SUBJECT: Alternate dispute resolution at state agencies

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 14 ayes — Wolens, S. Turner, Alvarado, Brimer, Carter, Counts, Craddick, Danburg, Hunter, D. Jones, Longoria, McCall, Ramsay, Stiles

0 nays

1 absent — Hilbert

SENATE VOTE: On final passage, Local and Uncontested Calendar, March 20 — 31-0

WITNESSES: *(On House companion, HB 1146)*
For — Dr. Charles Zucker, Texas Faculty Association; George S. Christian, Association of Attorney Mediators; Jim Sewell, Texas Building Branch; Lane A. Zivley, Texas Public Employees Association; Rick Levy, Texas AFL-CIO; Tom Reavley, Center for Public Policy Dispute Resolution; Don Adams

Against — None

On — Jan Summer, Andrew Bowman and Mina A. Clark, Center for Public Policy Dispute Resolution; Nancy N. Linch and Phillip Holder, State Office of Administrative Hearings; Carl Forrester, Texas Natural Resource Conservation Commission; Loretta DeHay and Suzanne Marshall, Texas Attorney General's Office

BACKGROUND: In 1987, the 70th Legislature enacted the Texas Alternative Dispute Resolution Act with the stated intent of encouraging peaceable resolution of disputes through such voluntary settlement procedures as mediation, arbitration, mini-trials, and summary jury trials. Under the law, courts may refer pending disputes to an alternative dispute resolution (ADR) system or organization or to an impartial third party for resolution. County commissioners courts are also allowed to establish ADR systems for peaceable and expeditious resolution of citizen disputes.

DIGEST:

CSSB 694 would enact the Governmental Dispute Resolution Act authorizing state agencies within the executive branch, including the Attorney General's Office, institutions of higher education and the State Office of Administrative Hearing (SOAH), to develop by rule and to use alternative dispute resolution (ADR) procedures when appropriate. Binding arbitration would not be allowed; any ADR procedures developed would supplement and not limit other dispute procedures available. The SOAH could issue model guidelines for ADR procedures.

State agencies would be allowed, subject to the parties' approval, to appoint a qualified government officer, employee or a private individual to serve as an impartial third party in an ADR procedure. Impartial third parties could also be obtained by agreement with the SOAH, the Center for Public Policy Dispute Resolution (CPPDR), county-established ADR systems, or another state or federal agency. Impartial third parties would not be required to testify in any proceedings relating to the dispute and would enjoy qualified immunity from civil liability for acts or omissions arising within the course and scope of their duties or functions.

Relevant or confidential communications between an impartial third party and a party, the notes of impartial third parties, and the parties' conduct and demeanor would be confidential and could not be disclosed without the consent of all the parties. Final written agreements to which a government entity was a signatory would be subject to disclosure as required by law.

Administrative law judges (ALJ) presiding at administrative agency hearings under the Administrative Procedure Act would be allowed to refer cases to ADR, to apportion costs among the parties, and to appoint impartial third parties. ALJs who were not the referring judge could serve as impartial third parties. An ALJ hearing a case on behalf of the Texas Natural Resource Conservation Commission (TNRCC) would be required to obtain the agreement of all parties before referring a case to ADR if TNRCC already had conducted an unsuccessful ADR procedure. If the TNRCC had not conducted a procedure, the ALJ would have to consider the commission's recommendation before referring a case to ADR.

State agencies would be able to use money budgeted for legal services or executive administration to pay for necessary costs and fees. Agencies also

would be able to share ADR program results and contract with other state agencies, including the CPPDR, and ADR systems established by counties.

CSSB 694 would not waive the state's sovereign immunity from lawsuits under the Eleventh Amendment to the U.S. Constitution, nor could the bill be applied in a manner that denied a person a right granted under state or federal law, including a right to an administrative or judicial hearing.

The bill would take effect September 1, 1997.

SUPPORTERS SAY:

CSSB 694 would provide explicit authority to state agencies already using ADR procedures and also implement Texas Performance Review recommendations to expand the use of ADR among state agencies. ADR procedures in general are less time consuming and costly to the parties. Consensus-based approaches such as ADR promote better relations with employees, stakeholder groups, and regulated public interests. The bill is patterned after the Federal Administrative Dispute Resolution Act enacted in 1990 and permanently authorized in 1996, which promotes the use of ADR in federal agencies in a government-wide, systematic manner.

Several Texas agencies have successfully used ADR procedures, including the Departments of Criminal Justice, Human Services and Insurance, General Land Office, General Services Commission, Texas Education Agency, Texas Natural Resource Conservation Commission, Office of the Attorney General, Comptroller's Office, Public Utility Commission, and the University of Texas system. Some of these agencies have enjoyed reduced complaint caseloads and savings through the use of ADR procedures. The Texas Department of Transportation (TxDOT), for example, estimates that it has saved about $7 million by using ADR procedures.

Texas agencies that have used ADR to resolve construction project disputes report reduced construction costs and time and reduced contractor claims. TxDOT reported that after implementing an ADR process that included partnering for dispute avoidance, only a few construction projects had major disputes. The University of Texas system has not had any major construction project claims since it instituted partnering as part of its ADR process.

CSSB 694 would clearly provide that the bill would not deny a party any state or federal right, including the right to an administrative or judicial hearing. The use of ADR procedures by state agencies would be a voluntary means of supplementing, not limiting, other available dispute procedures. Furthermore, parties participating in ADR procedures are not obligated to give away their strategy, witnesses or evidence. In Travis County, courts must refer all civil cases to mediation before going to trial. Many of these are high-dollar cases; if the parties felt that they were giving away their strategy because of mediation, they would not be willing to participate.

OPPONENTS SAY:

ADR procedures may act to deny a party a full adversarial hearing with all its formalities and protections. If ADR is unsuccessful, a party may have ruined its chances for subsequent court proceedings by divulging its strategy.

NOTES:

The committee substitute added county-established ADR systems to the list of entities with which an agency could contract for ADR services, changed the rulemaking provisions in the bill from mandatory to permissive, and deleted language allowing the Attorney General's Office and Travis County district courts to review confidentiality conflicts.