

3. **Discussion and possible action regarding proposed rule changes to title 37 TAC, Chapter 401, Practice and Procedure, including but not limited to, Subchapter A, General Provisions and Definitions; Subchapter B, Rulemaking Proceedings; Subchapter C, Examination Appeals Process; Subchapter D, Disciplinary Proceedings; Subchapter E, Prehearing Proceedings; Subchapter F, Contested Cases; Subchapter G, Conduct and Decorum, Sanctions, and Penalties; Subchapter H, Reinstatement; Subchapter I, Notice and Processing Periods For Certificate Applications; Subchapter J, Charges For Public Records; and Subchapter K, Historically Underutilized Business.**

## CHAPTER 401

### ADMINISTRATIVE PRACTICE AND PROCEDURE

#### SUBCHAPTER A

#### GENERAL PROVISIONS AND DEFINITIONS

##### **§401.1 Purpose and Scope.**

- (a) Purpose. The purpose of this chapter is to provide a system of procedures for practice before the **commission** [~~Texas Commission on Fire Protection~~] that will promote the just and efficient disposition of proceedings and public participation in the decision-making process. The provisions of this chapter shall be given a fair and impartial construction to attain these objectives.
- (b) Scope.
- (1) This chapter shall govern the initiation, conduct, and determination of proceedings required or permitted by law in matters regulated by the commission, whether instituted by order of the commission or by the filing of an application, complaint, petition, or any other pleading.
  - (2) This chapter shall not be construed so as to enlarge, diminish, modify, or otherwise alter the jurisdiction, powers, or authority of the commission, its staff, or the substantive rights of any person.
  - (3) This chapter shall not apply to matters related solely to the internal personnel rules and practices of this agency.
  - (4) To the extent that any provision of this chapter is in conflict with any statute or substantive rule of the commission, the statute or substantive rule shall control.
  - (5) In matters referred to the State Office of Administrative Hearings (SOAH), hearings or other proceedings are governed by 1 TAC Chapter 155 (relating to Rules of Procedures) adopted by SOAH [~~effective January 2, 1998~~]. To the extent that any provision of this chapter is in conflict with SOAH Rules of Procedures, the SOAH rules shall control.

##### **§401.3 Definitions.**

The following terms, when used in this chapter, shall have the following meanings, unless the context or specific language of a section clearly indicates otherwise:

- (1) Advisory Committee--An advisory committee that is required to assist the commission in its rule-making function and whose members are appointed by the commission pursuant to Government Code, §419.008, or other law.
- (2) Agency--Includes the commission, the executive director, and all divisions, departments, and employees thereof.
- (3) APA--Government Code, Chapter 2001, The Administrative Procedure Act, as it may be amended from time to time.
- (4) Applicant--A person, including the commission staff, who seeks action from the commission by written application, petition, complaint, notice of intent, appeal, or other pleading that initiates a proceeding.
- (5) Application--A written request seeking a license from the commission, petition, complaint, notice of intent, appeal, or other pleading that initiates a proceeding.

- (6) Authorized Representative--A person who enters an appearance on behalf of a party, or on behalf of a person seeking to be a party or otherwise to participate in a commission proceeding.
- (7) Chairman--The commissioner who serves as presiding officer of the commission pursuant to Government Code, §419.007.
- (8) Commission--The Texas Commission on Fire Protection.
- (9) Commissioner--One of the appointed members of the decision-making body defined as the commission.
- (10) Complainant--Any person, including the commission's legal staff, who files a signed written complaint intended to initiate a proceeding with the commission regarding any act or omission by a person subject to the commission's jurisdiction.
- (11) Contested Case--A proceeding, including but not restricted to, the issuance of certificates, licenses, registrations, permits, etc., in which the legal rights, duties, or privileges of a party are to be determined by the agency after an opportunity for adjudicative hearing.
- (12) Days--Calendar days, not working days, unless otherwise specified in this chapter or in the commission's substantive rules.
- (13) Division--An administrative unit for regulation of specific activities within the commission's jurisdiction.
- (14) Executive Director--The executive director appointed by the commission pursuant to Government Code, §419.009.
- (15) Hearings Officer--An administrative law judge on the staff of the State Office of Administrative Hearings assigned to conduct a hearing and to issue a proposal for decision, including findings of fact and conclusions of law, in a contested case pursuant to Government Code, Chapter 2003.
- (16) License--Includes the whole or part of any agency permit, certificate, approval, registration, license, or similar form of permission required or permitted by law.
- (17) Licensee--A person who holds an agency permit, certificate, approval, registration, license, or similar form of permission required or permitted by law.
- (18) Licensing--Includes the agency process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.
- (19) Party--Each person or agency named or admitted as a party in a contested case.
- (20) Person--Any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than the commission.
- (21) Pleading--A written document submitted by a party, or a person seeking to participate in a proceeding, setting forth allegations of fact, claims, requests for relief, legal argument, and/or other matters relating to a commission proceeding.
- (22) Preliminary Staff Conference -- A conference with commission staff for the purpose of showing compliance with all requirements of law, or to discuss informal disposition of any complaint or contested case.**
- ~~(23)~~ (22) Presiding Officer--The chairman, the acting chairman, the executive director, or a duly authorized hearings officer.

~~(24)~~<sup>23</sup>) Proceeding--Any hearing, investigation, inquiry, or other fact-finding or decision-making procedure, including the denial of relief or the dismissal of a complaint.

~~(25)~~<sup>24</sup>) Respondent--A person under the commission's jurisdiction against whom any complaint or appeal has been filed or who is under formal investigation by the commission.

**(26) SOAH – State Office of Administrative Hearings.**

**§401.5 Delegation of Authority.**

All decisions to suspend, revoke, or deny an application for any certificate or approval, to reprimand or place on probation the holder of such certificate or approval, or to impose an order for restitution, remedial action, or administrative penalties pursuant to Government Code, Chapter 419, shall be made by the executive director or designee.

