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AGENCY CHANGES TO AN ALJ'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

A review of the authority of state administrative agencies to change an administrative law judge's proposed findings of fact and conclusions of law and appellate decisions concerning such authority.

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INTRODUCTION[1]

"Every administrative decision is a purported application of the statutory grants of power to the facts as found." Jaffe, *Judicial Review of Administrative Action* at 555 (1965). Administrative law judges ("ALJs'") employed by the State Office of Administrative Hearings ("SOAH") act as the fact finders for state administrative agencies required by law to refer contested cases to SOAH and prepare proposals for decisions in accordance with § 2001.062 of the Texas Administrative Procedure Act ("APA"), Chapter 2001 of the Texas Government Code. The Legislature does not require all state agencies to send their contested cases to SOAH, but many agencies are required to do so. The APA does not contain such a requirement. The requirement to use SOAH will typically be found in the agency's enabling act or other statutes concerning the agency's powers. *See e.g.* Tex. Occ. Code § 2301.704(a).

Before SOAH was created, most agency heads "had virtually unlimited discretion to disregard any findings of a hearings examiner." McCown & Leo, *When Can An Agency Change The Findings or Conclusions of An Administrative Law Judge?,* 50 Baylor L. Rev. 65, 66 (1998). Since SOAH's creation, a recurring legal issue has been the power of the heads of the referring agency to review and change the proposed findings of fact and conclusions of law set forth in a SOAH ALJ's proposal for decision ("PFD") issued after an evidentiary hearing on the contested issues. The standard of review the referring agency is permitted to apply to the ALJ's findings of fact and conclusion of law, determines how much deference the agency must give to the ALJ's fact findings and legal conclusions. Stated differently, the applicable standard of review will determine how much, or how little, protection the ALJ's findings and conclusions will have when the referring agency reviews them. Typically, findings of fact ordinarily have a high degree of protection on review; conclusions of law do not. Among the most common standards agencies apply are *de novo*, usually applied to conclusions of law, and "clearly erroneous," "preponderance of the evidence," and "substantial evidence," usually applied to fact findings. A key component in the agency's review of fact findings is whether or not the agency is permitted to reevaluate and reweigh the evidence.

The power of most state agencies required to use SOAH to review an ALJ's findings of fact and conclusions of law is limited to the grounds identified in § 2001.058(e) of the APA.[2] However, the Legislature has given several major state

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[1] The views and comments expressed in this paper are strictly those of the author. The author does not speak for any organization of which he is a member, for any client his firm represents, or for the presenter of this paper. The author would like to thank Mr. Dudley McCalla and Mr. Paul Tough for their valuable comments, insights, and suggestions. However, any erroneous information in this paper is the sole responsibility of the author.

[2] It may be possible for a state agency required to use SOAH to bypass the ALJ's findings and conclusions of law if a majority of the agency heads who are to render the final decision in the

agencies additional powers of review, notably the Texas Commission on Environmental Quality ("TCEQ") and the Public Utility Commission of Texas ("PUC"). The Legislature has given the Texas Medical Board a more restricted power of review in disciplinary cases. Some state agencies, notably the Railroad Commission of Texas ("RRC"), is not required to refer contested cases to SOAH, and thus retains extensive review power over the proposed findings of fact and conclusions of law made by its ALJs and technical examiners.

This paper will first examine the review power of state agencies that use SOAH and are subject to § 2001.058(e) of the APA; then of several major state agencies that use SOAH, but are granted additional or lesser review powers; and finally, those like the RRC, which does not use SOAH and are not therefore subject to § 2001.058(e) of the APA when reviewing an ALJ's proposed findings of fact and conclusions of law.

I.
STATE AGENCIES SUBJECT TO § 2001.058(e) OF THE APA

Section 2001.058(e) of the APA provides that:

> "A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:
>
> (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;
>
> (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
>
> (3) that a technical error in a finding of fact should be changed.
>
> The agency shall state in writing the specific reason and legal basis for a change made under this subsection."

A. Changes based on legal grounds.

Subsections (1) and (2) of § 2001.058(e) recognize the referring agency's supremacy over SOAH ALJs in interpreting and applying applicable law, agency rules, written agency policies, and prior agency decisions. The referring agency's

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contested case actually "read the record themselves." See Tex. Gov. Code § 2001.062. This will likely not occur in most contested cases.

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