

11. Matters referred from the Fire Fighter Advisory Committee (FFAC), including but not limited to:

A. Discussion and possible final adoption on proposed amendments, new sections, and repeals as follows:

- 1. Discussion and possible action regarding proposed rule changes to title 37 TAC, Chapter 401, Practice and Procedure.**



Texas Commission on Fire Protection

Agenda Item Summary

MEETING: Commission

DATE: 1/29/2015

Agenda Item: 11.A.1

Agenda Title: Rule changes, 37, TAC, Chapter 401, Practice and Procedure

Action to be taken: Discussion, possible final adoption

Origin of Item: *Legal counsel, staff*

INTRODUCTION/PURPOSE

Update language in Chapter 401 regarding administrative practice and procedure

DESCRIPTION/ JUSTIFICATION

The recommended changes would update rule language so as to be in accordance with current statewide practices and procedures, and procedures of State Office of Administrative Hearings (SOAH).

BUDGET IMPACT

No budget impact anticipated

TIMELINE CONSIDERATIONS

If adopted, becomes effective 20 days following receipt by Texas Register.

RECOMMENDATION

Adoption recommended by advisory committee. No public comments received.

****SPECIAL NOTE**:** Additional recommendation by staff regarding reinstatement of deleted language in Subchapter G, §401.105

REFERENCES

37 TAC, Section 13, Chapter 401

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)~~²³) 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)~~²⁴) 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 **to the executive director or his designee** ~~[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.

11. Matters referred from the Fire Fighter Advisory Committee (FFAC), including but not limited to:

A. Discussion and possible final adoption on proposed amendments, new sections, and repeals as follows:

2. Discussion and possible action regarding proposed rule changes to title 37 TAC, Chapter 445, Administrative Inspections and Penalties.



Texas Commission on Fire Protection

Agenda Item Summary

MEETING: Commission
DATE: 1/29/2015

Agenda Item: 11.A.2

Agenda Title: Rule changes, 37 TAC, Chapter 445, Administrative Inspections and Penalties

Action to be taken: Discussion, possible final adoption

Origin of Item: Legal counsel, staff

INTRODUCTION/PURPOSE

Update language in Chapter 445 regarding administrative inspections and penalties

DESCRIPTION/ JUSTIFICATION

The recommended changes would update rule language so as to provide additional distinctions between minor and major rule violations, and to clarify procedures utilized by commission personnel regarding violations found during inspections. Additionally the recommendations provide clearer language regarding options available to regulated entities in response to inspection findings.

BUDGET IMPACT

No budget impact anticipated

TIMELINE CONSIDERATIONS

If adopted, becomes effective 20 days following receipt by Texas Register.

RECOMMENDATION

Adoption recommended by Advisory Committee. No public comments received.

REFERENCES

37 TAC, Section 13, Chapter 445

CHAPTER 445

ADMINISTRATIVE INSPECTIONS AND PENALTIES

§445.7 Procedures.

- (a) The inspector shall, if possible, notify the current or acting, on duty and available, department head of the inspector's presence at the department and his intention to conduct a departmental inspection.
- (b) During the course of the inspection, any noncompliance with state law or commission rule shall be noted. Violations shall be determined to be either minor or major violations based upon the following guidelines.
- (1) Minor violations shall be defined as those violations which the inspector determines do not pose a serious threat to personnel safety due to lack of personnel protection equipment or training, are not widespread, or are not repeat violations of the same nature for which the entity was cited within the previous five years.
- (2) Major violations shall be defined as those violations which in the inspector's opinion constitute an immediate threat to personnel safety, flagrant or repeated violations in the same or similar areas, fraud, or obvious attempts to circumvent state law or commission rule. **A major violation may be as follows but not limited to a deficiency or safety issue involving protective clothing, a self-contained breathing apparatus, personal alert safety systems, breathing air, or other matter that in the inspector's judgment presents an immediate and significant risk of injury.**
- (c) In order to determine compliance with commission requirements pertaining to a particular item, the inspector may examine as many items of protective clothing and equipment deemed necessary by the inspector.

§445.9 Procedure for ~~Minor~~ Violations.