**§401.7 Construction.**

- (a) A provision of a rule referring to the commission, the executive director, or a provision referring to the presiding officer, is construed to apply to the commission or chairman if the matter is within the jurisdiction of the commission, to the executive director if the matter is within the jurisdiction of the executive director.
- (b) Unless otherwise provided by law, any duty imposed on the commission, the chairman, or the executive director may be delegated to a duly authorized representative. In such case, the provisions of any rule referring to the commission, the chairman, or the executive director, shall be construed to also apply to the duly authorized representative of the commission, the chairman, or the executive director.

**§401.9 Records of Official Action.**

All official acts of the commission or the executive director shall be evidenced by a recorded or written record. Official action of the commission or the executive director shall not be bound or prejudiced by any informal statement or opinion made by any member of the commission, the executive director, or the employees of the agency.

**§401.11 Conduct of Commission and Advisory Meetings.**

- (a) Statements concerning items which are part of the commission's posted agenda. Persons who desire to make presentations to the commission concerning matters on the agenda for a scheduled commission or fire fighter advisory committee meeting shall complete registration cards which shall be made available at the entry to the place where the scheduled meeting is to be held. The registration cards shall include blanks in which all of the following information must be disclosed:
  - (1) name of the person making a presentation;
  - (2) a statement as to whether the person is being reimbursed for the presentation; and if so, the name of the person or entity on whose behalf the presentation is made;
  - (3) a statement as to whether the presenter has registered as a lobbyist in relationship to the matter in question;
  - (4) a reference to the agenda item which the person wishes to discuss before the commission;
  - (5) an indication as to whether the presenter wishes to speak for or against the proposed agenda item; and
  - (6) a statement verifying that all factual information to be presented shall be true and correct to the best of the knowledge of the speaker.

- (b) Discretion of the presiding officer. The presiding officer of the commission or the advisory committee, as the case may be, shall have discretion to employ any generally recognized system of parliamentary procedures, including, but not limited to Robert's Rules of Order for the conduct of commission or committee meetings, to the extent that such parliamentary procedures are consistent with the Texas Open Meetings Act or other applicable law and these rules. The presiding officer shall also have discretion in setting reasonable limits on the time to be allocated for each matter on the agenda of a scheduled commission meeting or advisory committee meeting and for each presentation on a particular agenda item. If several persons wish to address the commission or advisory committee on the same agenda item, it shall be within the discretion of the chair to request that persons who wish to address the same side of the issue coordinate their comments, or limit their comments to an expression in favor of views previously articulated by persons speaking on the same side of an issue.
- (c) Requests for issues to be placed on an agenda for discussion. Persons who wish to bring issues before the commission shall first address their request in writing to the Executive Director. Such requests should be submitted at least 15 days in advance of commission or fire fighter advisory committee meetings. The decision whether to place a matter on an agenda for discussion before the full commission, or alternatively before the fire fighter advisory committee, or with designated staff members, shall be within the discretion of the appropriate presiding officer.

#### **§401.13 Computation of Time.**

- (a) Computing Time. In computing any period of time prescribed or allowed by these rules, by order of the Agency, or by any applicable statute, the period shall begin on the day after the act, event, or default in controversy and conclude on the last day of such computed period, unless it be a Saturday, Sunday, or a legal holiday, in which event, the period runs until the end of the next day which is neither a Saturday, Sunday, nor a legal holiday. A party or attorney of record notified under §401.61 of this title (relating to Record) is deemed to have been notified on the date which notice is sent.
- (b) Extensions. Unless otherwise provided by statute, the time for filing any pleading, except a notice of protest, may be extended by order of the executive director or designee, upon the following conditions:
- (1) A written motion must be duly filed with the executive director or designee prior to the expiration of the applicable period of time allowed for such filings.
  - (2) The written motion must show good cause for such extension and that the need is not caused by the neglect, indifference, or lack of diligence on the part of the movant.
  - (3) A copy of any such motion shall be served upon all other parties of record to the proceeding contemporaneously with the filing thereof.

#### **§401.15 Agreements To Be in Writing.**

- (a) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.
- (b) No stipulation or agreement between the parties, their attorneys or representatives, with regard to any matter involved in any proceeding before the Agency, shall be enforced unless it shall have been reduced to writing and signed by the parties or their authorized representatives, or unless it shall have been dictated into the record by them during the course of a hearing, or incorporated in an order bearing their written approval. This rule does not limit a party's ability to waive, modify, or stipulate any right or privilege afforded by these rules, unless precluded by law.

## SUBCHAPTER B

### RULEMAKING PROCEEDINGS

#### **§401.17 Requirements.**

Except for the requirements of mandatory rule development by the fire fighter advisory committee provided for by law, the procedure for rulemaking is governed by Subchapter B of the Administrative Procedure Act (APA).

#### **§401.19 Petition for Adoption of Rules.**

- (a) Any person may petition the commission requesting the adoption of a new rule or an amendment to an existing rule as authorized by the APA, §2001.021.
- (b) Petitions shall be sent to the executive director. Petitions shall be deemed sufficient if they contain:
  - (1) the name and address of the person or entity on whose behalf the application is filed;
  - (2) specific reference to the existing rule which is proposed to be changed, amended, or repealed;
  - (3) the exact wording of the new, changed, or amended proposed rule with new language underlined and deleted language dashed out;
  - (4) the proposed effective date; and
  - (5) a justification for the proposed action set out in narrative form with sufficient particularity to inform the commission and any other interested person of the reasons and arguments on which the petitioner is relying.
- (c) The executive director shall direct that the petition for adoption of rules be placed on the next agenda for discussion by the commission or the fire fighter advisory committee with subject matter jurisdiction in accordance with §401.11 of this title (relating to Conduct of Commission and Advisory Meetings).
- (d) A request for clarification of a rule shall be treated as a petition for a rule change. The commission staff may request submission of additional information from the applicant to comply with the requirements of subsection (b) of this section.

