



**TEXAS**  
Department of  
Human Services

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James R. Hine

November 8, 2001

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OPINION COMMITTEE

The Honorable John Cornyn  
Attorney General of Texas  
Office of the Attorney General  
P.O. Box 12548  
Austin, TX 78711-2548

FILE # ML-42285-01

I.D. # 42285

Dear General Cornyn:

Re: *Mabee Health Care Center v. Texas Department of Human Services*; Docket No. 324-00-0077-KW in the State Office of Administrative Hearings; order granting sanctions ( July 3, 2001); order dismissing case (October 31, 2001)

This letter is a request for an opinion under section 402.042 of the Texas Government Code. Specifically, the Department of Human Services ("DHS") requests an opinion addressing this question: Did the State Office of Administrative Hearings ("SOAH") have the authority to sanction DHS by awarding attorneys' fees to the opposing party? Copies of the above-referenced orders granting sanctions and dismissing the administrative action are attached. For the reasons set out below, DHS has concluded that SOAH's power to sanction does not extend to an award of attorneys' fees, and that, consequently, this agency's payment of such fees would be *ultra vires*.<sup>1</sup>

**PROCEDURAL BACKGROUND**

The contested case in which the sanctions arose was an enforcement action brought by DHS against Mabee Health Care Center ("Mabee"), a nursing home facility located in Midland, Texas, to revoke its nursing home license. The hearing was conducted from February 20, 2001, through March 2, 2001.

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<sup>1</sup> DHS has also concluded that any suit to enforce an order granting sanctions in a administrative action that has been dismissed would be barred by sovereign immunity. However, **without waiving its immunity**, DHS intends to pay the fees, without the necessity of litigation, in the event the Attorney General concludes SOAH does have the power to impose such sanctions.

On Thursday, March 1st, DHS counsel informed the ALJs that several pages of Exhibit 10, which had been offered by DHS and admitted into evidence, were not authentic. In response, Mabee orally moved for sanctions requesting that it be awarded all costs and fees incurred in the administrative action, including those related to discovery, and that the license revocation action be dismissed. Immediately following DHS's disclosure, the ALJs struck the pertinent pages of Exhibit 10, as well as the testimony of two members of DHS's enforcement team, who had made the recommendation to revoke Mabee's license. The remainder of Mabee's motion for sanctions was taken under advisement.

Two weeks later, DHS filed a motion to substitute counsel and a motion to dismiss the case. In its motion to dismiss, DHS attached a copy of the authentic exhibit and stated that although the two versions were not substantially different and therefore did not change the merits of the case, it no longer wished to proceed with the enforcement action. On the same day, Mabee filed its written motion for sanctions. DHS filed a response raising among other issues SOAH's lack of authority to award attorneys' fees as sanctions. A hearing on Mabee's motion was held on April 10th. On July 3, 2001, SOAH issued its order granting sanctions, including an award of attorneys' fees to Mabee, and dismissed the case.

Subsequently, DHS moved for leave to file objections to certain costs, asserting that it had not been served with a copy of Mabee's costs, and so had been unable to review and respond to it. After seeing the cost statement, DHS raised a number of objections. In response, the ALJs vacated the dismissal order for the purpose of restoring jurisdiction to hear the objections. On consideration of the objections, SOAH reduced the amount awarded by the amount of costs related to videotaping depositions.<sup>2</sup> SOAH then entered its second order dismissing the case.

## LEGAL ANALYSIS

SOAH acted outside its statutory authority when it imposed sanctions that included an award of attorneys' fees. SOAH is an executive-branch state agency created by the Legislature to provide an independent forum for administrative hearings. TEX. GOV'T CODE ANN. § 2003.021(a) (Vernon 2000). "The basic rule is that a state administrative agency has only those powers that the Legislature expressly confers upon it." *Public Util. Comm'n v. City Pub. Serv. Bd.*, 44 Tex. Sup. Ct. J. 2001 WL 721110, at \*3 (June 28, 2001). Agencies may also have implied powers reasonably necessary to carry out express responsibilities. "An agency may not, however, exercise what is

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<sup>2</sup> DHS does not contend that SOAH is without power to award costs as sanctions. This type of sanction appears to be authorized by SOAH's organic statute. See TEX. GOV'T CODE ANN. §2003.0421(b)(2) (Vernon 2000). DHS has therefore recommended to the Attorney General's office and Governors' office that the cost component be paid.

effectively a new power, or a power contradictory to the statute, on the theory that such power is expedient for administrative purposes." *Id* at \* 4.

The plain language of SOAH's organic statute shows that the agency lacks power to award attorneys' fees as sanctions. Chapter 2003 of the Government Code expressly enumerates the types of sanctions that SOAH may impose in conducting hearings. TEX. GOV'T CODE ANN. §2003.0421(b) (Vernon 2000). Among those sanctions are the power to disallow further discovery, strike pleadings or witnesses, and exclude certain evidence. Absent from this list is any suggestion that SOAH has the power to award attorneys' fees as sanctions.

The specificity with which the Legislature delineated SOAH's power to sanction strongly indicates that it did not intend to include an award of attorneys' fees. When a statute gives an express listing of certain persons, things, consequences, or classes, it is equivalent to the statute's expressly excluding all others. *Maley v. 7111 Southwest Freeway, Inc.*, 843 S.W. 2d 229, 231 (Tex.App.–Houston [14th Dist.] 1992, writ denied). Further, a state agency, such as SOAH, "is a subordinate body that derives all its powers from the legislature and exercises those powers subject to legislative control. And where the legislature qualifies a delegated power by specifying a method for its exercise, '[t]he prescribed method excludes all others and must be followed.'" *Southwestern Bell Tel. v. Public Util. Comm'n*, 2001 WL 838883 at \*6 (Tex. App.–Austin July 26, 2001, pet. filed) (citations omitted). Because attorneys' fees are not included in Chapter 2003's list of authorized sanctions, they are excluded.