- (a) **Findings of only minor violations.** If during the course of a departmental inspection~~[,]~~ the inspector determines the department has committed **only** minor violations, the following **procedure applies.**~~[procedures shall apply.]~~
- (1) The inspector shall issue **an inspectors report which will identify** ~~[a report notice of alleged minor violations identifying]~~ the findings ~~[resulting]~~ from the compliance inspection. **The inspector's report is a written summary of an inspector's findings that is given to an inspected entity after an inspection. In cases of minor violations, the inspector's report may identify deficiencies and prescribe corrective action within specific timeframes.**
- (2) The department then has 30 calendar days from the date the **inspector's report** ~~[notice of minor violations]~~ is received to provide the Commission with a written schedule of actions **that** ~~[which]~~ will be **taken** ~~[carried out]~~ to correct the ~~[minor]~~ violations. The schedule of actions will allow necessary amounts of time for such things as obtaining items through city requisitions and bid processes, when necessary. Lack of funds is not an acceptable reason for delay.
- (3) If the department fails to **timely** provide **an acceptable written schedule of actions** ~~[a plan]~~ for obtaining compliance, **the inspector or compliance officer may issue a notice of alleged violation. The notice of alleged violation is a written document that briefly summarizes the alleged violation(s), and requires the person to correct the violation(s). The notice may also prescribe a specific time period to rectify the matter and achieve compliance, and assess an administrative penalty. If an administrative penalty is assessed, the notice shall state the amount of the penalty. The notice shall also inform the person of the person's right to an informal staff conference and that if the person fails to timely correct the alleged violation or fails to request a preliminary staff conference before the 61st day after receipt of the notice, the commission may issue a default order. In addition, the notice of alleged violation may:**

~~[within the required time frame, a hearing may be scheduled. If determined by the hearing process that violations occurred and were not corrected, the department may be:]~~

(A) ~~allow~~ ~~[allowed-]~~ extra time to come into compliance;

(B) ~~assess~~ ~~[assessed appropriate]~~ **administrative** penalties, which may be probated~~[and may include suspension of certificates, administrative penalties, hearing costs, and attorneys fees];~~

(C) suspend or revoke licenses or certificates; and

~~(D) [(C)]~~ **require** ~~[required to furnish]~~ proof of compliance.

(b) Findings of major violations. If during the course of a departmental inspection the inspector determines the department has committed a major violation, the following procedure applies.

(1) The inspector or compliance officer shall issue a notice of alleged violation. The notice shall identify the violations and require the department or provider to correct the violation. In addition, the notice of alleged violation may:

(A) specify a time period to achieve compliance;

(B) assess administrative penalties;

(C) suspend or revoke licenses or certificates; and

(D) require proof of compliance.

(2) In addition to any of the above, the commission may also temporarily suspend a person's or regulated entity's certificate on a determination by a panel of the commission that continued activity by the person or entity would present an immediate threat to the public, regulated personnel, or fire service trainees; and seek an injunction in a district court in Travis County along with civil penalties, court costs, and attorney's fees. See Tex. Gov't Code §419.906(a), (d).

(c) If a fire department or training provider fails to correct the alleged violation in a timely manner or fails to request a preliminary staff conference (information settlement conference) before the 61st day after the date it receives a notice of alleged violation, the commission through its executive director may issue a default order.

(d) When determining administrative penalties for a notice of alleged violation or default order the following factors shall be considered:

(1) compliance history;

(2) seriousness of the violation;

(3) the safety threat to the public or fire personnel;

(4) any mitigating factors; and

(5) any other factors the commission considers appropriate.

(e) If the fire department or training provider timely requests a preliminary staff conference (informal settlement conference), the procedures in Chapter 401, Subchapter E apply, and if the preliminary staff conference does not result in approval of a consent order the matter shall be referred for a contested case hearing.

~~§445.11 Major Violations.~~

~~[If during the course of a departmental inspection the inspector determines the department has committed major violations involving protective clothing, self-contained breathing apparatus, personal alert safety systems or breathing air, the following procedures shall apply.]~~

~~[(1) The inspector shall issue a formal notice of noncompliance identifying the violations and the corrective measures to be taken by the department to correct the listed violations.]~~

~~[(2) The department has 30 calendar days from the date of receipt of the formal notice of noncompliance to correct the violations, and to provide the Commission with proof of compliance or submit written notice of appeal.]~~

~~[(3) If the department fails to come into compliance within the allotted time frame, an administrative penalty of up to \$500 per day may be assessed from the first day of formal notice of violation for each violation. If it is determined that the department was assessed administrative penalties for the same or similar violations within the previous five years, the administrative penalty of up to \$1,000 per violation may be assessed.]~~

