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ADOPTION OF
SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE
43 TAC §215.22 and §215.55
SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE
§§215.59 - 215.63

INTRODUCTION. The Texas Department of Motor Vehicles adopts amendments to 43 TAC §215.22 and §215.55, and adopts new 43 TAC §§215.59 - 215.63, concerning contested cases. The department adopts §§215.22 and 215.59 - 215.63 with changes to the proposed text as published in the August 21, 2020, issue of the *Texas Register* (45 TexReg 5870). The rules will be republished. The department adopts §215.55 without changes to the proposed text as published in the August 21, 2020, issue of the *Texas Register* (45 TexReg 5870).

REASONED JUSTIFICATION. The amendments to §215.22 and new §§215.59 - 215.63 are necessary to implement Occupations Code §2301.709(d) and the recommendations from the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature* regarding standards for when the board reviews a contested case before issuing a final order. The department also adopts amendments to §215.22 and §215.55 to conform to statute and existing rules. The department further adopts amendments to §215.22(b) in response to a petition for rulemaking regarding presentations to the board when the board reviews a contested case before issuing a final order.

On April 3, 2020, the department posted on its website an informal working draft of the rules for public comment. The department considered the informal comments when drafting the proposed rules to publish in the *Texas Register* for public comment. The department published the proposed rules in the *Texas Register* on August 21, 2020, and considered the comments that were timely submitted to the department by the September 21, 2020, deadline.

1 The department adopts amendments to §215.22(a) to be consistent with Government Code
2 §2001.061 regarding ex parte communications and Occupations Code Chapter 2301. In response to an
3 informal comment regarding §215.22(a), the department added the word "person," which is included in
4 §2001.061. The department also adopts amendments to §215.22(a) to expand the scope of prohibited ex
5 parte communications to be consistent with §2001.061. The department further adopts amendments to
6 §215.22(a) to correct grammatical errors.

7 The department adopts amendments to §215.22(b) to acknowledge the authority and limitations
8 under existing law for department staff to communicate regarding contested cases with board members,
9 the hearing officer, and a person delegated power from the board under Occupations Code §2301.154.

10 The department adopts amendments to §215.22(b) to implement Occupations Code
11 §2301.709(d)(1) regarding the role of division personnel in advising the board or a person delegated
12 power from the board under Occupations Code §2301.154. New §215.22(b) is further adopted in response
13 to a petition for rulemaking dated February 5, 2019, requesting the department to prohibit department
14 staff from providing any recommendations to the board on contested cases. However, when the
15 department is a party to the contested case, department staff are authorized to recommend a final
16 decision, just as any other party is authorized to recommend a final decision.

17 The department renumbered the former §215.22(b) to §215.22(c) and made a conforming
18 amendment to §215.22(c) because not all cases under Occupations Code Chapter 2301 have a hearing
19 officer.

20 The department adopts nonsubstantive changes to §215.22 at adoption to add the word
21 "department" to make it clear that it is the department staff who may advise the board, the hearing
22 officer, and a person delegated power from the board under Occupations Code §2301.154 regarding the

1 contested case and any procedural matters. The department also deleted commas after the word "Code"
2 in the citations to statutes.

3 The department adopts amendments to §215.55 to make the language consistent with §215.58
4 under which the board delegated final order authority in certain cases.

5 The department adopts new §§215.59 - 215.63 to implement Occupations Code §2301.709(d),
6 which requires the board to adopt rules that establish standards for reviewing a case under Occupations
7 Code Chapter 2301, Subchapter O regarding hearing procedures. Section 2301.709(d) requires the rules
8 to: 1) specify the role of the department's personnel in managing contested cases before the board or a
9 person delegated power from the board under Occupations Code §2301.154, including advising on
10 procedural matters; 2) specify appropriate conduct and discussion by the board regarding proposals for
11 decisions issued by administrative law judges; 3) specify clear expectations limiting arguments and
12 discussion on contested cases to evidence in the record of the contested case hearing held by the
13 administrative law judge; 4) address ex parte communications; and 5) distinguish between using industry
14 expertise and representing or advocating for an industry when the board is reviewing a contested case
15 under Occupations Code Chapter 2301, Subchapter O regarding hearing procedures. The adopted rules
16 provide fair, clear, and express guardrails that will help the parties, as well as the board, to comply with
17 the law regarding the board's review of a contested case.

18 The department also adopts new §§215.59 - 215.63 to implement the *Sunset Advisory*
19 *Commission Staff Report with Final Results, 2018 - 2019*, 86th Legislature, in which the Sunset Advisory
20 Commission emphasized that the board has an important, but limited role as the final decision maker on
21 all protest cases. A protest case is a contested case in which a franchised motor vehicle dealer protests
22 certain actions by another motor vehicle dealer or the manufacturer. The department is not a party to a
23 protest case. The Sunset Advisory Commission's report stated that: 1) The board should not re-litigate

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

17 The department further adopts new §§215.59 - 215.63 in response to the Sunset Advisory
18 Commission's January 2021 *Compliance Report: Implementation of 2019 Sunset Recommendations*
19 (compliance report) in which they stated that the proposed contested case rules, which include §§215.59
20 - 215.63, were not in compliance with the Sunset Advisory Commission's recommendations. The Sunset
21 Advisory Commission's compliance report states that "the proposed rules insufficiently address the
22 problems identified in the Sunset report and do not ensure current and future board members and
23 stakeholders appropriately limit discussions regarding contested cases." In addition, the Sunset Advisory

