



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

December 9, 1997

Mr. Mark Littleton
Executive Director
State Board for Educator Certification
1001 Trinity
Austin, Texas 78701

Letter Opinion No. 97-105

Re: Whether the State Board for Educator Certification is required to use the State Office of Administrative Hearings to conduct all administrative hearings in contested cases before the agency under chapter 2001, Government Code (ID# 39583)

Dear Mr. Littleton:

You have asked this office whether the State Board for Educator Certification ("the SBEC") is required to use the State Office of Administrative Hearings ("SOAH") to conduct all hearings in contested cases under chapter 2001 of the Government Code. In our view, it is not, so long as it employs in-house hearing officers solely for that purpose.

The SBEC was established by the Legislature in 1995 to regulate the certification of public school educators. Its purpose is set forth in section 21.031(a) of the Education Code:

The State Board for Educator Certification is established to recognize public school educators as professionals and to grant educators the authority to govern the standards of their profession. The board shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators.

Prior to the establishment of the SBEC, its functions, particularly including its disciplinary function, were performed by the State Board of Education and the Commissioner of Education (the "commissioner"). The power of the commissioner to suspend or cancel a teacher's certificate, as well as the holder of the certificate's right to notice and an opportunity to be heard, were detailed in section 13.046 of the Education Code, which read in relevant part:

(a) Any teacher's certificate issued under the provisions of this code or under any previous statute relating to the certification of teachers may be suspended or canceled by the state commissioner of education [for a series of listed causes].

(b) Before any certificate shall be suspended or canceled the holder shall be notified and shall have an opportunity to be heard. . . .

Chapter 13 of the Texas Education Code was repealed as part of the series of educational reforms enacted by Senate Bill 1 in 1995. Authority to propose rules that “provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by Chapter 2001, Government Code” has been transferred to the SBEC by section 21.041(b)(7) of the Education Code. By November 1, 1997, the SBEC “shall propose rules relating to educator certification, including alternate certification, educator appraisals, and certification sanctions, and other rules the board is required to propose under Subchapter B, Chapter 21.” Until the effective date of such rules, the rules adopted by the State Board of Education under former Subchapter B, Chapter 13 remain in effect. Act of May 27, 1995, 74th Leg., R.S., ch. 260, § 63(h), 1995 Tex. Gen. Laws 2207, 2500 (effective May 30, 1995). Pursuant to section 63(h) of Senate Bill 1, the SBEC adopted chapter 19, section 230.901 of the Texas Administrative Code, which provides in relevant part:

The rules subject to this subchapter are to be construed to retain with the commissioner all authority related to administrative hearings involving educator certification and professional practices and standards of conduct under Chapter 137, Subchapter T of this title (relating to Reprimand, Suspension, Cancellation, and Reinstatement of Certificates), pending the adoption of rules by the SBEC to assume those administrative hearings. Until such adoption, any such hearings shall be conducted by the commissioner in accordance with procedural rules adopted for hearings before the commissioner or TEA. The commissioner or his designee shall enter a final order, which may be appealed in accordance with the Texas Education Code (TEC), § 7.057.

19 T.A.C. § 230.901(c). The effect of this rule is to continue the previous regime of disciplinary proceedings until such time as the SBEC has promulgated its rules in this regard.

At present, as you inform us, administrative proceedings considering sanctions against certified educators are conducted by hearings officers employed by the Commissioner of Education. To afford an opportunity to be heard under former section 13.046 of the Education Code, as you inform us, the commissioner, through the Texas Education Agency (“TEA”), employed in-house hearings officers. The commissioner was employing such hearings officers at the time SOAH came into existence in 1991. SOAH’s charge is set forth in chapter 2003 of the Government Code:

The office shall conduct all administrative hearings in contested cases under Chapter 2001 [of the Government Code] that are before a state agency *that does not employ an individual whose only duty is to preside as a hearings officer over matters related to contested cases before the agency.*

Gov’t Code § 2003.021(b) (emphasis added).

Because the commissioner employed full-time hearings officers to preside over the disciplinary proceedings, the State Board of Education was exempt from the strictures of Government Code section 2003.021(b).

SBEC is currently in the process of developing the rules under which it will assume the administrative hearings. As part of your development of the rules mandated by the legislature in Senate Bill 1, you wish to know whether the SBEC, like the commissioner, may employ in-house hearings officers to conduct such proceedings, or whether you must use SOAH for all such purposes.

You note that, when section 2003.021(b) of the Government Code came into effect, the SBEC did not exist, and that consequently, it did not “employ an individual whose only duty [was] to preside as a hearings officer over matters related to contested cases” before it. But this argument is, as you point out, a double-edged sword, since it is also the case that at the time SOAH came into existence the SBEC, because it did not exist, had no “administrative hearings in contested cases under Chapter 2001” before it.

We do not think the date at which a state agency came into existence is determinative for the purposes of Government Code section 2003.021(b). Had the legislature wished to require that all state agencies created after the effective date of the SOAH legislation use SOAH employees for all contested cases, it could have made such a requirement explicit. In our view, two questions must be answered in an analysis of whether the exception or the rule of section 2003.021(b) applies. First, does the agency in question have the authority to employ in-house hearings officers whose sole duty is to preside over contested cases? If not, it must use SOAH for any such proceedings. Second, if the agency has authority to employ such in-house hearings officers, has it elected to do so? If not, again it must use SOAH for all contested cases.

In the SBEC’s case, the first question may be answered in the affirmative. Since the SBEC has been charged by the legislature to “provide for disciplinary proceedings, including the suspension or revocation of an educator certificate,” Educ. Code § 21.041(b)(7), it has the authority necessary to carry out that charge, implicit in which would be the power to hire employees to do so.

The second question is therefore whether the agency has chosen to employ in-house hearings officers whose sole duty is to preside over such cases. It would appear that the SBEC has not chosen as yet between hiring such employees or employing SOAH, except insofar as 19 T.A.C. section 230.901(c) continues during the transition the commissioner’s practice of using in-house hearings officers. Therefore, the SBEC has the choice of employing in-house hearings officers or using SOAH employees.

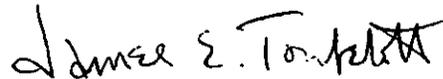
We caution that either of these choices carries further implications. Should the SBEC decide to hire personnel as in-house hearings officers, such persons’ sole duty must be the hearing of contested cases in order to escape the strictures of Government Code section 2003.021(b). On the other hand, should the SBEC prefer that SOAH conduct its contested cases, Attorney General

Opinion DM-231 (1993) holds that the SBEC may not make its own findings of fact and conclusions of law. While either choice has consequences, the choice is the SBEC's to make.

S U M M A R Y

The State Board of Educator Certification has the choice of either employing in-house hearings officers whose sole duty is to hear contested cases to conduct such proceedings, or using the hearings officers provided by the State Office of Administrative Hearings.

Yours very truly,



James E. Tourtelott
Assistant Attorney General
Opinion Committee