~~[(4) The department then has 30 calendar days from formal notice of administrative penalties assessed to pay the administrative penalty or submit written notice of appeal.]~~

~~[(5) Upon receipt of a written appeal concerning administrative action or penalty a hearing will be scheduled. Chapter 154 of the Texas Civil Practice and Remedies Code shall be used as a procedural guide.]~~

~~§445.13 Disciplinary Hearings.~~

~~[A complaint case shall be opened no later than the 30th day after formal notice to the fire department, training provider or individual, concerning unresolved major violations found during an inspection. A hearing will be scheduled with the fire department, training provider or individual to determine administrative actions or penalties. The Commission shall consider the following factors when determining administrative penalties:]~~

~~[(1) compliance history;]~~

~~[(2) seriousness of the violation;]~~

~~[(3) the safety threat to the public or fire personnel;]~~

~~[(4) any mitigating factors; and]~~

~~[(5) any other factors the commission considers appropriate.]~~

~~§445.15 Judicial Enforcement.~~

~~[The Commission may enter a default order if a fire department or training provider fails to take action to correct a violation found during an inspection conducted under this chapter, or to request an informal settlement conference before the 61st day after the date the Commission provides to the department or provider notice requiring the department or provider to correct the violations.]~~

11. Matters referred from the Fire Fighter Advisory Committee (FFAC), including but not limited to:

A. Discussion and possible final adoption on proposed amendments, new sections, and repeals as follows:

3. Discussion and possible action regarding proposed rule changes to title 37 TAC, Chapter 449, Head of a Fire Department.



Texas Commission on Fire Protection

Agenda Item Summary

MEETING: Commission
DATE: 1/29/2015

Agenda Item: 11.A.3

Agenda Title: Rule changes, 37 TAC, Chapter 449, Head of a Fire Department

Action to be taken: Discussion, possible final adoption

Origin of Item: Ad hoc committee, Advisory Committee

INTRODUCTION/PURPOSE

Update language in Chapter 449 regarding head of a fire suppression or fire prevention department.

DESCRIPTION/ JUSTIFICATION

The recommended changes adopt additional requirements for individuals appointed to either head of A fire suppression or fire prevention department.

BUDGET IMPACT

No budget impact anticipated

TIMELINE CONSIDERATIONS

If adopted, becomes effective 20 days following receipt by Texas Register.

RECOMMENDATION

Recommendations presented by ad hoc committee to FF Advisory Committee. Adoption recommended by FF Advisory Committee per special note below. Public comments included in meeting packets.
****SPECIAL NOTE****: Revised recommendations to be made by FF Advisory Committee in meeting. Handout of revised recommendations to be provided.

REFERENCES

37 TAC, Section 13, Chapter 449

CHAPTER 449

HEAD OF A FIRE DEPARTMENT

~~§449.1 Minimum Standards for the Head of a Fire Department.~~

- ~~[(a) An individual who becomes employed and is assigned as the head of a fire department must be certified by the Commission as head of a fire department, within one year of appointment.]~~
- ~~[(b) An individual appointed head of a department must be eligible to be certified at the time of the appointment or will become eligible to be certified within one year of the appointment and must submit an affidavit verifying eligibility status at the time of the appointment if not holding a Commission certification.]~~
- ~~[(c) Holding the head of a fire department certification does not qualify an individual for any other certification. An individual who seeks certification in another discipline must meet the requirements for that discipline.]~~
- ~~[(d) Nothing contained in this chapter shall be construed to supercede Chapter 143, Local Government Code, in regard to appointment of a head of a fire department.]~~

~~§449.3 Minimum Standards for Certification as Head of a Suppression Fire Department.~~

