

1 authorized under Occupations Code Chapter 2301. New §215.22(b) is further proposed in response to a
2 petition for rulemaking dated February 5, 2019 requesting the department to prohibit department staff
3 from providing any recommendations to the board on contested cases. However, when the department
4 is a party to the contested case, department staff are authorized to recommend a final decision, just as
5 any other party is authorized to recommend a final decision.

6 The department further proposes to renumber the current §215.22(b) to §215.22(c) and to make
7 a conforming amendment to new §215.22(c) because not all cases under Occupations Code Chapter 2301
8 have a hearing officer.

9 Proposed amendments to §215.55 are necessary to conform with §215.58 under which the board
10 delegated final order authority in certain cases.

11 Proposed new §§215.59 - 215.63 are necessary to implement Occupations Code §2301.709(d),
12 which requires the board to adopt rules that establish standards for reviewing a case under Occupations
13 Code Chapter 2301, Subchapter O regarding hearing procedures. Section 2301.709(d) requires the rules
14 to: 1) specify the role of the department's personnel in managing contested cases before the board,
15 including advising on procedural matters; 2) specify appropriate conduct and discussion by the board
16 regarding proposals for decisions issued by administrative law judges; 3) specify clear expectations
17 limiting arguments and discussion on contested cases in which the board allows oral argument; 4) address
18 ex parte communications; and 5) distinguish between using industry expertise and representing or
19 advocating for an industry when the board is reviewing a contested case under Occupations Code Chapter
20 2301, Subchapter O regarding hearing procedures.

21 At this time, the department declines to adopt rules under Occupations Code §2301.709(d)(2) to
22 specify the appropriate conduct and discussion by a person delegated power from the board under
23 Occupations Code §2301.154 regarding proposals for decision issued by administrative law judges. Under

1 43 TAC §215.88, the board only delegated power under Occupations Code §2301.154 in cases in which
2 there has not been a decision on the merits, so there will not be a proposal for decision issue by an
3 administrative law judge in the delegated cases.

4 Proposed new §215.59 is consistent with the department's current practice, including the practice
5 of having department staff provide a recommendation to the board when the department is a party to
6 the contested case. In response to an informal commenter's request for 30-days' notice of the date of a
7 board meeting to review the contested case, the department modified its informal working draft language
8 to increase the notice to at least 30-days' notice. The proposed new §215.59 is consistent with the
9 department's current practice of requiring a party to timely request oral argument before being granted
10 the privilege of providing oral argument. The board has the discretion on whether to allow oral arguments
11 under Occupations Code §2301.709(b). The department and the board chairman need to know in advance
12 whether a party wants to provide oral argument so the department and the chairman can efficiently
13 organize and schedule the board meeting, including the order in which certain agenda items are heard.

14 One informal commenter on §215.59 and §215.60 requested the opportunity for the parties to
15 file briefs. The department proposes new §215.60 to authorize the parties to submit written presentation
16 aids; however, the department limited the number of pages to a total of six pages: four pages for the
17 initial presentation aid, and two pages for any rebuttal presentation aids. . In the *Sunset Advisory*
18 *Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature*, the Sunset Advisory Commission
19 warned the board that the board is not authorized to relitigate contested cases. The State Office of
20 Administrative Hearings (SOAH) proceedings provide the parties to a contested case an opportunity to
21 make arguments and produce evidence in accordance with standard processes under the Texas
22 Administrative Procedure Act, Government Code Chapter 2001. SOAH proceedings can last from hours to
23 weeks, depending on the complexity of the case. The department does not want to impose any

1 unnecessary burdens on the board under Government Code §2001.141(e). Also, the department proposes
2 uniform standards for the size and appearance of the presentation aids so the aids will fit into the board
3 book that the department provides to the board, the board members can easily read the presentation
4 aids, the parties have a clear understanding of what is allowed, and the parties can be held to the same
5 standard to avoid an unfair advantage.

6 Proposed new §215.60 also requires the parties to timely provide their presentation aids to the
7 department and all other parties. The department needs the presentation aids in advance so the
8 department can include them in the board book that the department provides to the board members and
9 so the department can advise the board. The other parties need the presentation aids in advance so they
10 can provide a rebuttal presentation aid if needed and prepare for any oral argument. The department also
11 renumbered the remaining new §§215.61 - 215.63 after adding new §215.60, which was not included in
12 the informal working draft.

13 One informal commenter on the informal working draft of §215.59 and §215.60 requested a
14 requirement for department staff to provide a recommendation upon a board member's request. The
15 department declines to impose a requirement for department staff to provide a recommendation upon a
16 board member's request because it would place a new burden on department staff, and the board is
17 responsible for deciding the final order.

18 Some informal comments on the informal working draft of §215.59(b) stated it was acceptable
19 for department staff to provide a recommendation to the board on cases in which the department is a
20 party; however, one comment stated that the recommendation should be made available to the affected
21 parties prior to the board meeting under the fundamental tenant of due process. On cases in which the
22 department is a party to the contested case, the department's current practice is to provide the
23 department's recommendations in the board book, which is posted on the department's website prior to

1 each board meeting. Another informal comment on §215.59(b) stated that communications are
2 prohibited unless allowed by rule. The department disagrees with this comment. Occupations Code
3 §2301.709(d) does not require a board rule to give the department staff authority to communicate with
4 the board on contested cases because Government Code §2001.061, Government Code §2001.090, and
5 case law already provide the authority for department staff to do so. Proposed new §215.22(b)
6 acknowledges the authority and limitations under existing law for department staff to communicate with
7 board members regarding contested cases. Proposed new §215.62(a) complies with the requirement in
8 Occupations Code §2301.709(d)(1) for the board's rule to specify the role of division personnel in
9 managing contested cases before the board regarding advice on procedural matters.

10 Proposed new §215.61(a) reminds the parties to a contested case that they must limit their
11 arguments and discussion to evidence that is contained in the SOAH administrative record. Proposed new
12 §215.61(a) complies with Occupations Code §2301.709(d)(3), which requires the board to adopt rules that
13 specify clear expectations limiting arguments and discussion to evidence in the SOAH administrative
14 record. Proposed new §215.61(b) states each party is responsible for objecting when another party
15 attempts to make arguments or engage in discussion regarding evidence that is not contained in the SOAH
16 administrative record. The department received informal comments on the informal draft rule §215.60(b),
17 requesting the department to delete the language in proposed new §215.61(b), or to say that the failure
18 to object does not waive the violation or preclude the complaining party from raising the issue as a ground
19 for a rehearing in a motion for rehearing of the board's final order or in a petition for judicial review of
20 the board's final order. The department declines to amend §215.61(b) in response to the informal
21 comments, and the department won't provide legal advice regarding the impact of a failure to object on
22 a motion for rehearing or an appeal. Timely objections to arguments or discussion about evidence that is
23 outside of the SOAH administrative record are necessary to allow board members to appropriately and

1 efficiently review and decide contested cases. Timely objections give our board the opportunity to make
2 a decision on the spot and to say on the record whether they did or didn't consider the evidence, which
3 could avoid an unnecessary motion for rehearing or petition for judicial review. The board chairman has
4 the authority to preside over board meetings and to make rulings on motions and points of order under
5 Transportation Code §1001.023(b)(1).

6 The department also received informal comments on the informal working draft of §215.60,
7 requesting the department to add language regarding the authority for a party to make an argument or
8 to provide information outside of SOAH's administrative record if the party contends the case should be
9 remanded to SOAH. The department made the requested change in proposed new §215.61(a); however,
10 the propose change is limited to arguments requesting the board to remand the case to SOAH. Although
11 Government Code §2001.058(e) does not expressly authorize the board to remand a contested case to
12 SOAH, SOAH's administrative rule (Title 1 TAC §155.153(b)(13)) contemplates remands, and SOAH decides
13 whether a remand is appropriate.

14 An informal commenter requested the board to amend the informal working draft of §215.60 to
15 address a circumstance in which a party is arguing error under Government Code §2001.058(e) when the
16 SOAH administrative law judge fails to admit certain evidence presented, while another informal
17 commenter requested the board to add the word "admitted" before the word "record." In response to
18 the informal comments, the department added language to proposed new §215.61(a) to require the
19 parties to limit their arguments and discussion to evidence in the SOAH administrative record, consistent
20 with the scope of the board's authority to take action under Government Code §2001.058(e). The addition
21 of this language is sufficient to address the comments because §2001.058(e) establishes the boundaries
22 on the board's authority regarding review of contested cases.

1 Proposed new §215.62 sets out the order of presentations to the board for review of a contested
2 case. The department received informal comments on the informal working draft of §215.61, requesting
3 the department to modify the language to say the party with the burden of proof shall have the
4 opportunity to present oral argument first, and the department received comments stating the party that
5 is adversely affected should have the opportunity to present oral argument first. The department declines
6 to modify the proposed language that says the party who is adversely affected has the opportunity to
7 present oral argument first. By having the adversely affected party present first, it helps to focus the
8 board's review on issues the board is authorized to address, and it recognizes the SOAH administrative
9 law judge's role in assessing the evidence and making a recommendation in the proposal for decision.
10 Also, the Texas Rules of Civil Procedure do not apply to the presentation before the board.

11 An informal comment on the informal working draft of §215.61 requested an amendment that
12 says only the party with the burden of proof should have the authority to make a rebuttal presentation.
13 The department declines to make the requested change to proposed new §215.62, which gives all parties
14 an equal opportunity to make a rebuttal presentation. In response to an informal comment requesting
15 the addition of language to clarify that the board has the authority to decide the order if both parties lose
16 on an issue at SOAH, the department added the requested language. The department declines to add
17 language to give aligned parties the authority to agree on the order of presentation because the
18 department's proposed language provides certainty on the order of presentation. The board has authority
19 to allow presentation aids that are consistent with the SOAH administrative record and the board's
20 authority under Government Code §2001.058(e).

21 Proposed new §215.63 addresses board conduct and discussion when reviewing a contested case.
22 The department received an informal comment on the informal working draft of §215.62, requesting the
23 department to add language to §215.62(a) that says the board will conduct its review of a contested case

1 under Occupations Code Chapter 2301, as well as language limiting the authority for the board to vacate
2 or modify an order issued by the administrative law judge. The department declines to add the requested
3 language to proposed new §215.63 because the additions are unnecessary. Chapter 215 implements
4 Occupations Code Chapter 2301, which also authorizes the board to enforce Transportation Code Chapter
5 503. Also, Government Code Chapter 2001 governs the board's review of a contested case. Also, the SOAH
6 administrative law judge does not issue the final order in contested cases under Chapter 215, so it is
7 unnecessary to add language regarding the board's authority to vacate or modify an order issued by the
8 administrative law judge.

9 An informal commenter requested the department to add language to the informal working draft
10 of §215.62(b) to say the board may question the department about any matter that is relevant to a
11 proposal for decision, any matter that is in the administrative record, and any matter that is conducive to
12 the issuance of a final order. The department added language to proposed new §215.63(b); however, the
13 questions must be consistent with the scope of the board's authority to take action under Government
14 Code §2001.058(e). In response to the comment, the department also clarified that the board has the
15 authority to question any party on any matter that is relevant to the proposal for decision, as well as
16 evidence contained in the SOAH administrative record. The department added language to proposed new
17 §215.63(b) in response to an informal comment requesting the department to add language to allow
18 board members to ask questions regarding a request to remand the contested case to SOAH.