## SUBCHAPTER C

### EXAMINATION APPEALS PROCESS

#### §401.21 Examination Challenge.

- (a) An examinee who seeks to challenge the failure of an examination must submit a written request [~~for an informal conference to the Fire Service Standards and Certification division director~~] to discuss informal disposition of the complaint(s).
- (b) An examination may be challenged only on the basis of examination content, failure to comply with commission rules by a certified training facility, or problems in the administration of the examination.
- (c) The written request must identify the examinee, the specific examination taken, the date of the examination, and the basis of the appeal.
- (d) An examinee who challenges the content of an examination must identify the subject matter of the question(s) challenged and is not entitled to review the examination due to the necessity of preserving test security.
- (e) The request must be submitted within 30 days from the date the grade report is posted on the website.
- (f) Commission staff shall schedule a **preliminary staff** conference with the applicant in accordance with §401.41 of this title (relating to Preliminary Staff Conference) to discuss the challenge within 30 days of the request or as soon as practical. The examinee may accept or reject the settlement recommendations of the commission staff. If the examinee rejects the proposed agreement, the examinee must request **in writing** a formal administrative hearing as described in Subchapter F of this chapter (relating to Contested Cases) within 30 days of the action complained of.

#### §401.23 Examination Waiver Request.

- (a) An individual who is required to take a commission examination may petition the commission for a waiver of the examination if the person's certificate or eligibility expired because of a good faith clerical error on the part of the individual or an employing entity.
- (b) The waiver request must include a sworn statement together with any supporting documentation that evidences the applicant's good faith efforts to comply with commission requirements and that failure to comply was due to circumstances beyond the control of the certificate holder or applicant.
- (c) Commission staff shall schedule a **preliminary staff** conference with the applicant in accordance with §401.41 of this title (relating to Preliminary Staff Conference) to discuss the waiver request within 30 days of the request, or as soon as practical. The applicant may accept or reject the settlement recommendations of the commission staff. If the examinee rejects the proposed agreement, the applicant must request **in writing** a formal administrative hearing as described in Subchapter F of this chapter (relating to Contested Cases) within 30 days of the action complained of.

## SUBCHAPTER D

### DISCIPLINARY PROCEEDINGS

#### §401.31 Disciplinary Proceedings in Contested Cases.

- (a) If the commission staff recommends administrative penalties or any other sanction[ ~~pursuant to Chapter 445 of this title (relating to Administrative Inspections and Penalties) or §401.105 of this title, (relating to Administrative Penalties)~~] for alleged violations of laws or rules[~~administered or enforced by the commission and its staff~~], the respondent may request a preliminary staff conference[ ~~in accordance with §401.41 of this title (relating to Preliminary Staff Conference)~~].
- (b) Commission staff shall schedule a **preliminary staff** [~~Preliminary Staff~~] conference with the applicant[ ~~in accordance with §401.41 of this title to (Preliminary Staff Conference)~~] to discuss the alleged violations of laws or rules within 30 days of the request or as soon as practical. The respondent may accept or reject the settlement recommendations of the commission staff. If the respondent rejects the proposed agreement, the respondent must request **in writing** a formal administrative hearing as described in Subchapter F of this chapter (relating to Contested Cases) within 30 days of the notice of the staff's recommended disciplinary action.

## SUBCHAPTER E

### PREHEARING PROCEEDINGS

#### §401.41 Preliminary Staff Conference.

- (a) General. After receipt of [~~preliminary~~] notice of alleged violations of laws or rules administered or enforced by the commission and its staff, the holder of the certificate, applicant or regulated entity may request a conference with the commission's staff for the purpose of showing compliance with all requirements of law, or to discuss informal disposition of any complaint or contested case [~~pursuant to the Government Code, §419.906(e) and §2001.056~~].
- (b) Representation. The certificate holder, applicant or regulated entity may be represented by counsel or by a representative of his or her choice. The commission shall be represented by one or more members of its staff and by commission legal counsel.
- (c) Informal Proceedings. The conference shall be informal, and will not follow **procedures** [~~procedure established in Subchapter F of this chapter (relating to Contested Cases)]~~ for contested cases. The commission's representative(s) may prohibit or limit attendance by other persons; may prohibit or limit access to the commission's investigative file by the licensee, the licensee's representative, and the complainant, if present; and may record part or all of the staff conference. At the discretion of the commission's representative(s), the licensee, the licensee's representative, and the commission staff may question witnesses; make relevant statements; and present affidavits, reports, letters, statements of persons not in attendance, and such other evidence as may be appropriate.
- (d) Settlement Conference. At the discretion of the commission's representative(s), the preliminary staff conference may be concluded, and a settlement conference initiated to discuss staff recommendations for informal resolution of the issues. Such recommendations may include any disciplinary actions authorized by law, including **administrative penalties**, restitution, remedial actions, or such reasonable restrictions that may be in the public interest. [~~Recommendations for administrative penalties or monetary forfeitures shall be made in accordance with §401.105 of this title (relating to Administrative Penalties).~~] These recommendations may be modified by the commission's representative(s) based on new information, a change of circumstances, or to expedite resolution in the interest of protecting the public. The commission's representative(s) may also recommend that the investigation be closed or referred for further investigation.
- (e) Proposed Consent Order. The licensee may accept or reject the settlement recommendations of the commission staff. If the licensee accepts the recommendations, the licensee shall execute a settlement agreement in the form of a proposed consent order as soon thereafter as practicable. If the licensee rejects the proposed agreement, the matter may be scheduled for a hearing as described in Subchapter F of this chapter.
- (f) Approval of Consent Order. Following acceptance and execution of the settlement agreement recommended by staff, said proposed agreement shall be submitted to the executive director for approval. If the order is approved, it shall be signed by the executive director. If the proposed order is not approved, the licensee shall be so informed and the matter shall be referred to the commission staff for appropriate action to include dismissal, closure, further negotiation, further investigation, or a formal hearing.
- (g) Preliminary Notice. A revocation, suspension, annulment, denial, or withdrawal of a certificate or license is not effective unless, before the institution of contested case proceedings, the holder of the certificate receives preliminary notice of the facts or conduct alleged to warrant the intended action and an opportunity to show compliance with all requirements of law.**

