

SUNSET ADVISORY COMMISSION
STAFF REPORT WITH COMMISSION DECISIONS

*State Office of
Administrative Hearings*

JANUARY 2015



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Cover Photo: The Texas State Capitol was completed in 1888. With the Goddess of Liberty atop the dome, the Texas State Capitol Building is 19 feet taller than the U.S. Capitol Building in Washington, D.C. The photo shows the north facade of the Capitol. The gardens in the foreground sit atop a 667,000 square foot underground structure, the Capitol Extension, which houses many legislators’ offices and committee rooms. Photo Credit: Janet Wood

**STATE OFFICE OF
ADMINISTRATIVE HEARINGS**

**SUNSET STAFF REPORT WITH COMMISSION DECISIONS
JANUARY 2015**

This document is intended to compile all recommendations and action taken by the Sunset Advisory Commission for an agency under Sunset review. The following explains how the document is expanded and reissued to include responses from agency staff and the public.

- *Sunset Staff Report, November 2014* – Sunset staff develops a separate report on each individual agency, or on a group of related agencies. Each report contains both statutory and management recommendations developed after the staff’s extensive evaluation of the agency.
 - *Sunset Staff Report with Hearing Material, December 2014* – Adds responses from agency staff and the public to Sunset staff recommendations, as well as new issues raised for consideration by the Sunset Commission at its public hearing.
 - *Sunset Staff Report with Decision Material, January 2015* – Adds additional responses, testimony, or new issues raised during and after the public hearing for consideration by the Sunset Commission at its decision meeting.
 - *Sunset Staff Report with Commission Decisions, January 2015* – Adds the decisions of the Sunset Commission on staff recommendations and new issues. Statutory changes adopted by the Commission are presented to the Legislature in the agency’s Sunset bill.
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SUMMARY

SUMMARY

In 1991, the Texas Legislature created the State Office of Administrative Hearings (SOAH) to conduct contested case hearings for state agencies based on concerns that in-house agency hearing staff were biased and unqualified. The Legislature's decision set Texas administrative law on a course for increased independence, impartiality, fairness, and efficiency.

The Sunset review analyzed SOAH's hearings and alternative dispute resolution processes and found the agency provides a needed and independent venue for contested matters, produces quality decisions that are rarely overturned, and does its work in a timely manner. In evaluating the efficiency of having a separate, independent state agency to conduct contested case hearings, the review found SOAH performs more work today with fewer resources than it did during its last Sunset review in 2002. When adjusted for inflation, SOAH's 2013 budget was almost \$1.7 million less than its 2002 budget of \$8.7 million. During this same time frame, SOAH's caseload increased from 21,548 cases in 2002 to 36,302 cases in 2013, which SOAH disposed of with 11 fewer employees than the agency employed in 2002.

*SOAH efficiently provides
a needed and independent
venue for contested matters.*

The review identified a need to further strengthen SOAH's independence, which has been constrained by varied approaches used to move hearings to SOAH over time, such as a growing list of statutorily required yet unnecessary divisional structures and SOAH's lack of control over scheduling its largest volume of cases — Texas Department of Public Safety administrative license revocation hearings. In addition, statute requires Sunset to conduct a special purpose review of SOAH's tax division whose functions the Legislature transferred from the Comptroller of Public Accounts in 2007. Unless specifically continued at SOAH, responsibility for conducting these tax hearings will revert back to the comptroller's office in 2015. Sunset staff determined tax hearings should continue at SOAH, but several safeguards initially put in place when the transfer occurred are now problematic. These provisions should be removed to ensure SOAH's independence, provide SOAH with exclusive authority to oversee and evaluate its tax judges and adjust experience requirements to increase the pool of qualified applicants beyond former comptroller employees.

While the review found SOAH handles its hearings functions well, Sunset staff identified areas for improvement to enhance SOAH's management of its diverse caseload and ensure operations run smoothly. Stabilizing SOAH's funding has been a long-term challenge. Through SOAH's last Sunset review, the Legislature created an upfront lump-sum payment method, rather than a recovery-based billing process for agencies who pay by contract for SOAH's hearing services, but SOAH and these agencies have largely not implemented this process. Further, SOAH struggles to estimate its workload accurately,

which jeopardizes its continuity of operations and leads to lapsed funding, and SOAH could benefit from enhanced management tools to monitor quality and timeliness of decisions.

Finally, the review found little basis for commonly heard complaints such as SOAH taking too long to hold hearings and make decisions, or that its administrative law judges lack expertise needed to handle certain cases, but did find room for improvement in providing informational materials to parties without legal representation. Other dissatisfactions with the contested case process voiced during the review are outside of SOAH's control, such as agency changes to SOAH's proposal for decisions, and the overall length of the process when factoring in the time spent at agencies before and after disposition of cases by SOAH.

The following material summarizes Sunset staff's recommendations on the State Office of Administrative Hearings.

Issues and Recommendations

Please note: Summaries of Sunset Commission decisions on each of the following staff recommendations are located at the end of the detailed discussion of each issue.

Issue 1

SOAH's Budget Planning and Billing Processes Do Not Effectively Target and Fund the Agency's Needs, Jeopardizing the Agency's Operations.

In fiscal year 2013, SOAH spent \$9.1 million — one-third from general revenue, one-third from highway funds, and one-third from interagency contracts. Unfortunately, SOAH has difficulty predicting work that will come from each agency, leading to inaccurate budget estimates and lapsed funds. Even though statute requires agencies that contract with SOAH for services to pay up-front, lump-sum payments annually, SOAH has not enforced this payment method. Instead, SOAH collects payments from most contract agencies two months after providing services. This lag in cash flow has led to at least one instance where SOAH struggled to meet payroll when payments were late. Also, the \$100 hourly rate SOAH charges most contract agencies is too low to cover its costs, while the amount of funding to conduct hearings for the Texas Commission on Environmental Quality is too high. Additionally, SOAH lacks formal budget controls necessary to ensure it maintains and reports accurate financial and performance data. Giving SOAH the tools to estimate and collect its actual costs, while simplifying SOAH's billing processes, would stabilize SOAH's funding and allow it to focus on hearing contested matters.

Key Recommendations

- Authorize SOAH to adjust its hourly rate to recover the full cost of services.
- Require agencies contracting for services with SOAH to send their caseload projections to SOAH and the Legislative Budget Board each biennium.
- Direct SOAH to require all agencies contracting for services to pay lump-sum amounts upfront and only require adjustments if actual costs are not within 10 percent of projections.

- Direct SOAH to evaluate, on a regular basis, the effectiveness of its caseload projections to predict actual caseload and report this information to the Legislative Budget Board.
- The Senate Finance and House Appropriations Committees should consider removing the requirement that TCEQ pay SOAH \$1 million, regardless of actual costs.

Issue 2

SOAH Lacks Organizational Flexibility and Certain Management Tools to Best Manage the Agency.

SOAH organizes its 57 administrative law judges into seven divisions by subject area, including three statutorily required divisions for tax, utility, and natural resource conservation cases. Although originally intended to ensure SOAH had adequate resources for those cases, eliminating requirements that SOAH maintain specific divisions will increase its flexibility to restructure staff to streamline operations and meet changing demands. In addition, SOAH needs additional tools and policies to bolster managers' training and oversight of judges, and ensure judges meet deadlines and performance targets. SOAH's performance evaluation process also needs improvement, including enhanced performance feedback for mid-level managers and field offices. These changes will allow SOAH's leadership to better explain the agency's impact to the Legislature, manage and track performance, and gather customer service information.

Key Recommendations

- Remove the statutory requirements for SOAH to maintain separate tax, natural resource conservation, and utility divisions.
- Direct SOAH to improve its performance evaluation process, improve and formalize certain management tools, track and analyze informal complaints, and improve its customer service survey.

Issue 3

Contested Tax Case Hearings Should Continue at SOAH, but With Greater Independence.

SOAH's tax division conducts hearings for taxpayers who contest actions taken by the Comptroller of Public Accounts when collecting and enforcing certain taxes, such as sales and use or franchise taxes. The Legislature transferred these hearings to SOAH in 2007, but required the Sunset Commission to evaluate SOAH's tax division and report its recommendations to the 84th Legislature. If the Legislature does not continue the tax division, it will be abolished on September 1, 2015 and contested tax case hearings will return to the purview of the comptroller's office.

SOAH should continue to conduct these tax hearings to ensure fair and impartial hearings, free of any perceived influence by the comptroller's office. Also, as the expert in administrative hearings, SOAH has become efficient at handling these tax hearings and employs highly qualified tax judges who produce good decisions that are rarely overturned. SOAH's independence can be improved by removing certain statutory provisions established during the transfer of responsibilities from the comptroller's office, such as the comptroller's authority to evaluate judge performance and control whether tax judges can work on non-tax cases. In addition, removing overly strict experience requirements for tax judges will expand the pool of qualified applicants beyond former comptroller employees.

Key Recommendations

- Continue tax hearings at SOAH and remove the separate Sunset date for the tax division.
- Remove outdated provisions that give the comptroller undue and unnecessary authority over tax cases and SOAH judges.
- Change the statutory experience requirements for administrative tax law judges.

Issue 4

The State's Approach to Processing Administrative License Revocation Hearings Leads to Delays and Lacks Efficiency.

Administrative license revocation (ALR) hearings for drivers who have allegedly driven while intoxicated accounted for 84 percent of SOAH's caseload in fiscal year 2013. Unlike any other hearings held at SOAH, the Texas Department of Public Safety (DPS) — the agency referring the cases — has the statutory responsibility to schedule initial hearing dates and continuances for ALR hearings with SOAH taking over any subsequent scheduling. This shared responsibility for docketing cases has led to communication breakdowns between the agencies, scheduling confusion, unnecessary surges in SOAH's workload, and delays.

Given DPS' unique scheduling role, SOAH relies on DPS' docketing system, which is unsupported software that artificially constrains SOAH's productivity. Allowing SOAH to handle all scheduling of ALR cases will increase its efficiency and allow SOAH to incorporate ALR hearings in its plan for an integrated case filing and case management system. SOAH conducts about 20 percent of ALR hearings by telephone, but the technology for teleconferencing in SOAH's field offices is often insufficient and unreliable. SOAH could gain efficiencies by centralizing its telephone hearings, and hearing participants will be better able to participate when SOAH makes much needed improvements to its teleconferencing equipment.

Key Recommendations

- Transfer docketing responsibilities for ALR hearings from DPS to SOAH.
- Direct SOAH to centralize or otherwise significantly improve its telephonic ALR hearings and take advantage of current technology for conference calls.

Issue 5

Statute Does Not Provide Clear Authority to Allow Referring Agencies to Informally Dispose of SOAH's Default Cases.

If a party fails to appear for a SOAH hearing and the party does not bear the burden of proof, the Administrative Procedure Act allows an administrative law judge to proceed in the party's absence. In these default cases, the judge may issue a formal proposal for decision or issue a dismissal order and return the case to the referring agency for informal disposition, which is more efficient for both SOAH and the referring agency.

While SOAH's procedural rules provide for a clear and efficient process to dismiss default cases, statute is unclear as to whether referring agencies may rely on this authority. While some referring agencies

have clearly defined authority — in statute or rule — to dispose of default cases, more than 30 agencies that refer contested case hearings to SOAH have not adopted rules to informally dispose of default cases. Providing SOAH judges with the clear option to issue a dismissal order, rather than writing a proposal for decision, will make SOAH's disposition of default cases less time consuming and also benefit agencies that refer cases to SOAH.

Key Recommendation

- Specifically authorize SOAH to remand default cases back to the referring agencies for informal disposition.

Issue 6

Parties Without Attorneys Need Access to Quality, Detailed Information About the SOAH Hearing Process.

Contested case hearings conducted at SOAH can be difficult to navigate. SOAH's hearings are governed not only by SOAH's procedural rules and the referring agency's statute and substantive rules, but by the Administrative Procedure Act, the Texas Rules of Evidence, and parts of the Texas Rules of Civil Procedure related to discovery may apply as well. While SOAH is not a traditional court, SOAH decisions and proposals for decision carry considerable weight and can result in significant outcomes like the revocation of a person's occupational license or the imposition of substantial back taxes.

Since parties to SOAH hearings are not entitled to have legal representation and the state is not required to provide an attorney, many parties to SOAH cases represent themselves *pro se*. Sunset staff surveyed parties involved in SOAH hearings, and found a high level of dissatisfaction among parties representing themselves who reported feeling unprepared and overwhelmed by SOAH's hearings process. Improving resources for *pro se* parties, including making them more understandable and accessible, could help these parties better prepare for their contested case hearing.

Key Recommendations

- Direct SOAH to develop and maintain a comprehensive, plain-language guide for *pro se* parties.
- SOAH should require notices of hearing to include information about and a link to the *pro se* guide.

Fiscal Implication Summary

The recommendations contained in this report could result in an overall savings of about \$500,000 annually to the General Revenue Fund and savings to the Texas Commission on Environmental Quality (TCEQ) of about \$500,000 annually, as discussed below in Issue 1. Other recommendations would help ensure the efficient and effective use of funds, but would not result in significant overall fiscal impact.

Issue 1 — The recommendation to authorize SOAH to adjust its hourly rate to recover the full cost of services could result in a reduction of SOAH's general revenue funding by about \$500,000 annually, if the Legislature so chooses, based on the average amount of general revenue funding used to subsidize contracts over the last two fiscal years. Most of this amount would be offset by an increase in costs for contract agencies from raising SOAH's hourly rate. Shifting costs from general revenue to interagency contracts could result in some savings, since those individual contract agencies may use federal or dedicated funds to pay increased costs, but the exact amount of savings could not be estimated.

Removing the requirement that TCEQ pay SOAH \$1 million, regardless of actual costs, could result in a savings to TCEQ of about \$500,000 annually if the Legislature chooses to bring these payments to SOAH more in line with actual costs. Directing SOAH to require all agencies contracting for services to pay lump-sum amounts and authorizing agencies to make payments annually or quarterly would lead to savings in administrative costs from efficiencies gained by eliminating monthly billing of individual agencies, though this amount could not be estimated.

Issue 4 — While recommendations to transfer docketing responsibilities for administrative license revocation hearings from the Texas Department of Public Safety to SOAH would eventually create additional work for SOAH's docketing staff, all or part of the funding for the three full-time equivalent employees (FTEs) that DPS currently uses for ALR docketing should be transferred to SOAH along with corresponding decreases and increases in the FTE caps. The actual transfer would be worked out between the agencies in a memorandum of understanding since the resources DPS will need to maintain moving forward in this new system are unclear.

State Office of Administrative Hearings

Fiscal Year	Savings to the General Revenue Fund	Cost to Contract Agencies	Savings to TCEQ Funds*	Change in FTEs From 2013
2016	\$500,000	\$500,000	\$500,000	0
2017	\$500,000	\$500,000	\$500,000	0
2018	\$500,000	\$500,000	\$500,000	0
2019	\$500,000	\$500,000	\$500,000	0
2020	\$500,000	\$500,000	\$500,000	0

* TCEQ pays for SOAH hearings from four general revenue dedicated accounts. In fiscal year 2013, about \$100,000 came from the Clean Air Account 0151, \$85,000 from Petroleum Storage Tank Account 0655, \$120,000 from Waste Management Account 0549, and \$174,000 from Water Resource Management Account 0153.

AGENCY AT A GLANCE

NOVEMBER 2014

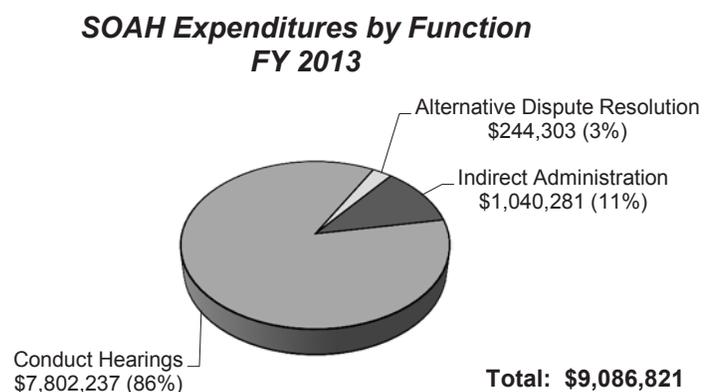
AGENCY AT A GLANCE

The State Office of Administrative Hearings (SOAH), established in 1991, serves as the State's independent centralized administrative hearing tribunal to conduct unbiased contested case hearings and alternative dispute resolution proceedings for state agencies. SOAH's mission is to conduct these proceedings in a fair, prompt, and efficient manner, and to provide fair, logical, and timely decisions. The agency carries out its mission through the following key activities:

- conducts administrative hearings for contested cases involving disputes between state agencies and private parties, and issues final decisions or proposals for decision used by agencies to make a final determination;
- performs alternative dispute resolution, such as mediation, to assist parties involved in contested cases to come to an agreement to avoid more costly and lengthy administrative hearings;
- oversees contested case hearings for the Texas Department of Public Safety (DPS) and issues final decisions concerning individuals who have their driver's license suspended for allegedly driving while intoxicated; and
- handles contested cases for the Comptroller of Public Accounts dealing with the collection, receipt, administration, and enforcement of state taxes and fees.