19 In response to comments to add and delete language in the informal working draft of proposed
20 new §215.62(c) regarding the requirement for the board to distinguish between using their industry
21 expertise and representing or advocating for an industry, the department added a clause to proposed new
22 §215.63(c) stating the board must do so consistent with the scope of the board's authority to take action
23 under Government Code §2001.058(e). The department declines to amend proposed §215.63 to say that

1 only members of the board and the executive director may question a person making a presentation on
2 behalf of a party, as requested by one informal commenter. Current §206.22(d)(1) only authorizes board
3 members and the department's administrative staff to question the people making a presentation to the
4 board. The chairman has the authority to preside over board meetings under Transportation Code
5 §1001.023(b)(1), including the authority to determine who has the floor to speak during a board meeting.
6 The department wants to preserve the chairman's flexibility to preside over board meetings.

7 **FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT.** Linda M. Flores, Chief Financial Officer,
8 has determined that for each year of the first five years the amendments and new sections will be in
9 effect, there will be no fiscal impact to state or local governments as a result of the enforcement or
10 administration of the proposal. Daniel Avitia, Deputy Executive Director, has determined that there will
11 be no measurable effect on local employment or the local economy as a result of the proposal.

12 **PUBLIC BENEFIT AND COST NOTE.** Mr. Avitia has also determined that, for each year of the first five years
13 the amended and new sections are in effect, there is an anticipated public benefit because parties to a
14 contested case will have more clarity regarding their rights, their obligations, and the board's authority
15 regarding a contested case that is presented at a board meeting.

16 Anticipated Costs To Comply With The Proposal. Mr. Avitia anticipates that there will be no costs
17 to comply with these rules. Parties to a contested case have an opportunity, rather than a requirement,
18 to make an oral presentation to the board and to provide presentation aids to the board.

19 **ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.** As required by Government
20 Code §2006.002, the department has determined that the proposed amendments and new sections will
21 not have an adverse economic effect on small businesses, micro- business, and rural communities because
22 parties to a contested case have an opportunity, rather than a requirement, to make an oral presentation

1 to the board and to provide presentation aids to the board. Therefore, the department is not required to
2 prepare a regulatory flexibility analysis under Government Cod, §2006.002.

3 **TAKINGS IMPACT ASSESSMENT.** The department has determined that no private real property interests
4 are affected by this proposal and that this proposal does not restrict or limit an owner's right to property
5 that would otherwise exist in the absence of government action and, therefore, does not constitute a
6 taking or require a takings impact assessment under the Government Code §2007.043.

7 **GOVERNMENT GROWTH IMPACT STATEMENT.** The department has determined that each year of the
8 first five years the proposed amendments and new sections are in effect, no government program would
9 be created or eliminated. Implementation of the proposed amendments and new sections would not
10 require the creation of new employee positions or elimination of existing employee positions.
11 Implementation would not require an increase or decrease in future legislative appropriations to the
12 department or an increase or decrease of fees paid to the department. The proposed amendments and
13 new sections include a new regulation that makes each party responsible for objecting when another
14 party attempts to make arguments or engage in discussion regarding evidence that is not contained in the
15 SOAH administrative record. The proposed amendments and new sections do not limit or repeal an
16 existing regulation. Lastly, the proposed amendments and new sections do not affect the number of
17 individuals subject to the rule's applicability and will not affect this state's economy.

18 **REQUEST FOR PUBLIC COMMENT.** If you want to comment on the proposal, submit your written
19 comments by 5:00 p.m. CDT on September 21, 2020. A request for a public hearing must be sent
20 separately from your written comments. Send written comments or hearing requests by email to
21 *rules@txdmv.gov* or by mail to Office of General Counsel, Texas Department of Motor Vehicles, 4000
22 Jackson Avenue, Austin, Texas 78731. If a hearing is held, the department will consider written comments
23 and public testimony presented at the hearing.

1 **STATUTORY AUTHORITY.** The department proposes amendments and new sections under Occupations
2 Code §§2301.153(a)(8), which authorizes the board to adopt rules; Occupations Code §2301.155, which
3 authorizes the board to adopt rules as necessary or convenient to administer Occupations Code Chapter
4 2301 and to govern practice and procedure before the board; Occupations Code §2301.709(d), which
5 authorizes the board to adopt rules that establish standards for reviewing a case under Occupations Code
6 Chapter 2301, Subchapter O; Government Code §2001.004(1), which authorizes a state agency to adopt
7 rules of practice that state the nature and requirements of all available formal and informal procedures;
8 and Transportation Code §1002.001, which authorizes the board to adopt rules that are necessary and
9 appropriate to implement the powers and the duties of the department.

