

SUBJECT: TNRCC hearings under State Office of Administrative Hearings

COMMITTEE: Natural Resources — favorable, without amendment

VOTE: 9 ayes — Counts, Yost, Combs, Corte, King, R. Lewis, Puente, Stiles,
Walker

0 nays

WITNESSES: None

BACKGROUND: The Office of Hearings Examiners is a division of the Texas Natural Resource Conservation Commission (TNRCC). The office hears contested cases concerning permitting and enforcement actions. The examiner makes a proposal for decision and proposed order, which includes a finding of fact, conclusion of law and recommended decision. The proposal for decision is sent to the three-member TNRCC, which makes the ultimate decision on the case.

Health and Safety Code sec. 361.0832 provides that the TNRCC may overturn an underlying finding of fact, that serves as the basis for a decision only if, according to the commission, the finding is not supported by the "great weight of the evidence." The commission may overturn a conclusion of law in a contested case only on the grounds that the conclusion was clearly wrong in light of precedent and applicable rules. The commission can reject a proposal for decision in a contested case, when the finding involves compliance with current statutes, for reasons of policy only.

The TNRCC interprets Health and Safety Code sec. 361.0832 to apply only to hazardous waste permitting matters, but TNRCC's interpretation has been challenged and is currently in litigation before the Austin Court of Appeals.

In 1991, the 72nd Legislature created the State Office of Administrative Hearings (SOAH) to consolidate and centralize administrative hearings of contested cases for various state agencies. SOAH began conducting hearings in 1992. SOAH currently holds hearings for over 60 agencies,

including the Texas Racing Commission, the Texas Department of Transportation, and the Texas Department of Insurance.

Government Code, sec. 2001.058, the Texas Administrative Procedures Act, provides guidelines for hearings conducted by the State Office of Administrative Hearings. Government Code, sec. 2001.058(e) provides that a state agency may change a finding of fact or conclusion of law, or vacate or modify an order made by the administrative law judge only for reasons of policy, and requires the agency to state in writing the reason and legal basis for such a change.

DIGEST:

HB 1097 would dissolve the Office of Hearings Examiners in the Texas Natural Resource Conservation Commission (TNRCC) and allow the State Office of Administrative Hearings (SOAH) to conduct TNRCC hearings.

No later than January 1, 1996, the chief administrative law judge of SOAH would be required to employ judges with the necessary expertise to conduct hearings on technical or specialized subject matters that might come before TNRCC, and to implement administrative changes necessary for the State Office of Administrative Hearings to assume the functions of the TNRCC Office of Hearings Examiners.

The chief administrative law judge of SOAH could consult with the chief administrative hearing examiner of TNRCC to determine the number of judges and what requirements they would need to conduct TNRCC hearings effectively.

Cases pending before a TNRCC hearing examiner on January 1, 1996 would continue until the examiner rendered a proposal for decision in the case or, if the examiner had accepted a position as an administrative law judge at SOAH, would be transferred to SOAH under the same examiner.

HB 1097 would provide for the transfer of office space, facilities, records, case files and other possessions of the TNRCC Office of Hearings Examiners to SOAH on January 1, 1996.

The bill would also ensure that the current provisions in Health and Safety Code sec. 361.0832, that narrow the TNRCC's authority to overturn a

finding of fact or conclusion of law, or reject a proposal for decision, would continue to apply, rather than Government Code, sec. 2001.058(e), Texas Administrative Procedures Act.

HB 1097 also provides that despite Government Code sec. 2001.058, the changes made by HB 1097 would not affect TNRCC's authority to change a finding of fact or conclusion of law, or to vacate or modify an order issued by an examiner, in any case pending before TNRCC filed before January 1, 1996. TNRCC's authority in such cases would be governed by the law in effect on December 31, 1995.

The bill would take effect September 1, 1995, with dissolution of the TNRCC office taking effect on January 1, 1996.

**SUPPORTERS
SAY:**

HB 1097 would give SOAH administrative law judges the freedom to make unpressured, independent decisions on TNRCC matters. Members of the public who have had to appear before a TNRCC hearing examiner have complained that they are being denied their right to a hearing before an impartial body. HB 1097 would help restore confidence that TNRCC hearings are impartial.

Hearings examiners should not hold preconceptions about a case, have any personal connections or interests to any party involved in the proceeding or have any financial interest that could be affected by the outcome of a case. A hearings examiner employed by the agency holding the hearing creates a perception of conflict of interest because the examiner is paid by the agency that is also a party to the dispute.

A recent incident, in which a TNRCC hearing examiner reported pressure to change a finding concerning the expansion of a landfill, underlines why it is necessary for hearings examiners to be independent of the agency from which a permit is sought.

TNRCC hearings examiners are agency employees and as such are put in a bind if their recommendations are contrary to the agency's original recommendations. In such a case the examiner may feel that their salary or career prospects are going to be affected by their decision.

Hearings examiners from the State Office of Administrative Hearings would be fully qualified to conduct hearings for the TNRCC. Not only would they be provided with written statements of applicable rules or policies, HB 1097 requires the chief administrative law judge of SOAH to employ judges who have the expertise necessary to conduct technical hearings before the TNRCC. This would provide opportunities for the examiners to become familiar with the agency's policies.

The TNRCC could reject or modify the recommendations of SOAH examiners if it found their judgment to be faulty. TNRCC would, however, be required to state in writing the reason for the rejection — which would help ensure that decisions were rejected or modified for reasons of sound public policy and not political pressure.

One of the recommendations in the Texas Performance Review's *Against the Grain* in January 1993 was to transfer hearings examiner functions from the Water Commission and the Air Control Board (which had not yet been consolidated into the TNRCC) to the Office of Administrative Hearings to "enhance the perceived fairness of the agencies' hearings process". The Senate Natural Resources Committee's interim report also recommended the transfer to "improve the independence, quality, and cost effectiveness of hearings".

OPPONENTS
SAY:

Hearings examiners at TNRCC make independent decisions and are not subject to political pressure of any kind, nor is it fair to impugn their integrity. Many issues that come before the TNRCC are of a highly technical nature and would be subject to misinterpretation by a hearing officer who is not an expert in that subject matter. It is almost impossible to interpret some of the scientific data presented at some of these hearings, without special preparation and knowledge.

OTHER
OPPONENTS
SAY:

The bill should be amended to set up a special division within SOAH to deal specifically with TNRCC issues, which can be highly technical in nature. SOAH examiners who would be conducting TNRCC hearings could then master TNRCC policies as well as technical issues.

To ensure that SOAH has the expertise necessary to conduct TNRCC hearings, the bill should require that personnel as well as case files from the TNRCC Office of Hearings Examiners should be transferred to SOAH.

SOAH should be required to charge a fixed annual fee rather than their usual hourly rate for TNRCC hearings, which can be very lengthy. Otherwise, the transfer could become prohibitively expensive for TNRCC.

NOTES:

A similar bill, SB 12 by Montford, which would dissolve the TNRCC office of hearings examiners and move it to the SOAH on September 1, 1995, and provide that SOAH charge an annual rather than an hourly fee for hearings, passed the Senate on April 4. The House Natural Resources Committee on April 18 reported a committee substitute for SB 12.

SB 373 by Armbrister and HB 3164 by Seidlits, the PUC sunset bills, would transfer the hearings division of the Public Utility Commission to SOAH.