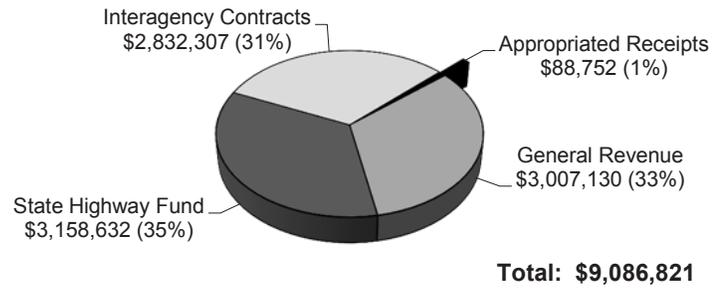
Key Facts

- **Chief Administrative Law Judge.** The chief administrative law judge (ALJ) serves as SOAH's executive director and is responsible for agency operations and policymaking, since the agency does not have a governing board. The Governor appoints the chief ALJ for two-year terms.¹
- **Funding.** SOAH spent about \$9.1 million in fiscal year 2013.² As shown in the chart, *SOAH Expenditures by Function*, the agency spends the majority of its funds on conducting hearings for state agencies.³ About one-third of SOAH's revenue comes from general revenue, one-third from the State Highway Fund for DPS driver's license revocation cases, and one-third from interagency contracts, as shown in the chart on the following page, *SOAH Sources of Revenue*.⁴
- **Field Offices.** In addition to SOAH's primary office in Austin, SOAH has seven field offices located in Corpus Christi, Dallas, El Paso, Fort Worth, Houston, Lubbock, and San Antonio. The primary mission of administrative law judges in field offices is to handle administrative license revocation cases.

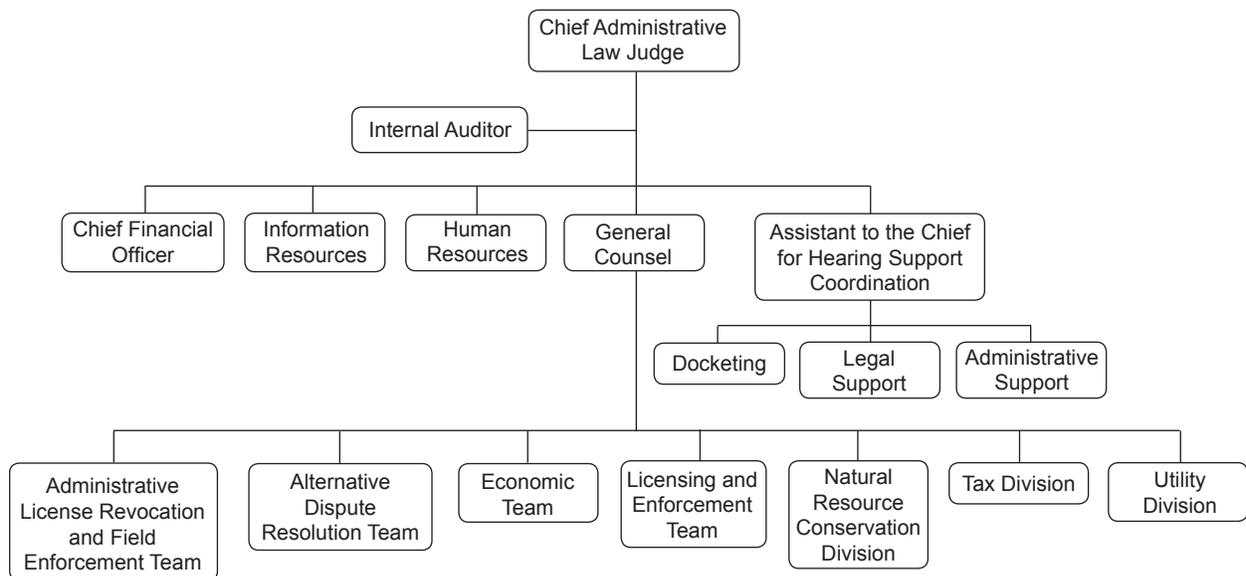


- Staffing.** In fiscal year 2013, SOAH employed 109 full-time and part-time staff for an average full-time equivalent of 107 employees.⁵ Most of SOAH's staff, about 57, are administrative law judges who preside over cases and issue proposals for decision. Nearly 70 percent of staff work in SOAH's Austin headquarters, with the remainder based in the seven field offices to conduct hearings at the local level. The *State Office of Administrative Hearings Organizational Chart* depicts the agency's structure. A comparison of the agency's workforce composition to the minority civilian labor force over the past three years is shown in Appendix A, *Equal Employment Opportunity Statistics*. Appendix B shows SOAH's use of historically underutilized businesses during the same period.

**SOAH Sources of Revenue
FY 2013**



**State Office of Administrative Hearings
Organizational Chart**



- Administrative hearings.** SOAH conducts hearings for 62 state agencies and local political subdivisions, though not all these entities will have contested cases every year. In fiscal year 2013, SOAH received 37,096 contested cases, and disposed of 36,302 cases for 52 state agencies, including driver license revocation cases for DPS, tax cases for the comptroller, and environmental regulation cases for the Texas Commission on Environmental Quality. SOAH initiates the hearing process after receiving a request from a state agency or local governmental entity. On average, SOAH completes a case 100 days after the case is referred by an agency, with hearings taking an average of two hours, though a hearing can last anywhere from a few minutes to as long as several weeks depending on the complexity of the case and any statutory requirements.⁶

- **Administrative license revocations.** State law provides for SOAH to hear administrative license revocation (ALR) cases involving an individual whose license was suspended due to allegedly driving while intoxicated.⁷ These cases accounted for about a third of SOAH's funding and 84 percent of its cases — in fiscal year 2013, SOAH received 31,009 ALR cases, disposing of 30,022 cases.
- **Alternative dispute resolution.** Statute requires SOAH to offer alternative dispute resolution proceedings, such as mediation or arbitration, to parties to avoid the time and costs associated with conducting a full hearing. In fiscal year 2013, SOAH received 110 mediation requests and resolved 60 cases through alternative dispute resolution.⁸
- **Tax hearings.** In 2007, the Legislature transferred responsibility to SOAH for cases involving disputes between the comptroller's office and taxpayers over the collection, receipt, administration and enforcement of taxes and fees.⁹ Statute requires SOAH to maintain a separate tax division and dictates special requirements for administrative law judges assigned to this division.¹⁰ In fiscal year 2013, SOAH received 487 tax cases from the comptroller's office, disposing of 339 cases.

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¹ Section 2003.022, Texas Government Code.

² State Office of Administrative Hearings (SOAH), *Legislative Appropriations Request for Fiscal Years 2016 and 2017* (Austin: State Office of Administrative Hearings, 2014), Section 2.A., p. 1.

³ Ibid.

⁴ Ibid., p. 2.

⁵ Ibid., Section 2.B., p. 7.

⁶ Ibid., Section 3.A., p. 1.

⁷ Section 524.033, Texas Transportation Code.

⁸ SOAH, *Legislative Appropriations Request*, Section 3.A., p. 6.

⁹ S.B. 242, 80th Texas Legislature, Regular Session, 2007.

¹⁰ Section 2003.101, Texas Government Code.

ISSUES

ISSUE 1

SOAH's Budget Planning and Billing Processes Do Not Effectively Target and Fund the Agency's Needs, Jeopardizing the Agency's Operations.

Background

In fiscal year 2013, the State Office of Administrative Hearings (SOAH) spent \$9.1 million from three main funding sources — general revenue, interagency contracts, and the State Highway Fund. Further details about each revenue source appear below. Appendix C, *Agencies by Funding Source*, lists the agencies SOAH serves according to the method of finance used for their hearings. To estimate its funding needs for the upcoming biennium, SOAH projects the number of hours it plans to work on cases — the caseload for each individual agency referring cases — based on historical hours worked and any other relevant information from referring agencies, though agencies do not always provide this information.

- **General revenue.** The Legislature appropriated \$3 million in general revenue to SOAH, in fiscal year 2013, to cover the costs of conducting contested case hearings for 34 state agencies. Although the total general revenue amount is based on SOAH's projected caseload for each agency — SOAH's bill pattern does not appropriate individual amounts for each of these agencies.
- **Contracts.** In fiscal year 2013, SOAH had interagency contracts with 20 agencies and some local governmental entities to pay for hearings using one of two different methods, as described in the textbox, *Funding Methods for SOAH's Contracts*. SOAH received \$2.8 million through these contracts in fiscal year 2013.

Funding Methods for SOAH's Contracts

Actual Costs

SOAH has contracts with the Texas Commission on Environmental Quality (TCEQ), the Comptroller of Public Accounts, and the Real Estate Commission to pay actual costs, through lump-sum payments, for the number of hours SOAH worked on their cases.¹ SOAH bills TCEQ quarterly and the other two entities annually. In fiscal year 2013, TCEQ paid \$483,000, the comptroller paid \$549,000, and the Real Estate Commission paid \$75,000 for administrative hearings.

Hourly Rate

Entities whose hearings are not covered by general revenue, and who do not negotiate with SOAH to pay actual costs, either pay monthly or a one-time amount based on SOAH's \$100 hourly rate for services.² In fiscal year 2013, 24 entities paid SOAH using this approach, including the Office of Attorney General, Department of Aging and Disability Services, and local entities such as groundwater conservation districts.

- **State highway funding.** In fiscal year 2013, the Legislature appropriated \$3.2 million to SOAH directly from the State Highway Fund to conduct administrative license revocation contested case hearings for the Texas Department of Public Safety. These hearings involve cases where drivers are contesting the suspension of their driver's license due to driving or boating while intoxicated charges. No billing process is involved since SOAH receives a direct appropriation.

Findings

SOAH does not accurately estimate its caseload and funding needs, leading to budget instability and inefficiencies.

SOAH's caseload projections are consistently off by 10 percent or more from SOAH's actual time spent on cases.

SOAH's caseload projections have not been very accurate at predicting actual costs. As a result of Sunset Commission recommendations in 2002, the 78th Legislature statutorily required SOAH to estimate its funding needs for its legislative appropriations request based on each referring agency's three-year average caseload and any other relevant information.³ Statute also specifies that if an agency or governmental entity does not have any hearings at SOAH in that three-year period, then SOAH can charge for services based on its hourly rate, which is currently \$100.⁴ SOAH has been developing caseload projections since 2003, but did not include them with its legislative appropriations requests until 2014, even though this is a statutory requirement.⁵

SOAH's caseload projections are consistently off by 10 percent or more from the agency's actual time spent on cases, and sometimes by much more. For example, SOAH overestimated its general revenue-funded caseload by roughly 20 percent in fiscal year 2013 and 2014, as shown in the table, *SOAH's Actual Versus Projected Caseload*. By comparison, if SOAH had simply based its projections on the three-year average of hours spent on these hearings, the caseload projections would have been more accurate.

SOAH's Actual Versus Projected Caseload, FYs 2013–2014*

Case Hours by Funding Source	2013			2014		
	Actual Hours	SOAH Projections	Percentage Difference	Actual Hours	SOAH Projections	Percentage Difference
General Revenue Hearings	20,453	25,190	+23%	20,687	24,291	+17%
Contract-Funded Hearings	26,675	24,557	-8%	27,407	43,443	+59%
Highway Fund Hearings	27,913	30,854	+11%	27,039	30,554	+13%

* This table shows the percentage difference between SOAH's projections and its actual caseload. Positive (+) numbers reflect overestimates and negative (-) numbers reflect underestimates.

Due to poor projections, SOAH usually lapses appropriations from all three of its funding sources. For example, in fiscal year 2013, SOAH lapsed \$292,000 general revenue, \$81,000 in state highway funding, and \$700,000 in contract funding. About \$500,000 of this contract amount was from SOAH's contract with the Texas Commission on Environmental Quality, which is set by the General Appropriations Act and does not reflect actual costs, as discussed below. Lapsing money is inefficient for the State since it ties up money that could be used for other purposes.

However, SOAH's job of estimating caseload is not an easy one. SOAH has difficulty making projections because the number of cases referred by individual agencies can vary drastically from year to year. For example, while SOAH's work hours for contract-funded hearings only increased by about 2 percent between fiscal years 2012 and 2014, the hours for attorney general's hearings decreased by nearly 70 percent, from 1,817 hours to 572 hours. To mitigate the effect of these fluctuations, SOAH requests agency feedback every biennium about any recent changes that might significantly affect caseload, such as legislative changes, but does not consistently receive responses. Only 35 of 52 agencies responded timely to SOAH's request for information in fiscal year 2014.

SOAH's complicated contract billing process is ineffective and puts the agency at risk of not properly funding its operations.

- **Statutory requirements not fully implemented.** SOAH and referring agencies have not implemented statutory remedies enacted to improve SOAH's inefficient billing process. In response to a 2002 Sunset Commission recommendation to help improve SOAH's cash flow and cost estimates, the Legislature statutorily required agencies using hourly contracts to pay for their SOAH hearings with a lump-sum payment.⁶ The reasoning was that lump-sum payments would allow SOAH to pool contract funding like it does with general revenue funding to increase its budget certainty. SOAH has not implemented this requirement, claiming agencies do not like lump-sum payments because these payments tie up more money than paying monthly and cause more accounting adjustments when unpredictable caseload fluctuations occur.

However, both SOAH and the Texas Facilities Commission have used lump-sum payments for years, without any major problems. Currently, SOAH collects lump-sum payments from three agencies and the Facilities Commission requires upfront, lump-sum payments from certain agencies to pay for the services it provides, like building maintenance. Furthermore, both SOAH and the Facilities Commission allow these agencies to pay fixed amounts quarterly, rather than all at once, to allay concerns of tying up too much money for too long. These lump-sum funding arrangements have proven to be beneficial for both the agencies making payments because these agencies maintain control of funding, and for SOAH and the Facilities Commission because billing is easier than monthly payments and they have greater budget certainty.

- **Delayed payments.** SOAH's current billing process is too complicated and very data-entry intensive. Most of SOAH's contracts involve billing agencies monthly, which aligns payments with actual costs but strains SOAH's cash flow and complicates accounting. Since SOAH's issuance of an invoice typically takes a month and the contract agencies have another month to pay, SOAH usually receives payment for contracted services two months after services have been rendered. As a result of late payments from certain contract agencies, SOAH almost did not meet its September

Most agencies paying SOAH by contract do not make lump-sum payments, as required by statute.

SOAH almost did not meet its September 2014 payroll because some referring agencies made late contract payments.

1, 2014 payroll. Fortunately, SOAH was able to use other funds without having to request emergency funding, but this might not be the case in the future.

In fiscal year 2014, SOAH had to make up for a \$700,000 shortfall in contract funds with general revenue.

- **Low hourly rate.** SOAH's \$100 hourly rate is not high enough to recover the full cost of SOAH's services, and SOAH did not request an increase from 2006 to 2013. To account for this shortfall, the agency used about \$700,000 in general revenue to subsidize the costs of hourly-rate-funded hearings in fiscal year 2014, and \$337,574 in fiscal year 2013. In fiscal year 2014, SOAH requested an hourly rate of \$128 in its 2016–2017 legislative appropriations request, an amount that is in line with the \$125 hourly rate the State Auditor's Office recommended in a 2012 report.⁷
- **Appearance of adverse incentives.** SOAH's current billing process for interagency contracts increases the appearance that SOAH may favor agencies based on their ability to pay, and that agencies could attempt to unduly influence judges' decisions. Since most agencies make contract payments after SOAH renders services, these agencies could potentially delay or withhold payments if they do not agree with judges' decisions. Additionally, smaller agencies are more sensitive to funding uncertainty, and may not choose to refer cases to SOAH because those agencies may not have enough funds set aside to pay for hearings.
- **No silver bullet.** As part of its 2016–2017 legislative appropriations request, SOAH requested that the Legislature convert all its contract funding to general revenue at a cost of about \$3.4 million. General revenue funding typically provides more stability because SOAH does not have to allocate it to individual agencies but uses it to cover hearings regardless of caseload. However, some state agencies and local governmental entities will always need to pay for their SOAH hearings through a contract rather than general revenue. For instance, some state agencies do not receive appropriations, so funding their hearings through general revenue would not be appropriate. This includes self-directed, semi-independent agencies such as the Texas Board of Professional Engineers and pension systems such as the Texas Municipal Retirement System. In fiscal year 2013, nine agencies and government entities, who must pay by contract, paid about \$100,000 combined, as shown in the Appendix D, *SOAH Hearings Requiring Interagency Contracts*.

