Good grief, I'm a trial lawyer. What am I supposed to do with an Administrative Appeal?

By Linda B. Secord

This article is designed to be a starter kit for general litigators who find themselves having to handle an administrative appeal for the first time. Make a file with the statute, the local rules, and the cases listed here. Take a deep breath. You got this.

"Administrative Appeal" is a colloquial term for suits for judicial review seeking reversal of decisions made by a state agency. The agency's enabling statute and the Administrative Procedure Act (APA), Texas Government Code chapter 2001, govern these cases. Enacted in 1975, the APA codifies pre-existing principles of the judiciary's role in reviewing decisions of the executive branch. Although these principles remain vibrant in cases falling outside the APA, this article focuses on challenges to state agency decisions covered by that statute.

The agency's enabling statute, in turn, addresses the actions and decisions a specific agency may take, and the processes it must follow. Always read both the agency's statute and the APA and consider how both can be harmonized in light of the applicable rules of statutory construction.

PART ONE: IN THE STATE AGENCY

1. If you're lucky, you will be hired early.

These cases start at the agency, which is the ultimate decision maker. Usually, the agency sends a contested matter to be heard by an Administrative Law Judge (ALJ) at the State Office of Administrative Hearings (SOAH) under the authority of Chapter 2003 of the Texas Government Code. Because this is an adjudicative hearing, a trial lawyer's skills are invaluable and the hearing serves as a litigant's primary opportunity to present evidence and testimony.. SOAH functions as a fact-finder, preparing a Proposal for Decision (PFD) that sets out the dispute, makes findings of fact and conclusions of law, and recommends an order for the agency to consider and adopt.

Usually, an agency will consider the PFD in an open meeting of the agency's board or commissioners. While no evidence is taken during this meeting, many agencies allow counsel a brief time to make legal argument based on the record made at SOAH. The agency will then make its decision, usually in the form of a written order. The extent to which an agency can alter the ALJ's findings and conclusions and issue a different order varies widely. Agencies whose decisions are highly technical, such as the Texas Commission on Environmental Quality and the Public Utility Commission of Texas, have specific statutes granting them broad discretion but must issue a written explanation of the reason and legal basis for their changes. Most other agencies fall under the narrower discretion authorized by APA section 2001.038(E), which allows changes only under limited circumstances.

Whether SOAH or the agency is the fact-finder, the *burden of proof* is "preponderance of the evidence" not "substantial evidence," which is the *standard of review* applied by the reviewing courts. Burden of proof and standard of review are two different things. Many practitioners conflate the two. Do not do that. Remember that in Texas, there are three levels of proof, the lowest being preponderance of the evidence, the highest being "beyond a reasonable doubt" (the well-known but hard to define burden of proof for criminal cases) and the intermediate being "by clear and convincing evidence," (a standard that is often seen in some mental-health and parent-child cases.) No initial fact-finding decision is made by less than the preponderance of the evidence, even though the fact-finder might be persuaded by a single piece of evidence that she considers so powerful as to outweigh all the others and, therefore, constitute the preponderance of the evidence.

2. If the order runs against you, file a motion for rehearing.

Once the agency decision is made, usually in the form of an order, an adversely affected party must file a motion for rehearing with the agency.

Motions for rehearing can be a trap for the unwary. APA sections 2001.142-47 set out an elaborate system in which the deadline for a motion is calculated from the date that counsel receives notice of the order. Because a timely motion for rehearing is a jurisdictional prerequisite to seeking judicial review, missing the deadline is fatal to your case. This draconian effect has led some reviewing courts to be willing to consider parties to have met the jurisdictional requirement if they have *something* timely on file that appears to be a bona fide attempt to seek rehearing.

But even though having something on file may meet the jurisdictional requirement, the contents—or lack of contents—of the motion for rehearing can defeat your case. Every error that you want to present in court must be in the motion and be articulated sufficiently.

READ THESE CASES

Hill v. Bd. of Trs. of the Ret. Sys. of Tex., 40 SW 3d 676 (Tex. App.—Austin 2001, no pet.) (holding that the timely filing of a motion for rehearing is jurisdictional, and the contents of the motion determine whether error has been preserved for judicial review).

***Texas Comm'n on Env't Quality v. Barua*, 632 SW3d 726 (Tex. App.—El Paso 2021, pet. denied)** (reiterating the principles of *Hill*, holding that a motion must identify the particular agency action and legal basis for claim that the action was error).

Unless the agency's enabling statute states a different time period, your suit for judicial review must be filed within 30 days of the agency denying the motion or its being overruled by operation of law, which APA section 2001.146(f) establishes as no later than the 100th day after the order being appealed is signed.

PART TWO: IN THE DISTRICT COURT

1. **Familiarize yourself with the Travis County Local Rules; they govern the process.**

With rare exceptions set by statute, Administrative Appeals are filed in Travis County District Court, where review is conducted based on the agency record without further evidence or discovery. The agency must prepare, certify, and file the administrative record upon which it based its decision. Section 2001.175(b) of the APA sets the deadline for the record as "within the time permitted for filing an answer or within additional time allowed by the court." No matter how diligent and fully staffed an agency is, filing the record by answer date is all but impossible. For many years, counsel for the agency sought additional time from the court by filing motions for extension. Ultimately, the Travis County District Judges addressed this in Local Rule 10.8, which requires that when a record has not been filed before the date of the hearing on the merits, counsel for the agency must have the record in the courtroom at the time of the hearing.

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