



**TEXAS BOARD
OF
PARDONS AND PAROLES**

Number: BPP-POL. 141.204

Date: June 8, 2011

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**Supersedes: BPP-DIR. 08-03.05
March 21, 2008**

BOARD POLICY

SUBJECT: NEGOTIATED RULEMAKING

PURPOSE: To establish a policy of the Texas Board of Pardons and Paroles regarding negotiated rulemaking.

AUTHORITY: Texas Government Code, Section 508.055; Chapters 2001 and 2008
Texas Civil Practices and Remedies Code, Chapter 154

POLICY: It is the policy of the Texas Board of Pardons and Paroles (Board) to encourage the use of negotiated rulemaking procedure under Chapter 2008, Texas Government Code, of the adoption of Board rule, and appropriate alternative dispute resolution procedure under Chapter 2009, Texas Government Code, to assist in the resolution of internal disputes under the Board's jurisdiction.

DISCUSSION: Negotiated rulemaking is a consensus-based approach to drafting a proposed rule that brings together representatives of the governmental body and the various affected interests to negotiate towards consensus on the text of a proposed rule or policy.

DEFINITIONS: Convener - a Board employee or contracted outside person with no financial or other interest in the outcome who is appointed by and assists the Presiding Officer or designee in determining the feasibility of negotiated rulemaking.

Facilitator - an individual appointed by the Presiding Officer who impartially presides over the negotiating rulemaking committee's meetings, sets the pace and tone of negotiations, ensures that each party has a full opportunity to be heard and help the committee to finish its tasks in a timely manner.

Negotiated Rulemaking - a consensus-based process in which a proposed rule is initially developed by a committee composed of representatives of all those interests that will be affected by the rule, including those interests represented by the rulemaking agency.

PROCEDURES:

- I. Assessment. The General Counsel, in consultation with the Board Presiding Officer (Chair) or designee, shall assess the suitability of negotiated rulemaking for a proposed rule or rule amendment (rule) within 10 days of receipt.
 - A. If the General Counsel and Chair initially decide to employ negotiated rulemaking, the Chair will appoint a convener to assist the General Counsel and Chair in determining whether it is advisable to proceed.
 1. Within 14 days of appointment, the convener shall identify persons whom the rule is likely to affect, including persons who may oppose the issuance of the rule. The convener shall discuss with those persons or their representative:
 - (a) whether they are willing to participate in negotiated rulemaking;
 - (b) whether the Board should engage in negotiated rulemaking to develop the proposed rule;
 - (c) which issues a negotiated rulemaking committee should address; and
 - (d) whether there are other persons the convener needs to identify who may be affected by the proposed rule.
 2. Upon conclusion of the above discussion(s), the convener shall report to the Chair and General Counsel in writing whether negotiated rulemaking is a feasible method to develop the proposed rule. The convener shall include the following relevant considerations in the written report:
 - (a) the number of identifiable interests that would be significantly affected by the proposed rule;
 - (b) the probability that those interests would be adequately represented in a negotiated rulemaking;
 - (c) the probable willingness and authority of the representatives of affected interests to negotiate in good faith;
 - (d) the probability that a negotiated rulemaking committee would reach a unanimous or a suitable general consensus on the proposed rule;
 - (e) the probability that negotiated rulemaking will not unreasonably delay notice and eventual adoption of the proposed rule;

- (f) the adequacy of Board and citizen resources to participate in negotiated rulemaking;
 - (g) the probability that the negotiated rulemaking committee will provide a balanced representation between public and regulated interests; and
 - (h) the willingness of the Board to accept the consensus of a negotiated rulemaking committee as the basis for the proposed rule.
- B. If the General Counsel and Chair decide not to employ negotiated rulemaking after receiving the convener's report, they shall proceed with rulemaking procedures in accordance with the Chapter 2001, Texas Government Code.
- C. If the General Counsel and Chair decide to continue with negotiated rulemaking, they will proceed as stated below and may use the publication, "Texas Negotiated Rulemaking Deskbook," as a reference. The deskbook is published by the Center for Public Policy Dispute Resolution, University of Texas School of Law and is available at the following Website: <http://www.utexas.edu/law/academics/centers/cppdr/resources/publications.php>.

II. Public Notice and Committee Appointment

- A. Public Notice. The Board shall publish timely notice of its intent to engage in negotiated rulemaking in appropriate media and file timely notice with the secretary of state for publication in the Texas Register. The notice must include:
- 1. a statement that the Board intends to engage in negotiated rulemaking;
 - 2. a description of the subject and scope of the rule to be developed;
 - 3. a description of the known issues to be considered in developing the rule;
 - 4. a list of the interests that are likely to be affected by the proposed rule;
 - 5. a list of the individuals the Chair or designee proposes to appoint to the negotiated rulemaking committee to represent the Board and affected interests;
 - 6. a request for comments on the proposal to engage in negotiated rulemaking and on the proposed membership of the negotiated rulemaking committee; and
 - 7. a description of the procedure through which a person who will be significantly affected by the proposed rule may, before the Chair or designee establishes the negotiated rulemaking committee, apply to the Chair for membership on the committee or nominate another to represent the person's interests on the committee.

