



**TEXAS BOARD  
OF  
PARDONS AND PAROLES**

**Number: BPP-POL. 141.204**

**Date: August 22, 2018**

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**Supersedes: January 16, 2014**

## **BOARD POLICY**

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**SUBJECT: NEGOTIATED RULEMAKING**

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

**AUTHORITY:** Texas Civil Practices and Remedies Code Chapter 154  
Texas Government Code Section 508.055, Chapter 2001, and Chapter 2008  
Texas Administrative Code Title 37, Part 5, Chapter 141, Section 141.57

**POLICY:** It is the policy of the Texas Board of Pardons and Paroles (Board) to encourage the use of the negotiated rulemaking procedure under Chapter 2008, Texas Government Code, for the adoption of a Board Rule; and the 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 helps 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 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 the Chair initially decide to employ negotiated rulemaking, the Chair will appoint a convener to assist the General Counsel and the 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 the General Counsel in writing as to 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



- 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;
    - 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 the 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, 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 and may not be disclosed unless the member or members of the committee, as appropriate, consent to the disclosure; and
  - 2. 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.

**ADPOTED BY A MAJORITY OF THE BOARD ON THE 22<sup>ND</sup> DAY OF AUGUST, 2018.**

**DAVID GUTIÉRREZ, PRESIDING OFFICER (CHAIR)**

*\*Signature on file.*