10 **CROSS REFERENCE TO STATUTE.** Occupations Code §§2301.001, 2301.151, 2301.152, 2301.153(a)(1),
11 (a)(7), (a)(8), and Chapter 2301, Subchapter O; and Government Code Chapter 2001, Subchapters C and
12 F.

13 **TEXT.**

14 **SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE**

15 **43 TAC §215.22 and §215.55**

16 §215.22. Prohibited Communications.

17 (a) No person, party, attorney of record, or authorized representative in any contested case shall
18 engage in, [make,] directly or indirectly, any ex parte communication, in violation of Government Code,
19 §2001.061, concerning the [merits of the] contested case with [to] the board or hearing officer assigned
20 to render a decision or make findings of fact and conclusions of law in a contested case.

21 (b) Except as prohibited by Government Code, §2001.061, department staff may advise the board,
22 the hearing officer, and a person delegated power from the board under Occupations Code, §2301.154

1 regarding the contested case and any procedural matters. However, staff shall not recommend a final
2 decision to the board unless the department is a party to the contested case.

3 (c) ~~(b)~~ Violations of this section shall be promptly reported to the hearing officer, as applicable,
4 and the general counsel of the department. The general counsel shall ensure that a copy or summary of
5 the ex parte communication is included with the record of the contested case and that a copy is forwarded
6 to all parties or their authorized representatives. The general counsel may take any other appropriate
7 action otherwise provided by law.

8
9 §215.55. Final Decision.

10 (a) Except as provided by §215.58 of this title, the [The] board has final order authority in a
11 contested case initiated by a complaint filed before January 1, 2014, under Occupations Code, §2301.204
12 or §§2301.601 - 2301.613.

13 (b) The hearings examiner has final order authority in a contested case filed on or after January 1,
14 2014, under Occupations Code, §2301.204 or §§2301.601 - 2301.613.

15 (c) Except as provided by subsections (a) and (b) of this section and §215.58 of this title (relating
16 to Delegation of Final Order Authority), the board has final order authority in a contested case filed under
17 Occupations Code, Chapter 2301 or under Transportation Code, Chapter 503.

18 (d) An order shall be deemed final and binding on all parties and all administrative remedies are
19 deemed to be exhausted as of the effective date, unless a motion for rehearing is filed with the
20 appropriate authority as provided by law.

21 **SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE**

22 **§§215.59 - §215.62**

23 §215.59. Request for Oral Argument.

1 (a) At least 30 days prior to the date of a board meeting during which the board will review a
2 contested case, department staff shall notify the parties regarding the opportunity to attend and provide
3 oral argument concerning a proposal for decision before the board.

4 (b) If a party wants to provide oral argument at the board meeting, it must submit a written
5 request for oral argument to the department's Office of General Counsel at least 14 days prior to the date
6 of the board meeting at which the party's contested case will be considered.

7 (c) If a party timely submits a written request for oral argument, that party may present oral
8 argument at the board meeting. If a party fails to timely submit a written request for oral argument, that
9 party shall not present oral argument at the board meeting.

10
11 §215.60. Presentation Aids.

12 (a) If a party wants to provide a presentation aid to the board, it must provide the presentation
13 aid to the department and all other parties in accordance with §215.30 of this title and §215.49 of this
14 title at least 21 days prior to the date of the board meeting. If a party wants to provide a rebuttal
15 presentation aid to the board, it must provide the rebuttal presentation aid to the department and all
16 other parties in accordance with §215.30 of this title (Relating to Filing of Documents) and §215.49 of this
17 title (Relating to Service of Pleadings, Petitions, Briefs, and Other Documents) at least 14 days prior to the
18 date of the board meeting. If a party fails to timely provide a presentation aid to the department or any
19 other party, the department shall not provide the presentation aid to the board and the party shall not
20 provide the presentation aid to the board at the board meeting.

