

1 clarifies that any oral presentation must be limited to evidence contained in the State Office of
2 Administrative Hearings' administrative record. The adopted rule provides fair, clear, and express
3 guardrails that will help the parties, as well as the board, to comply with the law regarding the board's
4 review of a contested case. For example, it is fair to the presenting party that the following aren't counted
5 against their 15 minutes to make an oral presentation to the board: 1) time spent responding to board
6 questions; and 2) time spent claiming that another party talked about evidence that is outside the SOAH
7 administrative record.

8 The chairman has the authority under §206.22(e) to grant each party more than three minutes to
9 present their contested case; however, the rulemaking petition and many informal commenters who
10 commented on the department's informal working draft of 43 TAC §215.61 requested the department to
11 amend §206.22 to give each party a minimum of 20 minutes to present their contested case to the board,
12 including the authority to reserve time to make a rebuttal argument. The department adopts amendments
13 to §206.22 to grant each party a maximum of 15 minutes for their oral presentation, with no rebuttal or
14 closing statement. However, the department reminds the commenters that the board is not authorized
15 to relitigate contested cases.

16 The department adopts amendments to §206.22(f) to implement the *Sunset Advisory Commission*
17 *Staff Report with Final Results, 2018-2019, 86th Legislature* in which the Sunset Advisory Commission
18 warned the board that the board is not authorized to relitigate contested cases. The final Sunset Advisory
19 Commission staff report emphasized that the board has an important, but limited role as the final decision
20 maker on all protest cases. A protest case is a contested case in which a franchised motor vehicle dealer
21 protests certain actions by another motor vehicle dealer or the manufacturer. The department is not a
22 party to a protest case. The Sunset Advisory Commission's report stated that: 1) The board should not re-
23 litigate contested cases by considering new information or testimony presented in a board meeting that

1 was not presented in the State Office of Administrative Hearings (SOAH) proceeding. This could include
2 actions, such as allowing 20 minutes of oral argument for each party that would then turn into hours of
3 discussion, including the discussion of evidence outside of the official SOAH record; 2) SOAH proceedings
4 provide the parties to a contested case an opportunity to make arguments and produce evidence in
5 accordance with standard processes under the Administrative Procedure Act; 3) The board must base
6 their final decisions on evidence from SOAH and may not consider new issues or evidence; 4) Protest cases
7 can cause difficulty for industry members of the board to separate the interests of their business sector
8 from their role of deciding these cases in an unbiased manner; 5) When the board members attempt to
9 affect the market in which they also participate, they risk, at a minimum, the appearance of being anti-
10 competitive, which not only puts the department at risk of costly litigation but also jeopardizes the
11 reputation of the board as a policymaking body and the integrity of the regulatory process; and 6) A
12 procedural violation, such as making changes based on evidence outside the SOAH record, puts the state
13 at risk in an appeal and is fundamentally unfair to the party who prevailed based on the record produced
14 at SOAH. If the board makes modifications to a proposal for decision, the parties or the public cannot
15 determine whether these modifications are based on the issues within or outside the SOAH record.

16 The department also adopts amendments to §206.22(f) in response to the Sunset Advisory
17 Commission's January 2021 *Compliance Report: Implementation of 2019 Sunset Recommendations*
18 (compliance report) in which they stated that the proposed contested case rules, which include
19 amendments to §206.22, were not in compliance with the Sunset Advisory Commission's
20 recommendations. The Sunset Advisory Commission's compliance report states that "the proposed rules
21 insufficiently address the problems identified in the Sunset report and do not ensure current and future
22 board members and stakeholders appropriately limit discussions regarding contested cases." In addition,
23 the Sunset Advisory Commission held a public hearing on January 13, 2021, in which the Vice-Chair for

1 the Sunset Advisory Commission made the following statements and asked the department the following
2 questions regarding the proposed contested case rules: 1) "We worry a lot about anti-competitive
3 behavior among our state agencies that regulate various industries and DMV was one of those agencies
4 that really had, I would say, a tough Sunset process. Recently we've seen some rulemaking that seems
5 consistent with past behavior and not consistent with our future anti-competitive behavior. We're seeing
6 some potential rule propagation that, yes, I have several questions...our agencies need to be behaving
7 and operating within the parameters that we set them and not going off in random directions and if they
8 do start on those paths, I think it will probably be painful for them;" 2) "Would the proposed rules allow
9 individuals who are not parties to the protest case to provide oral arguments before the board;" and 3)
10 "Will the proposed rules allow for an oral argument by each side and rebuttals similar to a trial structure?"