SOAH's current contract funding structure increases the risk that agencies could withhold funds to influence SOAH judges' decisions.

SOAH lacks formalized budget controls needed to address vulnerabilities in its budgeting process.

Two recent audits highlighted shortcomings in SOAH's budget process. During a 2012 audit, the State Auditor's Office found SOAH was not basing its budget on actual costs or using its budget methodology consistently, which made reconciling budget planning, accounting, and reporting difficult. For example, SOAH was basing its budget proposals on estimates of historical costs for general revenue and state highway funding rather than actual historical costs, which resulted in the agency budgeting \$193,000 more in general revenue

and about \$750,000 less in state highway funding than it needed in fiscal year 2011.⁸ The State Auditor's Office also found that SOAH lacked sufficient budget controls, such as formal reviews of budget spreadsheets.⁹

Budget control issues were also highlighted in a 2014 internal audit, including field offices not forwarding checks to the central office by certain deadlines and SOAH not accurately recording information in its internal accounting system for some funds put in escrow to pay for the costs of contract claims hearings.¹⁰ Both the State Auditor's Office and the internal auditor recommended that SOAH develop policies and procedures to address these problems. Although SOAH has addressed many of the specific problems noted in these audits, the agency still lacks written policies and procedures for its budget control processes.

The cost of SOAH's TCEQ contract does not reflect the actual hours SOAH works on these cases.

The General Appropriations Act requires TCEQ to provide SOAH with a \$1 million lump-sum payment each year regardless of actual historical costs. Originally intended to ensure SOAH has enough funds to handle these cases, this requirement actually causes funding uncertainty because SOAH has to routinely refund substantial amounts to TCEQ at the end of the fiscal year when costs are significantly less than the contract amount. For example, SOAH refunded \$517,000 in fiscal year 2013 and almost \$468,000 in 2014.

SOAH's contract with TCEQ is not based on actual costs, which has led to substantial refunds in recent years.

All SOAH reporting requirements continue to be useful, including those detailing financial information.

Many of SOAH's reporting requirements provide crucial performance and budget information. The Sunset Act establishes a process for the Sunset Commission to consider if reporting requirements of agencies under review need to be continued or abolished. The Sunset Commission has interpreted these provisions as applying to reports that are specific to the agency and not general reporting requirements that extend well beyond the scope of the agency under review. Reporting requirements with deadlines or expiration dates are not included, nor are routine notifications or notices, posting requirements, or federally mandated reports. Reports required by rider in the General Appropriations Act are also omitted under the presumption that the appropriations committees have vetted these requirements each biennium. Appendix F lists SOAH's reporting requirements, all of which Sunset staff found useful and should be continued.

Recommendations

Change in Statute

1.1 Authorize SOAH to adjust its hourly rate to recover the full cost of services.

This recommendation would give SOAH clear authority to set its hourly rate to recover costs. Rate adjustments would be effective at the start of the next biennium and would last for a minimum of two

years. SOAH would not have an incentive to overcharge agencies because the Legislature would retain oversight of SOAH's funding through the appropriations process. As currently provided in statute, SOAH would base its hourly rate on historical caseload and other relevant factors, including referring agency feedback. Before making any changes to its hourly rate, SOAH should coordinate with the Legislative Budget Board to ensure financial impacts are considered in the budget development process. Giving SOAH authority to adjust its hourly rate to recover actual costs would end the practice of the agency using general revenue to subsidize the costs of its contract-funded hearings.

1.2 Require agencies contracting for services with SOAH to send their caseload projections to SOAH and the Legislative Budget Board each biennium.

This recommendation would statutorily require agencies contracting with SOAH to submit information about their anticipated caseload to SOAH and the Legislative Budget Board each biennium, in time for SOAH to use this information to develop its legislative appropriations requests. This reporting would ensure SOAH has the information necessary to calculate more accurate projections.

1.3 Authorize agencies to make up-front, lump-sum payments to SOAH annually or quarterly and only require adjustments if actual costs are not within 10 percent of projections.

This recommendation would allow agencies contracting for services to make fixed annual or quarterly payments to SOAH with the understanding that these payments would occur at the beginning of the payment period before SOAH renders services. Small agencies, especially, would benefit from the option of spreading out payments. Also, SOAH would report any agencies that do not make timely payments to the Legislative Budget Board.

This recommendation would allow for a 10 percent variance between SOAH's actual costs and projected costs for each individual agency. If actual costs were no more than 10 percent below or above projected costs, SOAH could keep any excess funds and would not charge extra to cover shortfalls. To ensure adequate funding, SOAH would track and forecast costs after every quarter, and would make adjustments to quarterly payments — if an agency has chosen that option — when actual costs were going to be off by more than 10 percent at year's end. Otherwise, agencies making quarterly payments would pay equal installments, giving SOAH greater funding stability.

Under this recommendation, SOAH would not need to collect monthly payments from contract agencies, reducing the administrative burden from billing after rendering services. Ultimately, this recommendation would allow SOAH to pool its contract funds, similar to the way it handles general revenue funding to ensure adequate cash-flow throughout the year.

Management Action

1.4 Direct SOAH to evaluate, on a regular basis, the effectiveness of its caseload projections to predict actual caseload and report this information to the Legislative Budget Board.

This recommendation would direct SOAH to improve its efforts to better estimate its biennial caseload projections. While developing caseload projections for an upcoming biennium, SOAH should evaluate the accuracy of its previous projections by comparing them to its actual caseload. SOAH should also consider other options to improve projections, such as evaluating projections against actual costs on a monthly or quarterly basis, and using a weighted three-year average that places greater weight on the most recent past year. Also, since referring agencies would provide caseload projections feedback to

the Legislative Budget Board under Recommendation 1.2, they would be less likely to underestimate caseload to artificially hold down costs. Since SOAH has already submitted its legislative appropriations request for the upcoming biennium, SOAH should perform this analysis and provide any recommended adjustments to its budget to the Legislature by April 1, 2015.

1.5 Direct SOAH to require all agencies contracting for services to pay lump-sum amounts upfront.

Under this recommendation, SOAH would be directed to implement the current statutory provision requiring agencies contracting for services to pay lump-sum amounts. As currently authorized in statute, SOAH will continue to bill agencies or local governmental entities that have not referred cases to SOAH in the last three years for actual costs based on SOAH's hourly rate. However, SOAH should require in its contracts that these agencies with no referrals in the last three years pay half of the estimated costs of services up-front. SOAH should implement all the changes in this recommendation no later than September 1, 2015.

1.6 Direct SOAH to evaluate and improve its budget control processes and policies.

Under this recommendation, SOAH should evaluate and improve its current budget controls and identify areas where additional controls are needed. SOAH should also formalize all its budget control processes by developing and adopting written policies and procedures that the agency would use to train its budgeting and financial staff. SOAH should implement these processes and policies by August 31, 2015.

Change in Appropriations

1.7 The Senate Finance and House Appropriations Committees should consider removing the requirement that TCEQ pay SOAH \$1 million, regardless of actual costs.

This recommendation would express the will of the Sunset Commission that the Senate Finance and House Appropriations Committees consider removing the requirement in SOAH's appropriations bill pattern that requires TCEQ to pay \$1 million for contested case hearings, regardless of actual caseload. Instead, TCEQ's lump-sum payments would be based on average costs over the last three years, like most other agencies paying SOAH by contract.

Fiscal Implication

Under Recommendation 1.1, SOAH would adjust its hourly rate to recover contract costs and no longer use general revenue to subsidize the costs of its contract-funded hearings. This increase in the hourly rate could result in a reduction of SOAH's general revenue funding by about \$500,000 annually, if the Legislature so chooses, based on the average amount used to subsidize contracts over the last two fiscal years. Most of this amount would be offset by an increase in costs for contract agencies from raising SOAH's hourly rate. However, shifting costs from general revenue to interagency contracts could result in some savings, since those individual contract agencies may be able to use federal or dedicated funds to pay increased costs, but the exact amount of savings could not be estimated. Recommendations 1.3 and 1.5 could also lead to savings in administrative costs from efficiencies gained by implementing lump-sum payments and eliminating monthly billing of individual agencies, though this amount could not be estimated. Recommendation 1.7 could result in a savings to TCEQ of about \$500,000 annually if the Legislature chooses to bring its payments to SOAH more in line with its actual costs.

State Office of Administrative Hearings

Fiscal Year	Savings to the General Revenue Fund	Cost to Contract Agencies	Savings to TCEQ Funds*	Change in FTEs From 2013
2016	\$500,000	\$500,000	\$500,000	0
2017	\$500,000	\$500,000	\$500,000	0
2018	\$500,000	\$500,000	\$500,000	0
2019	\$500,000	\$500,000	\$500,000	0
2020	\$500,000	\$500,000	\$500,000	0

* TCEQ pays for SOAH hearings from four general revenue-dedicated accounts. In fiscal year 2013, about \$100,000 came from the Clean Air Account 0151, \$85,000 from Petroleum Storage Tank Account 0655, \$120,000 from Waste Management Account 0549, and \$174,000 from Water Resource Management Account 0153.

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¹ Riders 2 and 7(b), pages VIII-2 and VIII-3, Article VIII (S.B. 1), Acts of the 83rd Legislature, Regular Session, 2013 (the General Appropriations Act); Section 1105.009, Texas Occupations Code.

² Riders 7(a), page VIII-3, Article VIII (S.B. 1), Acts of the 83rd Legislature, Regular Session, 2013 (the General Appropriations Act).

³ Section 2003.024(a-1), Texas Government Code.

⁴ Section 2003.024(a-2), Texas Government Code.

⁵ Section 2003.024(c), Texas Government Code.

⁶ Section 2003.024, Texas Government Code.

⁷ State Auditor’s Office, *Selected Financial Controls at the State Office of Administrative Hearings* (Austin: State Auditor’s Office, 2012), p. 2.

⁸ *Ibid.*, p. 31.

⁹ *Ibid.*, p. 5.

¹⁰ Jansen & Gregorczyk, Certified Public Accountants, *State Office of Administrative Hearings Internal Audit of Accounting, Budgeting and Payroll Systems and Controls* (Austin: Jansen & Gregorczyk, 2014), p. 9.

RESPONSES TO ISSUE 1

Overall Agency Response to Issue 1

The challenges associated with SOAH's funding are many and varied, and we appreciate the effort of the Sunset staff to delve into them and to offer recommendations to address them.

SOAH agrees with the statement on page 14 of the report that SOAH's current billing process for interagency contracts lends itself to an appearance that SOAH may do the bidding of the referring agencies that reimburse SOAH by interagency contract, although we emphasize that the manner in which casework is funded has never had, and will not have, any influence on the way SOAH handles, hears, or decides cases. Replacing SOAH's interagency contract funding with general revenue may not mean SOAH never has to bill again, but general revenue is the mechanism by which the appearance of that funding as an instrument of potential influence is eliminated.

SOAH respects that the Sunset staff has chosen to recommend that interagency contracts remain a part of our funding structure. We understand that the LBB could well make the same recommendation to the Legislature. However, we believe that general revenue comes closer to resolving SOAH's funding and billing issues than the staff report allows (cf., general revenue is "no silver bullet" for SOAH, page 14 of the staff report). SOAH acknowledges that it would still need some interagency contracts for the SDSI agencies and for one-time case referrals such as from the groundwater conservation districts. Appendix D of the report reflects six permanent referring agencies that must pay SOAH by contract. These six agencies comprise approximately 10 percent of the total number of referring agencies. They accounted for a total of \$96,409 in reimbursements in FY 2013, less than 1 percent of SOAH's total FY 2013 budget, and just less than 3 percent of the FY 2013 interagency contract budget. SOAH's budgetary fortunes do not rise or fall with this group of agencies and entities, and the administrative resources their billing requires of SOAH are minimal. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

Recommendation 1.1

Authorize SOAH to adjust its hourly rate to recover the full cost of services.

Agency Response to 1.1

SOAH agrees with this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 1.1

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 1.1

None received.

Recommendation 1.2

Require agencies contracting for services with SOAH to send their caseload projections to SOAH and the Legislative Budget Board each biennium.

Agency Response to 1.2

SOAH agrees with this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 1.2

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 1.2

None received.

Recommendation 1.3

Authorize agencies to make up-front, lump-sum payments to SOAH annually or quarterly and only require adjustments if actual costs are not within 10 percent of projections.

Agency Response to 1.3

SOAH agrees with this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 1.3

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 1.3

None received.

Recommendation 1.4

Direct SOAH to evaluate, on a regular basis, the effectiveness of its caseload projections to predict actual caseload and report this information to the Legislative Budget Board.

Agency Response to 1.4

SOAH accepts this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 1.4

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 1.4

None received.

Recommendation 1.5

Direct SOAH to require all agencies contracting for services to pay lump-sum amounts upfront.

Agency Response to 1.5

SOAH accepts this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 1.5

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 1.5

None received.

Recommendation 1.6

Direct SOAH to evaluate and improve its budget control processes and policies.

Agency Response to 1.6

SOAH accepts this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 1.6

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 1.6

None received.

Recommendation 1.7

The Senate Finance and House Appropriations Committees should consider removing the requirement that TCEQ pay SOAH \$1 million, regardless of actual costs.

Agency Response to 1.7

None received.

For 1.7

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 1.7

None received.

COMMISSION DECISION ON ISSUE 1

The Sunset Commission adopted all of the staff recommendations in Issue 1.

ISSUE 2

SOAH Lacks Organizational Flexibility and Certain Management Tools to Best Manage the Agency.

Background

The State Office of Administrative Hearings' (SOAH) management structure centers around 57 administrative law judges who carry out the agency's main function to conduct fair and independent administrative hearings. Most of the agency's executives are or have served as judges, including the chief administrative law judge, the general counsel, and the assistant to the chief for hearings support.

By statute, SOAH's chief administrative law judge has broad statutory authority to establish divisions to handle SOAH's hearing caseload.¹ The table, *SOAH's Hearing Divisions*, lists seven divisions, including three that are statutorily required. SOAH assigns each judge to one division — their home team — but a judge often works on cases in other divisions, which increases their experience and allows SOAH to adapt to workload fluctuations. While all judges must have a minimum level of experience, the tax, utility, and natural resource conservation divisions each have specific experience requirements in statute that judges must meet before hearing cases assigned to those divisions, as discussed in Appendix E, *Statutory Experience Requirements for SOAH Judges*.

Each hearing division has a team leader responsible for assigning cases, coordinating workload, and conducting performance evaluations. The 37 judges in SOAH's central Austin office receive support from four paralegals and seven administrative assistants, overseen by the assistant to the chief for hearings support, who also serves as a judge with a hearing caseload.

More than a third of SOAH's judges work in seven field offices, primarily hearing administrative license revocation cases, as shown in the table, *SOAH Field Offices*. Each field office has a lead judge who handles day-to-day scheduling and management and one to three administrative assistants. A single team leader located in SOAH's central Austin office oversees all of the field offices.

SOAH's Hearing Divisions

Divisions	Number of Judges
Administrative License Revocation and Field Enforcement	24 (including 20 in the field)
Alternative Dispute Resolution	3
Economic	7
Licensing and Enforcement	9
Natural Resource Conservation*	6
Tax*	3
Utility*	5
Total	57

* Required by statute.

SOAH Field Offices

Field Office	Number of Judges
Corpus Christi	1
Dallas	4
El Paso	1
Fort Worth	4
Houston	7
Lubbock	1
San Antonio	2
Total	20

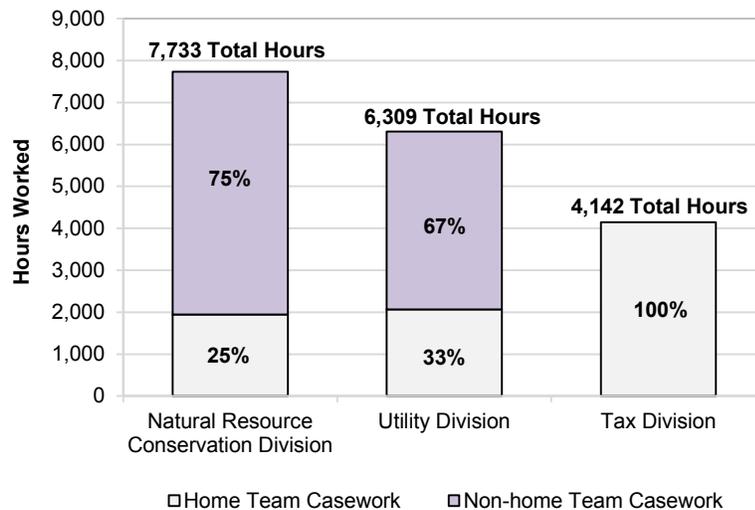
Findings

Statute unnecessarily limits SOAH’s organizational flexibility.