In defining SOAH's statutory authority, the Attorney General should also consider administrative construction of Chapter 2003. *See* TEX. GOV. CODE ANN. § 311.023 (Vernon 1998). SOAH's own rules and regulations demonstrate its understanding that it lacks power to award attorneys' fees as sanctions. SOAH procedural rules empower the ALJ to impose sanctions against a party but limit that power to sanctions that have been expressly authorized by SOAH's organic statute. *See* 1 TAC § 155.15(b)(12)(A-F); *compare* TEX. GOV'T CODE ANN. § 2003.0421(b) (Vernon 2000). Put another way, the language in the SOAH rules regarding sanctions is virtually identical to section 2003.0421(b) of the Government Code.

That SOAH is acting beyond its authority is further demonstrated by the lack of subject-matter jurisdiction in the district court to either review or enforce the SOAH order. Had the Legislature intended that SOAH have the power to award substantial monetary sanctions—here, the amount was \$126,120.00—surely it would have provided a mechanism for judicial review or enforcement of the order.

Here, however, the enforcement action to revoke Mabee's nursing home license has been dismissed; only the order granting sanctions remains. Neither Chapter 2003 of the Government Code nor the Administrative Procedure Act waives DHS's sovereign immunity, so as to allow Mabee to enforce

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the SOAH order. The APA waives sovereign immunity only for judicial review of agency decisions that are "final." *See* TEX. GOV. CODE ANN. § 2001.171 (Vernon 2000). A "final decision" under the APA would be one rendered by DHS on the merits of the license revocation enforcement action—and only after it had received a Proposal for Decision from SOAH. TEX. GOV. CODE ANN. §§ 2001.058(e)(f), 2001.141, 2001.145; *see also* 40 TAC § 79.1606; 1 TAC § 155.59. The SOAH sanctions order is not a final agency decision. Nor does APA section 2001.202 confer jurisdiction on the district court; that section only authorizes enforcement of a final agency decision in an action brought by the Attorney General on behalf of the state agency. It does not permit private litigants such as Mabee to enforce SOAH orders. *See* TEX. GOV. CODE ANN. §§ 2001.202 (Vernon 2000).

SOAH's rationale for awarding attorneys' fees appears to rest almost entirely on the premise that it is a "court" and may therefore help itself to any and all rules of procedure, statutes and doctrines that arguably authorize district courts, as part of an independent judiciary, to impose monetary sanctions on state agencies. But SOAH, though it performs an adjudicative function, is no more a district court than were executive state agencies that conducted their own administrative hearings before SOAH was created.

In any event, Chapter 2003 is conclusive on this point in that it expressly states that SOAH is "a state agency created to serve as an independent forum for the conduct of adjudicative hearings in the executive branch of state government." TEX. GOV'T CODE ANN. § 2003.021(a) (Vernon 2000). Both the Texas Constitution and the Government Code draw a clear distinction between an independent judiciary, one of three branches of government, and subordinate state agencies such as SOAH acting within the executive branch. The SOAH order granting sanctions fails to recognize this distinction.

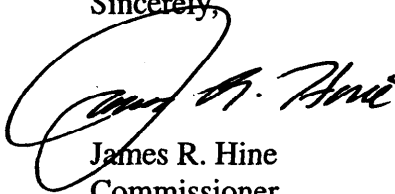
The Legislature, however, is clearly aware of the distinction. For example, Chapter 2006 of the Government Code expressly authorizes small businesses to recover attorneys' fees against state agencies for claims brought in bad faith, in either "an administrative adjudicatory proceeding or the court." TEX. GOV'T CODE ANN. § 2006.015(a) (Vernon 2000). Chapter 2006 goes on to expressly authorize the "[t]he hearings officer in an administrative adjudicatory proceeding" as well as the courts to make a determination that the state action was brought in bad faith or for the purposes of harassment. By way of contrast, none of the statutes or rules SOAH relies on in its sanctions order extend the power to award fees' against the State to hearings officers in an administrative action. For example, Chapter 10 of the Civil Practice and Remedies Code authorizes only "[a] court" to impose sanctions on a party that has signed a pleading or motion in violation of the standards set out in section 10.001 of that chapter. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 10.001, 10.004 (Vernon Supp. 2001). Likewise, Texas Rule of Procedure 215 authorizes the "court in which action is pending" to impose sanctions "including reasonable attorneys' fees." TEX. R. CIV. P. 215.2(b)(8). Texas Rule of Procedure 2, entitled "Scope of Rules," states: "These rules shall govern the procedure in the justice, county and district courts of the State of Texas in all actions of a civil nature . . ." Thus, Rule 215, on which SOAH relies, does not govern SOAH's power to sanction. That power

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is governed by section 2003.0421(b) of the Government Code and by section 155.15(b)(12)(A-F) of the SOAH rules, both of which *exclude* attorneys' fees.

DHS, in view of the foregoing, requests an opinion addressing whether the attorneys' fees component of the attached order granting sanctions exceeds SOAH's statutory authority. DHS respectfully reserves the right to file additional briefing pursuant to the OAG's briefing schedule. Thank you for your attention.

Sincerely,

A handwritten signature in black ink, appearing to read "James R. Hine", is written over a large, stylized circular flourish.

James R. Hine  
Commissioner

JRH:jbm

Attachments

cc: Honorable Suzanne Formby Marshall, w/o attachments  
Honorable Cassandra Church, w/o attachments  
Allison Spruill, w/o attachments