11 At the December 2020 board meeting, the board tabled the vote on the adoption of amendments
12 to §206.22, as well as the other contested case rules in Chapter 215 of Title 43 regarding adjudicative
13 practice and procedure, in order to allow further discussion. The board chairman created the Contested
14 Case Rule Subcommittee to address the response from the Sunset Advisory Commission regarding
15 implementation, as well as the comments from the public at the December 2020 board meeting. The
16 department modified the proposed rule language to bring the rules into compliance with the Sunset
17 Advisory Commission's report by making it clear that only parties to the underlying contested case from
18 SOAH are authorized to provide an oral presentation, by reducing the number of minutes that the parties
19 are allotted to make an oral presentation to 15 minutes, and by deleting the authority for the parties to
20 provide a rebuttal and closing statement like litigants have in a trial. Occupations Code §2301.709(d)
21 requires the department to adopt rules that establish standards for reviewing a case under Subchapter O
22 of Chapter 2301. The department is also required to comply with the Sunset Advisory Commission's
23 recommendations.

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2 The overarching role of the board, such as the department's board with final order and decision-making
3 authority on contested cases, is that they must base their final decisions on evidence contained solely
4 within the official administrative record from SOAH. Government Code §2001.058(e) and Occupations
5 Code §2301.709(d)(3) provide guidelines and directives for the board regarding contested cases, including
6 limiting arguments and discussions to evidence in the SOAH administrative record. Government Code
7 §2001.060 provides that the materials in the SOAH administrative record include pleadings, motions,
8 evidence, questions and offers of proof, objections, proposed findings and exceptions, rulings, and other
9 information. Department staff will continue to make the SOAH administrative record available to board
10 members for review. The administrative record at SOAH is developed when the parties to a contested
11 case present their case to the SOAH administrative law judge in a fact-finding trial. These cases, especially
12 protest cases, can result in multiple days of testimony and hundreds, if not thousands, of pages of
13 materials.

14

15 Additionally, even after the administrative law judge at SOAH issues the draft proposal for decision, the
16 parties to the case get an opportunity to respond to the administrative law judge to explain why they
17 think something in the draft proposal for decision should be changed under Government Code §2001.062
18 and 1 TAC 155.507. Examples of issues that the parties can raise in their exceptions to the draft proposal
19 for decision include the following from Government Code §2001.058(e), which are the same factors under
20 which the board is authorized to change a finding of fact or a conclusion of law in the final proposal for
21 decision when issuing the final order: 1) that the administrative law judge did not properly apply or
22 interpret applicable law, agency rules, written policies provided under Government Code §2001.058(c),
23 or prior administrative decisions; 2) that a prior administrative decision on which the administrative law

1 judge relied is incorrect or should be changed; or 3) that a technical error in a finding of fact should be
2 changed.

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4 While working on new §206.22(f), the department contacted other Texas state agencies and performed
5 some research to see whether other agencies authorize the parties to a contested case to make an oral
6 presentation to the person or people who will issue a final order after the proposal for decision becomes
7 final. The responses and research are as follows: 1) the Public Utility Commission only authorizes an oral
8 presentation if the Public Utility Commission allows it under 16 TAC 22.262; 2) the Comptroller of Public
9 Accounts (Comptroller) does not allow an oral presentation under 34 TAC 1.34; 3) the State Board for
10 Educator Certification allows 10 minutes for an oral presentation and grants the party with the burden of
11 proof the option of providing a rebuttal as stated in their Board Operating Procedures; 4) the Texas
12 Department of Transportation allows a three-minute comment under 43 TAC 1.4(b)(2); and 5) the Texas
13 Medical Board allows the parties to provide an oral presentation for up to 15 minutes. The Texas Medical
14 Board also has the option of reserving some of its 15 minutes to make a rebuttal since it has the burden
15 of proof. The department also reviewed other Texas state agency rules regarding general procedures for
16 contested cases.

