

PUBLIC INPUT, SUNSET REVIEW TEXAS HISTORICAL COMMISSION

Overview. The state's sovereign immunity doctrine prevents courts from having subject matter jurisdiction over a suit against a state agency without a legislative waiver. The Legislature must by statute expressly authorize a citizen to challenge a state agency's decisions through judicial review.

In the absence of judicial review, the THC is the final authority in all decisions it makes. As such the agency has been free to render arbitrary and inappropriate decisions without consequence that serve its own best interests over those of the public for whom the commissioners were appointed to serve. And as such it has felt free as well to selectively ignore state rule making procedures.

Applicant Recourse. An applicant having a legitimate grievance with regard to the agency's final decision of a matter has no recourse to a higher authority, no First Amendment right to a redress of grievances.

With the clear understanding that Sunset does not get involved in individual complaints, grievances, or cases, a paper entitled "A Pattern of Behavior" is at Enclosure 1 to exemplify the agency's general attitude and conduct in its handling of an application to correct a historical marker. It documents: (1) a clear unwillingness to give any consideration to newly developed historical research that conflicts with its own earlier findings, (2) placing unprecedented demands on a County Historical Commission to provide evidence in support of its earlier decision, (3) a complete disregard for the rules of evidence, (4) resorting to the creation of ad hoc rules to block consideration of an application, (5) willfully violating established agency rules, (6) subverting a commission hearing, (7) withholding potential evidence, (8) falsifying application reviewers' names and (9) providing disingenuous testimony before a legislative committee.

Rule Making. The agency has at times selectively ignored and failed to comply with Government Code § 2001.004 regarding the adopting and indexing of rules, orders and decisions pursuant to Government Code § 2001.005 (a), thereby invalidating many of the "rules" and policies it promulgates to the public, and it adopts extemporaneous rules to suit its own interests. It further ignores the procedures for the petition for adopting rules as prescribed in Government Code § 2001.021.

As an example of the agency's disregard for rule making requirements and procedures, at Enclosure 2 is a paper entitled TEXAS HISTORICAL COMMISSION RULE MAKING which describes the manner in which the agency dealt with one citizen's petition to adopt rules prescribing the procedures for the submission of applications to correct errors on existing historical markers.

Recommendations:

- The Legislature to pass an amendment relating to the appeal of certain determinations by the THC regarding the content of existing historical markers:

Section 442.006, Government Code, is amended by adding Subsection (i) to read as follows:

(i) A determination by the commission relating to the accuracy of the text of a historical marker that has been fabricated and installed may be appealed. An appeal is a contested case under Chapter 2001. Notwithstanding Section 2001.171, a final decision in a contested case described by this subsection is subject to judicial review under Subchapter G, Chapter 2001.

The agency is strongly opposed to any such amendment as it will place a restraint on its total independence and absence of oversight. At Enclosure 3 is a list of potential arguments the agency will raise in opposing this amendment and the reasons why they lack merit in every case.

- The agency to be directed to comply with Government Code § 2001.004 (1), (2) and (3) regarding the adopting and indexing of rules, orders and decisions pursuant to Government Code § 2001.005 (a)
- The agency be directed to establish rules in accordance with Government Code § 2001.004 (1), (2) and (3) for the processing of applications to correct text on existing markers.

Fiscal Implications:

These recommendations would not have a net fiscal impact to the State. The prospect of an application resulting in a contested case will substantially minimize arbitrary and improper decisions by the agency and encourage the application of Alternative Dispute Resolution procedures already directed by Sec. 442.023, NEGOTIATED RULEMAKING AND ALTERNATIVE DISPUTE PROCEDURES.

Contact Information:

Stanley Bacon, Jr.

Public Input, Texas Historical Commission

The Problem

Contemporary historical research frequently results in the need to correct errors in the text on several of the 16,000 existing state historical markers. According to *OFFICIAL Texas Historical Marker Policies*, January 27, 2012 (not indexed in accordance with Sec. 2001.004):

“4. Marker disputes: In the event the placement or content of an Official Texas Historical Marker is contested, the THC, after consultation with interested parties, has the sole authority to make the final decision related to retention, replacement or removal.”

In cases where an applicant has a legitimate grievance in the decision process or its outcome, he or she currently has no recourse to a higher authority, no First Amendment right to a redress of grievances. Nor is the agency answerable to a higher authority in its decisions.

Clearly, the agency is obligated by statute to offer alternative dispute resolution, but it has declined to do so when the outcome would not likely to be in its favor.

Such an arrangement where there is no oversight of an agency's actions encourages abuse, i.e. the agency is free to make decisions in its own self-interest rather than that of the public which its commissioners were appointed to serve.

The Solution

The Legislature to pass an amendment already drafted by the Legislative Council relating to the appeal of certain determinations by the THC regarding the content of existing historical markers:

Section 442.006, Government Code, be amended by adding Subsection (i) to read as follows:

(i) A determination by the commission relating to the accuracy of the text of a historical marker that has been fabricated and installed may be appealed. An appeal is a contested case under Chapter 2001.

Notwithstanding Section 2001.171, a final decision in a contested case described by this subsection is subject to judicial review under Subchapter G, Chapter 2001.

Fiscal Implications

The legislation would have no net fiscal impact to the State. Data shows an average of three such applications per year for the previous seven years. All were approved without cost.

The prospect of an application resulting in a contested case will substantially minimize arbitrary and improper decisions by the agency and encourage the application of Alternative Dispute Resolution procedures already directed by Sec. 442.023, NEGOTIATED RULEMAKING AND ALTERNATIVE DISPUTE PROCEDURES.