- ~~[(a) Applicants for Head of a Fire Department certification must complete the following requirements]:~~
- ~~[(1) must be appointed as head of a fire department; and]~~
- ~~[(2) complete the Standards Review Assignment for Head of a Fire Department identified in the applicable chapter of the Curriculum Manual; and]~~
- ~~[(3) meet with a Texas Commission on Fire Protection Compliance Section representative for review and approval of the Standards Review Assignment; and]~~
- ~~[(4) attend at least one Texas Commission on Fire Protection regularly scheduled commission meeting or one regularly scheduled fire fighter advisory committee meeting in the first year of appointment; and]~~
- ~~[(5) hold a certification as a fire protection personnel in any discipline that has a commission approved curriculum that requires structural fire protection personnel certification and five years experience in a full-time fire suppression position; or]~~
- ~~[(6) an individual from another jurisdiction who possesses valid documentation of accreditation from the International Fire Service Accreditation Congress that is deemed equivalent to the commission's approved basic fire suppression curriculum and provide documentation in the form of a sworn nonself-serving affidavit of five years experience in a full-time fire suppression position; or]~~
- ~~[(7) provide documentation in the form of a nonself-serving sworn affidavit of ten years experience as an employee of a local governmental entity in a full-time structural fire protection personnel position in a jurisdiction other than Texas; or]~~
- ~~[(8) provide documentation in the form of a sworn nonself-serving affidavit of ten years of experience as a certified structural part-time fire protection employee; or]~~
- ~~[(9) provide documentation in the form of a sworn nonself-serving affidavit of ten years experience as an active volunteer fire fighter in one or more volunteer fire departments that meet the requirements of subsection (b) of this section].~~

~~[(b) The ten years of volunteer service must include documentation of attendance at 40% of the drills for each year and attendance of at least 25% of a department's emergencies in a calendar year while a member of a volunteer fire department or departments with 10 or more active members that conducts a minimum of 48 hours of drills in a calendar year].~~

~~[(c) Individuals certified as the head of a fire department must meet the continuing education requirement as provided for in Chapter 441 of this title (relating to Continuing Education)].~~

~~[(d) An individual certified as head of a fire department under this section may engage in fire fighting activities only as the head of a fire department. These activities include incident command, direction of fire fighting activities or other emergency activities typically associated with fire fighting duties, i.e. rescue, confined space and hazardous materials response.]~~

~~§449.5 Minimum Standards for Certification as Head of a Prevention Only Department.]~~

~~[(a) Applicants for Head of a Fire Department certification must complete the following requirements:]~~

~~[(1) must be appointed as head of a fire department; and]~~

~~[(2) complete the Standards Review Assignment for Head of a Fire Department identified in the applicable chapter of the Curriculum Manual; and]~~

~~[(3) meet with a Texas Commission on Fire Protection Compliance Section representative for review and approval of the Standards Review Assignment; and]~~

~~[(4) attend at least one Texas Commission on Fire Protection regularly scheduled commission meeting or one regularly scheduled fire fighter advisory committee meeting in the first year of appointment; and]~~

~~[(5) hold a certification as a fire inspector, fire investigator, or arson investigator and have five years of full-time experience in fire prevention activities; or]~~

~~[(6) an individual from another jurisdiction who possesses valid documentation of accreditation from the International Fire Service Accreditation Congress that is deemed equivalent to the commission's approved basic arson investigator, fire investigator or fire inspector curriculum and provide documentation in the form of a sworn nonself serving affidavit of five years experience in a full-time fire prevention position; or]~~

~~[(7) provide documentation in the form of a sworn nonself serving affidavit of ten years experience as an employee of a local governmental entity in a full-time fire inspector, fire investigator, or arson investigator position in a jurisdiction other than Texas; or]~~

~~[(8) provide documentation in the form of a sworn nonself serving affidavit of ten years experience as a certified fire investigator, fire inspector or arson investigator as a part-time fire prevention employee; or]~~

~~[(9) provide documentation in the form of a sworn nonself serving affidavit of ten years experience as an active volunteer fire inspector, fire investigator, or arson investigator with ten years experience in fire prevention.]~~

~~[(b) Individuals certified as the head of a fire department under this section must meet the continuing education requirement as provided for in Chapter 441 of this title (relating to Continuing Education).]~~

CHAPTER 449

HEAD OF A FIRE DEPARTMENT

SUBCHAPTER A

MINIMUM STANDARDS FOR HEAD OF A SUPPRESSION FIRE DEPARTMENT

§449.1 Minimum Standards for the Head of a Suppression Fire Department.