1 Commission held a public hearing on January 13, 2021, in which the Vice-Chair for the Sunset Advisory
2 Commission made the following statements and asked the department the following questions regarding
3 the proposed contested case rules: 1) "We worry a lot about anti-competitive behavior among our state
4 agencies that regulate various industries and DMV was one of those agencies that really had I would say
5 a tough Sunset process. Recently we've seen some rulemaking that seems consistent with past behavior
6 and not consistent with our future anti-competitive behavior. We're seeing some potential rule
7 propagation that, yes, I have several questions...our agencies need to be behaving and operating within
8 the parameters that we set them and not going off in random directions and if they do start on those
9 paths, I think it will probably be painful for them...;" 2) "Just to clarify, for Commission, will the proposed
10 rules allow new evidence such as presentation aids to be presented to the board for consideration even
11 if the evidence wasn't recorded, wasn't in the record from the SOAH proceedings." In response to this
12 question from the Vice-Chair for the Sunset Advisory Commission, the department stated that the
13 proposed rules specify that parties are not permitted to produce additional evidence outside the SOAH
14 administrative record. The Vice-Chair then stated that their interpretation was a little different; and 3)
15 "Will the proposed rules allow for an oral argument by each side and rebuttals similar to a trial structure?"

16 At the December 2020 board meeting, the board tabled the vote and adoption of amendments
17 to §215.60 and the other contested case rules in order to allow further discussion. After the December
18 2020 board meeting, the Sunset Advisory Commission issued its compliance report in which the
19 Commission stated that the proposed contested case rules were not in compliance with the Sunset
20 Advisory Commission's recommendations. The board chairman created the Contested Case Rule
21 Subcommittee to address the response from the Sunset Advisory Commission, as well as the comments
22 from the public at the December 2020 board meeting. As previously state, the department modified the
23 proposed rule language to bring the rules into compliance with the Sunset Advisory Commission's report.

1 The department also contacted other Texas state agencies to see whether other agencies
2 authorize the parties to a contested case to provide written materials to the person or people who will
3 issue a final order after the proposal for decision becomes final: 1) the Public Utility Commission does not
4 allow the parties to provide written materials to the Public Utility Commission under 16 TAC 22.262; 2)
5 the Comptroller of Public Accounts (Comptroller) only allows written materials if the Comptroller
6 determines that additional arguments from the parties will be helpful before making a final decision under
7 34 TAC 1.34(b), and the Comptroller's Office doesn't think they requested written materials since §1.34
8 became effective on 1/1/19; 3) the State Board for Educator Certification allows three pages of written
9 materials that are double-spaced as stated in their Board Operating Procedures; 4) the Texas Department
10 of Transportation does not prohibit a party from submitting written materials; however, they don't
11 encourage it, and their rules don't expressly authorize it; and 5) the Texas Medical Board allows the parties
12 to provide written materials with no page limit.

13 However, no other state agency hears contested cases like the protest cases that come before
14 the board. Also, some state agencies have additional authority that the board does not have, such as the
15 Public Utility Commission's authority and the Comptroller's authority to change a finding of fact that is
16 not supported by a preponderance of the evidence under Government Code §2003.049(g) and
17 §2003.101(e), respectively. Also, in 2011, the Legislature added Occupations Code §164.007(a-1) and
18 deleted the Texas Medical Board's authority under Government Code §2001.058(e). The Texas Medical
19 Board is prohibited from changing the administrative law judge's findings of fact or conclusions of law.
20 Further, the contested cases that other state agencies hear are different than the cases that the board
21 hears.

22 While it is beneficial to look at the rules and practices at other state agencies, it is more important
23 to look at the Sunset Advisory Commission's reports and the specific statutes that apply to the

1 department. The board has access to the SOAH administrative record, as well as the opportunity to hear
2 a 15-minute oral presentation from the parties that choose to provide one under §206.22(f), which is also
3 published in this issue of the *Texas Register*. The board does not need to receive additional written
4 materials to exercise its authority to issue a final order.

5 The department adopts §215.61 with a change at adoption. The department referenced the
6 board's authority under Occupations Code Chapter 2301 in response to comments that were timely
7 submitted to the department. The department also adopts nonsubstantive changes to §215.61 by
8 changing the term "oral argument" to "oral presentation" to avoid using trial terminology since the board
9 is not authorized to retry the case.

10 Section 215.61 establishes the boundaries on the board's authority regarding review of contested
11 cases. Section 215.61(a) complies with Occupations Code §2301.709(d)(3), which requires the board to
12 adopt rules that specify clear expectations limiting oral arguments and discussion to evidence in the
13 record of the contested case hearing held by the Administrative Law Judge (ALJ). Section 215.61(a)
14 reminds the parties to a contested case that they must limit their arguments and discussion to evidence
15 that is contained in the SOAH administrative record. Section 215.61(b) also states each party is responsible
16 for objecting when another party attempts to make arguments or engage in discussion regarding evidence
17 that is not contained in the SOAH administrative record. Timely objections to arguments or discussion
18 about evidence that is outside of the SOAH administrative record are necessary to allow board members
19 to appropriately and efficiently review and decide contested cases. Timely objections give our board the
20 opportunity to make a decision on the spot and to say on the record whether they did or didn't consider
21 the evidence, which could avoid an unnecessary motion for rehearing or petition for judicial review. The
22 board chairman has the authority to preside over board meetings and to make rulings on motions and
23 points of order under Transportation Code §1001.023(b)(1).

