

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0101 CAF**

**KELSIE STEPHENSON and
KIMBERLY STEPHENSON,
Complainants**

v.

**FORD MOTOR COMPANY,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Kelsie Stephenson and Kimberly Stephenson (Complainants) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in their vehicle manufactured by Ford Motor Company (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. Consequently, the Complainants' vehicle does not qualify for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened and the record closed on February 22, 2017, in Odessa, Texas, before Hearings Examiner Andrew Kang. Mrs. Kimberly Stephenson represented and testified for herself and her daughter, Ms. Kelsie Stephenson. Maria Diaz, Consumer Legal Analyst, represented and testified for the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”² In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must continue to exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

The Lemon Law defines “serious safety hazard” as a life threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.⁴

b. Substantial Impairment of Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”⁶

c. Reasonable Number of Repair Attempts

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.⁷

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.⁸

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“[T]he Division’s interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute’s goal of mitigating manufacturers’ economic advantages in warranty-related disputes.”).

⁷ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

[A] nonconformity still exists that substantially impairs the vehicle's use or market value and: (A) the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.⁹

However, a statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.¹⁰ Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.¹¹

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner or someone on behalf of the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;¹² (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹³ and (3) the

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) (“[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite ‘reasonable number of attempts.’”).

¹¹ *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include “those occasions when the fault for failing to repair the vehicle rests with the dealership.” Conversely, “those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.”).

¹² TEX. OCC. CODE § 2301.606(c)(1). The Lemon Law does not define the words “mailed” or “mail”, so under the Code Construction Act, the common usage of the word applies. TEX. GOV'T CODE § 311.011. Dictionary.com defines “mail” as “to send by mail; place in a post office or mailbox for transmission” or “to transmit by email.” *Mail. Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/mail> (accessed: April 01, 2016). Also, 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement that someone on behalf of the owner mailed notice of the defect/nonconformity to the Respondent.

¹³ TEX. OCC. CODE § 2301.606(c)(2). A repair visit to a dealer can satisfy the “opportunity to cure” requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt the final repair on the manufacturer’s behalf. See *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹⁴

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a "defect . . . that is covered by a manufacturer's, converter's, or distributor's . . . warranty agreement applicable to the vehicle."¹⁵ The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."¹⁶

3. Burden of Proof

The law places the burden of proof on the Complainants.¹⁷ The Complainants must prove all facts required for relief by a preponderance, that is, the Complainants must present sufficient evidence to show that each required fact is more likely than not true.¹⁸ If any required fact appears equally likely or unlikely, then the Complainant has not met the burden of proof.

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.¹⁹ The complaint should state "sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law."²⁰ However, the parties may expressly or impliedly consent

¹⁴ TEX. OCC. CODE § 2301.606(d)(2).

¹⁵ TEX. OCC. CODE § 2301.204.

¹⁶ TEX. OCC. CODE § 2301.603(a).

¹⁷ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁸ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

¹⁹ "In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days." TEX. GOV'T CODE §§ 2001.051; "Notice of a hearing in a contested case must include . . . a short, plain statement of the matters asserted." TEX. GOV'T CODE § 2001.052. *See* TEX. OCC. CODE § 2301.204(b) ("The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty."); TEX. OCC. CODE § 2301.204(d) ("A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.").

²⁰ 43 TEX. ADMIN. CODE § 215.202(a)(2).

to trying issues not included in the pleadings.²¹ Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²²

A. Complainants' Evidence and Arguments

On November 29, 2014, the Complainants, purchased a new 2014 Ford Focus from Big Spring Ford Inc., a franchised dealer of the Respondent, in Big Spring, Texas. The vehicle had 25 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage of the vehicle for three years or 36,000 miles, whichever occurs first, and powertrain coverage for five years or 60,000 miles, whichever comes first. On September 16, 2016, the Complainants mailed a written notice of defect to the Respondent. On November 29, 2016, the Complainants filed a Lemon Law complaint with the Department alleging that from a stop, the vehicle's engine will rev without the vehicle moving forward and the vehicle will move forward slowly while jerking. The Complainants took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
January 20, 2016	14,468	When taking off from a stop, the vehicle is jerking roughly on acceleration
February 8, 2016	15,317	Vehicle is jerking roughly when accelerating
August 31, 2016	23,473	Vehicle is jerking and stuttering when taking off from a stop
September 8, 2016	23,588	Jerking, pulling and transmission issues, jerks on acceleration
October 25, 2016	25,631	Vehicle is jerking when taking off from a stop

The Respondent's final opportunity to repair the vehicle occurred on November 26, 2016.