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18 However, no other state agency hears contested cases like the protest cases that come before the board.
19 Also, some state agencies have additional authority that our board does not have, such as the Public Utility
20 Commission's authority and the Comptroller's authority to change a finding of fact that is not supported
21 by a preponderance of the evidence under Government Code §2003.049(g) and §2003.101(e),
22 respectively. Also, in 2011, the Legislature added Occupations Code §164.007(a-1) and deleted the Texas

1 Medical Board's authority under Government Code §2001.058(e). The Texas Medical Board is prohibited
2 from changing the administrative law judge's findings of fact or conclusions of law.

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4 While it is beneficial to look at the rules and practices at other state agencies, it is more important to look
5 at the Sunset Advisory Commission's reports and the specific statutes that apply to the department. The
6 adopted amendments to §206.22(f) provide the board with the opportunity to hear a 15-minute oral
7 presentation, which can help the board exercise its authority to issue a final order, while still acting in
8 compliance with the law. The board has strict guidelines it must adhere to when reviewing a SOAH
9 proposal for decision, as outlined in Government Code Chapter 2001, the Administrative Procedure Act;
10 Transportation Code Chapter 1001; and Occupations Code Chapter 2301 for cases that are governed by
11 Chapter 2301. The adopted amendments to §206.22(f) give each party an adequate amount of time to
12 present their case to the board, consistent with the board's role under Government Code §2001.058(e),
13 as well as Occupations Code Chapter 2301 for cases that are governed by Chapter 2301. For cases that
14 are governed by Occupations Code Chapter 2301, §2301.709(b) authorizes the board to hear oral
15 argument, but does not require the board to allow oral argument. Also, the parties aren't required to
16 provide oral argument to the board. In addition, the board has access to the SOAH administrative record.

17

18 The department adopts substantive changes to §206.22(f) at adoption by: 1) reducing the time allotted
19 for an oral presentation from 20 minutes to 15 minutes; 2) prohibiting the parties from providing a
20 rebuttal or closing statement; 3) clarifying that the oral presentation must be limited to evidence
21 contained in the SOAH administrative record; and 4) removing the authority for the chairman to grant
22 each party additional time to make an oral presentation to the board. The department made these
23 changes in part to help ensure that the department complies with the *Sunset Advisory Commission Staff*

1 *Report with Final Results, 2018-2019, 86th Legislature* and the Sunset Advisory Commission's compliance
2 report.

3
4 The department reduced the time allotted for an oral presentation from 20 to 15 minutes because: 1) 15
5 minutes is a reasonable amount of time for each party to provide a summary of their position; 2) the
6 board decides the final order, rather than the parties to the contested case; 3) the oral presentation could
7 start to resemble a trial structure if the parties are allowed too much time to provide the oral
8 presentation; 4) the opportunity for a party to introduce evidence outside the SOAH administrative record
9 increases as the number of minutes allowed for an oral presentation increases; 5) the board's authority
10 to change a finding of fact or conclusion of law in the SOAH administrative law judge's proposal for
11 decision is limited under Government Code §2001.058(e); and 6) for contested cases under Occupations
12 Code Chapter 2301, the parties are authorized to submit up to 15 pages of written materials under 43 TAC
13 §215.60, which is also published in this issue of the *Texas Register*.