1 In response to informal comments on the informal working draft of these rules, the department
2 added language expressly authorizing a party to argue that the board should remand the case to SOAH.
3 The language in §215.61(a) does not authorize the parties to talk about evidence that is outside of the
4 SOAH administrative record; however, amended §215.63(b) authorizes the board members to ask
5 questions regarding a request to remand the case to SOAH, including a remand to SOAH for further
6 consideration of the evidence. Occupations Code §2301.709(d)(3) requires the board's rules to specify
7 clear expectations limiting arguments and discussion "to evidence in the record of the contested case
8 hearing held by the administrative law judge." Although Government Code §2001.058(e) and Occupations
9 Code Chapter 2301 do not expressly authorize the board to remand a contested case to SOAH, SOAH's
10 administrative rule (Title 1 TAC §155.153(b)(13)) contemplates remands, and SOAH decides how it will
11 respond to the remand order. To the extent that a party discovers additional evidence after the SOAH
12 proposal for decision becomes final, the party may have the authority on appeal to request the court to
13 take such additional evidence under Government Code §2001.175(c) and Occupations Code §2301.753.

14 Section 215.62 sets out the order of presentations to the board for review of a contested case.
15 The department made changes at adoption in response to a comment that was timely submitted to the
16 department regarding the option for parties who are not adversely affected to agree on the order of their
17 presentation. The department also made changes to be consistent with the terminology used in 43 TAC
18 §206.22, which is also published in this issue of the *Texas Register*. In addition, the department added a
19 cross-reference to the time limits under §206.22(f).

20 The department further adopts substantive changes to §215.62 at adoption by removing the
21 authority for each party to provide a rebuttal and closing statement. The relevant inquiry for determining
22 whether a state agency's notice satisfies the Administrative Procedure Act's notice requirement is
23 "whether the agency's notice fairly apprises affected parties of the pertinent issues to allow them to

1 comment and participate in the rulemaking process in a meaningful and informed manner." *Texas*
2 *Workers' Comp. Comm'n v. Patient Advocates*, 136 S.W.3d 643, 650 (Tex. 2004); see *State Bd. of Ins. v.*
3 *Deffebach*, 631 S.W.2d 794, 800–01 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

4 The adopted rule satisfies the Administrative Procedure Act's notice requirements if it "is a logical
5 outgrowth of the proposed rule" such that "the final rule does not materially alter the issues raised in the
6 proposed rule." *Patient Advocates*, 136 S.W.3d at 650. The adopted rule is a logical outgrowth of the
7 proposed rule, does not encompass new persons or subject areas, does not propose any additional
8 requirements on affected persons, and does not impose any additional costs to meet the requirement of
9 the rule. As stated above, the department modified the rule in response to the Sunset Advisory
10 Commission's report and hearing regarding the department's implementation of the Sunset Advisory
11 Commission's recommendations. The adopted §215.62 does not materially alter the relevant issue raised
12 in the proposed rule, which is whether a rebuttal or closing statement is allowed during an oral
13 presentation to the board.

14 Also, some commenters on the informal working draft of §215.61 (which later became §215.62)
15 requested that the party with the burden of proof be given the right to reserve up to five minutes of the
16 party's allotted time to make a rebuttal argument, and one commenter requested that each party be
17 given a bare minimum of 10 minutes for rebuttal. If the department chose to republish §215.62 for
18 comment instead of adopting with amendments, the commenters would likely repeat the comments they
19 previously made regarding the informal working draft of §215.61. The department's notice fairly apprised
20 the affected parties of the pertinent issues to allow them an opportunity to comment and participate in
21 the rulemaking process in a meaningful and informed manner.

22 The department also adopts nonsubstantive changes to §215.62 by: 1) changing the term "oral
23 argument" to "oral presentation" to avoid using trial terminology since the board is not authorized to

1 retry the case; and 2) amending §215.62(e) to list the specific subsection in §206.22 that is being
2 referenced.

3 Section 215.62 complies with Occupations Code Section 2301.709(d), which requires the board to
4 adopt rules that establish standards for reviewing a case under Occupations Code Chapter 2301,
5 Subchapter O, as well as Occupations Code Section 2301.709(d)(1), which requires the board to adopt
6 rules that specify the role of division personnel in managing contested cases before the board. Also, the
7 chairman of the board has the authority to preside over board meetings under Transportation Code
8 §1001.023(b)(1), including the authority to determine who has the floor to speak during a board meeting.

9 The department received informal comments on the informal working draft of the rule text. An
10 informal commenter requested the department to modify the language to say the party with the burden
11 of proof shall have the opportunity to present oral argument first; however, the department also received
12 comments stating the party that is adversely affected should have the opportunity to present oral
13 argument first. The department adopts §215.62, which says the party that is adversely affected has the
14 opportunity to make its oral presentation first. By having the adversely affected party present first, it helps
15 to focus the board's review on issues the board is authorized to address, and it recognizes the SOAH ALJ's
16 role in assessing the evidence and making a recommendation in the proposal for decision. Also, the Texas
17 Rules of Civil Procedure do not apply to the presentation before the board. In response to an informal
18 comment requesting a clarification that the board has the authority to decide the order if both parties
19 lose on an issue at SOAH, the department added the requested language. An informal comment on the
20 informal working draft of the rule text also requested an amendment that says only the party with the
21 burden of proof should have the authority to make a rebuttal presentation. The department declined to
22 make the requested change.