- (a) An individual who becomes employed and is assigned as the head of a suppression fire department must be certified by the commission as Head of a Suppression Fire Department, within one year of appointment.
- (b) An individual appointed head of a suppression fire department must be eligible to be certified at the time of the appointment or will become eligible to be certified within one year of the appointment and must submit an affidavit verifying eligibility status at the time of the appointment if not holding a commission certification.
- (c) Holding the Head of a Suppression Fire Department certification does not qualify an individual for any other certification. An individual who seeks certification in another discipline must meet the requirements for that discipline.
- (d) Nothing contained in this chapter shall be construed to supersede Chapter 143, Local Government Code, in regard to appointment of a head of a suppression fire department.
- (e) Individuals certified as the Head of a Suppression Fire Department must meet the continuing education requirement as provided for in Chapter 441 of this title (relating to Continuing Education).
- (f) An individual certified as Head of a Suppression Fire Department under this subchapter may engage in fire fighting activities only as the head of a suppression fire department. These activities include incident command, direction of fire fighting activities or other emergency activities typically associated with fire fighting duties, i.e. rescue, confined space and hazardous materials response.

§449.3 Minimum Standards for Basic Head of a Suppression Fire Department Certification.

- (a) Applicants for Basic Head of a Suppression Fire Department Certification must complete the following requirements:
 - (1) must be appointed as head of a suppression fire department; and
 - (2) complete the Standards Review Assignment for Head of a Fire Department identified in the applicable chapter of the Certification Curriculum Manual; and
 - (3) meet with a Texas Commission on Fire Protection Compliance Section representative for review and approval of the Standards Review Assignment; and
 - (4) attend at least one Texas Commission on Fire Protection regularly scheduled commission meeting or one regularly scheduled fire fighter advisory committee meeting in the first year of appointment; and
 - (5) document completion of the National Incident Management System courses 100, 200, 700, and 800; and
 - (6) hold a Texas Commission on Fire Protection certification as a fire protection personnel in any discipline that has a commission approved curriculum that requires structural fire

protection personnel certification and five years experience within the last ten years in a full-time fire suppression position; or

(7) an individual from another jurisdiction who possesses valid documentation of accreditation from the International Fire Service Accreditation Congress that is deemed equivalent to the commission's approved basic fire suppression curriculum and provide documentation in the form of a sworn nonself serving affidavit of five years experience within the last ten years in a full-time fire suppression position; or

(8) provide documentation in the form of a nonself serving sworn affidavit of ten years experience within the last fifteen years as an employee of a local governmental entity in a full-time structural fire protection personnel position in a jurisdiction other than Texas; or

(9) provide documentation in the form of a sworn nonself serving affidavit of ten years of experience within the last fifteen years as a certified structural part-time fire protection employee; or

(10) provide documentation in the form of a sworn nonself serving affidavit of ten years experience within the last fifteen years as an active volunteer fire fighter in one or more volunteer fire departments that meet the requirements of subsection (b) of this section.

(b) The ten years of volunteer service referenced in subsection (a)(10) must include documentation of attendance at 40% of the drills for each year and attendance of at least 25% of a department's emergencies in a calendar year while a member of a volunteer fire department or departments with ten or more active members that conducts a minimum of 48 hours of drills in a calendar year.

§449.5 Minimum Standards for Intermediate Head of a Suppression Fire Department Certification.

(a) Applicants for Intermediate Head of a Suppression Fire Department Certification must complete the following requirements:

- (1) have a minimum of two years of experience in a full time head of a suppression fire department position; and
- (2) hold, as a prerequisite, Basic Head of a Suppression Fire Department Certification through the commission; and
- (3) hold Fire Officer II certification through the commission; and
- (4) document completion of the National Incident Management System courses 300 and 400; and
- (5) complete training listed in one of the following options:
 - (A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission that the courses comply with subsections (b) and (c) of this section; or
 - (B) Option 2--Completion of coursework from either the A-List or the B-List courses. Acceptable combinations of courses are as follows: two A-List courses; or eight B-List courses; or one A-List course and four B-List courses. (See the exception outlined in subsection (c) of this section); or
 - (C) Option 3--Completion of coursework from either the A-List or the B-List courses in combination with college courses in fire science or fire protection. Acceptable

combinations of courses are three semester hours meeting the requirements of Option 1, with either one A-List course or four B-List courses (See the exception outlined in subsection (c) of this section).

(b) Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's Certification Curriculum Manual or for experience in fire service, may not be counted toward this level of certification.

(c) The training required in this section must be in addition to any training used to qualify for any lower level Head of a Fire Department Certification. Repeating a course or a course of similar content cannot be used towards this level of certification.