**(h) Request for Formal Hearing. Except as otherwise provided by law, if an applicant's original application or request for a certificate is denied, he or she shall have 30 days from the date of denial to make a written request for a formal hearing, and if so requested, the formal hearing will be granted and the provisions of the APA and this chapter with regard to contested cases shall apply.**

**[§401.43 Prehearing Conferences.]**

[The presiding hearings officer shall schedule prehearing conferences as necessary for the efficient management of the proceedings. The presiding hearings officer shall conduct prehearing conferences for any appropriate purpose, including consideration of the following:]

- [ (1) motions and other preliminary matters related to the proceeding, including notice, discovery, and procedural schedules;]
- [ (2) settlement of the case, or clarification and simplification of the issues;]
- [ (3) the necessity or desirability of amended pleadings;]
- [ (4) the possibility of obtaining stipulations that would avoid the unnecessary introduction of evidence;]
- [ (5) evidentiary matters, including a request for interim relief;]
- [ (6) the specific procedures to be followed at the hearing;]
- [ (7) the scheduling of the hearing on the merits; and]
- [ (8) any other matters as may assist the disposition of the proceeding in a fair and efficient manner.]

**[§401.45 Interim Order.]**

[The presiding hearings officer shall issue orders covering procedural and discovery matters, requests for interim relief, and such other matters as may aid in the conduct of the hearing and efficient and fair disposition of the proceeding. Interim orders may be written or stated orally on the record.]

**[§401.47 Appeal of an Interim Order.]**

- [(a) Availability of Appeal. Appeals are available for any order of the presiding hearings officer that immediately prejudices a substantial or material right of a party, or materially affects the course of the hearing, other than evidentiary rulings. Interim orders shall not be subject to exceptions or applications for rehearing prior to issuance of a report of a presiding hearings officer.]
- [(b) Procedure for Appeal. If the presiding hearings officer intends to reduce an oral ruling to a written order, the presiding hearings officer shall so indicate on the record at the time of the oral ruling and shall promptly issue the written order. Any appeal to the executive director as to matters within his or her jurisdiction shall be filed within five working days of the issuance of the written order or the appealable oral ruling. The appeal shall be served on all parties by hand delivery, facsimile transmission, or by overnight courier delivery.]
- [(c) Contents. An appeal shall specify the reasons why the interim order is unjustified or improper.]
- [(d) Responses. Any response to an appeal shall be filed within five working days of the filing of the appeal.]
- [(e) Motions for Stay. Pending a ruling by the executive director, the presiding hearings officer may, upon motion, grant a stay of the interim order. A motion for a stay shall specify the basis for a stay. Good

~~cause shall be shown for granting a stay. The mere filing of an appeal shall not stay the interim order or the procedural schedule.~~

~~[(f) Denial. The executive director shall rule on the interim order within 20 days of the filing of the appeal. If the executive director does not rule on the appeal within 20 days of its filing, or extend the time for ruling, the interim order is deemed approved and any granted stay is lifted. The appeal may be carried with the underlying case provided the executive director does not act upon the appeal within the time provided in this section.]~~

~~[(g) Reconsideration. The presiding hearings officer may treat an appeal as a motion for reconsideration and may withdraw or modify the order under appeal prior to a decision on the appeal.]~~

**~~§401.49 Prehearing Statements.~~**

~~[(a) Prehearing Statements Required. Each party shall file a prehearing statement no later than three days before the start of a hearing unless the presiding hearings officer determines that such a requirement would add unjustified burden and expense to the proceeding, or that a different deadline should be imposed. The presiding hearings officer may impose sanctions provided in §401.103 of this title (relating to Discovery Sanctions) against any party who fails to comply with the requirement that a prehearing statement be filed.]~~

~~[(b) Contents of Prehearing Statement. Unless otherwise provided by order of the presiding hearings officer, the prehearing statement shall contain the following information:]~~

~~[- (1) a concise statement of the party's position in the proceeding;]~~

~~[- (2) a concise statement of each question of fact, law, or policy the party considers at issue;]~~

~~[- (3) a concise statement of the party's position on each issue identified pursuant to paragraph (2) of this subsection;]~~

~~[- (4) a statement of issues that have been resolved by agreement of the parties, including agreements that do not include all parties; and]~~

~~[- (5) a statement as to any requirement set forth in the prehearing order that cannot be complied with, the reasons for noncompliance, and such other information as will aid in achieving an orderly disposition of the proceeding.]~~

## SUBCHAPTER F

### CONTESTED CASES

#### **§401.51 [~~Preliminary Notice and ]Opportunity for Hearing.~~**

**In general, except**~~[(a) In General. Except]~~ as otherwise provided by law, the procedure for the grant, denial, renewal, revocation, suspension, annulment, or withdrawal of a certificate is governed by Government Code, Chapter 2001, pertaining to Administrative Procedures and by 1 TAC Chapter 155 (relating to Rules of Procedures) adopted by SOAH~~[-effective November 26, 2008].~~

~~[(b) Preliminary Notice. A revocation, suspension, annulment, or withdrawal of a certificate or license is not effective unless, before the institution of agency proceedings, the holder of the certificate receives preliminary notice of the facts or conduct alleged to warrant the intended action and an opportunity to show compliance with all requirements of law, as required by Government Code, §2001.054(c)].~~

~~[(c) Staff Conference. The holder of the certificate may request a conference with commission staff for the purpose of showing compliance with all requirements of law, or to discuss informal disposition of any complaint or contested case, pursuant to the Government Code, §419.906(c) and §2001.056, and the procedures provided in §401.41 of this title (relating to Preliminary Staff Conference).]~~

~~[(d) Request for Hearing. Except as otherwise provided by law, if an applicant's original application or request for certificate is denied, he or she shall have 30 days from the date of denial to make a written request for a hearing, and if so requested, the formal hearing will be granted and the provisions of the APA and this chapter with regard to contested cases shall apply.]~~

#### **§401.53 Contested Case[~~Notice of~~] Hearing.**

(a) **The commission appoints SOAH to be its finder of fact in contested cases. The commission does not delegate to the hearings officer and retains for itself the right to determine the sanctions and make the final decision in a contested case.**~~[Notice in a contested case shall comply with the APA, §2001.051 and §2001.052.]~~

