



TEXAS BOARD OF CRIMINAL JUSTICE

Carol S. Vance
Chairman
Houston

March 25, 1994

SJS

The Honorable Dan Morales
Attorney General of Texas
Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

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Opinions Committee

FILE # ML-25451-94

I.D.# 25451

RE: Opinion request on delegation and rulemaking.

RO-682

Dear General Morales:

On March 18, the Board of Criminal Justice agreed in an open meeting to pose the following request for an opinion in the hopes that a favorable response will streamline agency rulemaking, and yet preserve the prerogative of the board as policymaker for the agency.

The Proposal

Current practice in this agency requires that rule adoption occur using two Board meetings: the first, for the Board to review and approve the text of the rule to be proposed in the Texas Register; and the second, for the Board to respond to any comments, address any desired changes in the proposed rule, and approve an order finally adopting the rule for the second publication in the Register.

- (1) *May the Board, by rule, delegate to the executive director the first stage authority to initially propose rules in the Texas Register?*
- (2) *If, as a general proposition, the Board may not, is the answer altered by those limited instances in which the statutory authority for initiating rulemaking is directed to the staff of the agency?*

Under this proposal, the second stage of rulemaking would still occur by formal board action, and of course the entire process would still comply with statutory timelines and other requirements. The authority would be delegated by rule (to be drafted), to offer an initial opportunity for comment by the public, because this appears to be a close question of administrative law. The rule could include safeguards such as required consultation with the board general counsel and/or an individual board member, such as the board chairman or the chair of the affected committee of the board. It might also set out certain areas of board authority where the delegation of authority does not apply, also as a safeguard, if there are sensitive issues in which the board wants to continue controlling both stages of the rulemaking process. (These potential safeguards are noted here for the benefit of the board, and to give the Opinions Committee as much general information as possible, but are not intended as part of the legal argument.)

The Law Governing Rulemaking

The board's general authority for rulemaking is in Government Code §492.013(a): "The board may adopt rules as necessary for its own procedures and for operation of the department." Many other statutes require or (implicitly or explicitly) authorize Board rulemaking on individual subjects, such as:

- Government Code §499.071(a), "The board shall adopt and enforce an allocation formula [for prison admissions by county]."
- Government Code §493.009(b), "The board shall adopt criteria to determine the suitability of candidates for participation in the [substance abuse felony punishment] program."
- Code of Criminal Procedure Article 42.18, §25(d), "The [board] shall adopt rules necessary for the management of community-based facilities authorized by this section."

Some statutes governing this agency deviate from the typical authority or mandate to the board, and appear to contemplate a staff role in rulemaking, leading to the second inquiry in this letter. A non-exhaustive survey revealed these two examples:

- Code of Criminal Procedure Article 42.13, §2(a), "The [community justice assistance] division shall propose and the board shall adopt reasonable rules....[regarding standards and procedures for the operation of community supervision and corrections departments]." [See also, Government Code §493.003(a)(1)].
- Government Code §507.001(b), "The community justice assistance division,...shall adopt reasonable rules and procedures establishing minimum requirements for [programs in the new state jail system]."

The executive director's general duties are governed by Government Code §493.006(b): "The executive director is responsible for the administration and enforcement of all laws relating to the department including rules implemented by the department but may delegate those responsibilities as permitted by board rule or general law."

The rulemaking process is governed for all agencies by Government Code Chapter 2001, Subchapter B. The essence of the process is:

("Phase One")

- "A state agency shall give at least 30 days notice of its intention to adopt a rule before it adopts the rule....[and] shall file notice of the proposed rule with the secretary of state for publication in the Texas Register...." The notice must contain a brief explanation of the proposed rule, text of the proposed rule, a statement of legal authority for the proposed rule, a fiscal note, and a note showing the public benefits and costs of the proposed rule. §§2001.023 & 2001.024.

("Phase Two")

- "Before adopting a rule, a state agency shall give all interested persons a reasonable opportunity to submit data, views or arguments....[and] shall consider fully all written and oral submissions about a proposed rule." The order finally adopting the rule must include a reasoned justification for the rule and for the agency's response to any comments on the proposed rule, a restatement of the statutory authority for the rule, and a certification by legal counsel that the rule is a valid exercise of the agency's rulemaking authority. §§2001.029 & 2001.033.

Legality of Delegation of Phase One

There does not appear to be any authority one way or the other on this specific issue. It is important to note, however, that Government Code §2001.024, Content of Notice, specifies several elements that are specifically staff-oriented, particularly the certification by legal counsel, the fiscal note with the name of the officer or employee responsible, and the note about public benefits and costs with the name of the officer or employee responsible. The legislature clearly contemplates, and recognizes the necessity for, a significant role by staff in the rule initiation process.

Opinions by your office offer some authority on issues that are related, but not precisely on point. Attorney General Op. No. DM-135 (1992) found unconstitutional the delegation of rulemaking to private parties, where a group of insurers would have been given the authority; perhaps this demonstrates where the line is crossed, but would not foreclose the proposal advanced here. Attorney General Op. No. JM-366 (1985) prohibited the delegation to the executive director of the Parks and Wildlife Commission the authority to issue permits, but allowed delegation of authority to hold hearings and make recommendations. By analogy, the authorized staff functions there are comparable to the initiation of the rulemaking process, and phase two of rulemaking, the board's ultimate and exclusive area, is comparable to issuing permits.

I would argue that phase one can be delegated as a general proposition. In the alternative, where by statute the initiation of rulemaking function is specifically vested in agency staff, it is very clear that the board can legitimately delegate phase one.

Thank you for your assistance with this matter.

Sincerely,



Carl Reynolds
Board General Counsel