-examine any witness called by a party; move for specific relief; and make opening and closing statements/arguments.

c. All parties in a contested case must be afforded an opportunity to respond and present evidence and argument on all issues involved. (*APA, §2001.051*).

d. §2001.059 of the APA mandates the transcription of proceedings or any part of them upon the written request of any party; therefore a permanent record of the hearing is necessary.

2. TELEPHONIC HEARINGS

a. Agency rules sometimes expressly provide for prehearing conferences to be conducted by telephone, but are often silent regarding whether hearings may also be conducted in that manner. Occasionally, an agency's governing statute expressly provides for the conduct of telephonic hearings. (*See*

Chapter 524, §524.034(2), Transportation Code). Generally, whether addressed by rule or by statute, a telephonic hearing may be conducted if agreed upon by all parties of record.

b. An agency's rules may also specify the procedures to be followed in conducting telephonic hearings.

3. EVIDENCE GENERALLY

a. Rules of Evidence

In general, the rules of evidence applied in non-jury civil cases in district court are applicable in administrative hearings, and irrelevant, immaterial, or unduly repetitious evidence is to be excluded. (*APA §2001.081*).

(1) Exception: When necessary to ascertain facts not reasonably susceptible of proof under the Rules of Evidence, evidence not admissible under those rules may be admitted, except where precluded by statute, if it is of the type commonly relied upon by reasonably prudent men in the conduct of their affairs. (*Id.*)

(2) Agencies are to give effect to the rules of privilege recognized by law. (*Id.*)

(3) In connection with any contested case held under the provisions of APA, an agency may swear witnesses and take their testimony under oath. (*APA, §2001.088*).

b. Evidence in Written Form

Subject to the requirements regarding the admission of evidence, if a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form. (*APA, §2001.085(1)(2)*).

(1) Prefiled written direct and rebuttal testimony is expressly authorized in some agency's rules.

c. Copies and Excerpts from Documents

In contested cases, documentary evidence may be received in the form of copies or excerpts if the original is not readily available, but on request parties must be given an opportunity to compare the copy with the original. (*APA, §2001.086*).

d. Official Notice

The ALJ in an administrative hearing may take official notice of all facts judicially cognizable and generally recognized facts within the area of the agency's specialized knowledge. (*APA, §2001.090 (a) (1)&(2)*).

4. CONDUCT OF THE HEARING

a. Convening the Hearing

The ALJ will normally convene the hearing and announce the docket/case number, the style of the case and possibly the date and time; and will also identify himself/herself for the record.

(1) The ALJ will also:

(a) ensure that the appearances of the parties are announced on the record;

(b) give preliminary instructions, if any, regarding such matters as the order of presentation of direct evidence and the calling of witnesses; the order of cross-examination, the hearing hours and breaks, the procedures to be followed in presenting evidence and making objections, etc.; and

(c) address any other matters appropriate preliminary to the presentation of evidence.

NOTE: Preliminary instructions such as those described above are sometimes set forth in a written order issued by the ALJ in advance of the hearing.

(2) If a hearing is not concluded on the day it commences, the agency is required, to the extent possible, to proceed with the

conduct of the hearing on each subsequent working day until the hearing is concluded. (*APA, §2001.057(c)*).

b. Opening Statements/ Arguments

Prior to the presentation of evidence, parties may wish to make brief opening remarks summarizing their principal contentions, the evidence to be presented and the relief sought. Often opening statements are waived by the parties.

c. Presentation of Evidence

(1) The party with the burden of proof proceeds first with its direct case, followed by the presentation of the direct case of any other party, and then any rebuttal evidence.

(2) Objections to evidentiary offers may be made and must be noted for the record. (*APA, §2001.084*).

(3) Any party may conduct cross-examinations required for a full and true disclosure of the facts. (*APA, §2001.087*).

(a) A witness may be cross-examined on any matter relevant to any issue in the case, including creditability. (*Texas Rules of Civil Evidence 611(b)*).

(b) Some agencies limit redirect examination of a witness, if any, to the scope of cross-examination and likewise limit re-cross to the scope of re-direct. In general, the scope of re-direct and re-cross is a matter that is within the ALJ's discretion to decide. See *Texas Employers Ins. Ass'n v. Hitt, 125 S.W.2d 323 (Tex. Civ. App. -- Galveston, 1939, no writ)*.

(c) The number of rounds of direct and cross-examinations allowed is also a matter that is discretionary with the ALJ.

(4) The ALJ may question witnesses and/or direct the submission of supplemental data.

d. Closing Statements/ Arguments

Following the presentation of evidence, parties may make

closing statements/arguments. Parties may however (particularly in complex proceedings) waive oral closing statements/arguments and summarize their positions and supporting evidence in post-hearing briefs.

e. Briefing Schedule

If post-hearing briefs (and possibly reply briefs) are to be filed in the proceeding, the deadline(s) for doing so is usually established prior to the adjournment of the hearing.

f. Adjournment of the Hearing

After oral closing statements/arguments have been made, if any, the ALJ may adjourn the hearing at that time; or recess the hearing and leave the evidentiary record open for receipt of any exhibits/data to be filed after the conclusion of the presentation of evidence. The recessed hearing is generally adjourned following the receipt of the late-filed exhibits/data, or the passage of the deadline by which such material was to be filed, whichever occurs first.