(b) **SOAH hearings of contested cases shall be conducted in accordance with the APA by a hearings officer assigned by SOAH. Jurisdiction over the case is acquired by SOAH when the commission staff files a request to docket case.**~~[Deposit in the United States mails of a registered or certified letter, return receipt requested, containing a notice of a hearing in compliance with the requirements specified in this rule, or containing a copy of any decision or order addressed to the affected party or the attorney of record for the party at the party's last known address, shall constitute notice of the hearing or of such decision or order. The date of deposit as herein provided is the date of the act, after which any designated period begins to run as provided in §401.13 of this title (relating to Computation of Time).]~~

(c) **The commission may serve the notice of hearing on the respondent at his or her last known address as shown by commission records. The notice may be served by registered U.S. mail or by certified mail, return receipt requested.**

#### **~~§401.55 Hearings Officer.~~**

~~[(a) The executive director may designate and appoint a hearings officer to act on his or her behalf in conducting any hearing or proceeding held under this chapter and to prepare proposals for decision on those hearings.]~~

~~[(b) The hearings officer has the authority to administer oaths; call and examine witnesses; issue subpoenas; make rulings on motions, admissibility of evidence, and amendments to pleadings; maintain decorum; schedule and recess the proceedings from day to day; and make any other orders as justice requires.]~~

~~[(c) If the hearings officer is unable to continue presiding over a case at any time before the final decision, another officer will be appointed who shall perform any remaining function without the necessity of repeating any previous proceedings.]~~

#### **§401.57 Filing of Exceptions and Replies to Proposal for Decision.**

- (a) A copy of the proposal for decision in a contested case shall be simultaneously delivered or mailed by certified mail, return receipt requested, to each party representative of record.
- (b) Exceptions to the proposal for decision shall be filed within **20**~~[ten calendar]~~ days of the date of the proposal for decision.
- (c) Replies to exceptions shall be filed within **15** ~~[20 calendar]~~ days **after** ~~[of]~~ the date of **filing of the exceptions and briefs**~~[the proposal for decision]~~.

~~[(d) All disagreements with the factual finds of the proposal for decision must be made in the parties' exceptions to the proposal for decision or be waived.]~~

~~(d)~~~~(e)~~ The exceptions shall be specifically and concisely stated. The evidence relied upon shall be stated with particularity, and any evidence or arguments relied upon shall be grouped under the exceptions to which they relate.

**(e) The hearings officer will rule on all exceptions, briefs, replies, and requests for extension of time and notify the parties of decisions and any amendments to the proposal for decision.**

#### **§401.59 Orders.**

After the time for filing exceptions and replies to exceptions expires, the hearings officer's proposal for decision will be considered by the executive director and either adopted or modified and adopted. ~~[ An order issued by the hearings officer may be modified or vacated only for reasons of policy, with the reasons and legal basis clearly stated in writing.]~~ All final decisions or orders of the commission or the executive director shall be in writing and signed. A final decision shall include findings of fact and conclusions of law separately stated. Findings of fact, if set forth in statutory language, shall be accomplished by a concise and explicit statement of the underlying facts supporting the findings. Parties shall be notified either personally or by certified mail of any decision or order, and a copy of the decision or order shall be delivered or mailed to any party and to his or her authorized representative.

#### **§401.61 Record.**

- (a) The record in a contested case includes the matters listed in the APA, *Government Code, §2001.060*.
- (b) Proceedings, or any part of them, shall be transcribed on written request of any party. The party requesting the proceeding to be transcribed shall **make the initial payment for the transcription. Ultimately, however, the commission or executive director has the authority to assess, in addition to an administrative penalty, the costs of transcribing the administrative hearing.** ~~[bear the expense thereof in accordance with the usual and customary charges of a court reporter. Should two or more parties make such request, the cost shall be borne on a pro rata basis. This section does not limit the agency to a stenographic record of proceedings.]~~

**(c) Appeal. The costs of transcribing the testimony and preparing the record for an appeal by judicial review shall be paid by the party who appeals.**

#### **§401.63 Final Decision and Orders~~[Appeals to the Commission]~~.**

**(a) Commission action. A copy of the final decision or order shall be delivered or mailed to any party and to the attorney of record.**

**(b) Recorded. All final decisions and orders shall be in writing. A final order shall include findings of fact and conclusions of law, separately stated.**

**(c) Changes stated in final order. If the hearings officer's proposed findings of fact or conclusions of law are modified, the final order shall reflect the specific reason and legal basis for each change made.**

~~(d)~~(a) In general. Any party aggrieved of a final decision or order of the executive director in a contested case may appeal to the commission after the decision or order complained of is final. An appeal to the commission for review of action of the executive director shall be made within 30 days from the date that the writing evidencing the official action or order complained of is final and appealable, but for good cause shown, the commission may allow an appeal after that date. A motion for rehearing is not a prerequisite for an appeal to the commission.

~~[(b) Standard of Review. The review of decisions of the executive director by the commission shall be based on the substantial evidence rule. In reviewing any final decision or order of the executive director, the commission may consider the record in the contested case developed before the executive director or the assigned examiner, and may not consider evidence not presented to or officially noticed by the executive director or the hearings officer. A party may apply to the commission to present additional evidence. If the commission is satisfied that the additional evidence is material and that there were good reasons for the failure to present it in the proceeding before the executive director, the commission may order that additional evidence be taken before the assigned hearings officer on conditions set by the commission. The executive director may change his or her findings and decision by reason of the additional evidence and shall file the additional evidence and any changes, new findings, or decisions with the commission. ]~~

~~(e)~~[(e)] Oral argument. On the request of any party, the commission may allow oral argument prior to the final determination of an appeal of a decision or order of the executive director.