14
15 The department eliminated any rebuttal or closing statements because: 1) the board is not authorized to
16 relitigate contested cases like a court; 2) a rebuttal and closing statement is not necessary because the
17 parties are limited to the evidence in the SOAH administrative record; and 3) the language in §206.22(f)(5)
18 expressly authorizes a party to claim that another party talked about evidence that is not contained in the
19 SOAH administrative record, and the time spent making such claim is not counted against the objecting
20 party's oral presentation time. For contested cases under Occupations Code Chapter 2301, the parties are
21 required to object when another party attempts to make arguments or engage in discussion regarding
22 evidence that is not contained in the SOAH administrative record under §215.61(b), which is also
23 published in this issue of the *Texas Register*.

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2 The department modified §206.22(f) to expressly state that the oral presentation must be limited to the
3 evidence contained within the SOAH administrative record since the board is not authorized to relitigate
4 contested cases and is limited to the authority under Government Code §2001.058(e). Although this
5 language is repeated in 43 TAC §215.61(a), §206.22(f) is not limited to contested cases under Occupations
6 Code Chapter 2301.

7

8 The department removed the board chairman's discretion to increase the number of minutes for oral
9 presentation in the proposed §206.22(f) as published in the August 21, 2020, issue of the *Texas Register*
10 to help ensure consistency between the time allotted for the parties to make an oral presentation in each
11 contested case. Section 206.22(e) gives the board chairman the authority to waive a requirement under
12 §206.22 in the public interest if necessary for the performance of the responsibilities of the board or the
13 department.

14

15 The relevant inquiry for determining whether a state agency's notice satisfies the Administrative
16 Procedure Act's notice requirement is "whether the agency's notice fairly apprises affected parties of the
17 pertinent issues to allow them to comment and participate in the rulemaking process in a meaningful and
18 informed manner." *Texas Workers' Comp. Comm'n v. Patient Advocates*, 136 S.W.3d 643, 650 (Tex. 2004);
19 see *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 800-01 (Tex. App.--Austin 1982, writ ref'd n.r.e.).

20

21 The adopted rule satisfies the Administrative Procedure Act's notice requirements if it "is a logical
22 outgrowth of the proposed rule" such that "the final rule does not materially alter the issues raised in the
23 proposed rule." *Patient Advocates*, 136 S.W.3d at 650. The adopted rule is a logical outgrowth of the

1 proposed rule, does not encompass new persons or subject areas, does not propose any additional
2 requirements on affected persons, and does not impose any additional costs to meet the requirements
3 under the rule. The adopted rule does not materially alter the issues raised in the proposed rule, which
4 are the amount of time that shall be allowed for each party to make an oral presentation to the board and
5 whether a party is allowed to make a rebuttal or closing statement.

6
7 The department's notice in the August 21, 2020, issue of the *Texas Register* fairly apprised the affected
8 parties of the pertinent issues to allow them an opportunity to comment and participate in the rulemaking
9 process in a meaningful and informed manner. If the department chose to republish the adopted
10 amendments to §206.22(f) for comment instead of adopting with amendments, the commenters would
11 likely repeat their requests for a minimum of 20 minutes for oral argument with the opportunity to reserve
12 time to make any rebuttal arguments.

13
14 The petition for rulemaking dated February 5, 2019, requested that the party with the burden of proof in
15 the contested case be given the right to reserve a portion of its oral presentation time to present a rebuttal
16 and a closing statement. Some commenters commented on the department's informal working draft rules
17 that the department posted on its website on April 3, 2020, after receiving board approval at the board
18 meeting on April 2, 2020. The posted informal working draft rule did not modify §206.22(a) to expressly
19 give the parties to a contested case more than three minutes to make a comment. The board chairman
20 has the authority under §206.22(e) to grant a commenter more than three minutes to make a comment.
21 The department received comments in response to the informal working draft rule, and the comments
22 were consistent with the petition for rulemaking dated February 5, 2019. The commenters requested that
23 each party be given a minimum of 20 minutes to make their respective argument. Examples of comments

1 on the informal working draft of §215.61 (which later became §215.62) are: 1) a request that the party
2 with the burden of proof be given the right to reserve up to five minutes of the party's allotted time to
3 make a rebuttal argument; 2) a request that each party be given a bare minimum of 10 minutes for
4 rebuttal; and 3) a request that only the party with the burden of proof should have the authority to make
5 a rebuttal. The proposed version of §206.22 that was published in the *Texas Register* gave parties a
6 maximum of 20 minutes to make an initial oral presentation and a maximum of five minutes for a rebuttal.
7