1 The department adopts §215.63 with changes at adoption. The department made changes in
2 response to comments that were timely submitted to the department regarding the proposal that was
3 published in the *Texas Register* on August 21, 2020. The department also rearranged the language about
4 questions being limited to evidence in the SOAH administrative record, and clarified the board's authority
5 to ask questions regarding a request to remand the case to SOAH, including a remand to SOAH for further
6 consideration of the evidence, as long as the evidence is contained in the SOAH administrative record as
7 required by §215.61 and Occupations Code §2301.709(d)(3). The department further removed the term
8 "arguments" from subsection (b) since the word was not necessary and the department is trying to avoid
9 trial terminology.

10 Section §215.63 complies with the requirement for the board to adopt rules under Occupations
11 Code Section 2301.709(d)(2) and (5) by addressing appropriate board conduct and discussion when
12 reviewing a contested case, as well as distinguishing between using industry expertise and representing
13 or advocating for an industry when reviewing a case under Occupations Code Chapter 2301, Subchapter
14 O. Section 215.63, as published in the *Texas Register* on August 21, 2020, was previously modified in
15 response to informal comments that were submitted regarding the department's informal working draft
16 of the rule text. The department modified the language to strike a balance between the requirements
17 under Occupations Code §2301.709(d)(2) and (5); the limitations under Government Code §2001.058(e);
18 the warning from the Sunset Advisory Commission that the board is not authorized to relitigate contested
19 cases, as well as their reminder that board structures are intended to provide expertise for effective
20 decision making, rather than to provide representation of a regulated industry (Sunset Advisory
21 Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature); and the case law regarding
22 contested cases. Board members are not advocates for a particular industry. Transportation Code
23 §1001.0221(b) requires the board to carry out its policy-making functions in a manner that protects the

1 interests of the public and industry, maintains a safe and sound motor vehicle industry, and increases the
2 economic prosperity of the state.

3 The adopted §215.63 is a logical outgrowth of the proposed rule, does not encompass new
4 persons or subject areas, does not propose any additional requirements on affected persons, and does
5 not impose any additional costs to meet the requirement of the rule. As previously stated, the department
6 rearranged the language, while complying with §215.61 and Occupations Code §2301.709(d)(3).

7 **SUMMARY OF COMMENTS.**

8 The department received seven written comments on the proposal during the comment period
9 that began on August 21, 2020, and closed on September 21, 2020. The department received written
10 comments from Wm. R. Crocker, Attorney at Law; Cardwell, Hart & Bennett, LLP; Barack Ferrazzano
11 Kirschbaum & Nagelberg LLP; Coffey & Alaniz, PLLC; the Texas Automobile Dealers Association (TADA);
12 Padfield & Stout, LLP; and Shackelford, Bowen, McKinley & Norton, LLP. The following summary does not
13 include written or verbal comments that the department received before the comment period opened on
14 August 21, 2020, or after the comment period closed on September 21, 2020. In addition, the department
15 adopted amendments in response to the Sunset Advisory Commission's implementation report and
16 hearing on January 13, 2021, which are not summarized below.

17 **General Comment.**

18 One commenter requested the department to adopt a new rule to clarify that the parties are
19 allowed to file briefs with the board, in addition to the timing and page limitations for briefs. The
20 commenter cited to Government Code §2001.062(a)(2), which allows an adversely affected party an
21 opportunity to file exceptions and present briefs to the officials who are to render the decision.

22 **Agency Response.**

1 The department disagrees with the comment and declines to adopt a new rule to expressly
2 authorize briefs to be filed with the board. As previously stated, §2001.062(a) does not require the board
3 to accept written briefs if the board sufficiently reviewed the SOAH administrative record.

4 The parties have ample opportunity to submit briefs to SOAH prior to the issuance of the final
5 proposal for decision. After the ALJ at SOAH issues the draft proposal for decision, the parties to the case
6 get an opportunity to respond to the ALJ to explain why they think something in the draft proposal for
7 decision should be changed under Government Code §2001.062 and 1 TAC 155.507. Examples of issues
8 that the parties can raise in their exceptions to the draft proposal for decision include the issues under
9 Government Code §2001.058(e), which are the same factors under which the board is authorized to
10 change a finding of fact or a conclusion of law in the final proposal for decision when issuing the final
11 order.

12 In addition, the parties have ample opportunity to provide an oral presentation to the board
13 under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation
14 to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register*. Board
15 members are authorized to ask the parties to answer questions during the board meeting, and the time
16 spent answering board questions is not counted against the party's presentation time. Further, the board
17 has access to the SOAH administrative record, so there is no need for the parties to provide it to the board.
18 Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature*,
19 the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested
20 cases.

21 **§215.22**

22 **Comment.**

1 One commenter stated it does not have any specific objection to the proposed amendments, and
2 they believe the amendments comply with the statutory mandate.

3 **Agency Response.**

4 The department appreciates the comment.

5 **§215.55**

6 **Comment.**

7 One commenter stated it does not have any objection or opinion on the proposed amendments.

8 **Agency Response.**

9 The department appreciates the comment.

10 **§215.59**

11 **Comment.**

12 Two commenters requested the department to modify the language to state how the department
13 will give notice to a party regarding the opportunity to provide an oral presentation to the board. The
14 commenters also requested the department to modify the language to state how a party must submit a
15 written request for oral argument.

16 **Agency Response.**

17 The department agrees with the comment. The department modified the language to state how
18 the department will give notice to a party regarding an opportunity to provide an oral presentation to the
19 board, as well as how a party must submit a written request for an oral presentation. The department
20 further clarified that the department will deliver the notice using the last known address that the parties
21 provided to the department.

