

SUBJECT: Continuing the State Office of Administrative Hearings

COMMITTEE: Licensing and Administrative Procedures — favorable, without amendment

VOTE: 6 ayes — Flores, Hamilton, Eissler, Goolsby, D. Jones, Wise
0 nays
3 absent — Raymond, Driver, Homer

SENATE VOTE: On final passage, April 16 — 31-0

WITNESSES: None

BACKGROUND: Government Code, ch. 2003 prescribes the duties and functions of the State Office of Administrative Hearings (SOAH), an agency that serves as an independent forum for the conduct of adjudicative hearings in the executive branch of government. The purpose of the office is to separate the adjudicative function from the investigative, prosecutorial, and policymaking functions in the executive branch among hearings that SOAH is authorized to conduct. SOAH conducts all administrative hearings and dispute resolution procedures the law requires. The office may conduct, for a fee and under a contract, administrative hearings or mediations in matters referred voluntarily to the office by a governmental entity. More than 70 state agencies and local political subdivisions refer cases to SOAH, including the Texas Department of Public Safety, the Texas Commission on Environmental Quality, and the Public Utility Commission of Texas.

In the fiscal 2002-03, SOAH was budgeted about 120 full time equivalent positions and \$14,158,540. The office is directed by a chief administrative law judge appointed by the governor for a two-year term. The chief administrative law judge is eligible for reappointment.

Government Code, sec. 552.021 requires that public information be available to the public during the normal governmental body's business hours. Secs. 552.027 to 552.137 provide exceptions to the disclosure rule governing public information.

In Open Records opinion OR2002-5059, the attorney general determined that the records maintained by SOAH in connection with hearings on an permit application were public information, because SOAH is not a court and contested case proceedings are not lawsuits. However, the opinion exempted from disclosure certain notes taken by the administrative law judge in connection with the hearing and the judge's draft proposal for deciding the case because it was "agency memoranda," under sec. 552.111.

DIGEST:

CSSB 1147 would continue the State Office of Administrative Hearings and its functions until September 1, 2015, transfer certain hearing functions to that office, and revise some of its governing statutes.

Contract for SOAH services. The bill would require SOAH and a client state agency to enter into a contract in which the agency would pay SOAH for providing hearing and other dispute resolution services, if:

- the agency had referred matters to SOAH during any of the three most recent state fiscal years; and
- SOAH's costs for conducting the agency's hearings or mediation proceedings were not paid through the biennial appropriations act.

The contract would require the referring agency to pay SOAH a lump-sum amount at the beginning of each fiscal year to cover the cost of conducting the hearings and procedures for the agency. The contracted payment would derive from the hourly rate set by SOAH and the anticipated hourly usage of SOAH services by the agency during each fiscal year.

SOAH would forecast annually the service usage it anticipated for each state agency that referred matters to it during any one of the previous three fiscal years. Factors for forecasting an agency's usage would include the number of hours SOAH spent conducting hearings or other dispute resolution procedures for the agency during the past three years, and any other relevant information that suggested an upcoming change in the agency's usage of SOAH services. SOAH would provide the Legislature its forecasted estimates.

An agency that did not refer matters to SOAH during any of the previous three fiscal years, and for which the cost of SOAH services was not appropriated, would pay SOAH the cost of conducting hearings or other

procedures based on the hourly rate set by SOAH and based on the agency's actual usage of the office's hearing and other services.

Transfer of hearing function. The bill would transfer the case hearing functions of the Texas Department of Licensing and Regulation (TDLR) to SOAH administrative law judges. On September 1, 2003, all related funds, property, functions, and two full-time equivalent positions also would transfer from TDLR to SOAH. TDLR would establish a plan for executing this transfer, including a timetable for any necessary movement of property, inventory of records, and describing any continued support by TDLR to ensure an efficient transfer of services and planning.

The bill would repeal the authority of TDLR's executive director to employ a hearings officer to conduct hearings or to prescribe procedures for determining or appealing a decision to deny, suspend, or revoke a license.

Public information exemption. CSSB 1147 would exempt from disclosure as public information the working papers of a SOAH administrative law judge, including notes recording the judge's observations, thoughts, or impressions; drafts of proposals for decision; drafts of orders made in connection with conducting contested case hearings; and drafts of orders made in connection with conducting alternative dispute resolution procedures.

Administration. SOAH's chief administrative law judge could be removed for failure to maintain a license to practice law in Texas, not having practiced administrative law or conducted administrative hearings for at least five years, being unable to discharge the judge's duties for a substantial part of a term due to illness or disability, or engaging in the practice of law while serving as the chief administrative law judge.