C. Post-Hearing Procedures

1. POST-HEARING BRIEFS

Parties in a contested case proceeding may request an opportunity to file post-hearing briefs or such may be requested by the ALJ. Post-hearing briefs may be utilized to summarize the parties' positions (and supporting evidence) regarding the issue(s) litigated; to address relevant legal issues; and to present proposed findings of fact and conclusions of law.

a. The period of time allowed for preparation of post-hearing briefs may vary depending upon considerations such as the complexity of the case, any time constraints involved, and the time requested by the parties.

b. The post-hearing briefs of all parties are typically due on the same date. Additionally, when post-hearing briefs are filed, the parties may also be permitted to file reply briefs responding to

arguments made in other parties' initial briefs.

2. PROPOSAL FOR DECISION

a. When Required

A proposal for decision is required prior to a final decision being rendered in a contested case proceeding if a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, and the decision is adverse to a party to the proceeding other than the agency itself. (*APA, §2001.062(a)*).

(1) Generally, a proposal for decision is not required prior to a final decision if a majority of the officials of the agency who are to render the final decision hear the case.

(2) A question exists as to whether a proposal for decision is required prior to the final decision being rendered when a majority of the officials of the agency who are to render the final decision attend the hearing presided over by an administrative law judge from the State Office of Administrative Hearings.

b. Preparation

The proposal for decision must be prepared by the ALJ or one who has read the record and must contain a statement of the reasons for the proposed decision and of each finding of fact and conclusion of law necessary to the decision. (*APA, §2001.062(c)*).

c. Service

The proposal for decision must be served on all parties, and each party must be afforded an opportunity to file exceptions and present briefs to the officials who are to render the decision. If any party files exceptions or presents briefs, an opportunity must be afforded to all parties to file replies to exceptions or briefs. (*APA, §2001.062*).

(1) Agency rules frequently address the time period within which exceptions and replies to exceptions must be filed.

(2) In the absence of a fixed time period for filing exceptions and replies, the matter is left to the discretion of the ALJ. Generally, however, a period of at least 10 days is allowed for the filing of exceptions and at least 7 days for filing replies to exceptions.

d. Amendments

The proposal for decision may be amended pursuant to exceptions, replies, or briefs submitted by the parties without again being served on the parties. *APA, §2001.062*).

3. FINAL DECISIONS

As previously noted, the SOAH ALJ sometimes enters the final decision in a case. Examples include:

- a. ALR Hearings.
- b. Texas Worker's Compensation Commission cases under §§411.049, 413.031 or 415.034 of the Labor Code.
- c. Certain Department of Agriculture cases as delegated by the department or commissioner.
- d. Certain cases in which there is no contested issue of fact or law as delegated by the Public Utility Commission.

VI. ADMINISTRATIVE LICENSE REVOCATION PROGRAM

On New Year's Day, 1995, legislation took effect creating an Administrative License Revocation program (ALR) in Texas, (*See chapters 524 and 724 of the Transportation Code*). The law requires the Texas Department of Public Safety (DPS) to automatically suspend the license of suspected DWI drivers who either fail or refuse a test for blood alcohol content. Usually, an arresting officer delivers a written notice of suspension to the driver at the station house. The notice

advises that the driver may request an administrative hearing to oppose the suspension. The driver can request a hearing by promptly calling, faxing or writing to the DPS's Driver Improvement and Control section. The request for hearing stays the suspension.

Once a hearing is set, a notice of hearing is mailed to SOAH and the parties, and SOAH provides a forum and presiding officer. By statute, SOAH has state-wide jurisdiction over ALR hearings. During the first year of operation, if a telephonic hearing was requested, it was conducted at SOAH's Austin headquarters. Otherwise, the statute requires hearings in the county of arrest or, in less populous areas, within 75 miles of the county seat of the county of arrest. (*See Chapter 524, Section 524.034, Transportation Code*). As a result, SOAH began the 1995 New Year with over 25 new ALJ's to preside over ALR suspension hearings at more than 35 field offices and remote sites across the state.

Before the ALR program took effect, every aspect of planning and scheduling to fulfill SOAH's legislative mandate had to be carefully integrated with the corresponding efforts of the DPS. The legislation required both SOAH and the DPS to adopt additional rules and implement procedures to administer the new law. A sophisticated computer system was needed to transfer case information and scheduling from Driver Improvement and Control at the DPS to SOAH and its field offices. SOAH had to lease space for offices and hearing rooms in most major Texas cities and secure remote hearing sites in other cities. Furniture, equipment and supplies were ordered by the truckload. Most importantly, SOAH had to interview, hire and train regional directors, ALJ's and support staff. The ALR program more than doubled the size of the organization.