22 **§215.60**

23 **Comment.**

1 A commenter requested the department to modify the definition of presentation aids to expressly
2 include briefs, and three commenters agreed with the comment.

3 **Agency Response.**

4 The department disagrees with the comment and declines to make the requested changes to the
5 rule, which the department amended at adoption to delete language regarding presentation aids. As
6 previously stated, §2001.062(a) does not require the board to accept written briefs if the board
7 sufficiently reviewed the SOAH administrative record.

8 The parties have ample opportunity to submit briefs to SOAH prior to the issuance of the final
9 proposal for decision. After the ALJ at SOAH issues the draft proposal for decision, the parties to the
10 contested case get an opportunity to respond to the ALJ to explain why they think something in the draft
11 proposal for decision should be changed under Government Code §2001.062 and 1 TAC 155.507.
12 Examples of issues that the parties can raise in their exceptions to the draft proposal for decision include
13 the issues under Government Code §2001.058(e), which are the same factors under which the board is
14 authorized to change a finding of fact or a conclusion of law in the final proposal for decision when issuing
15 the final order.

16 In addition, the parties have ample opportunity to provide an oral presentation to the board
17 under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation
18 to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register*. Board
19 members are authorized to ask the parties to answer questions during the board meeting, and the time
20 spent answering board questions is not counted against the party's presentation time. Further, the board
21 has access to the SOAH administrative record, so there is no need for the parties to provide it to the board.
22 Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature,*

1 the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested
2 cases.

3 **§215.60**

4 **Comment.**

5 A commenter requested the department to increase the page limit on presentation aids from a
6 total of six pages to a total of 35 pages if the board wants a page limit. The commenter also requested the
7 department to exclude from the page limit any proposed final order, prior agency decision, and
8 preliminary and concluding pages of a brief. The commenter further requested the department to add the
9 word "chart" to the definition of "presentation aid." The commenter argues that the proposed page limit
10 will have the effect of giving undue weight to the SOAH ALJ's proposal for decision and of violating the
11 adversely-affected party's right to due process. Three commenters agreed with the comment.

12 **Agency Response.**

13 The department disagrees with the comment and declines to make the requested changes to the
14 rule, which the department amended at adoption to delete language regarding presentation aids. As
15 previously stated, §2001.062(a) does not require the board to accept written briefs if the board
16 sufficiently reviewed the SOAH administrative record.

17 The parties have ample opportunity to submit prior agency decisions and briefs to SOAH prior to
18 the issuance of the final proposal for decision. After the ALJ at SOAH issues the draft proposal for decision,
19 the parties to the case get an opportunity to respond to the ALJ to explain why they think something in
20 the draft proposal for decision should be changed under Government Code §2001.062 and 1 TAC 155.507.
21 Examples of issues that the parties can raise in their exceptions to the draft proposal for decision include
22 the issues under Government Code §2001.058(e), which are the same factors under which the board is

1 authorized to change a finding of fact or a conclusion of law in the final proposal for decision when issuing
2 the final order.

3 In addition, the parties have ample opportunity to provide an oral presentation to the board
4 under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation
5 to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register*. Board
6 members are authorized to ask the parties to answer questions during the board meeting, and the time
7 spent answering board questions is not counted against the party's presentation time. Further, the board
8 has access to the SOAH administrative record, so there is no need for the parties to provide it to the board.
9 Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature*,
10 the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested
11 cases.

12 **§215.60**

13 **Comment.**

14 Two commenters stated that there should be no limit on the number of pages for presentation
15 aids. One of these comments stated that the rule should also allow for the submission of proposed orders
16 and proposed findings of fact and conclusions of law. One of these commenters requested the
17 department to modify the definition of "presentation aid" to specifically exclude the following so it is clear
18 that they can be provided to the board: a party's proposed order, a proposal for decision, and new findings
19 of fact or conclusions of law. One of the commenters stated that a limit on the board's access to
20 information may preclude the board from having the benefit of necessary information with which to make
21 an informed decision.

22 **Agency Response.**

1 The department disagrees with the comment and declines to make the requested changes to the
2 rule, which the department amended at adoption to delete language regarding presentation aids. The
3 parties have ample opportunity to submit a proposal for decision, findings of fact, and conclusions of law
4 to SOAH prior to the issuance of the final proposal for decision. After the ALJ at SOAH issues the draft
5 proposal for decision, the parties to the case get an opportunity to respond to the ALJ to explain why they
6 think something in the draft proposal for decision should be changed under Government Code §2001.062
7 and 1 TAC 155.507. Examples of issues that the parties can raise in their exceptions to the draft proposal
8 for decision include the issues under Government Code §2001.058(e), which are the same factors under
9 which the board is authorized to change a finding of fact or a conclusion of law in the final proposal for
10 decision when issuing the final order.

11 In addition, the parties have ample opportunity to provide an oral presentation to the board
12 under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation
13 to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register*. Board
14 members are authorized to ask the parties to answer questions during the board meeting, and the time
15 spent answering board questions is not counted against the party's presentation time. Further, the board
16 has access to the SOAH administrative record. Lastly, in the *Sunset Advisory Commission Staff Report with*
17 *Final Results, 2018 - 2019, 86th Legislature*, the Sunset Advisory Commission warned the board that the
18 board is not authorized to relitigate contested cases.