Also, the bill would require rules for verifying the identity of a witness who appeared by telephone.

CSSB 1147 would add standard sunset language governing equal employment opportunity, conflicts of interest, required information for SOAH employees, information maintenance and notice, equal employment policy, the state employee incentive program, effective technology use, and rule-making and dispute resolution.

The bill would take effect September 1, 2003.

**SUPPORTERS
SAY:**

CSSB 1147 would simplify SOAH's procedure for charging state agencies for hearing and mediation services to save money and to ensure that SOAH had resources necessary to provide these services. SOAH currently must tabulate the exact number of hours of service it provides each client agency, then bill each agency accordingly. By requiring a procedure in which SOAH determined the likely number of service hours a client agency demanded and charged the agency in advance, SOAH would save the expense of at least one-half full-time equivalent employee.

In addition, prepayment for SOAH services would allow the office to obtain the necessary resources to conduct hearings before they arose, thus shortening time it would require to conclude hearings and issue decisions. By always relying on a client agency's previous three years of SOAH service usage to determine the amount the office could charge an agency for hearing services, the bill would preserve an incentive for client agencies to moderate their demand for SOAH services.

Transfer of TDLR hearing functions to SOAH would improve the public's confidence in formal decisions that resulted from case hearings. Because TDLR functions to discipline license holders, it is more appropriate for TDLR to appoint SOAH judges to hear its cases against license holders than to ask a TDLR employee to perform this function. Moreover, SOAH's specialization in conducting administrative hearings would make it the logical place to resolve cases that arose from TDLR's enforcement actions. Like other agencies participating in hearings before SOAH judges, TDLR's commission would maintain final authority to accept, reverse, or modify a SOAH judge's decision.

CSSB 1147 properly would exempt from public disclosure SOAH judges' working notes and drafts of proposals for orders and decisions in connection with case hearings and other dispute resolutions. The attorney general has stated that the law exempts these items from disclosure, and district court and other judges who also rule on complex issues with significant consequences already enjoy document privacy. The bill merely would codify this sensible rule for administrative law judges, which otherwise could result in ongoing requests by litigants to gain access to the papers of SOAH judges.

The bill should not require SOAH to publish case decisions online and support computerized searches of the documents. It would require \$15,000 to purchase technology and would require hiring a one-half full time equivalent employee to publish such information on-line.

**OPPONENTS
SAY:**

CSSB 1147 would encourage client agencies to seek more SOAH-conducted hearings and mediations because the agencies could not obtain a refund for hearing or other services they did not use. The number of cases pending with SOAH judges in each of the past five fiscal years has risen, from 1,695 cases in fiscal year 1998 to nearly 4,000 cases in fiscal year 2002. As a result, SOAH could not accommodate easily any additional demand for its services.

The bill wrongly would transfer TDLR's hearing functions to SOAH. This transfer would compromise needlessly the efficiency with which TDLR resolves cases through its own independent hearing process. In fiscal 2002, two full time equivalent employees at TDLR held 155 hearings and issued a decision an average of 15 days after each one, helping the TDLR dispose of more than 3,000 complaints that year. The independence of the TDLR's hearings never has been questioned, and the agency conducts its hearings for less expense than SOAH. Transfer of hearing responsibility could increase the fee that TDLR assessed the license holders it regulates.

CSSB 1147 would introduce another unneeded exemption restricting the public's access to public information. The attorney general has determined that notes and drafts prepared by administrative law judges are public information. Researchers and journalists should be able to access these documents after the conclusion of cases to improve public policy. For example, defendants offering large settlements in tire tread separation cases have required the sealing of evidence. This stipulation has hindered government and parties injured by the defendants from researching the wrongdoers' conduct. Access to a judges' notes and draft decisions could provide an alternative for learning facts that otherwise would remain unknown.

**OTHER
OPPONENTS
SAY:**

CSSB 1147 should require SOAH to make its proposals for final decisions and final orders available on SOAH's website. Texas and United States' district courts, courts of appeals, and supreme courts all publish their decisions online. SOAH decisions also educate the public and prospective

litigants in regard to legal interpretations and public policy. In light of the trend toward posting administrative law decisions, the minor cost and capacity of technology to do so, and the public value of these judicial decisions, the bill should require SOAH to post its decisions online.

Also, the requirement that SOAH develop rules for verifying the identity of a witness testifying by telephone has not been shown to be necessary and would be too burdensome.