Statute specifies that SOAH must maintain three separate divisions — a tax division, utility division, and natural resource conservation division. While requiring these specific divisions when SOAH first took over responsibility for these hearings was justified, SOAH has since established the expertise needed to handle these hearings appropriately and now needs more flexibility to better allocate its workforce to meet changing workload demands. Additionally, statute has very specific qualifications for the judges who hear tax, utility, and natural resource cases to ensure they have necessary expertise.² As priorities and workload have changed, SOAH has required its judges to cross train in several areas to address workload needs and ensure continuity when judges are sick, on vacation, or retire. In fact, the judges assigned to the utility and natural resource divisions actually spend the majority of their time working on non-home team cases, as detailed in the chart, *Judge Home Team and Non-home Team Casework Hours*.

Requiring SOAH to maintain certain divisions limits the agency’s ability to allocate workload to meet changing needs.

Judge Home Team and Non-home Team Casework Hours – FY 2013



Judges in the utility and natural resource divisions spend the majority of their time on non-utility and natural resource cases.

Explicitly requiring SOAH to maintain separate divisions limits its ability to reorganize and shift resources to deal with changing workload demands. The Legislature’s transfer of water utility cases from the Texas Commission on Environmental Quality (TCEQ) to the Public Utility Commission (PUC) in 2013 highlights the disadvantages of having such fixed divisional structures. By statute, SOAH is required to handle TCEQ hearings through its natural resource conversation division, and PUC hearings through its utility division.³ As of September 1, 2014, due to the transfer, SOAH’s natural resource division will no longer be responsible for water utility cases. However, SOAH should have discretion for its natural resource conversation division to continue to conduct water utility hearings given the division’s expertise handling similar cases related to natural resources, including cases from TCEQ on water

rights, dams, and reservoirs; the Edwards Aquifer Authority; the Texas Water Development Board; and underground water conservation districts regarding permit disputes for wells.

SOAH's performance evaluation process lacks sufficient feedback and clarity.

- **Lack of formal policies on performance feedback.** While team leaders and supervisors gather and provide feedback on the judges and support staff they supervise, SOAH does not have a formal policy that allows the judges and support staff to provide feedback on their team leaders and supervisors. Thus, the general counsel and chief administrative law judge, who conduct performance evaluations for these mid-level managers, are missing valuable information about managers' performance. According to SOAH's 2014 employee engagement survey, many employees expressed that SOAH does not make enough effort to get the opinions of people throughout the organization and indicated dissatisfaction about the lack of a feedback loop on team leaders' and supervisors' performance.⁴
- **Lack of opportunities to discuss performance evaluations.** No policies exist to ensure that field office judges can discuss their performance evaluations with the field office team leader. Whereas central office judges receive evaluations from team leaders whom they work with day-to-day, judges in the field offices are evaluated by a team leader who does not observe their work very often. Due to this limited interaction, providing field judges with opportunities to discuss their performance evaluations is critical yet does not always happen, limiting field judges' ability to request clarification or offer a differing perspective.
- **Unclear promotion policy.** In 2009, several judges complained that they were not receiving deserved salary or promotions. SOAH's leadership responded by issuing a letter to clarify the performance expectations and qualifications needed to receive a promotion, especially to master level judge. This letter, however, is not a formal policy; and along with the career ladder, is not available in SOAH's employee handbook or the other materials provided to new employees. Also, SOAH has not updated this letter since 2009.
- **Unclear performance evaluation meeting.** As part of the performance evaluation process for judges, team leaders collect performance information from a variety of sources, including a self-evaluation submitted by the judge, examples of the judge's work and feedback from multiple team leaders since most judges conduct hearings in several divisions. Once all the feedback is gathered, the team leaders, general counsel, and chief administrative law judge hold a closed-door meeting to discuss each judge's performance and to ensure the team leaders who write the evaluations have feedback from other management staff. The review found that many judges do not fully understand how their performance is actually assessed and discussed in this meeting or how the information from the meeting is incorporated into

Many of SOAH's employees are dissatisfied with not being able to give feedback on their manager's performance.

SOAH's policies on promotions are not always clear or easily accessible to judges.

the resulting evaluation. Without a clear understanding of the purpose and procedures for this meeting, some of SOAH's non-managerial staff question its usefulness and fairness.

SOAH's team leaders lack the training, policies, and procedures necessary to help them manage staff consistently and effectively.

SOAH lacks formal policies to ensure team leaders consistently track judges' performance, deadlines, and hearing quality.

SOAH team leaders, who are also judges, spend a significant amount of their time mentoring other judges and monitoring their performance, in addition to performing their own casework. SOAH offers some internal managerial training but it occurs on an ad hoc basis. Training focuses more on internal processes, such as the steps in the performance evaluation process, rather than managerial skills, such as how to communicate clearly. Some of SOAH's team leaders and other supervisors have attended outside management training, but this has not occurred on a regular basis.

Although team leaders use various tools to monitor judges' performance, such as reviewing their workload and billable hours, SOAH does not have formal policies and procedures in place to ensure team leaders apply these tools consistently and effectively. SOAH does not have written policies requiring team leaders to:

- regularly review measures related to each judge's individual performance, such as the number of cases disposed and median number of days to dispose of a case;
- track whether each judge is meeting critically important deadlines, such as whether each of their decisions is issued within the 60-day requirement; and
- attend at least one of a judge's hearings or review recordings of the hearings to evaluate the judge's performance on an ongoing basis, except for new judges.

SOAH also does not have the data necessary or formal policies and procedures in place to evaluate why a referring agency modifies or overturns a SOAH judge's proposal for decision. Statute authorizes referring agencies to modify or overturn SOAH's proposals for decision for various reasons, such as taking into account evidence not presented during the hearing or interpreting the law differently. However, proposals for decisions are not changed or overturned very often, with only 19 out of 1,043 modified or overturned in fiscal year 2013.

SOAH does not evaluate modified and overturned proposals for decision to identify trends and areas where SOAH can improve.

While SOAH has performance measures to generally capture this information, the data is incomplete since agencies do not consistently provide this information to SOAH, and SOAH only reviews this information on an ad hoc basis. Without knowing the reasons why an agency modified or overturned a proposal for decision, SOAH cannot identify trends and areas for improvement, such as a need to clarify procedural rules or the legal reasoning judges use.

SOAH needs to improve efforts to collect external information on overall operations of the agency.

- **Complaint information.** SOAH receives very few formal complaints and does not track or analyze trends from the informal complaints it receives, typically through phone calls from agencies involved in hearings. While SOAH's leadership has made changes in response to informal complaints in the past, such as reallocating workload and counseling judges, it does not have clear policies and procedures in place regarding how to track informal complaints to handle them more consistently and analyze trends. Additionally, in response to a survey conducted by Sunset staff, several respondents commented that SOAH does not have a good complaint process.
- **Customer service information.** Many agencies that provide services to customers offer exit surveys shortly after services have been rendered to get feedback, when the events are fresh on their minds and they are more likely to respond. However, SOAH does not survey hearing participants as soon as it has completed its duties. Instead, every June, SOAH sends a customer satisfaction survey to a random sample of participants taken from a list of parties involved in cases completed during the current fiscal year. However, the usefulness of this survey has been limited, particularly due to a low response rate. In fiscal year 2013, SOAH sent the survey to 1,100 individuals and only received 100 responses.⁵

SOAH does not track informal complaints even though this is the main way parties to hearings provide feedback.

Recommendations

Change in Statute

2.1 Remove the statutory requirements for SOAH to maintain separate tax, natural resource conservation, and utility divisions.

This recommendation would remove all statutory references requiring SOAH to establish or maintain specific structural divisions, allowing SOAH flexibility to organize as necessary to deal with workload requirements. Since experience requirements for judges are important to ensuring needed expertise rather than organizational structure, this recommendation would not affect eligibility requirements of judges who hear contested matters for PUC, TCEQ, and the comptroller's office. The recommendation would also remove language relating to transfers of administrative law judges to particular divisions since that authority would no longer be needed. SOAH could consider combining divisions where cases involve similar or complementary subject matter or divisions take similar approaches to casework.

Removing these statutory requirements for specific divisions would give SOAH the flexibility to reorganize and streamline its organizational structure to free up judges to handle more cases. This approach would allow SOAH to establish clear lines of accountability to improve its employee evaluation process.

2.2 Require referring agencies to provide SOAH with a copy of their final orders.

Under this recommendation, when SOAH issues a proposal for decision to a referring agency that makes the final decision, that agency would be required to send an electronic copy of the final order to SOAH. This recommendation would ensure SOAH has the information necessary to more accurately track

and report its performance measures related to proposals for decision that are modified or overturned by referral agencies, and to implement Recommendation 2.4, directing SOAH to review and evaluate the modified and overturned proposals for decision to help identify trends and areas for improvement.

Management Action

2.3 Direct SOAH to improve its performance evaluation process.

This recommendation would direct SOAH to improve its performance evaluation process as follows.

- **Performance evaluation input.** SOAH should develop formal policies to solicit and gather input regarding employee performance and add them to the employee handbook. SOAH should require all managers to have a discussion with each employee about their performance evaluation every year, including reviewing guidelines on promotions. For judges in field offices, the evaluation discussion can be held by telephone or video conference. SOAH should also develop a formal policy to allow staff the opportunity to provide confidential feedback on managers' performance during annual evaluations.
- **Guidelines for promotions.** SOAH should update and clarify its guidelines regarding promotions for both judges and support staff. These guidelines should clearly specify what a judge needs to do to reach higher level positions, such as master level, and SOAH should include these guidelines and a summary of its career ladder in the employee handbook. Also, team leaders should review these guidelines with judges every year during their performance evaluations.
- **Managers' meeting.** SOAH should restructure or clarify the purpose of its closed-door managers' meeting to better ensure that the process is more transparent to judges and that they clearly understand the basis and reasons for their evaluation results, particularly as they relate to discussions in this meeting.

In improving the employee evaluation process, SOAH's leadership should solicit input from staff in every area of the agency, including field and support staff, to ensure any clarifications and changes address their concerns. Establishing clear performance evaluation policies and procedures would not only improve performance monitoring and employee performance overall, but would also help increase employee satisfaction.

2.4 Direct SOAH to improve and formalize certain management tools.

This recommendation would direct SOAH to implement the following tools for monitoring and improving staff performance.

- **Strengthen management training.** SOAH should develop clear goals and policies to ensure team leaders receive managerial training on a regular basis in addition to their legal education.
- **Regular review of performance measures.** SOAH should develop a consistent approach for team leaders to regularly track and analyze performance information for each of the judges under their supervision. However, while the approach should be consistent, SOAH must be cognizant of the varying complexity of cases judges handle.
- **Clear procedures for monitoring deadlines.** To ensure consistency among divisions, SOAH should develop standardized policies and processes that all team leaders must follow to track and monitor the status of cases and deadlines. SOAH should attempt to automate this process as much as possible as it develops new information technology solutions.

- **Review of hearings and decisions.** SOAH should require team leaders to observe or listen to a recording of at least one hearing for each judge every year, or more often if a judge receives a complaint. SOAH should also begin to track and analyze the reasons why referring agencies are modifying judges' proposals for decision to identify ways SOAH can improve the hearing process and quality of decisions. This information would not be used to decide whether a judge's proposal for decision was correct or to require judges to rule a certain way in certain cases, but instead would provide valuable management information, such as areas where procedural rules needed clarification or where judges could improve the clarity of proposals for decision.

This recommendation would formalize many of the tools managers currently use to monitor performance, and some that they do not use, to ensure consistency and effectiveness.

2.5 Direct SOAH to track and analyze informal complaints and improve its customer service survey.

This recommendation would direct SOAH to develop procedures to track and analyze informal complaints and use that information to improve agency performance. SOAH would continue to have the flexibility to address informal complaints as they do now to prevent any influence on a judge's decision.

SOAH should also revise its customer satisfaction survey process to offer surveys to all parties participating in a case, not just a sampling, as soon after SOAH's role with a case ends as is practical. SOAH should tailor survey questions and instructions to make it clear to respondents that they should comment on the hearing process and not on whether they agreed with the judge's decision, which will always be an area of disagreement for parties. As it does now, SOAH could continue to provide the survey online to make it easier for parties to access and should continue to report survey results annually to the Legislative Budget Board and in its legislative appropriations requests. SOAH could also consider whether to continue its annual survey if it finds this additional information beneficial.

Fiscal Implication

This recommendation will not have a direct fiscal impact to the State. Removing the statutory requirements for certain divisions and improving SOAH's management structure could allow the agency to realize savings through reorganization. However, Sunset staff cannot estimate specific savings for this report. SOAH can improve its employee performance evaluation process, management tools, and customer service feedback within its existing budget.

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¹ Section 2003.046(b), Texas Government Code.

² Sections 2003.047(d), 2003.049(d), and 2003.101(d), Texas Government Code.

³ Sections 2003.047 and 2003.049, Texas Government Code.

⁴ University of Texas Institute for Organizational Excellence, *State Office of Administrative Hearings Survey of Employee Engagement Data Report* (Austin: Institute for Organizational Excellence, 2014), pp. 26 and 29.

⁵ State Office of Administrative Hearings, *Report on Customer Service, Fiscal Year 2013* (Austin: State Office of Administrative Hearings, 2014), p. 1.

RESPONSES TO ISSUE 2

Recommendation 2.1

Remove the statutory requirements for SOAH to maintain separate tax, natural resource conservation, and utility divisions.

Agency Response to 2.1

SOAH agrees with this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 2.1

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 2.1

None received.

Recommendation 2.2

Require referring agencies to provide SOAH with a copy of their final orders.

Agency Response to 2.2

SOAH agrees with this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 2.2

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 2.2

None received.

Recommendation 2.3

Direct SOAH to improve its performance evaluation process.

Agency Response to 2.3

SOAH accepts this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 2.3

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 2.3

None received.

Recommendation 2.4

Direct SOAH to improve and formalize certain management tools.

Agency Response to 2.4

SOAH accepts this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 2.4

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 2.4

None received.

Recommendation 2.5

Direct SOAH to track and analyze informal complaints and improve its customer service survey.

Agency Response to 2.5

SOAH accepts this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 2.5

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 2.5

None received.

COMMISSION DECISION ON ISSUE 2

The Sunset Commission adopted all of the staff recommendations in Issue 2.

ISSUE 3

Contested Tax Case Hearings Should Continue at SOAH, but With Greater Independence.

Background

The tax division within the State Office of Administrative Hearings (SOAH) conducts hearings for taxpayers who contest actions taken by the Comptroller of Public Accounts when collecting and enforcing certain taxes. The comptroller's office originally handled these tax case hearings internally, but in response to questions about the independence and impartiality of judges who worked for the State's chief tax collection officer, the comptroller transferred them to SOAH in January 2007 through an interagency contract. The 80th Legislature formalized this transfer later in 2007 by passing Senate Bill 242 to ensure taxpayers who disagree with the comptroller's office on tax matters had access to a fair and impartial hearing.

Most of these tax case hearings relate to sales and use tax audits or refund claims involving business entities, including franchise tax disputes, and mixed beverage gross receipts tax disputes. The textbox, *Comptroller Tax Case Example*, shows how a tax case could end up at SOAH. In addition to these tax case hearings, SOAH has also assigned the tax division responsibility for hearings on disputes between local appraisal review boards and residential, commercial, or mineral property owners with property valued at more than \$1 million. Tax case hearings occur in Austin while statute requires appraisal board hearings to take place locally.² In fiscal year 2014, SOAH received referrals for 449 tax case hearings and 18 appraisal review hearings as shown in the table, *Cases Referred to SOAH's Tax Division*. That same year, SOAH's tax division disposed of 535 tax and nine appraisal board cases by issuing 417 proposals for decision and dismissing 127 cases.