**(f) If the executive director's final decision or order is appealed to the commission, the matter shall be set for the next available commission meeting and the commission shall take action in open session. A copy of the commission decision shall be delivered or mailed to any party and to the attorney of record.**

#### **§401.65 Suspension of Orders.**

~~[Pending appeal and final disposition of a matter, the commission, for good cause, may suspend the effectiveness of the executive director's orders. A request for hearing does not of itself stay an official act or order unless the official act or order is stayed by controlling law.]~~

#### **§401.67 Motions for Rehearing.**

- (a) In the absence of a finding of imminent peril, a motion for rehearing is a prerequisite to a judicial appeal. A motion for rehearing must be filed by a party within 20 days after the date the party representative is notified of the final decision or order.
- (b) Replies to a motion for rehearing must be filed with the agency within 30 days after the date the party representative is notified of the final decision or order.
- (c) Agency action on the motion for rehearing must be taken within 45 days after the date a party representative is notified of the final decision or order. If agency action is not taken within the 45-day period, the motion for rehearing is overruled by operation of law 45 days after the date the party representative is notified of the final decision or order.
- (d) The commission may rule on a motion for rehearing at a meeting or by mail, telephone, telegraph, facsimile transmission, or another suitable means of communication. The motion shall be deemed overruled by operation of law, unless a majority of the commissioners serving vote to grant the motion within the time provided by law for ruling on the motion for rehearing.

- (e) The agency may, by written order, extend the period of time for filing the motions or replies and taking agency action, except that an extension may not extend the period for agency action beyond 90 days after the date a party representative is notified of the final order or decision.
- (f) In the event of an extension, the motion for rehearing is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date the party representative is notified of the final decision or order.

## SUBCHAPTER G

### CONDUCT AND DECORUM, SANCTIONS, AND PENALTIES

#### ~~§401.101 Conduct and Decorum.~~

~~[(a) Standard of conduct during adjudicative proceedings.]~~

~~[(1) The hearings officer and the party representative should refer to the Texas Disciplinary Rules of Professional Conduct for guidance, regardless of whether all participants are licensed attorneys (Texas State Bar Rules, Article 10, §9).]~~

~~[(2) Party representatives shall maintain high standards of professionalism during the administrative process and promote an atmosphere of civility and fairness.]~~

~~[(3) A party representative shall use these rules for legitimate purposes and not for dilatory purposes or to harass or intimidate other participants.]~~

~~[(b) Exclusion or disqualification of party representatives.]~~

~~[(1) Contemptuous conduct. A hearings officer may exclude or disqualify a party representative from participating in an agency hearing for contemptuous conduct. The hearings officer shall warn the party representative prior to exclusion, if possible. Contemptuous conduct includes:]~~

~~—[(A) actual or threatened physical assault of any participant to the proceeding;]~~

~~—[(B) knowingly or recklessly making a false statement of material fact or law to the hearings officer;]~~

~~—[(C) counseling or assisting a witness to testify falsely;]~~

~~—[(D) knowingly or recklessly offering or using false evidence;]~~

~~—[(E) filing a frivolous or knowingly false pleading or other document, or filing a frivolous or knowingly false defense. A frivolous filing is one:]~~

~~—[(i) primarily for the purpose of harassing or maliciously injuring another person; or]~~

~~—[(ii) for which the party representative is unable to make a good faith argument for an extension, modification, or reversal of existing law;]~~

~~—[(F) paying, offering to pay, or acquiescing in a payment or offer of payment to a witness based on the content of the witness' testimony or the outcome of the proceeding;]~~

~~—[(G) continually violating an established rule of agency procedure or of evidence;]~~

~~—[(H) raising superfluous objections or otherwise unreasonably delaying the proceeding or increasing the costs or other burden of the proceeding;]~~

~~—[(I) misrepresenting, mischaracterizing, or misquoting facts or law to gain unfair advantage;]~~

~~—[(J) except as otherwise permitted by law, communicating or causing someone else to communicate with the hearings officer without the knowledge and consent of opposing party representatives in order to gain unfair advantage or to influence the proceeding;]~~

~~—[(K) using vulgar or abusive language during the proceeding; and]~~

~~[(L) engaging in disruptive conduct.]~~

~~[(2) Conflicts of interest. A hearings officer may disqualify a party representative from participating in a proceeding if the hearings officer decides that the party representative has a conflict of interest. Conflicts of interest can be, but are not limited to, the following:]~~

~~[(A) when a party representative who previously acted as a public officer or employee on a matter later attempts to represent a private client on the same matter, unless the appropriate government agency consents;]~~

~~[(B) when a party representative who serves as a public officer or employee on a matter negotiates for private employment with a party or party representative involved in the same matter;]~~

~~[(C) when a party representative who serves as a public officer or employee participates in a matter involving a former private client whom he or she represented on the same matter, unless no one may legally act in the attorney's stead;]~~

~~[(D) when an attorney engages in the practice of law while under suspension or in violation of a disciplinary order or judgment; and]~~

~~[(E) any other conflict of interest that, in the opinion of the hearings officer, offends the dignity and decorum of the proceeding.]~~

~~[(3) Procedures for excluding or disqualifying a party representative.]~~

~~[(A) Notice. The hearings officer shall state the specific reason for excluding or disqualifying a party representative on the record or in a written order. The hearings officer shall notify the affected party and representative of the exclusion or disqualification personally or by certified mail.]~~

~~[(B) Reasonable time for substitution. After the hearings officer has excluded or disqualified a party representative, the affected party or party representative shall have reasonable time to appeal to the executive director. If the exclusion or disqualification order is sustained, the party shall have a reasonable time to substitute a new representative. In determining a reasonable time, the hearings officer shall consider the right of opposing parties to have the proceeding resolved without undue delay. The hearings officer may therefore align the affected party with another party in interest instead of permitting a substitution.]~~

~~[(C) Appeal of exclusion or disqualification. A party or party representative may appeal the exclusion (if it is for a period of more than eight hours) or disqualification to the executive director pursuant to §401.47 of this title (relating to Appeal of an Interim Order).]~~

~~[(D) No further participation. After being disqualified from the proceeding, a party representative may not provide further assistance, either directly or indirectly, to any party with regard to the proceeding, except to the extent reasonably necessary to make an appeal of the disqualification order pursuant to §401.47 of this title (relating to Appeal of an Interim Order) and to complete the withdrawal and substitution of a new party representative.]~~

