

**Consideration of Change in Board Policy Regarding Appearance of Respondents Before the Board, including Consideration of Proposed Amendments to 22 Tex. Admin. Code §213.23(d), Pertaining to *Decision of the Board***

**Summary of Request:** Consider amending the Board's current policy of permitting a Respondent to appear before the Board regarding a Proposal For Decision (PFD).

**Background:** At its April, 2009, Board meeting, the Board discussed its practice of providing Respondents the opportunity to make oral presentations to the Board regarding PFDs. The Board voted to allow Respondents to make oral presentations to the Board regarding a PFD **only if** the Respondent provided, in advance of the Board meeting, written argument, exceptions, and briefs for Board consideration. The Board adopted rules to implement this policy on November 15, 2009.

Over the last two years, the Board has considered, on average, 4-5 PFDs at each Board meeting. However, due to the recent staffing increase in the Board's Legal Department, the number of PFDs available for Board consideration has increased. At its July, 2010, meeting, the Board considered 7 PFDs. During this meeting, the Board is scheduled to consider 18 PFDs. Board Staff anticipates that approximately 12-18 PFDs will be scheduled for Board consideration at each Board meeting. The anticipated increase in the number of PFDs may make oral presentations by Respondents impractical and unworkable.

The Board is not required by the Government Code Chapter 2001 (Administrative Procedure Act) or the Occupations Code Chapter 301 to provide a Respondent with an opportunity to appear before it to make an oral presentation regarding a PFD once the individual has been afforded a hearing at the State Office of Administrative Hearings (SOAH). Nevertheless, out of a sense of fairness, the Board has historically offered Respondents this additional opportunity to be heard. Recently, the Board has limited this opportunity to Respondents who provide written material to the Board well in advance of their oral presentation.

Written argument and briefing alone, however, still provides Respondents an opportunity to present their legal arguments to the Board. Further, it allows the Board time to review and fully consider the Respondent's arguments. Written submissions also allow all parties to properly respond and reply as contemplated by the Administrative Procedure Act and help guard against potential agency error.

**Options:**

**Option 1:** Make no changes to the Board's current policy and continue to permit Respondents to make oral presentations regarding PFDs to the Board at its quarterly meetings, in accordance with the Board's rules.

**Option 2:** Amend the Board's current policy to prohibit all oral presentations regarding PFDs by Respondents. All PFDs will continue to be considered by the Board at its quarterly meetings, and written materials may be submitted for Board consideration, provided they are timely filed. See Attachment "A" for related proposed rule amendments.

**Board action:**

**Option 1:** No action required.

**Option 2:** Move to approve the proposed amendments to 22 Tex. Admin. Code §213.23(d), Pertaining to *Decision of the Board*, and authorize Staff to publish the proposal in the *Texas Register* for a 30-day comment period, with authority for General Counsel to make editorial changes as necessary to clarify rule and Board intent and to comply with the formatting requirements of the *Texas Register*. If no negative comments and no request for a public hearing are received, move to adopt the proposed amendments to 22 Tex. Admin. Code §213.23(d), Pertaining to *Decision of the Board*, as proposed.

## Attachment “A”

### §213.23. Decision of the Board.

(a) - (c) (No change.)

(d) Parties shall have an opportunity to file written exceptions and briefs with the Board concerning a proposal for decision. An opportunity shall be given to file a response to written exceptions and briefs. In order to be considered by the Board, all written exceptions and briefs must be filed with the Board at least 21 days prior to the date of the next regularly scheduled Board meeting where the Board will deliberate on the proposal for decision. In order to be considered by the Board, all responses to written exceptions and briefs must be filed with the Board at least 10 days prior to the date of the next regularly scheduled Board meeting where the Board will deliberate on the proposal for decision. Respondents shall not have an opportunity to make an oral presentation to the Board concerning a proposal for decision. [However, a Respondent shall not be permitted to make an oral presentation to the Board concerning a proposal for decision unless the Respondent has first filed written exceptions or briefs with the Board at least 21 days prior to the date of the next regularly scheduled Board meeting where the Board will deliberate on the proposal for decision. A Respondent shall not be permitted to make an oral presentation to the Board concerning a proposed modification to a proposal for decision unless the Respondent has first filed a written response to the proposed modification with the Board at least 10 days prior to the date of the regularly scheduled Board meeting where the Board will deliberate on the proposal for decision].

(e) - (k) (No change.)