- B. The Chair, after receiving the report of the negotiated rulemaking committee, shall announce in a statement accompanying the notice of a proposed rule that:
1. negotiated rulemaking was used in developing the proposed rule; and
 2. the report of the negotiated rulemaking committee is public information and is available through the Board's Web site at www.tdcj.state.tx.us/bpp.
- C. Appointment and Duration of Negotiated Rulemaking Committee. After considering comments received in response to the notice of proposed negotiated rulemaking, the Chair or designee shall establish a negotiated rulemaking committee and appoint the members of the committee.
1. The Chair or designee shall:
 - (a) consider the appropriate balance between representatives of affected interests in appointing the negotiated rulemaking committee;
 - (b) appoint individuals to the committee to represent the Board; and
 - (c) appoint other individuals to the committee to represent the interests identified by the Board that are likely to be affected by the proposed rule. Texas Government Code Chapter 2110 (State Agency Advisory Committees), does not apply to the size or composition of the committee or to the Board's ability to reimburse expenses of committee members under Section 2008.003(b).
 2. The committee is automatically abolished on the adoption of the proposed rule, unless the committee or the Chair, after consulting the committee, specifies an earlier abolition date.
- D. Appointment of Facilitator. Concurrently with its establishment of the negotiated rulemaking committee, the Chair or designee shall appoint a facilitator.
1. The Chair may appoint an agency employee, subject to Subdivision 3.c) below, or contract with another state employee or private individual to serve as the facilitator.
 2. The Chair's appointment of the facilitator is subject to the approval of the negotiated rulemaking committee and the facilitator serves at the will of the committee.
 3. The facilitator:

- (a) must possess the qualifications required for an impartial third party under Section 154.052(a) and (b), Civil Practice and Remedies Code (see Attachment A);
- (b) is subject to the standards and duties prescribed by Section 154.053(a) and (b), Civil Practice and Remedies Code, and has the qualified immunity prescribed by Section 154.055, Civil Practice and Remedies Code, if applicable;
- (c) shall not be the person designated to represent the Board on the negotiated rulemaking committee on substantive issues related to the rulemaking; and
- (d) shall not have a financial or other interest in the outcome of the rulemaking process that would interfere with the person's impartial and unbiased service as the facilitator.

III. Duties of Negotiated Rulemaking Committee and Facilitator

- A. The facilitator shall preside over meetings of the negotiated rulemaking committee and assist the members of the committee:
 - 1. to establish procedures for conducting negotiations; and
 - 2. to discuss, negotiate, mediate, and employ other appropriate alternative dispute resolution processes to arrive at a consensus on the proposed rule.
- B. The facilitator shall encourage the members of the committee to reach a consensus but may not compel or coerce the members to do so. It is presumed that the committee has reached a consensus on a matter only if the consensus is unanimous, unless the committee unanimously:
 - 1. agrees to define a consensus to mean a general rather than a unanimous consensus; or
 - 2. agrees to define the term in another manner.
- C. At the conclusion of the negotiations, the committee shall send a written report to the Chair and General Counsel that:
 - 1. contains the text of the proposed rule, if the committee reached a consensus on the proposed rule; or
 - 2. specifies the issues on which the committee reached consensus, the issues that remain unsolved, and any other information, recommendations, or materials that the committee considers important, if the committee did not reach a consensus on the proposed rule.

- IV. Administrative Procedure Act Requirements Unaffected. If the Chair intends to proceed with the rulemaking process after receiving the report of the negotiated rulemaking committee, it shall proceed in accordance with Chapter 2001, Administrative Procedure, Texas Government Code.
- V. Confidentiality of Certain Records and Communications
- A. Sections 154.053 and 154.073, Civil Practice and Remedies Code, apply to the communications, records, conduct and demeanor of the facilitator and the members of the negotiated rulemaking committee as if the negotiated rulemaking were a dispute being resolved in accordance with Chapter 154, Civil Practice and Remedies Code.
- B. In the negotiated rulemaking context the attorney general, subject to review by a Travis County district court, decides in accordance with Section 154.073(d), Civil Practice and Remedies Code, whether a communication or material subject to Section 154.073(d) is confidential, excepted from required disclosure, or subject to required disclosure.
- C. Notwithstanding Section 154.073(e), Civil Practice and Remedies Code:
1. a private communication and a record of a private communication between a facilitator and a member or members of the committee are confidential;
 2. may not be disclosed unless the member or members of the committee, as appropriate, consent to the disclosure; and
 3. the notes of a facilitator are confidential except to the extent that the notes consist of a record of a communication with a member of the committee who has consented to disclosure in accordance with Subdivision 1 above.
- D. The report and recommendations of a convener and a negotiating committee are public information and available upon request.

SIGNED THIS, THE 8th DAY OF JUNE 2011.

RISSIE OWENS, PRESIDING OFFICER (CHAIR)

** Signature on file.*