~~[(E) No recusal. The exclusion or disqualification of a party representative by a hearings officer is not a ground for recusal of the hearings officer in the same or any subsequent proceeding.]~~

### **~~§401.103 Discovery Sanctions.]~~**

~~[(a) After notice and opportunity for hearing, an order imposing sanctions, as are just, may be issued by the hearings officer for failure to comply with a discovery order or subpoena issued pursuant to a Commission for deposition or production of books, records, papers, or other objects. The order imposing sanctions may:~~

- ~~[- (1) disallow any further discovery of any kind or of a particular kind of disobedient party;~~
  - ~~[- (2) require the party, the party's representative, or both to obey the discovery order;~~
  - ~~[- (3) require the party, the party's representative, or both to pay reasonable expenses, including attorney fees, incurred by reason of the party's noncompliance;~~
  - ~~[- (4) direct that the matters regarding which the discovery order was made shall be deemed established in accordance with the claim of the party obtaining the order;~~
  - ~~[- (5) refuse to allow the disobedient party to support or oppose designated claims or defenses or prohibit the party from introducing designated matters into evidence;~~
  - ~~[- (6) strike pleadings or parts thereof or abate further proceedings until the order is obeyed; or~~
  - ~~[- (7) dismiss the action or proceeding or any part thereof or render a decision by default against the disobedient party.~~
- ~~[(b) Appellate Review. Any discovery order or subpoena and any order imposing sanctions issued by the hearings officer is subject to review by an appeal to the executive director in accordance with §401.47 of this title (relating to Appeal of an Interim Order).]~~

#### **§401.105 Administrative Penalties.**

- (a) **Following the hearing the administrative law judge shall issue a proposal for decision containing findings of facts and conclusions of law. While the administrative law judge may recommend a sanction, findings of fact and conclusions of law are inappropriate for sanction recommendations, and sanction recommendations in the form of findings of fact and conclusions of law are an improper application of applicable law and these rules. In all cases, the commission or executive director has the discretion to impose the sanction that best accomplishes the commission's legislatively-assigned enforcement goals. The commission or executive director is the ultimate arbiter of the proper penalty.** [The commission, acting through the executive director may, after notice and hearing required by Government Code, Chapter 2001, Administrative Procedure Act, impose an order requiring payment of an administrative penalty or monetary forfeiture in an amount not to exceed \$1,000 for each violation of Government Code, Chapter 419, or rule promulgated there under, as provided by Government Code, §419.906.]
- (b) In determining the amount of the administrative penalty or monetary forfeiture **the commission or** the executive director shall consider:
- (1) the seriousness of the violation, including but not limited to the nature, circumstances, extent, and gravity of the prohibited act, and the hazard or potential hazard created to the health and safety of the public;
  - (2) the economic damage to property or the public's interests or confidences caused by the violation;
  - (3) the history of previous violations;
  - (4) any economic benefit gained through the violation;
  - (5) the amount necessary to deter future violations;
  - (6) the demonstrated good faith of the person, including efforts taken by the alleged violator to correct the violation;

(7) the economic impact of imposition of the penalty or forfeiture on the person; and

(8) any other matters that justice may require.

**(c) The commission or executive director retains the right to increase or decrease the amount of an administrative penalty based on the circumstances in each case. In particular, the commission or executive director may increase the amount of administrative penalties when the respondent has committed multiple violations (e.g. some combination of different violations).**

**(d) Because it is the policy of the commission to pursue expeditious resolution of complaints when appropriate, administrative penalties in uncontested cases may be less than the amounts assessed in contested cases. Among other reasons, this may be because the respondent admits fault, takes steps to rectify matters, timely responds to commission concerns, or identified mitigating circumstances, and because settlements avoid additional administrative costs.**

**(e) The commission or executive director may impose an administrative penalty alone or in addition to other permitted sanctions.**

## SUBCHAPTER H

### REINSTATEMENT

#### **§401.111 Application for Reinstatement of License or Certificate.**

- (a) At the expiration of one year from the date of revocation or suspension, or upon the conclusion of any specified period of suspension, the commission may consider a request for reinstatement by the former licensee or certificate holder (applicant).
- (b) The request for reinstatement must be submitted to the commission office in writing and should include a short and plain statement of the reasons why the applicant believes the license should be reinstated.
- (c) Upon denial of any application for reinstatement, the commission may not consider a subsequent application until the expiration of one year from the date of denial of the prior application.
- (d) In taking action to revoke or suspend a license or certificate, the commission may, in its discretion, specify the terms and conditions upon which reinstatement shall be considered.

#### **§401.113 Evaluation for Reinstatement.**

In considering reinstatement of a suspended or revoked license or certificate, the commission will evaluate:

- (1) the severity of the act which resulted in revocation or suspension of the license or certificate;
- (2) the conduct of the applicant subsequent to the revocation or suspension of the license or certificate;
- (3) the lapse of time since revocation or suspension;
- (4) the degree of compliance with all conditions the commission may have stipulated as a prerequisite for reinstatement;
- (5) the degree of rehabilitation attained by the applicant as evidenced by sworn notarized statements sent directly to the commission from qualified people who have personal and professional knowledge of the applicant; and
- (6) the applicant's present qualifications to perform duties regulated by the commission.

#### **§401.115 Procedure upon Request for Reinstatement.**

- (a) An applicant for reinstatement of a revoked or suspended license or certificate must personally appear before an administrative law judge designated by the commission at a scheduled date and time to show why the license or certificate should be reinstated.
- (b) Upon submission of proof of past revocation or suspension of the applicant's license or certificate, the applicant has the burden of proof to show present fitness and/or rehabilitation to perform duties regulated by the commission.
- (c) Upon receipt of a written request for reinstatement as required by §401.111 of this title (relating to Application for Reinstatement of License or Certificate), the applicant will be notified of a date and time of an appearance before the administrative law judge.