8 The department modified §206.22(f) to expressly state that the oral presentation must be limited to the
9 evidence contained within the SOAH administrative record since the board is not authorized to relitigate
10 contested cases and is limited to the authority under Government Code §2001.058(e). Also, the petition
11 for rulemaking dated February 5, 2019, requested this amendment to §206.22(f).
12

13 The department removed the board chairman's discretion to increase the number of minutes for oral
14 presentation in the proposed §206.22(f) for the reasons previously stated. However, §206.22(e) gives the
15 board chairman the authority to waive a requirement under §206.22 in the public interest if necessary for
16 the performance of the responsibilities of the board or the department.
17

18 The department provided the public with access to draft rule language in advance of each board meeting
19 at which the board was scheduled to address §206.22 and other contested case rules in Title 43 Chapter
20 215, which are also published in this issue of the *Texas Register*. The department's draft rule language for
21 each board meeting was posted on the department's public website days in advance of each meeting,
22 including the Contested Case Rule Subcommittee meeting during which the subcommittee voted to
23 recommend the adopted rule language to the full board.

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2 The department adopts nonsubstantive changes to §206.22 at adoption by: 1) changing "will" to "shall"
3 in the first sentence to clarify that the language imposes a duty for the department to provide the parties
4 with an opportunity to provide an oral presentation to the board; 2) amending §206.22(f)(6) to substitute
5 "State Office of Administrative Hearings" for "SOAH" because "SOAH" isn't defined in §206.22; 3) changing
6 the term "oral argument" to "oral presentation" and rewording §206.22(f)(6) to avoid using trial
7 terminology since the board is not authorized to retry the contested cases; and 4) clarifying that the
8 language in §206.22(f)(3) regarding an intervening party is limited to intervenors of record from the SOAH
9 proceeding, in response to the Sunset Advisory Commission's question about allowing non-parties to
10 make an oral presentation to the board.

11

12 **SUMMARY OF COMMENTS.**

13 The department received one written comment on the proposal during the comment period that began
14 on August 21, 2020, and closed on September 21, 2020. The following summary does not include written
15 or verbal comments that the department received before the comment period opened on August 21,
16 2020, or after the comment period closed on September 21, 2020.

17

18 **Comment.**

19 The department received a written comment from Coffey & Alaniz, PLLC in support of the proposed
20 amendments.

21

22 **Agency Response.**

1 The department appreciates the supportive comment on the proposed rule. However, the department
2 adopts §206.22 with amendments as previously stated.

3

4 **STATUTORY AUTHORITY.** The department adopts amendments under Occupations Code §2301.153(a)(8),
5 which authorizes the board to adopt rules; Occupations Code §2301.155, which authorizes the board to
6 adopt rules as necessary or convenient to administer Occupations Code Chapter 2301 and to govern
7 practice and procedure before the board; Occupations Code §2301.709(d), which authorizes the board to
8 adopt rules that establish standards for reviewing a contested case under Occupations Code Chapter
9 2301, Subchapter O; Occupations Code §2302.051, which authorizes the board to adopt rules as necessary
10 to administer Occupations Code Chapter 2302; Transportation Code §502.091, which authorizes the
11 department to adopt and enforce rules to carry out the International Registration Plan; Transportation
12 Code §623.002, which authorizes the board to adopt rules that are necessary to enforce Transportation
13 Code Chapter 623; Transportation Code §643.003, which authorizes the department to adopt rules to
14 administer Transportation Code Chapter 643; Government Code §2001.004(1), which authorizes a state
15 agency to adopt rules of practice that state the nature and requirements of all available formal and
16 informal procedures; and Transportation Code §1002.001, which authorizes the board to adopt rules that
17 are necessary and appropriate to implement the powers and the duties of the department.