Unlike traditional administrative law cases, ALR hearings involve criminal law issues such as reasonable suspicion, probable cause, and the validity of investigative stops and warrantless arrests. Nonetheless, license suspension hearings are civil matters that, by statute, are independent of any criminal charges. (*See Chapter 524, §524.012(e) and Chapter 724, §724.048, Transportation Code. See also Burrows v. Tex. DPS, 740 S.W.2d 19 (Tex. App.-- Dallas 1987, no writ)*). In these hybrid cases, ALJ's must apply civil rules of evidence to determine by a preponderance of the evidence whether there was

reasonable suspicion or probable cause for an officer to make an initial traffic stop or arrest, whether probable cause existed to request a breath test, and whether there was a refusal to give a specimen on proper request or a valid test result showing an alcohol concentration of 0.10 or greater while driving.

ALR hearings are governed by the Administrative Procedure Act (APA), but only to the extent the Act is not inconsistent with the ALR statutes and SOAH rules. The legislature intended driver's license suspension hearings to be heard expeditiously--usually within forty days of the arrest. Discovery is limited, there are no depositions, and more often than not, the DPS presents its case entirely through affidavits and certified public records. The ALR statutes and SOAH's administrative rules permit the DPS to introduce affidavit testimony from breath test operators and their supervisors as to the test results, the validity of the test, and the reliability of the instrument. Peace officers' affidavits as to reasonable suspicion and probable cause are also admissible. Having witnesses appear in person has been the exception, rather than the rule.

A defendant who wants to cross-examine a DPS witness must take affirmative steps. In test failure cases, the defendant may simply file a formal written request for the breath test operator or supervisor. Otherwise, the defendant must obtain an administrative subpoena and have it served. Once the witness has been properly requested or subpoenaed, the DPS may not admit his or her affidavit if the witness is not present. Unless the defendant takes the proper steps, the DPS will most likely proceed on affidavits and documents alone, without calling the police officers to testify.

Defendants often appear without counsel, and SOAH does not appoint or furnish defense attorneys. Defendants are allowed to proceed *pro se* and often advance some interesting theories as to why they should prevail. For example, one *pro se* defendant testified that he was not drunk; he was just nervous because he had *two bags of cocaine* hidden underneath the driver's seat. Then, he quickly added that it was not his, and he was not going to sell it or anything like that. Another driver came up with a fairly original defense when he said: "I wasn't drunk. I was beating up my girlfriend. She hit me over the head with a beer bottle. That's why I smelled like alcohol and had unsteady

balance."

When drivers do have counsel, it is usually a criminal defense lawyer who is also involved in defending the criminal DWI charge. Accordingly, they sometimes urge the reasonable doubt standard, criminal rules of evidence and the code of criminal procedure, but in civil, administrative hearings, such arguments are generally inappropriate. For instance, even though the driver may be facing pending criminal DWI charges in the county courthouse, in a civil proceeding before SOAH the driver can be called by the DPS to testify in the ALR hearing, and the driver must assert his Fifth Amendment right as to each particular question that may call for self-incrimination, rather than simply refusing to take the witness stand. (*See McInnis v. State*, 618 S.W. 2d 389, 392, 397 (Tex. Civ. App.-- Beaumont 1981, writ *ref'd n.r.e. cert denied*, 456 U.S. 976 1982)) Legal issues as to applicability of criminal case law and the code of criminal procedure confront the judges daily as do constitutional claims involving confrontation of witnesses, due process, self-incrimination, and double jeopardy. Needless to say, the ALR proceedings bring a new twist to the administrative hearings process.

The length of an ALR license suspension varies depending on prior DWI suspensions or arrests and the type of case. A driver who fails the breath or blood alcohol test draws a minimum suspension of 60 days. The driver who refuses to take the test faces a longer suspension starting at a minimum of 90 days. These double for a second offense, and can go as high as six months to a year for multiple offenders. SOAH's ALJ's have no discretion under the ALR statute to probate or modify the suspension periods or to issue occupational or hardship licenses. The ALJ makes a final written decision rather than a proposal for decision. Written findings of fact and conclusions of law are typically hand-written on a pre-printed checklist and fill-in-the-blank form which is served on the parties at the conclusion of each hearing. Appeals must be made to the county court at law in the county of arrest, but an appeal does not stay the suspension unless the driver is a first time offender, then the stay is only for ninety days. Before ALR, all driver's license suspension hearings were held before municipal courts and justices of the peace, and county courts at law reviewed their decisions *de novo*. Under the new ALR statutes, SOAH

electronically records the suspension hearings, and appeals must be made on a written record transcribed at the appellant's expense. County courts at law are now required to apply the substantial evidence rule. At this time, no uniform appellate procedure has been established. For example, in some courts the parties are permitted to use written pleadings rather than appellate briefs. Also, in some counties with specialized county courts at law, ALR appeals are occasionally filed in, or channeled through, the criminal courts even though the original proceedings are statutorily classified as civil, administrative matters.

In enacting the ALR program, Texas joined 34 other states with similar programs. The volume of ALR cases is substantially less than that originally estimated by DPS. Although no definitive finding has been made as to why the expected caseload has not materialized it is hoped that the ALR laws are having the intended affect of deterring motorists from drinking and driving.