19 **§215.60**

20 **Comment.**

21 One commenter requested an amendment to the language to say that a party's filed briefs,
22 replies, exceptions, and response to exceptions must be given to board members and that these filed
23 documents are excluded from the definition of "presentation aid."

1 **Agency Response.**

2 The department disagrees with the comment and declines to make the requested changes to the
3 rule, which the department amended at adoption to delete language regarding presentation aids. As
4 previously stated, §2001.062(a) does not require the board to accept written briefs if the board
5 sufficiently reviewed the SOAH administrative record.

6 The parties have ample opportunity to submit briefs, replies, exceptions, and response to
7 exceptions to SOAH prior to the issuance of the final proposal for decision. After the ALJ at SOAH issues
8 the draft proposal for decision, the parties to the case get an opportunity to respond to the ALJ to explain
9 why they think something in the draft proposal for decision should be changed under Government Code
10 §2001.062 and 1 TAC 155.507. Examples of issues that the parties can raise in their exceptions to the draft
11 proposal for decision include the issues under Government Code §2001.058(e), which are the same
12 factors under which the board is authorized to change a finding of fact or a conclusion of law in the final
13 proposal for decision when issuing the final order.

14 In addition, the parties have ample opportunity to provide an oral presentation to the board
15 under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation
16 to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register*. Board
17 members are authorized to ask the parties to answer questions during the board meeting, and the time
18 spent answering board questions is not counted against the party's presentation time. Further, the board
19 has access to the SOAH administrative record, so there is no need for the parties to provide it to the board.
20 Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature*,
21 the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested
22 cases.

23 **§215.60**

1 **Comment.**

2 One commenter requested the department to take into account the different types of
3 presentation aids, such as easel charts, photographs, and PowerPoint slides. The commenter stated that
4 not all presentation aids fit within the narrow confines of the rule language. For example, an easel chart
5 would not comply with the size limit of 8.5 inches by 11 inches. Also, if the board determines that a
6 limitation is in the best interest of the parties, then a rule should be narrowly defined, allow for reasonable
7 limits, and be based on the type of presentation aid.

8 **Agency Response.**

9 The department disagrees with the comment and declines to make the requested changes to the
10 rule, which the department amended at adoption to delete language regarding presentation aids. The
11 parties have ample opportunity to submit evidence to SOAH prior to the issuance of the proposal for
12 decision.

13 In addition, the parties have ample opportunity to provide an oral presentation to the board
14 under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation
15 to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register*. Board
16 members are authorized to ask the parties to answer questions during the board meeting, and the time
17 spent answering board questions is not counted against the party's presentation time. Further, the board
18 has access to the SOAH administrative record. Lastly, in the *Sunset Advisory Commission Staff Report with*
19 *Final Results, 2018 - 2019, 86th Legislature*, the Sunset Advisory Commission warned the board that the
20 board is not authorized to relitigate contested cases.

21 **§215.60**

22 **Comment.**

1 A commenter requested the department to add language that says a party may submit
2 presentation aids to the board, regardless of whether the party requests oral argument. Three
3 commenters agreed with the comment.

4 **Agency Response.**

5 The department disagrees with the comment and declines to make the requested change to the
6 rule, which the department amended at adoption to delete language regarding presentation aids. As
7 previously stated, §2001.062(a) does not require the board to accept written briefs if the board
8 sufficiently reviewed the SOAH administrative record.

9 The parties have ample opportunity to submit written materials to SOAH prior to the issuance of
10 the final proposal for decision. After the ALJ at SOAH issues the draft proposal for decision, the parties to
11 the case get an opportunity to respond to the ALJ to explain why they think something in the draft
12 proposal for decision should be changed under Government Code §2001.062 and 1 TAC 155.507.
13 Examples of issues that the parties can raise in their exceptions to the draft proposal for decision include
14 the issues under Government Code §2001.058(e), which are the same factors under which the board is
15 authorized to change a finding of fact or a conclusion of law in the final proposal for decision when issuing
16 the final order.

17 Also, the board has access to the SOAH administrative record. Lastly, 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.

20 **§215.60**

21 **Comment.**

22 A commenter requested the department to modify the language to make it clear that the scope
23 of the board's authority to take action on a SOAH proposal for decision isn't restricted to the actions

1 authorized under Government Code §2001.058(e). The commenter stated the proposed rule could be
2 construed as a relinquishment of the board's powers under Occupations Code §2301.709(c) and
3 §2301.711. Three commenters agreed with the comment.

4 **Agency Response.**

5 The department agrees with the comment. The department modified the language to reference
6 the board's authority under Occupations Code Chapter 2301. However, the department reminds the
7 commenters of the court's opinion in *Hyundai Motor Am. v. New World Car Nissan, Inc.*, 581 S.W.3d 831
8 (Tex. App.-Austin 2019, no pet.) regarding the limits and requirements that apply to the board under
9 Government Code §2001.058(e). Also, §2001.058(e) is the more specific statute that tells the board how
10 they may change a finding of fact or conclusion of law made by the ALJ. Further, Occupations Code
11 §2301.709(d)(3) says the board's rules must specify clear expectations limiting arguments and discussion
12 to evidence in the SOAH record.

13 **§215.61**

14 **Comment.**

15 A commenter requested the department to modify the language to make it clear that the scope
16 of the board's authority to take action on a SOAH proposal for decision isn't restricted to the actions
17 authorized under Government Code §2001.058(e). The commenter stated the proposed rule could be
18 construed as a relinquishment of the board's powers under Occupations Code §2301.709(c) and
19 §2301.711. The commenter also stated that SOAH has no authority to refuse to comply with a referring
20 state agency's remand order. Three commenters agreed with the comment. A fourth commenter agreed
21 with the comment and added that the rule doesn't account for, clarify, or address a circumstance where
22 a party is arguing that the error under Government Code §2001.058(e) is that the SOAH ALJ did not admit
23 certain evidence presented.