18

19 **CROSS REFERENCE TO STATUTE.** Occupations Code §§2301.001, 2301.153(a)(1) and (a)(7), and Chapter
20 2301, Subchapter O; Occupations Code §2302.354 and §2302.355; Transportation Code §§502.091,
21 623.271-623.272, 643.251-643.257, Chapter 1001, and §1004.002; and Government Code Chapter 2001,
22 Subchapters C and F.

23 **TEXT.**

1 §206.22. Public Access to Board Meetings.

2 (a) Posted agenda items. A person may speak before the board on any matter on a posted agenda
3 by submitting a request, in a form and manner as prescribed by the department, prior to the matter being
4 taken up by the board. A person speaking before the board on an agenda item will be allowed an
5 opportunity to speak:

6 (1) prior to a vote by the board on the item; and

7 (2) for a maximum of three minutes, except as provided in subsections (d)(6), (e), and (f)
8 of this section.

9 (b) Open comment period.

10 (1) At the conclusion of the posted agenda of each regular business meeting, the board
11 shall allow an open comment period, not to exceed one hour, to receive public comment on any other
12 matter that is under the jurisdiction of the board.

13 (2) A person desiring to appear under this subsection shall complete a registration form,
14 as provided by the department, prior to the beginning of the open comment period.

15 (3) Except as provided in subsections (d)(6) and (e) of this section, each person shall be
16 allowed to speak for a maximum of three minutes for each presentation in the order in which the speaker
17 is registered.

18 (c) Disability accommodation. Persons with disabilities, who have special communication or
19 accommodation needs and who plan to attend a meeting, may contact the department in Austin to
20 request auxiliary aids or services. Requests shall be made at least two days before a meeting. The
21 department shall make every reasonable effort to accommodate these needs.

22 (d) Conduct and decorum. The board shall receive public input as authorized by this section,
23 subject to the following guidelines.

1 (1) Questioning of those making presentations shall be reserved to board members and
2 the department's administrative staff.

3 (2) Organizations, associations, or groups are encouraged to present their commonly held
4 views, and same or similar comments, through a representative member where possible.

5 (3) Presentations shall remain pertinent to the issue being discussed.

6 (4) A person who disrupts a meeting shall leave the meeting room and the premises if
7 ordered to do so by the chair.

8 (5) Time allotted to one speaker may not be reassigned to another speaker.

9 (6) The time allotted for presentations or comments under this section may be increased
10 or decreased by the chair, or in the chair's absence, the vice chair, as may be appropriate to assure
11 opportunity for the maximum number of persons to appear.

12 (e) Waiver. Subject to the approval of the chair, a requirement of this section may be waived in
13 the public interest if necessary for the performance of the responsibilities of the board or the department.

14 (f) Contested Cases. The parties to a contested case under review by the board shall be allowed
15 an opportunity to provide an oral presentation to the board, subject to the following limitations and
16 conditions.

17 (1) Each party shall be allowed a maximum of 15 minutes for their oral presentation.

18 (2) No party is allowed to provide a rebuttal or a closing statement.

19 (3) Any party that is intervening in support of another party shall share that party's time;
20 however, this provision is limited to intervenors of record from the State Office of Administrative Hearings'
21 proceeding.

22 (4) Time spent by a party responding to any board questions is not counted against their
23 time.

1 (5) The parties to a contested case under review by the board shall limit their oral
2 presentation and discussion to evidence in the State Office of Administrative Hearings' administrative
3 record.

4 (6) During an oral presentation, a party to the contested case before the board may orally
5 claim that a presenting party talked about evidence that is not contained in the State Office of
6 Administrative Hearings' administrative record; time spent discussing such claims is not counted against
7 the objecting party's time.

8 (7) A party must timely comply with the requirements of §215.59 of this title (relating to
9 Request for Oral Presentation) before it is authorized to provide an oral presentation to the board.

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

12 Issued at Austin, Texas, on February 8, 2021.

13 /s/ Tracey Beaver
14 Tracey Beaver, General Counsel