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# CASELAW UPDATE

Linda B. Secord

[lbsecord@aol.com](mailto:lbsecord@aol.com)

Karen Watkins

[Karen.watkins@oag.texas.gov](mailto:Karen.watkins@oag.texas.gov)

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***The authors are former and currently serving Assistant Attorneys General. This paper does not reflect the opinions of the Office of the Attorney General and should not be construed as such.***

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The opinions summarized below were decided by the Supreme Court of Texas and the intermediate Texas Courts of Appeals between September 1, 2022, and August 31, 2023. They have been chosen because they reflect principles of administrative law that have applicability beyond the individual case decided. For cases that are moving from the intermediate courts to the Supreme Court of Texas, information on their status is included in brackets.

## I. Administrative Record

- ***Tex. Dep't of Pub. Safety v. Kennedy*, No. 12-22-00285-CV, 2023 WL 2766094 (Tex. App.—Tyler Mar. 31, 2023, no pet.) (mem. op.)**

This case highlights the importance of complying with the rule that the party challenging an agency decision must ensure that the administrative record is admitted in evidence before the court performing judicial review.

Kennedy contested the administrative suspension of his driver's license before a SOAH ALJ, who issued an order sustaining the suspension.

Kennedy sought judicial review before the County Court at Law but did not offer in evidence the administrative record of the SOAH hearing. The court allowed the arresting DPS Officer to testify, including about her technical difficulties in appearing before the SOAH ALJ via Zoom. The court also viewed the video from the Officer's police car camera but did not rule on the admissibility of either the testimony or the video. The court issued an order reversing the SOAH ALJ's order sustaining the suspension.

The Department of Public Safety appealed; Kennedy did not participate in the appeal. The Tyler Court of Appeals reversed the County Court at Law's order and rendered judgment upholding the suspension. The court explained that courts review driver's license suspensions under the substantial evidence standard of review. APA § 2001.175 applies, and review is confined to the agency record. The County Court at Law erred in taking testimony and reviewing video footage; neither qualified under § 2001.175's provisions allowing reviewing courts to admit evidence concerning procedural irregularities not reflected in the record and to consider new material evidence there was good cause not to have presented to the agency. The failure to admit the SOAH record, required under

§ 2001.175, was fatal to Kennedy’s case. Because there was no record for the courts to review, Kennedy could not carry his burden and overcome the presumption that findings and decisions of administrative agencies are valid and supported by substantial evidence.

The court of appeals reversed and rendered, no petition for review was filed.

## **II. Harm**

***New World Car Nissan, Inc. v. Hyundai Motor Am.*, 658 S.W.3d 754 (Tex. App.—El Paso 2022, pet. filed) [Pending in the Texas Supreme Court as No. 23-0122; briefing at the petition for review stage completed August 25.]**

The El Paso Court of Appeals (acting as a transferee court) rejected all five of New World Car’s claims that a Motor Vehicle Board order prejudiced its substantial rights. The court affirmed the order.

Two issues are of interest beyond the specific facts of this case. As a preliminary matter, the appellees claimed that the court lacked jurisdiction because New World Car’s petition for judicial review was untimely filed. Appellees urged that the proper deadline should be calculated under the APA as it read before the 2015 amendments to the motion for rehearing process. Under their analysis, New World Car missed the deadline by one day. The 2015 amendments applied only to agency hearings “set” on or after their effective date of September 1, 2015. On March 19, 2015, the SOAH ALJ issued an order setting the hearing for September 14, 2015. Appellees urged that the March 19 date controlled. The court disagreed, relying on *Fisher v. PUC*, 549 S.W.3d 178, 182 (Tex. App.—Austin 2018, no pet.) for the principle that “is set” means the time prescribed for the hearing, not the date of the order prescribing that time. Ruling that the 2015 amendments applied, the court held that the petition for judicial review was timely filed.

In addition to the jurisdictional dispute, one merits issue is of interest. New World Car claimed that the Board’s final order was procedurally flawed because the Board violated APA § 2001.062 by prohibiting New World Car from filing briefing. This APA provision applies to situations in which the state agency officials who will render the decision have not heard

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