SUBJECT: Contested cases conducted under the Administrative Procedure Act

COMMITTEE: Special Purpose Districts — favorable, without amendment

VOTE: 7 ayes — D. Bonnen, Alvarado, Clardy, Goldman, Krause, Stickland, E. Thompson

0 nays

2 absent — D. Miller, Lucio

SENATE VOTE: On final passage, April 25 — 24-4 (Campbell, Huffman, Nelson, Williams)

WITNESSES: For — Bruce Bennett; (*Registered, but did not testify:* Kathy Barber, NFIB/Texas; George Christian, Texas Civil Justice League; Kandice Sanaie, Texas Association of Business; Jeffery Hart)

Against — None

DIGEST: SB 522 would amend the Government Code relating to contested cases conducted under the Administrative Procedure Act, which governs procedures in contested case hearings before state agencies.

Detailed statement of the facts. A state agency or other party would be required to include a short, plain statement of factual matters in detail at the time notice of a contested case hearing was served. In a proceeding in which the state agency had the burden of proof, a state agency that intended to rely on a section of a statute or rule not previously referenced in the notice of hearing would have to amend the notice within seven days, rather than three days, of the hearing.

This would not prohibit the state agency from filing an amendment during the hearing of a contested case provided the opposing party was granted a continuance of at least seven days to prepare its case on request of the opposing party.

In a suit for judicial review of a final decision or order of a state agency in a contested case, the state agency's failure to include in the notice for a

contested case hearing a reference to the particular sections of the statutes and rules involved or a detailed statement of the facts would constitute prejudice to the substantial rights of the appellant under sec. 2001.174(2), making it reversible error, unless the court found that the failure did not unfairly surprise and prejudice the appellant.

License suspension. Licensees would be required to be given notice and an opportunity to show compliance before their licenses were suspended. If a state agency that already had the power to suspend a license under another statute determined that an imminent threat to the public health, safety, or welfare required emergency action and incorporated a factual and legal basis establishing that threat in an order, the agency could issue an order to suspend the license pending proceedings for revocation or other action.

The agency would be required to initiate the proceedings for revocation or other action within 30 days of the summary suspension order being signed. The proceedings would have to be promptly determined, and if the proceedings were not initiated within 30 days of the order being signed, the license holder could appeal the summary suspension order to a Travis County district court.

This would not grant any state agency the power to suspend a license without notice or a hearing.

Notice and show of compliance before license suspension. In a suit for judicial review of a final decision or order of a state agency brought by a license holder, the agency's failure to give notice and give the license holder an opportunity to show compliance before a license is suspended would constitute prejudice to the substantial rights of the license holder, making it a reversible error, unless the court determined that the failure did not unfairly surprise and prejudice the license holder.

Notification of decisions and orders. SB 522 would revise the provision requiring that a party in a contested case hearing be notified of decisions and orders personally or by first-class mail, to instead require a state agency to make such notification to each party personally, by e-mail, fax, or by first-class, certified, or registered mail.

Motion for rehearing. A motion for rehearing in a contested case would have to identify the errors made in the contested case and be filed by a

party within 20 days of the date the decision or order that was the subject of the motion was signed, unless the time for filing the motion for rehearing had been extended by an agreement or by a written state agency order. On filing of the motion for rehearing, copies of the motion would be sent to all other parties using the appropriate notification procedures. The bill would provide a deadline for replying to a motion for rehearing, but it would not be required.

The bill would establish when and how the time for filing a motion for rehearing and a reply to a motion for rehearing could be extended.

If a party did not receive notice of the date the decision or order was signed within 15 days, the deadline for filing a motion for rehearing would begin to run either on the date that the party finally received the notice or on the date the party actually acquired knowledge that a decision or order had been signed, whichever happened first. The deadline would begin to run no earlier than the 15th day following the signing of the decision or order, and could not begin later than the 90th day.

SB 522 would place the burden of showing that proper notice of the decision or order was not received within 15 days on the adversely affected party by filing a sworn motion. If the state agency wished to contest the party's claim that it did not receive notice, it would have to deny the sworn motion at its next meeting or, if it did not hold meetings, no later than 10 days after the date it received the motion. If the state agency failed to respond, the motion would be granted.