21 (b) For the purposes of this section, presentation aids are defined as written materials, such as a
22 document or PowerPoint slides, which contain a party's arguments and discussion of evidence, laws, and
23 rules regarding the contested case. Presentation aids shall be limited to evidence contained in the SOAH

1 administrative record and consistent with the scope of the board's authority to take action under
2 Government Code §2001.058(e). However, any party may argue that the board should remand the case
3 to SOAH.

4 (c) All information in the presentation aids shall include a cite to the SOAH administrative record
5 on all points to specifically identify where the information is located.

6 (d) Presentation aids shall be single-sided, double-spaced, 8.5 inches by 11 inches, and at least
7 12-point type. Initial presentation aids are limited to four pages, and rebuttal presentation aids are limited
8 to two pages for a total of six pages. If a party provides the department with a presentation aid that
9 contains more pages than the maximum allowed, the department shall not provide the presentation aid
10 to the board and the party shall not provide the presentation aid to the board at the board meeting.

11
12 §215.61. Limiting Arguments and Discussion to Evidence in the Administrative Record.

13 (a) The parties to a contested case under review by the board shall limit their arguments and
14 discussion to evidence in the SOAH administrative record, and their arguments and discussion shall be
15 consistent with the scope of the board's authority to take action under Government Code §2001.058(e).
16 However, any party may argue that the board should remand the case to SOAH.

17 (b) Each party is responsible for objecting when another party attempts to make arguments or
18 engage in discussion regarding evidence that is not contained in the SOAH administrative record.

19
20 §215.62. Order of Presentations to the Board for Review of a Contested Case.

21 (a) The department's staff will present the procedural history and summary of the contested case.

1 (b) The party that is adversely affected has the opportunity to present its case first. However, the
2 board chairman is authorized to determine the order of each party's presentation in the event of the
3 following:

4 (1) it is not clear which party is adversely affected;

5 (2) it appears as though more than one party is adversely affected; or

6 (3) different parties are adversely affected by different portions of the contested case
7 under review.

8 (c) The other party or parties then have an opportunity to respond. If there are more than one
9 other party, each party will have an opportunity to respond in alphabetical order based on the name of
10 the party in the pleadings in the SOAH administrative record.

11 (d) Each party then has an opportunity to provide a rebuttal.

12 (e) A party must timely comply with the requirements of §215.59 of this title (relating to Request
13 for Oral Argument) before it is authorized to provide oral argument to the board.

14
15 §215.63. Board Conduct and Discussion When Reviewing a Contested Case.

16 (a) The board shall conduct its review of a contested case in compliance with Government Code
17 Chapter 2001, including the limitations on changing a finding of fact or conclusion of law made by the
18 administrative law judge at SOAH, and the prohibition on considering evidence outside of the SOAH
19 administrative record.

20 (b) Board members may question any party or the department on any matter that is relevant to
21 the proposal for decision or the evidence contained in the SOAH administrative record; however, any
22 questions shall be consistent with the scope of the board's authority to take action under Government
23 Code §2001.058(e), and the communication must comply with §215.22 of this title (Relating to Prohibited

1 Communications). In addition, board members are authorized to ask questions regarding arguments or a
2 request to remand the case to SOAH.

3 (c) Board members may use their industry expertise to help them understand the case and make
4 effective decisions, consistent with the scope of the board's authority to take action under Government
5 Code §2001.058(e). However, board members are not advocates for a particular industry. Board members
6 are public servants who take an oath to preserve, protect, and defend the Constitution and laws of the
7 United States and Texas.

8 **CERTIFICATION.** The agency certifies that legal counsel has reviewed the proposal and found it to be
9 within the state agency's legal authority to adopt.

10 Issued at Austin, Texas, on August 7, 2020.

11 /s/ Tracey Beaver
12 Tracey Beaver, General Counsel