**§401.117 Commission Action Possible upon Reinstatement.**

After evaluation, the commission may:

- (1) deny reinstatement of a suspended or revoked license or certificate;
- (2) reinstate a suspended or revoked license or certificate and probate the practitioner for a specified period of time under specific conditions;
- (3) authorize reinstatement of the suspended or revoked license or certificate;
- (4) require the satisfactory completion of a specific program of remedial education approved by the commission; and/or
- (5) reinstate a suspended or revoked license or certificate after verification through examination of required knowledge and skills appropriate to the suspended or revoked license or certificate. All applicable procedures shall be followed and all applicable fees shall be paid.

**~~§401.119 Failure To Appear for Reinstatement.~~**

~~[An applicant for reinstatement of a revoked or suspended license or certificate who makes a commitment to appear before the administrative law judge, and fails to appear at a hearing set with notice by the agency, shall not be authorized to appear before the administrative law judge before the expiration of six months. For good cause shown, the executive director may authorize an exception to this rule.]~~

## SUBCHAPTER I

### NOTICE AND PROCESSING PERIODS FOR CERTIFICATE APPLICATIONS

#### **§401.121 Purpose of Establishing Time Periods.**

In order to minimize delays, this subchapter establishes time periods within which the **commission** [~~Texas Commission on Fire Protection~~] shall review and process certificate applications efficiently and provides for an appeal process should the agency violate these periods in accordance with the Government Code, Chapter 2005.

#### **§401.123 Notice of Deficiency.**

Written notice that an application is deficient must be mailed to the applicant or delivered by such means as will reasonably provide actual notice.

#### **§401.125 Processing Periods.**

(a) Notice to applicant. Within 30 days from receipt of an application for a certificate or approval issued pursuant to the Government Code, Chapter 419, the agency shall determine a filing to be complete or deficient and issue written notice in accordance with §401.123 of this title (relating to Notice of Deficiency) to the applicant regarding the status of the application.

(1) Complete application.

(A) The written notice for a complete application shall state that the application is complete and accepted for filing and shall advise the applicant of the time period in which the agency must deny or approve the application unless such information has previously been provided to the applicant.

(B) For purposes of this section, an application is complete upon agency determination that it is in compliance with the content and form prescribed by the agency.

(2) Deficient application.

(A) The written notice for a deficient application shall state that the application is not complete, set out the specific additional information that is required for completion, and advise the applicant that the agency may disapprove an application that is not complete. After one written notice of deficiency has been issued, another is not required for an application resubmitted in whole or in part with deficiencies.

(B) In addition to notice issued under subparagraph (A) of this paragraph, the agency may notify the applicant, in any manner, of deficiencies in the application.

(b) Processing of application. Within 60 days after receipt of a complete application, the agency shall:

(1) issue the certificate on payment of the appropriate fees and successful completion of all required examinations; or

(2) deny the certificate.

#### **§401.127 Appeal.**

(a) Hearing.

- (1) Notice. An applicant who does not receive notice as to the complete or deficient status of a certificate application within the period established in this subchapter for such application may petition for a hearing to review the matter.
  - (2) Processing. An applicant whose permit is not approved or denied within the period established in this subchapter for such certificate may petition for a hearing to review the matter.
  - (3) Procedure. A hearing under this section shall be in accordance with the Administrative Procedure Act and Subchapter E of this chapter (relating to Contested Cases).
- (b) Petition. A petition filed under this section must be in writing and directed to the executive director. The petition shall identify the applicant, indicate the type of certificate sought and the date of the application, specify each provision in this subchapter that the agency has violated, and describe with particularity how the agency has violated each provision. The petition shall be filed with the office of the executive director.
- (c) Decision. An appeal filed under this section shall be decided in the applicant's favor if the executive director finds that:
- (1) the agency exceeded an established period under this subchapter; and
  - (2) the agency failed to establish good cause for exceeding the period.
- (d) Good cause. The agency is considered to have good cause for exceeding a notice or processing period established for a permit if:
- (1) the number of certificates to be processed exceeds by 15% or more the number of certificates processed in the same calendar quarter of the preceding year;
  - (2) the agency must rely on another public or private entity for all or part of its certificate processing, and the delay is caused by the other entity;
  - (3) the hearing and decision-making process results in reasonable delay under the circumstances;
  - (4) the applicant is under administrative review; or
  - (5) any other conditions exist giving the agency good cause for exceeding a notice or processing period.
- (e) Commission review. A permit applicant aggrieved by a final decision or order of the executive director concerning a period established by these sections may appeal to the commission in writing after the decision or order complained of is final, in accordance with §401.63 of this title (relating to **Final Decision and Orders** ~~[Appeals to the Commission]~~).
- (f) Relief.
- (1) Complete or deficient status. An applicant who maintains a successful appeal under subsection (c) of this section for agency failure to issue notice as to the complete or deficient status of an application shall be entitled to notice of application status.
  - (2) Certificate approval or denial. An applicant who maintains a successful appeal under subsection (c) of this section for agency failure to approve or deny a certificate shall be entitled to such approval or denial of the certificate and to full reimbursement of all filing fees that have been paid to the agency in connection with the application.

## SUBCHAPTER J

### CHARGES FOR PUBLIC RECORDS

#### **§401.129 Charges for Public Records.**

- (a) The **commission** [~~Texas Commission on Fire Protection~~] is subject to Texas Government Code, Chapter 552, Texas Public Information Act. The Act gives the public the right to request access to government information.
- (b) The **commission** [~~Texas Commission on Fire Protection~~] adopts by reference Title 1, Part 13, Chapter 70, Cost of Copies of Public Information, as promulgated by the Office of the Attorney General.
- (c) The executive director may waive or reduce a charge for copies when furnishing the information benefits to the general public.

## SUBCHAPTER K

### HISTORICALLY UNDERUTILIZED BUSINESSES

#### **§401.131 Historically Underutilized Businesses.**

The **commission** [~~Texas Commission on Fire Protection~~] adopts by reference Title 34, Part 1, Chapter 20, Texas Procurement and Support Services, Subchapter B, Historically Underutilized Business Program, as promulgated by the Comptroller of Public Accounts.