1 **Agency Response.**

2 The department agrees with the comments in part. The department modified the language to
3 reference the board's authority under Occupations Code Chapter 2301. However, the department
4 reminds the commenters of the court's opinion in *Hyundai Motor Am. v. New World Car Nissan, Inc.*, 581
5 S.W.3d 831 (Tex. App.-Austin 2019, no pet.) regarding the limits and requirements that apply to the board
6 under Government Code §2001.058(e). Also, §2001.058(e) is the more specific statute that tells the board
7 how they may change a finding of fact or conclusion of law made by the ALJ. Further, Occupations Code
8 §2301.709(d)(3) says the board's rules must specify clear expectations limiting arguments and discussion
9 to evidence in the SOAH record.

10 The department agrees that SOAH's administrative rule (Title 1 TAC §155.153(b)(13))
11 contemplates remands. If the board determines that the SOAH ALJ did not admit certain evidence, the
12 board could remand the case to SOAH, depending on the facts and issues. If the SOAH ALJ then admits
13 the evidence, it may impact the ALJ's findings of fact or conclusions of law.

14 **§215.61**

15 **Comment.**

16 One commenter says the language in §215.61(b) is problematic. The rule says each party is
17 responsible for objecting when another party attempts to make arguments or engage in discussion
18 regarding evidence that is not in the SOAH administrative record. The rule text doesn't say what the
19 consequence is for a party's failure to object. Also, the rule doesn't spell out the specifics, such as when
20 the objection needs to be made or who will rule on the objections. Further, if a board member asks a
21 question about something that isn't in the record, the party is put in the precarious position of objecting
22 to a question from a board member who will vote for or against the party that objects. The burden should

1 be placed on the party who strays from the administrative record, rather than shifting the burden to the
2 other party to police them during oral argument.

3 **Agency Response.**

4 The department declines to amend §215.61 in response to the comment, and the department
5 won't provide legal advice regarding the impact of a failure to object. Timely objections to arguments or
6 discussion about evidence that is outside of the SOAH administrative record are necessary to allow board
7 members to appropriately and efficiently review and decide contested cases. Timely objections give our
8 board the opportunity to make a decision on the spot and to say on the record whether they did or didn't
9 consider the evidence, which could avoid an unnecessary motion for rehearing or petition for judicial
10 review. The board chairman has the authority to preside over board meetings and to make rulings on
11 motions and points of order under Transportation Code §1001.023(b)(1).

12 **§215.62**

13 **Comment.**

14 A commenter stated if two or more parties on the same side of a case can agree among
15 themselves on the order of presentation, there is no need for a rule that might contradict their proposed
16 order of presentation of their oral arguments. One commenter stated that they do not have an objection
17 to §215.62.

18 **Agency Response.**

19 The department agrees with the comment requesting changes, and the department appreciates
20 the comment regarding no objections to the language in §215.62. The department modified the language
21 in §215.59(c) and §215.62(c), in response to the comment, and limited the modified language to parties
22 who are not adversely affected. If the parties who are not adversely affected reach an agreement on the
23 order in which they want to provide an oral presentation, they must timely notify the department of the

1 agreement. The department needs to know about such agreements in advance so we can organize the
2 board meeting to help ensure it runs smoothly. If any parties are adversely affected, the chairman
3 determines the order in which such parties make an oral presentation under §215.62(b). In the event a
4 party is intervening in support of another party, it is probably helpful for such parties to consecutively
5 present any oral presentation.

6 **§215.63**

7 **Comment.**

8 A commenter requested the department to modify the language to make it clear that the scope
9 of the board's authority to take action on a SOAH proposal for decision isn't restricted to the actions
10 authorized under Government Code §2001.058(e). The commenter stated the proposed rule could be
11 construed as a relinquishment of the board's powers under Occupations Code §2301.709(c) and
12 §2301.711. Three commenters agreed with the comment.

13 **Agency Response.**

14 The department agrees with the comment. The department modified the language to reference
15 the board's authority under Occupations Code Chapter 2301. However, the department reminds the
16 commenters of the court's opinion in *Hyundai Motor Am. v. New World Car Nissan, Inc.*, 581 S.W.3d 831
17 (Tex. App.-Austin 2019, no pet.) regarding the limits and requirements that apply to the board under
18 Government Code §2001.058(e). Also, §2001.058(e) is the more specific statute that tells the board how
19 they may change a finding of fact or conclusion of law made by the ALJ. Further, Occupations Code
20 §2301.709(d)(3) says the board's rules must specify clear expectations limiting arguments and discussion
21 to evidence in the SOAH record.

22 **STATUTORY AUTHORITY.** The department adopts amendments and new sections under Occupations
23 Code §§2301.153(a)(8), which authorizes the board to adopt rules; Occupations Code §2301.155, which

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

8 **CROSS REFERENCE TO STATUTE.** Occupations Code §§2301.001, 2301.151, 2301.152, 2301.153(a)(1),
9 (a)(7), (a)(8), and Chapter 2301, Subchapter O; Government Code Chapter 2001, Subchapters C and F; and
10 Transportation Code §1001.023(b)(1).