§449.7 Minimum Standards for Advanced Head of a Suppression Fire Department Certification.

(a) Applicants for Advanced Head of a Suppression Fire Department Certification must complete the following requirements:

(1) have a minimum of four years of experience in a full time head of a suppression fire department position; and

(2) hold, as a prerequisite, an Intermediate Head of a Suppression Fire Department Certification through the commission; and

(3) hold Fire Officer III certification through the commission; and

(4) complete training listed in one of the following options:

(A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission that the courses comply with subsections (b) and (c) of this section; or

(B) Option 2--Completion of coursework from either the A-List or the B-List courses. Acceptable combinations of courses are as follows: two A-List courses; or eight B-List courses; or one A-List course and four B-List courses. (See the exception outlined in subsection (c) of this section); or

(C) Option 3--Completion of coursework from either the A-List or the B-List courses in combination with college courses in fire science or fire protection. Acceptable combinations of courses are three semester hours meeting the requirements of Option 1, with either one A-List course or four B-List courses (See the exception outlined in subsection (c) of this section).

(b) Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's Certification Curriculum Manual or for experience in fire service, may not be counted toward this level of certification.

(c) The training required in this section must be in addition to any training used to qualify for any lower level Head of a Fire Department Certification. Repeating a course or a course of similar content cannot be used towards this level of certification.

§449.9 Minimum Standards for Master Head of a Suppression Fire Department Certification.

(a) Applicants for Master Head of a Suppression Fire Department Certification must complete the following requirements:

(1) have a minimum of six years of experience in a full time head of a suppression fire department position; and

- (2) hold, as a prerequisite, an Advanced Head of a Suppression Fire Department Certification through the commission; and
- (3) hold Fire Officer IV certification through the commission; and
- (4) acquire 60 college semester hours or an associate degree, which includes at least 18 college semester hours in fire science subjects.

(b) College level courses from both the upper and lower division may be used to satisfy the education requirement for Master Head of a Suppression Fire Department Certification.

SUBCHAPTER B

MINIMUM STANDARDS FOR HEAD OF A PREVENTION ONLY FIRE DEPARTMENT

§449.201 Minimum Standards for the Head of Prevention Only Fire Department.

- (a) An individual who becomes employed and is assigned as the head of a prevention only fire department must be certified by the commission as Head of a Prevention Only Fire Department, within one year of appointment.
- (b) An individual appointed head of a prevention only fire department must be eligible to be certified at the time of the appointment or will become eligible to be certified within one year of the appointment and must submit an affidavit verifying eligibility status at the time of the appointment if not holding a commission certification.
- (c) Holding the Head of a Prevention Only Fire Department certification does not qualify an individual for any other certification. An individual who seeks certification in another discipline must meet the requirements for that discipline.
- (d) Nothing contained in this chapter shall be construed to supersede Chapter 143, Local Government Code, in regard to appointment of a head of a prevention only fire department.
- (e) Individuals certified as the Head of a Prevention Only Fire Department must meet the continuing education requirement as provided for in Chapter 441 of this title (relating to Continuing Education).

§449.203 Minimum Standards for Basic Head of Prevention Only Fire Department Certification.

- (a) Applicants for Basic Head of a Prevention Only Fire Department Certification must complete the following requirements:
 - (1) must be appointed as head of a prevention only fire department; and
 - (2) complete the Standards Review Assignment for Head of a Fire Department identified in the applicable chapter of the Certification Curriculum Manual; and
 - (3) meet with a Texas Commission on Fire Protection Compliance Section representative for review and approval of the Standards Review Assignment; and
 - (4) attend at least one Texas Commission on Fire Protection regularly scheduled commission meeting or one regularly scheduled fire fighter advisory committee meeting in the first year of appointment; and
 - (5) documentation of completion of National Incident Management System 100, 200, 700 and 800; and
 - (6) hold a Texas Commission on Fire Protection certification as a fire inspector, fire investigator, or arson investigator and have five years experience within the last ten years in a full-time fire prevention position; or
 - (7) an individual from another jurisdiction who possesses valid documentation of accreditation from the International Fire Service Accreditation Congress that is deemed equivalent to the commission's approved basic arson investigator, fire investigator or fire inspector curriculum and provide documentation in the form of a sworn non self serving affidavit of five years experience within the last ten years in a full-time fire prevention position; or
 - (8) provide documentation in the form of a sworn non self serving affidavit of ten years experience within the last fifteen years as an employee of a local governmental entity in a

full-time fire inspector, fire investigator, or arson investigator position in a jurisdiction other than Texas; or