Mrs. Stephenson testified that Ms. Stephenson first noticed the transmission issue about August or September (2015). They initially believed the problem resulted from bad fuel so they used premium fuel before taking the vehicle to the dealership for service. Mrs. Stephenson testified that the transmission issue does not occur every time. In the last 48 hours before the hearing, she drove the vehicle eight times and the issue occurred twice. When taking off, the rpms will go up but with little to no vehicle movement but the transmission will eventually engage and the rpms will go down and the vehicle will continue. In the first instance, the hesitation lasted one or two

²¹ 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

²² See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref'd).

seconds and the second time seemed longer. However, Mrs. Stephenson noted that an 18-wheeler was coming and she did not know whether the approaching 18-wheeler made the second hesitation seem longer or if the hesitation actually lasted longer. She noted that the transmission vibration previously stopped when the Ford representative replaced loose brackets, but the vibration started again. Mrs. Stephenson last noticed the hesitation the day before the hearing. She confirmed that repairs would temporarily improve the hesitation issue but noted that the Sewell dealerships would not repair the vehicle again. She estimated that hesitation recurred about a week after Ford representative's repair, one month after the first repair and five months after the second repair. Mrs. Stephenson added that while her father rode with Ms. Stephenson and the vehicle "stalled" several times after which he obtained a rental car for her. Mrs. Stephenson requested reimbursement for the rental. Mrs. Stephenson clarified that the stalling was the same hesitation issue. She expressed a safety concern given the high rate of accidents and vehicular deaths in the area.

On cross-examination, Mrs. Stephenson asked if the vibration/shudder is normal, why the vehicle did not exhibit these characteristics until after 10,000 to 12,000 miles. Ms. Diaz explained that the vehicle has a break in period and that the vibration/shudder does not happen all the time, but as the clutches wear, the vibration/shudder will be more noticeable.

B. Respondent's Evidence and Arguments

On cross-examination, Mrs. Stephenson testified that outside of the last 48 hours she had ridden with Ms. Stephenson but had not driven the vehicle. When asked about the dealership not repairing the vehicle, Mrs. Stephenson elaborated that the dealer's service manager explained that there was no reason to repair anymore because the issue will continue to recur. She affirmed that the dealer did not refuse to fix the vehicle but stated that repair would not resolved the issue.

Ms. Diaz contended that the vehicle did not qualify for repurchase or replacement because it had not been out of service for repair 30 or more days, did not have a safety problem, did not have two repairs within the first 12,000 miles and two repairs in the second 12,000 miles. The vehicle was first taken in at 14,468 miles. Ms. Diaz explained that the characteristics of the vehicle may be different than what the customer is used to. The vehicle utilizes a unique six speed transmission that operates like a manual transmission but shifts automatically. The transmission incorporates clutches, which are wear items, and the transmission has more shift points. The

vehicle may normally exhibit harshness and vibration when driving. The characteristics are listed in the vehicle's quick start guide and owner's manual. When diagnosing transmission concerns, the technician reprograms the TCM (transmission control module) and PCM (power control module) and then checks for fluctuations in the clutch function. Shudder normally occurs with the vehicle. The shudder should be less than 250 rpm. Shudder over 250 rpm would require clutch replacement. Shudder within 250 rpms is within specifications. A dealer may not be able to fix vibration and shudder because it does not meet the specifications for repair (because the transmission is operating normally). The transmission jerking and shuddering is part of the vehicle's characteristics and is in documentation provided to the customer. The field service engineers report shows seven different recordings, all under 250 rpm except one, which resulted in a repair.

C. Inspection

The vehicle displayed 28,304 miles on the odometer before the test drive. The test drive occurred over a span of five miles, predominately on residential areas controlled by stop signs. The vehicle appeared to operate normally and did not exhibit any hesitation or shudder.

D. Analysis

1. Reasonable Repair Attempts

The repair history shows that the vehicle did not have reasonable repair attempts to qualify for repurchase or replacement relief. All of the statutory presumptions for establishing a reasonable number of repair attempts require at least one repair attempt within the first 12,000 miles of delivery of the vehicle. In this case, the first attempt occurred on January 20, 2016, at 14,468 miles, 14,443 miles after delivery. Moreover, the record does not otherwise support finding a reasonable number of attempts to repair the vehicle based on different circumstances. The testimony shows that Ms. Stephenson first noticed the transmission issue in August or September of 2015.

2. Warrantable Defect

The Lemon Law does not apply to all problems a vehicle may have. Whether the Lemon Law applies to a condition does not depend on the undesirability or troublesomeness of the condition. Rather, the Lemon Law only applies to defects/conditions covered by the warranty (warrantable defects). Accordingly, to qualify for replacement/repurchase or warranty repair under

the Lemon law, the vehicle must have a defect covered by an applicable warranty.²³ In this case, the vehicle's warranty provides that:

Under your New Vehicle Limited Warranty if:

- your Ford vehicle is properly operated and maintained, and
- was taken to a Ford dealership for a warranted repair during the warranty period, then authorized Ford Motor Company dealers will, without charge, repair, replace, or adjust all parts on your vehicle that malfunction or fail during normal use during the applicable coverage period due to a manufacturing defect in factory-supplied materials or factory workmanship.²⁴