Statute specifically subjects SOAH's tax division to the Sunset Act and requires the Sunset Commission to evaluate the division and report its recommendations to the 84th Legislature.³ If the Legislature does not continue the tax division, it will be abolished on September 1, 2015 and contested tax case hearings will return to the purview of the comptroller's office.⁴

Comptroller Tax Case Example

The comptroller performs a tax audit of a business and issues an assessment through a notice of tax due, stating the business owes additional taxes. The business owner basically has three options.

1. **Accept the results.** Pay the amount of taxes due.
2. **Contest the case administratively.** Request a redetermination. This action is a prerequisite for the administrative hearings process, which starts at the comptroller's office and eventually leads to a hearing at SOAH. This option allows the taxpayer to challenge the tax assessment without first paying the tax.
3. **Take the comptroller to court.** Pay the tax while submitting a protest with the comptroller, and file suit for a refund in district court. The resolution of the case will be decided by a Travis County district court judge.¹

**Cases Referred to SOAH's Tax Division
FYs 2007–2014**

Fiscal Year	Comptroller Tax Cases	Appraisal Review Board Cases
2007	152	–
2008	265	–
2009	235	–
2010	388	32
2011	467	44
2012	266	20
2013	487	10
2014	449	18

Findings

SOAH is still the most appropriate agency to conduct contested tax case hearings for the State.

- **Impartiality.** Ensuring taxpayers have access to a fair and impartial hearing was the original intent of transferring contested tax case hearings to SOAH.⁵ The State has a continuing need to make sure these hearings remain fair and impartial by conducting them at a separate state agency with judges who are independent of the comptroller's office. Continuing to require SOAH to perform these hearings is also in line with the state's overall approach over the last few decades, to transfer contested case hearings to SOAH to protect the independence of judges and ensure impartiality, which is also a best practice throughout the country.
- **Quality of decisions.** Statute requires SOAH to maintain the expertise necessary to ensure timely and impartial tax hearings and legally sound decisions. Tax judges must meet minimum qualifications, including having "substantial experience in tax cases," to ensure SOAH only hires the most qualified candidates.⁶ As a result, of the 338 tax proposals for decision ruled on by the comptroller in fiscal year 2014, the comptroller only overturned three of them.
- **Efficiency.** SOAH is also the state agency with the most expertise and experience in conducting administrative hearings. SOAH has been conducting administrative hearings since 1992 and is currently responsible for conducting 80 different types of administrative hearings. This proficiency has enabled SOAH to administer tax case hearings efficiently, conducting almost 500 cases in fiscal year 2013 with only three judges and a budget of \$548,766, compared to the five judges originally transferred to SOAH in 2007.

The comptroller only overturned three of SOAH's 338 tax proposals for decision in fiscal year 2014.

Although the full process for resolving contested tax cases can take years, SOAH's involvement usually lasts about three months.

Although tax law is very complex and the full process for resolving contested tax cases can take years, SOAH handles its part of the process efficiently. Many of the tax cases Sunset staff reviewed took more than two years to complete from the time the comptroller issues audit findings to the time the case is closed.⁷ While the comptroller handles everything prior to referring the case to SOAH as well as everything after SOAH issues a proposal for decision, the time these tax cases are at SOAH is relatively short — a median of 99 days in fiscal year 2014.

Historical safeguards enacted to ensure a smooth transfer of the tax hearings to SOAH are no longer necessary and, in some cases, perpetuate the perception of the comptroller having undue influence over these cases.

As part of the legislation that transferred the contested tax case hearings to SOAH, certain safeguards were enacted to help ensure a smooth transfer and mollify concerns about how the cases would be handled at SOAH. However,

seven years after the transfer, these safeguards have not proven necessary and as such, they are no longer needed, as discussed below.

- **Sunset review of tax division.** Agency divisions do not usually have separate Sunset dates, but in the case of the tax division, the Legislature originally gave it a 2011 Sunset date to ensure SOAH's handling of tax cases was reviewed soon after the transfer.⁸ The Legislature ultimately set 2015 as the division's Sunset date to coincide with SOAH's overall Sunset review date.⁹ The current Sunset review found that SOAH has and continues to handle tax cases effectively and that a separate Sunset date is no longer needed since the division would be reviewed as part of the agency during SOAH's regularly scheduled Sunset reviews.
- **Management of tax judges.** Statute prohibits tax judges from working on non-tax cases without the comptroller's prior approval.¹⁰ Although originally intended to ensure SOAH had enough resources to handle tax cases, this restriction limits SOAH's flexibility to respond to fluctuations in its workload. Currently, SOAH can only assign tax judges to hear other types of cases if it:
 - notifies the comptroller in writing about the proposed temporary reassignment;
 - describes both the case and the administrative law judge being assigned to hear it;
 - estimates the time the hearing would take; and
 - reimburses the comptroller's office at an appropriate hourly rate for the time the judge spent on the case.

SOAH requested approval for tax judges to work on non-tax cases once, in 2009 for administrative license revocation cases, which the comptroller approved.

The comptroller also has the authority to review SOAH's tax division, including requesting any information necessary in evaluating the performance of judges.¹¹ While this provision has never been used for this purpose, it gives the appearance of the comptroller having undue influence over tax hearings. During the review, stakeholders indicated that having this authority to oversee tax judges allowed the comptroller's office to influence tax-case outcomes, but Sunset staff could not confirm this. The comptroller did invoke this provision in 2013 to request a regular report on the status of tax cases at SOAH, but the comptroller could have requested and received this same information under a different section of statute.¹² Other agencies that refer cases to SOAH do not have authority to oversee the judges that hear these cases. For example, the Texas Commission on Environmental Quality and the Public Utility Commission do not have this authority even though, like the comptroller, they have special requirements

SOAH cannot assign tax judges to non-tax cases without the comptroller's approval.

The comptroller can evaluate SOAH tax judges' performance, giving the appearance of undue influence.

in SOAH's statute to ensure the judges have some level of expertise, such as the minimum qualifications discussed below and in Appendix E.

- **Tax judge qualifications.** Tax judges have extremely strict experience requirements, which significantly limit SOAH's ability to find qualified candidates. Statute requires judges in SOAH's tax division to:
 - be a master administrative law judge II with significant experience in state tax law;
 - be licensed to practice law in Texas for at least seven years;
 - have substantial tax experience in tax cases; and
 - have devoted at least 75 percent of their legal practice to tax law in at least five of the last 10 years.¹³

Tax judge experience requirements are so strict that usually only ex-comptroller employees qualify.

These experience requirements for tax judges are so strict that very few people can meet all of these qualifications. In fact, since these qualifications were enacted in 2007, most of the people who have filled these tax judge positions came directly from the comptroller's office. Furthermore, two of these judges who previously heard tax cases at SOAH, but stopped to work on other types of cases, no longer meet the 75 percent tax experience requirement and can no longer preside over tax cases. By comparison, the attorneys at the comptroller's office who handle these same tax cases do not have any statutory qualifications. Experience requirements that effectively limit eligibility for judges to ex-comptroller employees only increase the perception that these judges are beholden to the comptroller.

SOAH judges hearing natural resource and utility cases must also meet certain statutory qualifications, but they are not nearly as prescriptive as those for tax judges. For example, SOAH's judges hearing utility cases must have a minimum of five years of general legal experience or three years of experience with utility law.¹⁴

- **Unused avenues for input.** Statute requires the comptroller to provide SOAH with input on the comptroller's priorities and public policy needs, which contributes to the appearance of undue influence.¹⁵ The comptroller recently invoked this provision to request that SOAH expedite tax cases put on hold by SOAH, pending litigation. However, the comptroller could use its authority under Section 2003.103, Government Code, to make this type of request, making the requirement to provide SOAH with input about comptroller priorities or policy needs unnecessary.

Recommendations

Change in Statute

3.1 Continue tax hearings at SOAH and remove the separate Sunset date for the tax division.

This recommendation would continue SOAH's authority to conduct tax hearings. Tax judges would continue to have minimum experience requirements, as set out in Recommendation 3.3, to ensure SOAH has the knowledge and expertise to conduct tax cases. This recommendation would also remove the separate Sunset date for the tax division. The tax division would simply be reviewed with all other SOAH functions as part of the agency's future Sunset reviews.

3.2 Remove outdated provisions that give the comptroller undue and unnecessary authority over tax cases and judges.

Under this recommendation, the comptroller would no longer have authority to oversee SOAH's tax judges. The following provisions would be removed.

- **Prior approval for tax judges to work on other cases.** Tax judges would still have to meet strict statutory experience requirements, but SOAH could organize and assign them to other cases as needed to efficiently handle fluctuating workload. This recommendation would not eliminate SOAH's responsibility to ensure it has enough tax judges to handle tax hearings. In addition, SOAH would continue to charge the comptroller only for work on tax cases and not for any work the tax judges perform for other referring agencies.
- **Evaluate judge performance.** The comptroller would no longer have special authority to evaluate SOAH's tax division or tax judges, but could file complaints to address problems like any other agency that refers cases to SOAH. Also, the comptroller's office could request tax judge qualifications through an open records request, a process currently available to taxpayers.
- **Provide input on comptroller priorities.** Under this recommendation, statute would no longer require the comptroller to provide its priorities and policy needs to SOAH. However, the comptroller and SOAH should continue to work together informally to address any concerns that arise with SOAH's performance.

3.3 Change the statutory experience requirements for administrative tax law judges.

This recommendation would remove the statutory requirement that administrative law judges hearing SOAH tax cases have devoted at least 75 percent of their legal practice to Texas tax law in at least five of the last 10 years. This recommendation would retain the other statutory experience requirements for tax judges, such as the minimum seven years' experience practicing law and classifying these judges as master administrative law judge II, which is the highest judge classification.¹⁶ Statute would also continue to require tax judges to have substantial tax experience, not to be substituted by other types of experience.

Fiscal Implication

These recommendations would require the continuation of about \$660,000 annually from the comptroller's office to pay for SOAH's tax hearings and three judges, based on the comptroller's fiscal year 2015 interagency contract with SOAH. The Legislature would continue to appropriate these funds — mostly general revenue — to the comptroller for transfer to SOAH through interagency contract.

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- 1 Chapter 112, Subchapter B, Texas Tax Code.
- 2 Section 2003.902, Texas Government Code.
- 3 Section 2003.102, Texas Government Code.
- 4 Section 111.00455, Texas Tax Code.
- 5 Comptroller of Public Accounts, "Comptroller Susan Combs Moves Tax Hearings to Neutral Agency," news release, January 9, 2007, <http://www.window.state.tx.us/news2007/070109soah.html>.
- 6 Section 2003.101(d), Texas Government Code.
- 7 While reviewing a sample of amended proposals for tax case decisions, Sunset staff noticed that most of the cases had been pending at the comptroller's office for one to two years before a hearing at SOAH was requested.
- 8 S.B. 242, 80th Texas Legislature, Regular Session, 2007.
- 9 S.B. 652, 82nd Texas Legislature, Regular Session, 2011.
- 10 Section 2003.101(c), Texas Government Code.
- 11 Section 2003.107, Texas Government Code.
- 12 Section 2003.108, Texas Government Code.
- 13 Section 2003.101(d), Texas Government Code.
- 14 Section 2003.049(d), Texas Government Code.
- 15 Section 2003.106, Texas Government Code.
- 16 Section 2003.101(d), Texas Government Code.

RESPONSES TO ISSUE 3

Recommendation 3.1

Continue tax hearings at SOAH and remove the separate Sunset date for the tax division.

Agency Response to 3.1

SOAH agrees with this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 3.1

John Kennedy, Senior Analyst – Texas Taxpayers and Research Association, Austin

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 3.1

None received.

Recommendation 3.2

Remove outdated provisions that give the comptroller undue and unnecessary authority over tax cases and judges.

Agency Response to 3.2

SOAH agrees with this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 3.2

John Kennedy, Senior Analyst – Texas Taxpayers and Research Association, Austin

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 3.2

None received.

Recommendation 3.3

Change the statutory experience requirements for administrative tax law judges.

Agency Response to 3.3

SOAH agrees with this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 3.3

John Kennedy, Senior Analyst – Texas Taxpayers and Research Association, Austin

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 3.3

None received.

COMMISSION DECISION ON ISSUE 3

The Sunset Commission adopted all of the staff recommendations in Issue 3.

ISSUE 4

The State's Approach to Processing Administrative License Revocation Hearings Leads to Delays and Lacks Efficiency.

Background

Since 1995, the State Office of Administrative Hearings (SOAH) has conducted administrative license revocation (ALR) hearings for the Texas Department of Public Safety (DPS).¹ If a driver refuses or fails a blood or breath test following an arrest for driving or boating while intoxicated, the law enforcement officer confiscates the driver's license, and issues a temporary driving permit. The driver may appeal the license suspension through the ALR hearings process at SOAH, where an administrative law judge makes a final decision on whether or not to sustain the license suspension. A request for a hearing stays suspension of a person's driver's license until the date of the final decision of the administrative law judge. ALR cases make up about 84 percent of SOAH's total caseload — 31,009 of 37,096 total cases in fiscal year 2013.

To meet statutory requirements for conducting ALR hearings based on the county of arrest, SOAH maintains seven field offices and 32 remote hearing locations as described in the table, *SOAH ALR Hearing Locations*.² If the county of arrest has a population of 300,000 or more, SOAH conducts the hearing in that county.³ Otherwise, SOAH conducts the hearing no more than 75 miles from the county seat of the county of arrest.⁴

Alternatively, a driver may request a hearing conducted by telephone. SOAH conducts about 20 percent of its ALR hearings by telephone as authorized by statute.⁵ For telephonic ALR hearings, a judge in Austin or in one of SOAH's field offices calls the driver facing license suspension, a DPS attorney, and any needed witnesses to conduct the hearing. In fiscal year 2013, SOAH's Austin office conducted 1,927 of the 5,873 total telephonic hearings, with the remaining 3,946 conducted in SOAH's field offices.

SOAH ALR Hearing Locations

SOAH Field Offices	SOAH Remote Hearing Sites	
Corpus Christi	Abilene	Midland
Dallas	Alpine	New Boston
El Paso	Alvin	Paris
Fort Worth	Amarillo	Plano
Houston	Beaumont	Richmond
Lubbock	Borger	Round Rock
San Antonio	Bryan	San Angelo
	Conroe	Texas City
	Denton	Tulia
	Fort Stockton	Tyler
	Fredericksburg	Uvalde
	Harlingen	Van Horn
	Lampasas	Vernon
	Laredo	Victoria
	Lufkin	Waco
	McAllen	Wichita Falls

Findings

Statutory and information technology impediments prevent SOAH from efficiently processing ALR hearings.

Due to a unique statutory arrangement, DPS schedules most ALR hearings, not SOAH.

- **Statutory barriers and resulting inefficiencies.** DPS is the only referring agency that controls the scheduling of hearing dates at SOAH. Pursuant to statute and rule, DPS sets the initial hearing date for ALR hearings and sets initial five-day continuances available to drivers.^{6,7} SOAH then becomes responsible for setting future hearing dates and continuances. For all other SOAH hearings, the referring agency sends a hearing request to SOAH with a range of proposed dates, SOAH selects the date, and handles all scheduling matters. Having DPS select and set hearing dates does not fully separate DPS' investigative, prosecutorial, and policymaking functions from SOAH's adjudicative function.⁸ This practice also requires SOAH to use a separate docketing system exclusively for ALR cases, rather than using the docket it has for all other contested cases, and prevents SOAH from best managing its workload.

Shared responsibility for scheduling leads to inefficient use of available hearing slots and regularly leads to delays in resetting hearing dates. SOAH controls only 35 percent of the hearing slots available within the ALR docketing system, limiting SOAH's ability to reschedule cases. Generally, DPS docketing hearing requests in the order that DPS receives them. However, DPS occasionally docketing all requests for a particular field office at once, which can lead to workload surges in that SOAH field office. When DPS falls behind in scheduling, SOAH judges cannot process ALR hearings efficiently leaving potentially dangerous drivers on the road for longer periods of time. SOAH offices have reported getting overwhelmed by the spike in referrals, and when a large volume of cases comes in, SOAH has had to send additional judges to field offices to cover the surge.

SOAH has recognized a need to create an integrated case filing, management, billing, and docketing system and has begun planning for such a system. However, statutory limitations in scheduling ALR hearings may prevent SOAH from incorporating ALR hearings in its planned redesign. Ideally, SOAH would develop one comprehensive integrated system, but would need control over scheduling the ALR docket to do so.

DPS and SOAH often fail to communicate scheduling changes.

- **Process and communication breakdowns.** DPS docketing of ALR hearings causes communication problems between the agencies, which disrupts SOAH's hearings processes and can affect public safety. SOAH field staff indicated that DPS does not always communicate continuance requests to SOAH, and DPS has reported scheduling challenges when a five-day continuance request is mistakenly sent to SOAH instead of DPS. When DPS fails to notify SOAH of a continuance, the only way SOAH knows the initial hearing has been rescheduled is when SOAH holds the initial hearing and the parties are not present, wasting SOAH's time and effort, as well as a hearing slot. DPS indicates that SOAH judges will

occasionally cancel an entire hearing date because there are not enough cases to merit the time traveling to the remote hearing location. When DPS and SOAH do not effectively communicate hearing changes, peace officers' and other witnesses' time is wasted.

- **Technological barriers and resulting inefficiencies.** DPS and SOAH use Lotus Notes to initially schedule ALR cases. Lotus Notes is an aged software system that has had no official support from its developer since 2009. Though DPS and SOAH have had intermittent discussions about replacing this ineffective and unsupported software, discussions have not led to any consensus or action. DPS has not identified replacing Lotus Notes as a high priority, as the project is currently unfunded and not mandated, and DPS has not requested funding for replacement. This situation creates unnecessary risk to SOAH since it relies so heavily on this software system to schedule the vast majority of its hearings.

The ALR docketing software impairs SOAH's efficiency by artificially limiting the number of courts SOAH can create, limiting each court to a morning and an afternoon docket, and capping each docket at eight hearings slots. As a workaround, SOAH creates multiple ghost courts overseen by a single judge to ensure judges have enough cases and to allow for last-minute cancellations or failures to appear, which are common. SOAH staff then use a time intensive and inefficient paper-based process to reconcile dockets and ensure judges have been assigned to cases.

Lotus Notes also significantly limits the time available to conduct ALR hearings and who controls hearing slots. If a hearing needs to be rescheduled, SOAH can use an empty hearing slot, but cannot fill the original hearing slot for reuse because of technological limitations that do not allow for slots to be re-assigned. In this way, one hearing can tie up multiple hearing slots. The software further limits efficiency at SOAH since it does not allow case documents to be uploaded. As a result, the docket contains only basic information about the case such as the time and location and none of the standard documents required for an ALR hearing. SOAH must separately send electronic files, which staff then prints out and maintains for each ALR case, which is extremely inefficient and increases opportunities for mistakes and filing errors.

SOAH's current approach to telephonic hearings is problematic and can limit meaningful participation.

About 20 percent of SOAH's ALR hearings are done by telephone. Sunset staff observed telephonic ALR hearings during visits to SOAH field offices that raised significant concerns about hearing quality. First, not all SOAH hearing rooms used for telephonic hearings were equipped with proper teleconferencing equipment. SOAH relies on the local facility provider, such as a business park, to provide telephone access. Staff observed judges call a license holder and a DPS attorney on separate telephones, place the two telephones next to one another, and use the speaker function for each telephone creating an

DPS' outdated docketing system limits SOAH's productivity.

SOAH holds one in five ALR hearings by phone, but judges often lack proper teleconferencing equipment.

Judges at times place two speaker phones together to create a three-way conference call.

approximation of a conference call. This approach likely reduces clarity and reliability of communication. Parties may have difficulty hearing testimony, cross-examining witnesses, or miss vital information from the judge or the other party. In hearing rooms where teleconferencing was available, SOAH staff indicated that the equipment was not reliable and that dropped calls were common. SOAH field office staff also cited multiple, unsuccessful attempts to replace existing phones with newer systems. However, some field offices still use older systems, which are said to be more reliable than the new ones.

For SOAH's Austin office, the Department of Information Resources (DIR) supports the office's telephone needs through the Capitol Complex Telephone System (CCTS) that enables conference calling, recording, and optional transcription functions for up to five simultaneous parties to a call. In addition, CCTS handles calls for all capitol complex agencies, and does telephonic hearings for the Texas Workforce Commission and Texas Department of Insurance, among others. CCTS is also undergoing a substantial quality upgrade.

While SOAH chooses to use its regional offices to conduct telephonic hearings, statute does not require this practice. As previously discussed, in-person hearings do have local requirements; however, the statutory exception to allow hearings by telephone does not retain the local restriction. As a result, SOAH could choose to conduct telephonic hearings at the most productive and effective location.

Recommendations

Change in Statute

4.1 Transfer docketing responsibilities for ALR hearings from DPS to SOAH.

This recommendation would remove the statutory language charging DPS with setting hearing dates and granting statutory continuances for contested hearings conducted by SOAH. Instead, this recommendation would require SOAH to set all hearing schedules for ALR cases. However, the effective date of this requirement would be delayed until September 1, 2016 to allow time for necessary planning and coordination to occur between DPS and SOAH to implement the transfer. DPS would retain responsibility for receiving hearing requests from drivers and issuing notices of hearing, which would ensure DPS continues to receive driver information needed for law enforcement purposes. DPS would inform SOAH of the issuance of a notice of hearing to a driver, allowing SOAH to set a hearing within the statutory time frames. SOAH would receive and notify DPS of five-day continuance requests and the new hearing date.

The recommendation would also require the agencies to develop a memorandum of understanding to implement provisions related to the continuing coordination of information and records for ALR cases, and to allow for exchanges of necessary information for DPS' records, ensure continued confidentiality, and provide for the transfer of scheduling duties from DPS to SOAH. The memorandum would also outline key functions of each agency, and clearly delineate roles. The statute would require the memorandum to be completed no later than September 1, 2016.

Management Action

4.2 Direct SOAH to centralize or otherwise significantly improve its telephonic ALR hearings and take advantage of current technology for conference calls.

SOAH should evaluate its current telephonic capabilities and determine how best to increase the quality and efficiency of telephone hearings. Given the variability in quality of its telephone technology in regional offices, SOAH may need to centralize these hearings in one location that has appropriate technology. In researching this issue, SOAH should consult with DIR to evaluate options available, and consider locations where reliable technology and support are already in place, or could be developed and maintained easily. While not all judges would necessarily need to conduct telephone hearings from one location, the system needs to include only those judges who have sufficient technology available to them. SOAH should complete its evaluation of telephonic ALR hearings and implement changes no later than September 1, 2015.

Fiscal Implication

While the recommendations contemplated in this issue would eventually create additional work for SOAH's docketing staff, all or part of the funding for the three full-time equivalent employees (FTEs) that DPS currently uses for ALR docketing should be transferred to SOAH along with corresponding decreases and increases in the FTE caps. The actual transfer would be worked out between the agencies in the memorandum of understanding since the resources DPS will need to maintain moving forward in this new system are unclear. The management action to improve SOAH's telephone hearings may require expenditures for upgraded telephone technology; however, until SOAH, with the assistance of DIR, analyzes current technology and options, the fiscal impact cannot be estimated.

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¹ Chapter 886 (S.B. 1), Acts of the 73rd Texas Legislature, Regular Session, 1993; Section 524.033, Texas Transportation Code.

² Field offices also handle other hearing types such as liquor license applications referred by the Texas Alcoholic Beverage Commission, and cases referred by the Department of Family and Protective Services regarding day care licenses and/or permits.

³ Section 524.034, Texas Transportation Code.

⁴ Ibid.

⁵ Ibid.

⁶ Section 524.032, Texas Transportation Code.

⁷ 1 T.A.C. Section 159.201; Section 524.032(b), Texas Transportation Code.

⁸ Ibid.

RESPONSES TO ISSUE 4

Recommendation 4.1

Transfer docketing responsibilities for ALR hearings from DPS to SOAH.

Agency Response to 4.1

SOAH agrees with this recommendation; however, the recommendation proposes that SOAH also be responsible for five-day continuance requests. The volume of those requests is significant, perhaps on the order of 18,000 or 19,000 per year in an annual ALR caseload of 35,000 cases. To handle those effectively and to address the inefficiencies discussed in the report, we believe we will need another two full-time equivalent employees in addition to the three employees and associated funding contemplated by the report to be transferred from DPS to SOAH. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

Affected Agency Response to 4.1

The Texas Department of Public Safety thanks you for the opportunity to respond to the Sunset Advisory Commission Staff Report on the State Office of Administrative Hearings. The staff report contains findings and recommendations that would affect the Administrative License Revocation (ALR) program administered by DPS. Specifically, the report recommends the transfer of scheduling responsibilities for ALR original hearings from DPS to SOAH.

DPS identifies two issues for consideration as the Commission considers the details of implementing the staff recommendations. First, the ALR scheduling system should continue to meet the legislative directive that initial hearings be scheduled within 40 days. Shifting scheduling and docketing responsibilities to SOAH without sacrificing the 40-day directive will pose some challenges. Because of the immediate licensing impact on drivers either requesting or foregoing hearings, initial hearing requests, of necessity, will continue to be sent to DPS. DPS would counsel against any statutory mandates requiring that all scheduling and docketing be accomplished by SOAH. DPS agrees with the general goal of the staff recommendation to move toward SOAH as the primary ALR scheduling entity. However, in our opinion, such a shift will not require a statutory change. Rather, the agencies should work together under the current statutory framework and within the rulemaking process. Rulemaking rather than statutory amendments will allow the flexibility necessary to achieve the staff report's goals.

Our second concern relates to shifting the responsibility of receiving “five-day” continuances and rescheduling hearings arising from those continuances from DPS to SOAH. The five-day continuance arises from a statutory provision allowing a defendant to receive one continuance automatically without a need to show cause if the request is made within five days of the scheduled hearing. The volume of requests for these automatic continuances is very high. It is critical that DPS attorneys immediately communicate to law enforcement witnesses who have been subpoenaed to attend a hearing that they will not be needed. By requiring that automatic five-day continuance requests be processed through DPS, the Legislature has placed DPS in a position to notify law enforcement witnesses of postponed hearings at the earliest opportunity

and, consequently, the current system serves to reduce time in which officers are taken from enforcement duties. The Sunset Commission staff report has helpfully directed needed focus to the challenges of scheduling and docketing that are inherent in the ALR program. We look forward to working collaboratively with SOAH and your staff to continually improve the efficiency in which this important program contributes to highway safety in Texas.

Texas Department of Public Safety Modification

1. Direct SOAH and DPS through a management action, rather than statutory amendments, to establish SOAH as the primary ALR hearing scheduling entity and improve scheduling and docketing procedures for ALR hearings through the rulemaking process.

(D. Phillip Adkins, General Counsel – Texas Department of Public Safety)

For 4.1

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 4.1

None received.

Sunset Member Modification

2. Require SOAH and DPS to develop and adopt a memorandum of understanding (MOU) no later than September 1, 2016, establishing that SOAH has primary scheduling responsibility for ALR hearings and require the agencies to update the MOU at least biennially. The MOU shall, at a minimum:
 - set out the roles and responsibilities of each agency in the ALR hearing process, including which agency is responsible for scheduling each phase of the ALR hearing process;
 - ensure SOAH and DPS have timely access to scheduling and continuance information; and
 - transfer funding for three full-time equivalent employees that DPS currently uses for ALR docketing when SOAH assumes responsibility for initial scheduling of ALR hearings.

In addition, remove the statutory requirement that DPS receive five-day continuance requests for ALR hearings and instead, require SOAH and DPS, through the MOU and existing joint rulemaking authority in Chapter 524, Transportation Code, to specify the agency responsible and outline the process for receiving and scheduling five-day continuance requests.

Finally, require SOAH and DPS to consult with the Texas Department of Information Resources and the Office of Court Administration for expertise and assistance in developing any information technology solutions needed to complete the transfer of responsibilities, as outlined in the MOU.

(Representative Four Price, Vice Chair – Sunset Advisory Commission)

Recommendation 4.2

Direct SOAH to centralize or otherwise significantly improve its telephonic ALR hearings and take advantage of current technology for conference calls.

Agency Response to 4.2

SOAH accepts this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 4.2

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 4.2

None received.

COMMISSION DECISION ON ISSUE 4

In lieu of staff Recommendation 4.1, the Sunset Commission adopted Modification 2, which requires SOAH and DPS to develop and adopt a memorandum of understanding establishing that SOAH has primary scheduling responsibility for ALR hearings and specifying the roles and responsibilities of each agency in the ALR hearing process. The Sunset Commission adopted staff Recommendation 4.2.

ISSUE 5

Statute Does Not Provide Clear Authority to Allow Referring Agencies to Informally Dispose of SOAH's Default Cases.

Background

At the State Office of Administrative Hearings (SOAH), an administrative law judge conducts administrative hearings for contested cases referred from state agencies. Depending on the type of case, a SOAH judge may issue a final decision or issue a proposal for decision in which the state agency that referred the matter to SOAH makes the final decision.

If a party fails to appear for a SOAH hearing and the party does not bear the burden of proof, the Administrative Procedure Act allows the judge to proceed in the party's absence.¹ In these default cases, the judge may issue a formal proposal for decision, in which the factual allegations listed in the notice of hearing are deemed admitted. Alternatively, the judge may issue a dismissal order and return the case to the referring agency for informal disposition, which is more efficient for both SOAH and the referring agency. In fiscal year 2013, SOAH held 680 hearings where the respondent defaulted. Of these cases, SOAH judges issued 320 final decisions, 211 proposals for decision, and 149 dismissal orders.

Finding

Many agencies do not have clear authority to informally dispose of SOAH default cases.

While SOAH's procedural rules provide for a clear and efficient process to dismiss default cases, statute is unclear as to whether referring agencies may rely on this authority.² Some referring agencies, like the Texas Commission on Environmental Quality (TCEQ), have clearly defined authority to dispose of default cases, which has helped reduce SOAH's workload and clear TCEQ's Commissioners' agenda.³ However, more than 30 agencies that refer contested case hearings to SOAH have not adopted rules to informally dispose of default cases. For example, SOAH judges wrote 158 proposals for decision for the Texas Lottery Commission and Texas Alcoholic Beverage Commission since those agencies lack clear authority to informally dispose of cases heard at SOAH.

Recommendation

Change in Statute

5.1 Specifically authorize SOAH to remand default cases back to the referring agencies for informal disposition.

This recommendation would clearly authorize SOAH to dismiss default cases and remand them back to the referring agency for informal disposition, pursuant to the Administrative Procedure Act.⁴ This recommendation would further authorize a referring agency to apply its own rules or SOAH's procedural rules to informally dispose of default cases. This recommendation would not apply to a contested case in which the SOAH judge is authorized to render a final decision.

Fiscal Implication

While this recommendation would create significant efficiencies, the fiscal impact to the State could not be estimated.

-
- 1 Section 2001.056, Texas Government Code.
 - 2 1 T.A.C. Section 155.501.
 - 3 Section 7.057, Texas Water Code; 30 T.A.C. Section 70.106(b).
 - 4 Section 2001.056, Texas Government Code.

RESPONSES TO ISSUE 5

Recommendation 5.1

Specifically authorize SOAH to remand default cases back to the referring agencies for informal disposition.

Agency Response to 5.1

SOAH agrees with this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 5.1

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 5.1

None received.

COMMISSION DECISION ON ISSUE 5

The Sunset Commission adopted the staff recommendation in Issue 5.

ISSUE 6

Parties Without Attorneys Need Access to Quality, Detailed Information About the SOAH Hearing Process.

Background

Contested case hearings conducted at the State Office of Administrative Hearings (SOAH) can sometimes be difficult to navigate, even for experienced attorneys. SOAH's hearings are governed not only by SOAH's procedural rules and the referring agency's statute and substantive rules, but the Administrative Procedure Act, the Texas Rules of Evidence, and parts of the Texas Rules of Civil Procedure related to discovery may apply as well. While SOAH is not a traditional court, SOAH decisions and proposals for decision carry considerable weight and can result in significant outcomes like the revocation of a person's occupational license or the imposition of substantial back taxes.

Parties to a SOAH hearing are not required to have a lawyer represent them, nor does the State provide one. These "*pro se*" parties may appear on their own behalf. A state-employed attorney usually represents the referring agency. *Pro se* parties appear in about 19 percent of contested cases held at SOAH. *Pro se* parties most commonly participate in occupational licensing cases, and cases referred by the Department of Family and Protective Services and the Texas Commission on Environmental Quality, but they can participate in any contested case hearing.

As required by the Administrative Procedure Act, when an agency refers a contested case to SOAH, the agency issues a notice of hearing containing the time, date, location, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing is to be held, including a citation to SOAH's procedural rules; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.¹ After receiving a notice of hearing, *pro se* parties frequently contact SOAH seeking legal and procedural advice. To maintain impartiality in contested matters, SOAH does not provide legal advice to any party as a matter of policy and has a standard practice of providing limited procedural information on request.^{2,3} Instead, SOAH provides general information about its contested case hearings and mediation processes on its website and in printed brochures, including brochures on administrative license revocation hearings and mediation. These brochures provide basic information about SOAH such as a description of what an administrative law judge is and brief citations of law generally applicable to contested case hearings.

Findings

***Pro se* parties do not have sufficient access to enough detailed information to ensure they are best prepared for a hearing at SOAH.**

The notice of hearing is usually the first piece of information the parties to a SOAH hearing receive from the referring agency, but the notice does not advise the parties that additional information about the contested case process is available on SOAH's website or upon request.⁴ Not providing this information

at the initial stage of the hearings process leaves *pro se* parties unaware of available resources to help them better prepare to represent themselves in an administrative hearing.

SOAH's website provides some basic information about contested case hearings to help *pro se* parties prepare for their hearings, such as links to procedural rules and frequently asked questions. However, the website lacks sufficient detail regarding key hearing procedures such as engaging in discovery, filing motions, or properly serving documents that would be useful to parties with little or no legal expertise. The website does not provide any interpretive guidance of rules and statutes or other assistive services such as a glossary of relevant legal terms. The website also does not include a collection of examples and common forms used in the hearings process, such as motions to continue and motions for common types of discovery.

Additionally, the information SOAH does provide on its website for *pro se* parties is not well organized or available in a single downloadable or printer-friendly document. While SOAH does have a general agency brochure that is available at hearing locations, it only provides basic information about the agency, including information on where to park on the day of a hearing. This brochure is not available online and is not routinely distributed to parties prior to a contested case hearing.

The information SOAH provides parties involved in contested case hearings differs significantly from the information provided to parties in mediation cases. For mediation, SOAH provides a detailed brochure and supplementary information in the notice of mediation. The mediation brochure clearly describes the basic steps of the mediation process in plain language and suggests how to form expectations about the mediation, phrase needs and wants, and communicate settlement offers. The brochure also provides suggestions about witnesses and affidavits, and suggests items to bring to the mediation, such as cases supporting the individual's position. Finally, the brochures provide some guidance on how to interact with the other party and the mediator in an effective manner.

During the review process, Sunset staff surveyed parties involved in SOAH hearings. Respondents who indicated they represented themselves *pro se* were generally dissatisfied with SOAH, citing frustration with the lack of pre-hearing assistance and resources. These respondents submitted comments that as non-lawyers, the information provided on the SOAH website was difficult to understand and did not answer many of their questions. *Pro se* parties also indicated feeling overwhelmed and confused by the process, and some reported they underestimated the severity of the proceedings and associated outcomes. Others simply felt "out-lawyered" or unprepared.

Hearing participants without legal representation report feeling overwhelmed and unprepared for their hearings.

SOAH's website lacks key information that would help pro se parties better understand its contested case process.

Without access to more useful and detailed information about SOAH's contested case hearing process, *pro se* parties are often not fully prepared, which can impact the appearance of impartiality of the SOAH judge.

Given the uniqueness of the state administrative hearings process and lack of detailed informational materials, SOAH judges often preside over cases where parties are unprepared to represent themselves. As a result, many judges have developed their own informal methods of helping *pro se* parties during the hearings process. Judges commonly explain to *pro se* parties what rights they have, how the proceedings work, and the possible outcomes. This practice varies by judge, meaning judges often convey different types and amounts of information to *pro se* parties. During the review, Sunset staff observed that some judges appear more willing to grant a continuance to give a *pro se* party more time to prepare once that party realizes the ramifications of the process. Other judges will postpone *pro se* hearings until the end of the day's proceedings to allow *pro se* parties to observe some hearings before having to represent themselves.

Several agency respondents to the Sunset survey reported that SOAH judges provided too much assistance to *pro se* parties because the judge wants the party to have a fair chance. Some agencies expressed concern that judges effectively become coaches to the parties and go beyond their authority to be impartial judges when providing advice on how to handle procedural matters like entering an objection. Agency representatives also voiced concerns that judges held state agencies to a higher standard than the general public for procedural matters, and deviated from process and enforcement of procedural rules, particularly when parties to the case represented themselves.

SOAH's decisions receive a high degree of deference on appeal creating a greater need to ensure *pro se* defendants adequately represent themselves.

Pro se parties are often unaware of the broader implications of a SOAH decision and may underestimate the consequences of their hearing. Parties may be surprised when they arrive at the hearing to discover that significant penalties can be assessed against them for their alleged violations, such as the revocation of an occupational license or the assessment of heavy tax penalties. While the vast majority of SOAH and agency decisions can be appealed in district court, these decisions typically receive significant deference in court on appeal, as shown in the textbox *Standards of Review in Appeals of Cases Heard at SOAH*. In addition, referring agencies seldom overturn or modify SOAH decisions. In fiscal year 2013, referring agencies only overturned or modified 19 of SOAH's 1,043 proposals for decision.

*Agencies raised concerns that some SOAH judges provided too much assistance to *pro se* parties.*

Standards of Review in Appeals of Cases Heard at SOAH

SOAH conducts contested case hearings for 80 types of cases, with the following levels of review upon appeal of SOAH or agency final decisions.

Substantial Evidence (71 case types)

- Appellate court will uphold the decision if it is supported by substantial evidence.

Abuse of Discretion (One case type)

- Appellate court will uphold the decision unless it was plainly unreasonable or unlawful.

Trial De Novo (Three case types)

- New trial at the appellate level.

No Appeal (Five case types)

- SOAH's or agency's decision is final.

Other courts and administrative hearings agencies offer more informative and useful resources for *pro se* parties.

Other hearings offices and courts often provide plain-language, step-by-step guides to help parties cut through legalese.

Other states with agencies similar to SOAH offer more comprehensive information and guides for *pro se* parties, including plain-language guides on rules and procedures, forms, databases for common filings and motions, interpretive guidance, and video walkthroughs of how a hearing actually works. Arizona's Office of Administrative Hearings offers 27 different guides for parties. These guides include detailed walkthroughs on every part of the hearing from filing to discovery to appeal, common filing forms, and information on how to contact the office for additional clarification. The California Office of Administrative Hearings provides a printer-friendly guide for *pro se* parties, which includes information on case filing, motions, discovery, and evidence, a forms database, information on how to seek a continuance, and instructional

videos on how a hearing works along with sample hearing videos. New York's Office of Administrative Hearings provides suggestions as to what types of evidence to bring, how to subpoena parties, a plain-language summary of the general procedural rules, and information on how to contact the office for interpretive guidance on background law.

Some courts have developed detailed handbooks for *pro se* litigants that contain pre-trial, trial, and post-trial information as described in the textbox, *Common Pro Se Handbook Information*, even though they are not required by statute or rule. For example, the United States District Court for the Northern District of Texas provides a handbook with an overview of how to request the five main types of discovery and a list of motions, including deadlines and filing instructions.

The Texas Workforce Commission (TWC) conducts several types of administrative hearings, including hearings for appeals related to unemployment insurance benefits and wage

claims. Recognizing that some parties may not have legal representation, TWC provides a plain-language, step-by-step guide to the appeals process that includes information on how to file an appeal (with details on how to fill out the provided forms), information on what evidence a party should bring to the hearing (along with a documentation sheet to help parties assemble and label their evidence), how to subpoena witnesses, and how to file appeals of decisions to civil courts. TWC also provides sample hearing transcripts and audio files for reference.

Common Pro Se Handbook Information

Pre-hearing and pre-trial

- Information on who to serve and how to serve them.
- Common preliminary filings and forms for filings.
- Overview of discovery and how to request it.
- Links to statutes and interpretive, plain-language guidance on statutes.
- Contact information for assistance.
- Examples of types of evidence to bring and introduce.

Hearing and trial

- Information on motions, including the use of motions and how to file them.
- Information on subpoenas for witnesses.
- Information on basic hearing or trial procedures.
- Guides on how to conduct cross-examination.
- Information about objections and what can be excluded.

Post-hearing and post-trial

- Information on appeals, including filing of appeals.

Recommendations

Management Action

6.1 Direct SOAH to develop and maintain a comprehensive, plain-language guide for *pro se* parties.

Under this recommendation, SOAH would develop a guide for *pro se* parties to help them better prepare for SOAH hearings. In creating this guide, SOAH should seek input from stakeholders, including individuals who have represented themselves at SOAH hearings. SOAH should also solicit input from referring state agencies about common areas of confusion for parties and any unique processes and deadlines associated with hearings for those agencies. SOAH should also solicit feedback from SOAH judges, who regularly deal with *pro se* parties. SOAH should update the guide biennially after each legislative session, and work with referring agencies to ensure that any hearing-related changes are reflected. At a minimum, the guide should include:

- a description of how to serve filings;
- detailed information and examples of common motions and discovery, including sample forms and filing instructions;
- procedural rules with general descriptions of each stage of the hearings process from the prehearing stage through filing exceptions to a proposal for decision or a motion for rehearing for a final decision;
- access to sample hearings;
- examples of types of evidence and other documents that would be helpful to bring to a hearing; and
- a glossary of common legal terms used in SOAH hearings.

The guide should be made available online on SOAH's website in an easily downloadable and printer-friendly format, and individuals should be able to request a free copy of the guide.

6.2 SOAH should require notices of hearing to include information about and a link to the *pro se* guide.

This recommendation would direct SOAH to amend its procedural rules to require referring agencies to include a statement in the notice of hearing that detailed information about the contested case hearings process, including a guide for *pro se* parties, is available on the SOAH website, and in printed format upon request. The notice should include a link to the information and the *pro se* guide on SOAH's website.

Fiscal Implication

These recommendations would not have a fiscal impact to the State. Providing information to explain the SOAH hearings process is a current function of the agency that could be performed with existing resources.

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¹ Section 2001.052, Government Code.

² Section 2003.021(a), Government Code.

³ SOAH interprets Section 2003.021(a), Government Code, which requires that SOAH act as an “independent forum,” to mean that it must remain impartial and not assist either party.

⁴ 1 T.A.C. Section 155.401.

RESPONSES TO ISSUE 6

Recommendation 6.1

Direct SOAH to develop and maintain a comprehensive, plain-language guide for pro se parties.

Agency Response to 6.1

SOAH accepts this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 6.1

Eric Allmon, Attorney – Frederick, Perales, Allmon & Rockwell, Austin

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 6.1

None received.

Recommendation 6.2

SOAH should require notices of hearing to include information about and a link to the pro se guide.

Agency Response to 6.2

SOAH accepts this recommendation. (Cathleen Parsley, Chief Administrative Law Judge – State Office of Administrative Hearings)

For 6.2

Eric Allmon, Attorney – Frederick, Perales, Allmon & Rockwell, Austin

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin

Against 6.2

None received.

COMMISSION DECISION ON ISSUE 6

The Sunset Commission adopted all of the staff recommendations in Issue 6.

NEW ISSUES

NEW ISSUES

The following issues were raised in addition to the issues in the staff report. These issues are numbered sequentially to follow the staff's recommendations.

7. Establish a uniform standard of review for SOAH decisions, including removing Section 2003.0047, Government Code that provides a different standard of review for TCEQ cases.

Eric Allmon, Attorney – Frederick, Perales, Allmon & Rockwell, Austin

Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin)

8. Clarify in statute who has standing for each type of contested case SOAH hears, require Texas to follow federal law on standing provisions for all case types, and allow those seeking to be parties to a SOAH hearing to have the opportunity to seek party status at the pre-trial hearing. (Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin)

Natural Resource and Utility Cases

9. Transfer natural gas utility rate cases currently handled at the Texas Railroad Commission to SOAH. (Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin)
10. Clarify in statute that the burden of proof for approval of any environmental permits stays with the applicant and the agency proposing approval of the application, not the protestant. (Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin)
11. Remove Section 5.315, Water Code that limits a protestant's ability to conduct discovery subsequent to the submission of pre-filed testimony. (Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin)
12. Remove statutory provisions that limit other state agencies from participating in contested case hearings on environmental permits and other matters. (Cyrus Reed, Conservation Director – Sierra Club, Lone Star Chapter, Austin)

Staff Comment: New issues 7 through 12 primarily affect the statutes of individual agencies whose decisions are heard on appeal at SOAH. Sunset staff did not review the substantive law governing appeals, just SOAH's procedural role in the process.

Tax Cases

13. Remove the comptroller's authority to alter SOAH-issued proposals for decision in tax cases, but specify that the comptroller could file exceptions and further appeal an adverse final decision to district court as taxpayers do. (John Kennedy, Senior Analyst – Texas Taxpayers and Research Association, Austin)
14. Prohibit the comptroller from changing SOAH-issued proposals for decision in tax cases without first filing exceptions in accordance with 1 T.A.C. Section 155.507. (John Kennedy, Senior Analyst – Texas Taxpayers and Research Association, Austin)
15. Repeal Section 2003.101(e)(2), Government Code to remove the comptroller's ability to change a proposal for decision because a current policy or prior administrative decision is now

deemed incorrect. Require that the text of any altered portions of a proposal for decision be included in the comptroller's final decision along with the rationale for any changes. (John Kennedy, Senior Analyst – Texas Taxpayers and Research Association, Austin)

16. Require the comptroller to issue a final decision in a timely fashion by specifying that the decision be released within a reasonable period after receipt of a final proposal for decision. The deadline and any extension permitted should be established in consultation with the comptroller and SOAH. Require the comptroller to promptly post final decisions on the State Tax Automated Research (STAR) System. (John Kennedy, Senior Analyst – Texas Taxpayers and Research Association, Austin)

COMMISSION DECISION ON NEW ISSUES

The Commission did not adopt any new issues.

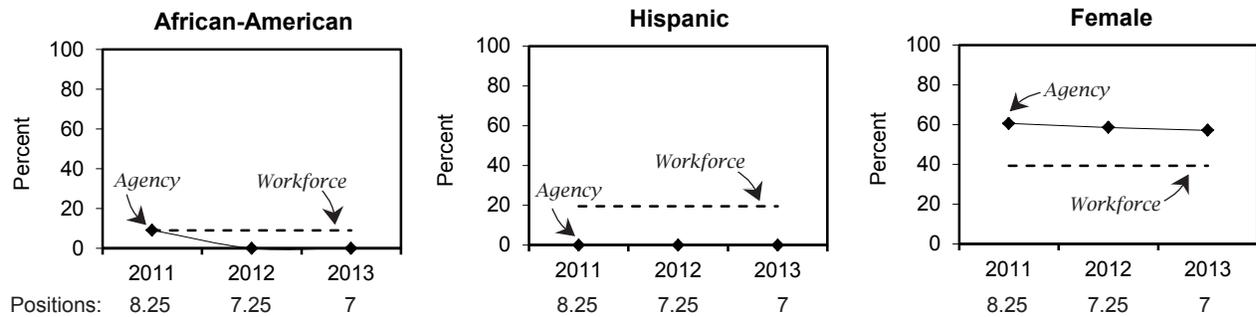
APPENDICES

APPENDIX A

Equal Employment Opportunity Statistics 2011 to 2013

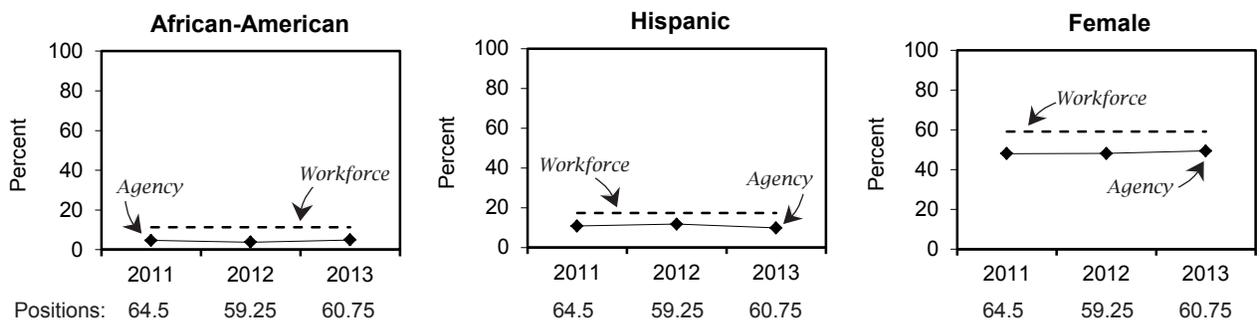
In accordance with the requirements of the Sunset Act, the following material shows trend information for the employment of minorities and females in all applicable categories by the State Office of Administrative Hearings (SOAH).¹ The agency maintains and reports this information under guidelines established by the Texas Workforce Commission.² In the charts, the dashed lines represent the percentages of the statewide civilian workforce for African-Americans, Hispanics, and females in each job category.³ These percentages provide a yardstick for measuring agencies' performance in employing persons in each of these groups. The diamond lines represent the agency's actual employment percentages in each job category from 2011 to 2013. SOAH's performance fell below civilian workforce percentages in most categories, except for females in the administration category, and minorities and females in the administrative support category.

Administration



SOAH met workforce percentages for African-Americans in 2011, but fell below workforce percentages in 2012 and 2013. SOAH fell below workforce percentages for Hispanics in all three years, and exceeded workforce percentages for females in all three years. However, SOAH currently has only seven employees in this category.

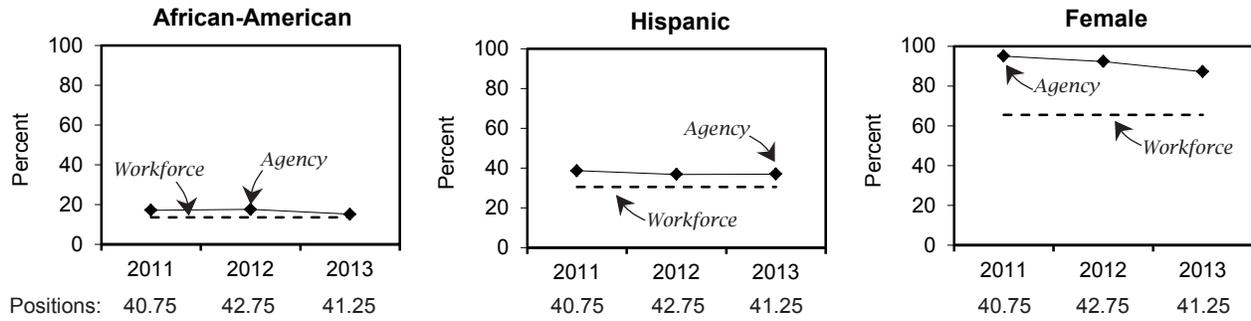
Professional



SOAH fell below civilian workforce percentages for minorities and females in all three years.

Appendix A

Administrative Support



SOAH exceeded civilian workforce percentages for minorities and females in all three years.

¹ Section 325.011(9)(A), Texas Government Code.

² Section 21.501, Texas Labor Code.

³ Because the Texas Workforce Commission has not released statewide civilian workforce percentages for fiscal years 2012 and 2013, this analysis uses fiscal year 2011 percentages for those two years.

APPENDIX B

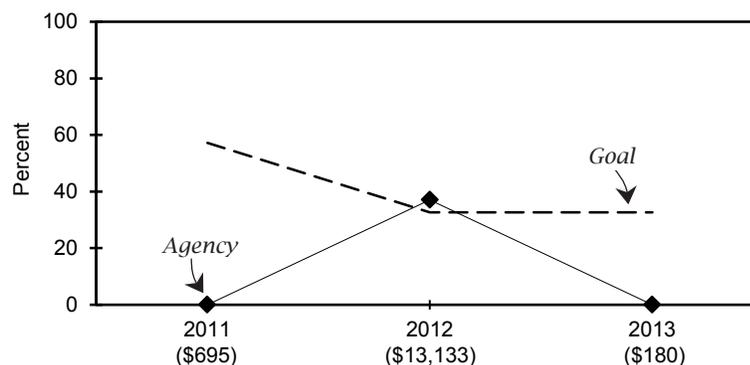
Historically Underutilized Businesses Statistics 2011 to 2013

The Legislature has encouraged state agencies to increase their use of historically underutilized businesses (HUBs) to promote full and equal opportunities for all businesses in state procurement. The Legislature also requires the Sunset Commission to consider agencies' compliance with laws and rules regarding HUB use in its reviews.¹

The following material shows trend information for the State Office of Administrative Hearings' (SOAH) use of HUBs in purchasing goods and services. The agency maintains and reports this information under guidelines in statute.² In the charts, the dashed lines represent the goal for HUB purchasing in each category, as established by the comptroller's office. The diamond lines represent the percentage of agency spending with HUBs in each purchasing category from 2011 to 2013. Finally, the number in parentheses under each year shows the total amount the agency spent in each purchasing category.

In 2011 and 2013, SOAH did not meet statewide HUB purchasing goals for the special trade category. SOAH failed to meet statewide HUB purchasing goals for professional services from 2011 to 2013. The agency exceeded statewide HUB purchasing goals for other services and commodities categories in all three years. SOAH complies with all other HUB-related requirements, including adopting HUB rules and a HUB forum program, having a HUB coordinator, and creating HUB subcontracting plans for large contracts. SOAH did not spend any money in the heavy construction or building construction categories from 2011 to 2013.

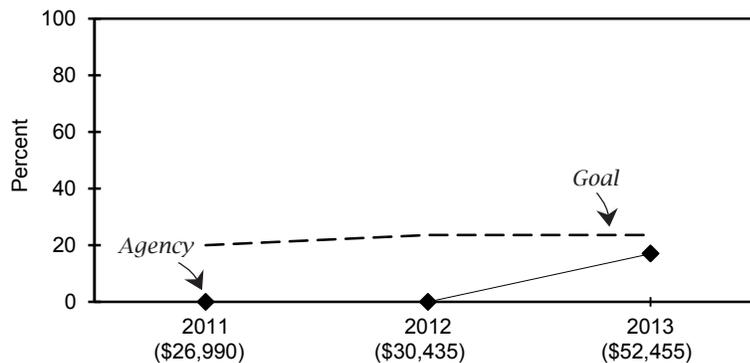
Special Trade



SOAH exceeded the statewide goal for HUB purchasing in the special trade category in 2012, but did not meet the goals in this category for 2011 and 2013. The lone expense for special trade in 2011 was for the purchase and installation of an alarm system in the Lubbock field office, and the lone expense in 2013 was for maintenance of that same system. Together, these expenses totaled less than \$1,000.

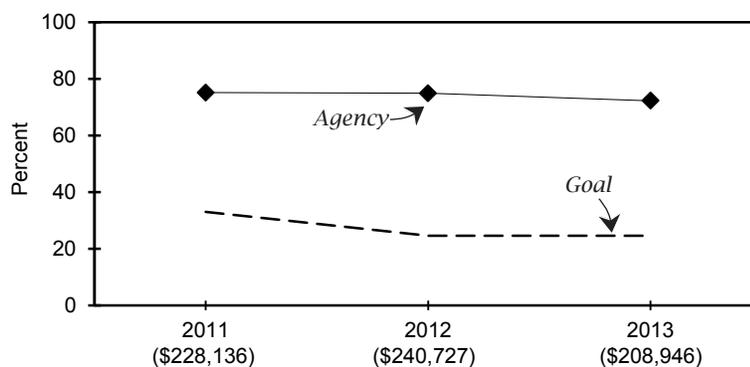
Appendix B

Professional Services



SOAH failed to meet the statewide goal for HUB purchasing in the professional services category in all three years, but increased its HUB purchases in 2013. SOAH’s expenditures in this category are primarily for the services of their internal auditor. While SOAH attempted to procure a HUB contractor for these services, SOAH received only one bid, which they accepted.

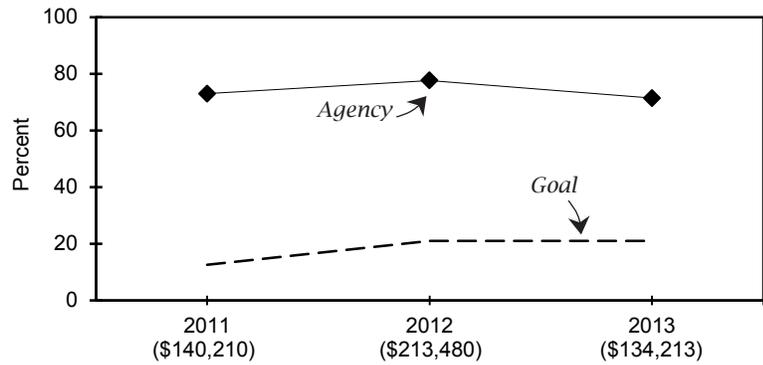
Other Services



SOAH significantly exceeded the statewide goal for HUB purchasing in the other services category in all three years.

Appendix B

Commodities



SOAH significantly exceeded the statewide goal for HUB purchasing in the commodities category in all three years.

.....
¹ Section 325.011(9)(B), Texas Government Code.

² Chapter 2161, Texas Government Code.

APPENDIX C

Agencies by Funding Source

Highway Fund

Public Safety, Texas Department of (Administrative License Revocation (ALR))

General Revenue

Agriculture, Texas Department of

Alcoholic Beverage Commission, Texas

Chiropractic Examiners, Texas Board of

Dental Examiners, Texas State Board of

Employees Retirement System of Texas

Fire Protection, Texas Commission on

Funeral Services Commission, Texas

Higher Education Coordinating Board, Texas

Housing and Community Affairs, Texas Department of

Insurance, Texas Department of (Excluding the Division of Workers' Compensation)

Law Enforcement, Texas Commission on

Licensing and Regulation, Texas Department of

Lottery Commission, Texas

Medical Board, Texas

Nursing, Texas Board of

Optometry Board, Texas

Parks and Wildlife Department, Texas

Pension Review Board, State

Pharmacy, Texas State Board of

Physical Therapy and Occupational Therapy Examiners, Executive Council of

Plumbing Examiners, Texas State Board of

Podiatric Medical Examiners, Texas State Board of

Appendix C

Professional Geoscientists, Texas Board of
Professional Land Surveying, Texas Board of
Psychologists, Texas State Board of Examiners of
Public Safety, Texas Department of (Non-ALR Cases)
Public Utility Commission of Texas
Racing Commission, Texas
Secretary of State, Texas
Securities Board, State
Teacher Retirement System of Texas
Texas Emergency Services Retirement System
Transportation, Texas Department of
Veterinary Medical Examiners, State Board of

Interagency Contracts

Accountancy, Texas State Board of Public
Aging and Disability Services, Department of
Animal Health Commission, Texas
Architectural Examiners, Texas Board of
Assistive and Rehabilitative Services, Department of
Attorney General of Texas, Office of the
Comptroller of Public Accounts
Credit Union Department, Texas
Education Agency, Texas
Education Agency, Texas (The Individuals with Disabilities Education Act)
Emergency Communications, Commission on State
Engineers, Texas Board of Professional
Environmental Quality, Texas Commission on
Ethics Commission, Texas
Family and Protective Services, Department of

Appendix C

General Land Office, Texas

Groundwater Conservation Districts (e.g. Lost Pines Groundwater Conservation District)

Health and Human Services Commission

Higher Education Coordinating Board, Texas (Negotiated Rulemaking)

Historical Commission, Texas

Insurance, Texas Department of (Division of Workers' Compensation)

Juvenile Justice Department, Texas

Motor Vehicles, Texas Department of

Public Utility Commission of Texas (Water and Sewer Utility Cases)

Real Estate Commission, Texas

State Health Services, Department of

Texas County and District Retirement System

Texas Municipal Retirement System

Water Development Board, Texas (Mediation)

Loser Pays¹

Appraisal Review Board Appeals

Breach of Contract Claims

¹ In these cases, SOAH conducts hearings without contracting with the parties, and the losing party pays the cost of the hearings.

APPENDIX D

*SOAH Hearings Requiring Interagency Contracts, FY 2013**

Governmental Entities	FY 2013 Hearings Cost
Self-Directed Semi-Independent State Agencies	
Texas Real Estate Commission	\$76,065
Texas Board of Architectural Examiners	\$10,327
Texas State Board of Public Accountancy	\$9,563
Texas Board of Professional Engineers	\$309
Quasi-Independent State Pension Funds	
Texas Municipal Retirement System	\$122
Texas County and District Retirement System	\$23
Local Governmental Entities	
Lost Pines Groundwater Conservation District	\$2,209
Edwards Aquifer Authority	\$1,090
Bluebonnet Groundwater Conservation District	\$305
Total	\$100,013

* The contracts for the local governmental entities in this chart represent a point in time and are not ongoing. These entities only contract with SOAH as needed and only for as long as a case will last, which is usually about a year. Once SOAH finishes the hearing and issues a decision, it may not receive any cases from these entities for years afterwards.

APPENDIX E

Statutory Experience Requirements for SOAH Judges

Agency	Administrative Law Judge Eligibility	Hearing Limitations
Texas Commission on Environmental Quality (TCEQ)	<u>Eligibility.</u> To preside at a hearing for TCEQ, an administrative law judge must be licensed to practice law in Texas and have the expertise necessary to conduct hearings regarding technical or other specialized subjects that may come before TCEQ.	Only a judge in the natural resource conservation division may conduct a hearing on behalf of TCEQ. Judges can also work on cases from other agencies.
Public Utility Commission (PUC)	<u>Eligibility.</u> To preside at a hearing for PUC, an administrative law judge must be licensed to practice law in Texas and have not less than five years of general experience or three years of experience in utility regulatory law.	Only an judge in the utility division may conduct a hearing on behalf of PUC. Judges can also work on cases from other agencies.
Comptroller of Public Accounts (comptroller)	<u>Eligibility.</u> To preside at a tax division hearing, an administrative law judge must: <ul style="list-style-type: none"> • be a United States citizen; • be an attorney in good standing with the State Bar of Texas; • have been licensed in Texas to practice law for at least seven years; • have substantial experience in tax cases in making the record suitable for administrative review; and • have devoted at least 75 percent of the person's legal practice to Texas state tax law in at least five of the past 10 years before the date on which the person begins employment in the tax division. An administrative law judge in the tax division is a master administrative law judge II.	Before conducting a hearing for another state agency, the tax division must get the comptroller's approval, which includes notifying the comptroller in writing, describing the case and judge who will conduct the hearing, and estimating the time the judge will spend on the case. SOAH is required to reimburse the comptroller for the time spent by the judge on the case. The comptroller may revoke approval for tax judges to conduct hearings for other state agencies at any time.
All Other Agencies	<u>Eligibility.</u> An administrative law judge must be licensed to practice law in Texas and meet other requirements prescribed by the chief administrative law judge.	None.

APPENDIX F

State Office of Administrative Hearings Reporting Requirements

Report Title	Legal Authority	Description	Recipient	Sunset Evaluation
1. Hourly Usage and Costs for Services	Section 2003.024(c), Texas Government Code	Requires SOAH, as part of its legislative appropriations request, to provide anticipated hourly usage of SOAH's services by state agencies and its estimated hourly costs for each type of hearing or procedure.	Legislative Budget Board, Governor	Continue
2. Contract Claims Against the State	Section 2260.1055, Texas Government Code	If a SOAH administrative law judge determines that a claim involves damages of \$250,000 or more, the judge issues a report containing findings and recommendations. The judge may recommend that the legislature appropriate money to pay the claim, or not appropriate money and deny consent to suit.	Legislature	Continue
3. Tax Division Case Status	Section 2003.108(a), Texas Government Code	Requires SOAH to provide a monthly list of pending cases and information on any case exceeding comptroller timelines for issuing a proposal for decision or an agreed order.	Comptroller of Public Accounts	Continue
4. Tax Division Services	Section 2003.108(c), Texas Government Code	Requires SOAH to report quarterly on services performed by its tax division for the comptroller.	Comptroller of Public Accounts	Continue
5. Equal Employment Opportunity	Section 2003.053, Texas Government Code	Requires SOAH to report annually regarding the implementation of an equal employment opportunity program.	Texas Workforce Commission, Governor	Continue

APPENDIX G

Staff Review Activities

During the review of the State Office of Administrative Hearings (SOAH), Sunset staff engaged in the following activities that are standard to all Sunset reviews. Sunset staff worked extensively with agency management and personnel; met with staff from key legislative offices; conducted interviews and solicited written comments from interest groups, stakeholders, and the public; reviewed agency data, documents and reports, state statutes, legislative reports, previous legislation, and literature; researched the organization and functions of similar state agencies in other states; and performed background and comparative research.

In addition, Sunset staff also performed the following activities unique to SOAH.

- Observed various contested case hearings and spoke with administrative law judges and hearing participants.
- Visited two SOAH field offices in Houston and San Antonio to observe in-person and telephonic hearings and interview administrative law judges and administrative staff; interviewed additional regional staff by phone.
- Interviewed docketing and paralegal staff, and observed docketing staff performing duties.
- Conducted a survey of SOAH stakeholders and hearing participants and evaluated approximately 400 responses.
- Attended the ninth annual Advanced Administrative Law Seminar at The University of Texas at Austin.
- Watched a continuing legal education presentation detailing the differences between SOAH rules and civil procedural rules.

Sunset Staff Review of the *State Office of Administrative Hearings*

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