Final decisions or orders. SB 522 would require a decision or order that could become final in a contested case to be signed, rather than rendered, within 60 days of the hearing being finally closed. In a contested case heard by other than a majority of the officials of a state agency, the person who conducted the contested case hearing could extend the period in which the decision or order could be signed, in lieu of the agency.

SB 522 would provide that a decision or order in a contested case would be final on the date it was signed, rather than rendered.

Prematurely filed petitions. In a contested case in which a motion for rehearing was a prerequisite for seeking judicial review, a prematurely filed petition would be effective to initiate judicial review and would be considered to be filed on the date the last timely motion for rehearing was

overruled and after the motion was overruled.

Effective date. This bill would take effect September 1, 2013.

SUPPORTERS SAY:

SB 522 would address procedures and the rights of parties in contested case hearings involving state agencies. Differences between the Administrative Procedure Act, which governs procedures in contested case hearings before state agencies, and the Texas Rules of Civil Procedure, which govern procedures in traditional courts, can be confusing and difficult with respect to when an agency decision can be appealed. These procedures can be difficult for even experienced administrative lawyers to apply, especially with regard to motions for rehearing and suits for judicial review.

Detailed statement of the facts. SB 522 would achieve effective enforcement of the Administrative Procedure Act's notice of hearing requirement in contested case proceedings. State agencies are required to give notice to the licensees regarding the statutes and rules involved in a contested case before it goes to trial. However, agencies often fail to give adequate notice of the grounds for contested cases, either by failing to comply with statutory requirements or by justifying decisions based on statutes and rules that were never disclosed before the hearing. As a result, many businesses, professionals, and other entities have been disciplined for violating statutes or rules that were never disclosed before the hearing and against which they had no opportunity to defend. Such disciplinary actions are contrary to the due process of law.

A licensee that goes before a state agency to defend his or her license should be provided all information as required by law. If the licensee does not receive the appropriate notifications, his or her license should not be jeopardized simply because a state agency failed to do its job. Small business owners are at a disadvantage in this process simply because retaining a lawyer is most likely not within their financial resources. They must rely on the state for relevant information and when they do not receive it, they cannot vigorously defend their licenses.

Notice and show of compliance before license suspension. The courts are currently not strictly enforcing the requirements of notice and an opportunity to show compliance before a license is suspended due to a desire to give agencies flexibility to suspend licenses in emergencies. Consequently, licensees are being denied the statutory right to show

compliance. This bill would allow agencies to suspend licenses in emergencies, while strictly enforcing the requirements of notice and an opportunity to show compliance before a license was suspended. The bill would make failure by a state agency to provide the statutes and rules involved in the contested case a reversible error. This would provide incentive to state agencies to make available necessary information as required by law.

Motion for rehearing. Under the current process, the deadline for seeking relief from an agency decision is dependent on the date a party to the proceeding receives actual or presumed notice of the decision. Starting the clock on the date each party received actual or presumed notice of an agency decision results in multiple deadlines for filing motions for rehearing or petitions for judicial review in multi-party cases. The multiple, different deadlines and the resulting uncertainty cause regulated businesses, professionals, and other licensees to lose their appellate rights– even when they are represented by capable, experienced attorneys.

SB 522 would establish a similar structure contained in the Texas Rules of Civil and Appellate Procedure by providing that the deadlines for a motion for rehearing would begin on the date the agency decision was signed. This structure has worked well for many years without major problems. Tying the beginning date for seeking relief from an agency decision to the date the decision was signed would cause fewer deadlines to be missed because one controlling date would be established.

Prematurely filed petitions. SB 522 includes a provision that would overrule judicial decisions in which the courts had ruled that a prematurely filed petition for judicial review was ineffective in contested cases in which a motion for rehearing was a prerequisite for seeking judicial review. This would allow a prematurely filed petition for judicial review to become effective immediately after the last timely motion for rehearing was overruled by the agency and the agency decision became final. This would prevent appellate rights from being lost because of premature action.

OPPONENTS SAY:

SB 522 would allow agencies to suspend licenses in emergencies without a hearing. While this provision of the bill would be limited to agencies that already have this authority under another statute, a suspension of a license could be extremely damaging financially and would be a clear case of regulatory overreach that would have a chilling effect on the marketplace.

Many licensed professionals depend on their licenses for their livelihoods. It could create regulatory uncertainty and reduce the willingness of businesses to invest in Texas.