The courts have explained that a “manufacturing defect is one created by a manufacturer’s failure to conform to its own specifications, i.e., the product would not have been defective if it had conformed to the manufacturer’s design specifications.”²⁵ In other words, a manufacturing defect is an aberration occurring only in those vehicles not produced according to the manufacturer’s specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a broken part. As a result, a defective vehicle differs from a properly manufactured vehicle. Issues that do not arise from manufacturing, such as the design of the vehicle (which occurs before manufacturing), are not warrantable defects. In contrast to manufacturing defects, “[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves.”²⁶ Likewise, design characteristics result from the vehicle’s specified design and not from any error during manufacturing, so that the same-model vehicles made according to the manufacturer’s specifications should ordinarily have the same characteristics. If the complained of condition constitutes a design characteristic or even a design defect, the Lemon Law does not apply because the warranty only covers manufacturing defects.

In the present case, the Complainants’ concerns, e.g., hesitation, vibration/shudder, jerking, etc., arise from the vehicle’s PowerShift transmission. The record shows that the transmission may normally exhibit such characteristics because of the transmission’s design and not because of any

²³ TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

²⁴ Complainants’ Ex. 9, 2014 Model Year Ford Warranty Guide (emphasis added).

²⁵ *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

²⁶ *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

manufacturing defect. Specifically, PowerShift transmissions use clutches to transfer power from the engine to the transmission, which differs from conventional automatic transmissions, which use torque converters. Consequently, PowerShift transmissions will behave differently than conventional automatic transmissions. The clutches are wear items with friction surfaces that may increasingly slip as the friction surfaces wear out. Further, clutch slippage within 250 rpms falls within the manufacturer's specifications for normal operation, indicating that at least some slippage may normally occur (leading to the characteristic hesitation, shudder, vibration, etc.) Additionally, various reference sources from the manufacturer specify that the vehicle may exhibit the complained of characteristics. Although the transmission's characteristics may be troubling, the record shows that these characteristics result from the design of the vehicle's transmission, specifically the clutches, and not from a manufacturing defect. Accordingly, the vehicle does not qualify for repurchase/replacement or warranty repair relief.

III. Findings of Fact

1. On November 29, 2014, the Complainants, purchased a new 2014 Ford Focus from Big Spring Ford Inc., a franchised dealer of the Respondent, in Big Spring, Texas. The vehicle had 25 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage of the vehicle for three years or 36,000 miles, whichever occurs first, and powertrain coverage for five years or 60,000 miles, whichever comes first.
3. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
January 20, 2016	14,468	When taking off from a stop, the vehicle is jerking roughly on acceleration
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September 8, 2016	23,588	Jerking, pulling and transmission issues, jerks on acceleration
October 25, 2016	25,631	Vehicle is jerking when taking off from a stop

4. On September 16, 2016, the Complainants mailed a written notice of defect to the Respondent.

5. On November 29, 2016, the Complainants filed a Lemon Law complaint with the Department alleging that from a stop, the vehicle's engine will rev without the vehicle moving forward and the vehicle will move forward slowly while jerking.
6. On January 6, 2017, the Department's Office of Administrative Hearings issued an amended notice of hearing directed to the Complainants and the Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.
7. The hearing in this case convened and the record closed on February 22, 2017, in Odessa, Texas, before Hearings Examiner Andrew Kang. Kimberly Stephenson represented and testified for herself and Kelsie Stephenson. Maria Diaz, Consumer Legal Analyst, represented and testified for the Respondent.
8. The vehicle's odometer displayed 28,305 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. The vehicle did not exhibit any shuddering or hesitation during the test drive at the hearing and otherwise operated normally.
11. The vehicle's transmission design incorporates manual transmission components, including clutches, unlike a conventional automatic transmission.
12. The vehicle's transmission, as designed, performs differently than a conventional automatic transmission.
13. Normal clutch slippage may lead to shudder, vibration, hesitation, and the like.
14. As a result of the vehicle's transmission design, the vehicle may normally exhibit shudder, vibration, hesitation, and the like.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613; TEX. OCC. CODE § 2301.204.

2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. TEX. OCC. CODE § 2301.704.
3. The Complainants timely filed a sufficient complaint with the Department. TEX. OCC. CODE §§ 2301.204, 2301.606(d); 43 TEX. ADMIN. CODE § 215.202.
4. The parties received proper notice of the hearing. TEX. GOV'T CODE §§ 2001.051, 2001.052; 43 TEX. ADMIN. CODE § 215.206(2).
5. The Complainants bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainants did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainants did not meet the statutory requirement for a reasonable number of repair attempts. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).
8. The Complainants' vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.
9. The Complainants' vehicle does not qualify for warranty repair. TEX. OCC. CODE §§ 2301.204 and 2301.603.
10. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED April 7, 2017



ANDREW KANG
HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES