The 2015 Amendments to the Administrative Procedures Act

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The 84th Texas Legislature enacted four bills that affect the Administrative Procedure Act ("APA"): S.B. 1267, H.B. 763, H.B. 2154, and H.B. 2299. This paper describes the problems that each bill was designed to address and examines the way the Legislature addressed them.

The most significant of the four bills is S.B. 1267, which made changes to the APA's provisions governing notices of contested case hearings and motions for rehearing. A separate paper by Mr. Journeay will discuss specific issues and concerns that have arisen with S.B. 1267 since it became effective.

S.B. 1267: The Texas Administrative Procedures Act Reform Bill of 2015

I. Introduction

In 2013, during the 83rd Regular Session of the Texas Legislature, Senator Craig Estes responded to calls from administrative lawyers to reform the APA's notice and rehearing provisions by filing S.B. 522.[1] After several revisions, the Senate passed S.B. 522, but the bill died on the General State Calendar in the House of Representatives.

In 2015, during the 84th Regular Session, Senators Estes and Kirk Watson re-filed S.B. 522 as S.B. 1267,[2] while State Representative Travis Clardy filed a nearly-identical companion bill as H.B. 1419.[3] S.B. 1267 passed both houses of the Legislature, was signed by Governor Abbott, and became effective on September 1, 2015.

II. Purposes of S.B. 1267

The legislative history of S.B. 1267 shows that the Legislature intended to achieve three broad goals: (1) requiring state agencies to give meaningful notice of the alleged conduct that triggers administrative proceedings; (2) creating a judicial remedy for a licensee whose license has been suspended by a state agency without prior notice in an emergency situation if the agency has unduly delayed giving the licensee the opportunity for a hearing; and (3) reforming the procedure for issuing final agency orders and filing motions for rehearing to better protect the right to seek judicial review from final agency orders.

[1] S.B. 522, 83d Leg., Reg. Sess. (Tex. 2013).
[2] *Compare id. with* S.B. 1267, 84th Leg., Reg. Sess. (Tex. 2015).
[3] H.B. 1419, 84th Leg., Reg. Sess. (Tex. 2015).

A. Meaningful Notice

The first area that S.B. 1267 addressed concerns the APA's notice provisions for contested cases found in §§ 2001.052 and 2001.054. Generally, the changes that S.B. 1267 made seek to give parties, particularly licensees, better notice of the alleged misconduct that triggers administrative proceedings against them and to enforce the separate plain meanings of those statutes, which had been judicially conflated.

1. Background

The Legislature enacted the APA to "provide minimum standards of uniform practice and procedure for state agencies".[4] In other words, its primary goal was to standardize, codify, and compel due process.[5] Whether administrative procedures and proceedings satisfy due process depends on the presence or absence of the rudiments of fair play.[6] The rudiments of fair play are notice and an opportunity to be heard.[7] The sufficiency of notice and the opportunity to be heard is measured by a flexible standard that balances three factors: (1) the private interest the governmental action affects, (2) the risk of erroneous deprivation of a constitutionally-protected interest[8] under the procedures used and the likely benefit of any additional procedures, and (3) the government's interest, including the fiscal and administrative burdens that additional procedural requirements would entail.[9] This flexible, sliding scale test requires only modest process when the governmental action may temporarily deprive a person of an interest with slight value, but stronger procedural protections for a more valuable interest, especially when the deprivation may be permanent.[10]

To be meaningful, a notice of hearing or a complaint against a person must (1) set forth the alleged misconduct with particularity and (2) be provided far enough in advance of the hearing so that the affected person will have a reasonable opportunity to prepare for the hearing.[11] These requirements seek

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[4] TEX. GOV'T CODE ANN. § 2001.001(1) (West 2008).

[5] *Compare* Tex. State Bd. of Med. Exam'rs v. Guice, 704 S.W.2d 113, 116 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (stating that a "purpose of the APA is to allow parties fair play in the conduct of the administrative hearing) *with* State v. Crank, 666 S.W.2d 91, 94 (Tex. 1984) (stating that "the ultimate test of due process in an administrative hearing is the presence or absence of the rudiments of fair play.").

[6] Crank, 666 S.W.2d at 94.

[7] Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Perry v. Del Rio, 67 S.W.3d 85, 92 (Tex. 2001); Univ. of Tex. Med. Sch. at Houston v. Than, 901 S.W.2d 926, 930 (Tex. 1995).

[8] Almost every agency action affects a constitutionally-protected interest of some kind. *See* J. Bruce Bennett, *The Rights of Licensed Professionals to Notice and Hearing in Agency Enforcement Actions*, 7 TEX. TECH. ADMIN. L.J. 205, 208–12 (2006).

[9] Mathews, 424 U.S. at 335.

[10] *See* Gilbert v. Homar, 520 U.S. 924, 932–33 (1997); Wall v. City of Brookfield, 406 F.3d 458, 460 (7th Cir. 2005).

[11] In re Gault, 387 U.S. 1, 33 (1967).

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