11 **TEXT.**

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

13 **43 TAC §215.22 and §215.55**

14 §215.22. Prohibited Communications.

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

19 (b) Except as prohibited by Government Code §2001.061, department staff may advise the board,
20 the hearing officer, and a person delegated power from the board under Occupations Code §2301.154
21 regarding the contested case and any procedural matters. However, the department staff shall not
22 recommend a final decision to the board unless the department is a party to the contested case.

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

6
7 §215.55. Final Decision.

8 (a) Except as provided by §215.58 of this title (relating to Delegation of Final Order Authority), the
9 ~~The~~ board has final order authority in a contested case initiated by a complaint filed before January 1,
10 2014, under Occupations Code, §2301.204 or §§2301.601 - 2301.613.

11 (b) The hearings examiner has final order authority in a contested case filed on or after January 1,
12 2014, under Occupations Code, §2301.204 or §§2301.601 - 2301.613.

13 (c) Except as provided by subsections (a) and (b) of this section and §215.58 of this title, the board
14 has final order authority in a contested case filed under Occupations Code, Chapter 2301 or under
15 Transportation Code, Chapter 503.

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

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

20 **§§215.59 - §215.63**

21 §215.59. Request for Oral Presentation.

22 (a) At least 30 days prior to the date of a proposed board meeting during which the board may
23 review a contested case, department staff shall notify the parties regarding the opportunity to attend and

1 provide an oral presentation concerning a proposal for decision before the board. The department will
2 deliver notice in accordance with §215.30 of this title (relating to Filing of Documents), using the last
3 known address that the parties provided to the department.

4 (b) If a party seeks to provide an oral presentation at the board meeting, it must submit a written
5 request for an oral presentation to the department's contact listed in the notice provided under
6 subsection (a) of this section and copy all other parties in accordance with §215.49 of this title (relating to
7 Service of Pleadings, Petitions, Briefs, and Other Documents) at least 14 days prior to the date of the board
8 meeting at which the party's contested case will be considered.

9 (c) If there is more than one other party who was not adversely affected by the proposal for
10 decision, such parties may agree on the order of their presentations in lieu of the order prescribed under
11 §215.62(c) of this title (relating to Order of Presentations to the Board for Review of a Contested Case). If
12 the parties who were not adversely affected by the proposal for decision do not timely provide the
13 department and the other parties with notice under subsection (b) of this section regarding their agreed
14 order of presentation, their order of presentation will be determined under §215.62(c) of this title.

15 (d) If a party timely submits a written request for an oral presentation, that party may make an
16 oral presentation at the board meeting. If a party fails to timely submit a written request for an oral
17 presentation, that party shall not make an oral presentation at the board meeting.

18
19 §215.60. Written Materials and Evidence.

20 The parties are prohibited from providing written materials, including any photographs or evidence, to
21 the board. The department will provide the board with access to the SOAH administrative record.

22

23 §215.61. Limiting Oral Presentation and Discussion to Evidence in the Administrative Record.

1 (a) The parties to a contested case under review by the board shall limit their oral presentation
2 and discussion to evidence in the SOAH administrative record, and their oral presentation and discussion
3 shall be consistent with the scope of the board's authority to take action under Government Code
4 §2001.058(e) and Occupations Code, Chapter 2301. However, any party may argue that the board should
5 remand the case to SOAH.

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

8

9 §215.62. Order of Presentations to the Board for Review of a Contested Case.

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

11 (b) The party that is adversely affected has the opportunity to make its oral presentation first.

12 However, the board chairman is authorized to determine the order of each party's oral presentation in
13 the event of the following:

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

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

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

18 (c) The other party or parties who were not adversely affected then have an opportunity to make
19 their oral presentation. If there is more than one other party, each party will have an opportunity to
20 respond in alphabetical order based on the name of the party in the pleadings in the SOAH administrative
21 record, except as stated otherwise in §215.59(c) of this title (relating to Request for Oral Presentation).

22 (d) A party must timely comply with the requirements of §215.59 of this title before the party is
23 authorized to provide an oral presentation to the board.

1 (e) Each party is limited to the time allotted under §206.22(f) of this title (relating to Public Access
2 to Board Meetings).

3
4 §215.63. Board Conduct and Discussion When Reviewing a Contested Case.

5 (a) The board shall conduct its review of a contested case in compliance with Government Code
6 Chapter 2001 and Occupations Code, Chapter 2301, including the limitations on changing a finding of fact
7 or conclusion of law made by the administrative law judge at SOAH, and the prohibition on considering
8 evidence outside of the SOAH administrative record.

9 (b) Board members may question any party or the department on any matter that is relevant to
10 the proposal for decision; however, any questions shall be consistent with the scope of the board's
11 authority to take action under Government Code §2001.058(e) and Occupations Code, Chapter 2301; any
12 questions must be limited to evidence contained in the SOAH administrative record; the communication
13 must comply with §215.22 of this title (relating to Prohibited Communications). In addition, board
14 members are authorized to ask questions regarding a request to remand the case to SOAH, including a
15 remand to SOAH for further consideration of the evidence.

16 (c) Board members may use their industry expertise to help them understand the case and make
17 effective decisions, consistent with the scope of the board's authority to take action under Government
18 Code §2001.058(e) and Occupations Code, Chapter 2301. However, board members are not advocates for
19 a particular industry. Board members are public servants who take an oath to preserve, protect, and
20 defend the Constitution and laws of the United States and Texas.

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

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

1
2

/s/ Tracey Beaver
Tracey Beaver, General Counsel

DRAFT