

**Consider Change in Board's Current Practice and Deliberate Proposals for Decision on  
Written Submissions Only as Authorized by Chapter 2001 of the Texas Government Code**

**Summary of Request:** Consider changing the Board's current practice of providing Respondents an opportunity to present oral argument to the Board regarding final proposals for decision.

**Background:**

Historically, the Board has provided Respondents the opportunity to present oral argument prior to the Board's deliberation and decision on a proposal for decision. This is particularly true when Staff has requested a modification to a proposal for decision in the final order. Although the Respondents are invited to submit all argument and briefing in advance of the Board meeting, there is a current trend to ignore Staff's request for written submission and instead opt to make their presentations orally.

Neither the Administrative Procedures Act Chapter 2001 nor the Nursing Practice Act requires the Board to provide Respondents an additional oral presentation. The Government Code requires a party, who may be adversely affected by an agency decision, be given an opportunity to file exceptions and present "briefs." *See* Tex. Gov. Code Ann § 2001.062 (a)(2). Additionally, if briefs or exceptions are filed, the other party shall be given an opportunity to file replies to the exceptions or briefs. *See id.* at §2001.062(b). The statute does not specifically require or contemplate inviting the licensee into the Board meeting to present orally. Nevertheless, Respondents have been invited to present oral argument because it seems fair and it provides Respondents one last opportunity to make their point to the Board.

The Board's current practice of inviting Respondents to present oral argument has led to a problematic trend whereby Respondents will utilize the oral forum to argue information and issues which were outside the record considered by the Administrative Law Judge (ALJ). Receiving additional factual information that was not urged during the ALJ proceeding is not necessarily unlawful or unprecedented, but it is problematic and could have the potential to lead to agency error in its decisions. The Board's discretion to consider additional information or evidence outside the record presented to the ALJ is very limited.

When an ALJ renders a proposal for decision to be considered by the Board, that decision is subject to modification only under specific circumstances. They include:

1. the ALJ did not properly apply or interpret applicable law, agency rules, or written policies provided to the ALJ during the hearing or prior administrative decisions;
2. a prior administrative decision on which the ALJ relied is incorrect or should be changed; and
3. a technical error in the finding of fact should be changed.

See Tex. Gov. Code Ann. §2001.058(e); and 22 Tex. Admin. Code §213.23(d). Additionally, although subject to considerable debate and controversy, the Board legally retains an authority to adopt the appropriate disciplinary sanction other than that recommended by the ALJ. *Chalifoux Jr. V. State Bd. Of Medical Examiners*, 2006 S.W.3d (03-05-00320-CV) (Tex.App. – Austin 2006); *Grotti v. State Bd. Of Medical Examiners*, 2005 LEXIS 8279 (Tex.App. –Austin 2005, no pet.).

Based on these limited reasons allowing modification to a proposal for decision, it is obvious that any argument or brief concerning the proposal for decision may be best vetted and presented in written argument and briefs. A decision upon whether to adopt the proposal for decision should not necessarily be based on the introduction of new evidence or new information orally presented. Any receipt of new evidence which influences the decision may properly require a remand to the ALJ for proper hearing and cross-examination.

It is General Counsel's opinion that the receipt of new evidence and information during open meeting of the Board is not necessarily a prudent practice. Receipt of testimony outside the confines of the contested case hearing before the ALJ is problematic and should be controlled.

Staff is recommending that the Board discuss their views on this matter and consider whether to approve changing the current practice of inviting Respondents to speak during the deliberation of the Board's agenda item and allowing only written information and argument be presented regarding proposals for decision. This option helps guard against potential agency error, while also maintaining a sense of fairness in Board decisions.

### **Pros and Cons:**

**Pros:** Written argument and briefing allows Respondents to present their legal arguments to the Board based on the record presented to the ALJ and prior to its deliberation and vote on a proposal for decision, while helping guard against potential agency error. The written submissions allow all parties to properly respond and reply as contemplated by the Administrative Procedure Act.

**Cons:** Respondents may consider the change as unfair and a denial of an opportunity to make a oral appeal to the Board should they be aggrieved by the recommendation of the ALJ or Staff. The Board may have questions concerning the proposal for decision not anticipated through the submissions of briefs.

### **Staff Recommendations:**

Board Action: Move to change Board's practice to allow only written Respondent testimony regarding proposals for decision to be presented at Board meetings.