(9) provide documentation in the form of a sworn non self serving affidavit of ten years experience within the last fifteen years as a certified fire investigator, fire inspector or arson investigator as a part-time fire prevention employee; or

(10) provide documentation in the form of a sworn non self serving affidavit of ten years fire prevention experience within the last fifteen years as an active volunteer fire inspector, fire investigator or arson investigator.

§449.205 Minimum Standards for Intermediate Head of a Prevention Only Fire Department Certification.

(a) Applicants for Intermediate Head of a Prevention Only Fire Department Certification must complete the following requirements:

(1) have a minimum of two years of experience in a full time head of a prevention only fire department position; and

(2) hold, as a prerequisite, a Basic Head of a Prevention Only Fire Department Certification through the commission; and

(3) hold Fire Officer II certification through the commission; and

(4) document completion of National Incident Management System 300 and 400; and

(5) complete training listed in one of the following options:

(A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission that the courses comply with subsections (b) and (c) of this section; or

(B) Option 2--Completion of coursework from either the A-List or the B-List courses. Acceptable combinations of courses are as follows: two A-List courses; or eight B-List courses; or one A-List course and four B-List courses. (See the exception outlined in subsection (c) of this section); or

(C) Option 3--Completion of coursework from either the A-List or the B-List courses in combination with college courses in fire science or fire protection. Acceptable combinations of courses are three semester hours meeting the requirements of Option 1, with either one A-List course or four B-List courses (See the exception outlined in subsection (c) of this section).

(b) Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's Certification Curriculum Manual or for experience in fire service, may not be counted toward this level of certification.

(c) The training required in this section must be in addition to any training used to qualify for any lower level Head of a Fire Department Certification. Repeating a course or a course of similar content cannot be used towards this level of certification.

§449.207 Minimum Standards for Advanced Head of a Prevention Only Fire Department Certification.

(a) Applicants for Advanced Head of a Prevention Only Fire Department certification must complete the following requirements:

- (1) have a minimum of four years of experience in a full time head of a prevention only fire department position; and**
- (2) hold, as a prerequisite, an Intermediate Head of a Prevention Only Fire Department through the commission; and**
- (3) hold Fire Officer III certification through the commission; and**
- (4) complete training listed in one of the following options:**

- (A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission that the courses comply with subsections (b) and (c) of this section; or**
- (B) Option 2--Completion of coursework from either the A-List or the B-List courses. Acceptable combinations of courses are as follows: two A-List courses; or eight B-List courses; or one A-List course and four B-List courses. (See the exception outlined in subsection (c) of this section); or**
- (C) Option 3--Completion of coursework from either the A-List or the B-List courses in combination with college courses in fire science or fire protection. Acceptable combinations of courses are three semester hours meeting the requirements of Option 1, with either one A-List course or four B-List courses (See the exception outlined in subsection (c) of this section).**

- (b) Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's Certification Curriculum Manual or for experience in fire service, may not be counted toward this level of certification.**
- (c) The training required in this section must be in addition to any training used to qualify for any lower level Head of a Fire Department Certification. Repeating a course or a course of similar content cannot be used towards this level of certification.**

§449.209 Minimum Standards for Master Head of a Prevention Only Fire Department Certification.

- (a) Applicants for Master Head of a Prevention Only Fire Department Certification must complete the following requirements:**
 - (1) have a minimum of six years of experience in a full time head of a prevention only fire department position; and**
 - (2) hold, as a prerequisite, an Advanced Head of a Prevention Only Fire Department Certification through the commission; and**
 - (3) hold Fire Officer IV certification through the commission; and**
 - (4) acquire 60 college semester hours or an associate degree, which includes at least 18 college semester hours in fire science subjects.**
- (b) College level courses from both the upper and lower division may be used to satisfy the education requirement for Master Head of a Prevention Only Fire Department Certification.**

From: Billy Wusterhausen:
Sent: Thursday, August 28, 2014 10:28 AM
To: Tim Rutland
Cc: Billy Wusterhausen
Subject: Suggested language change to head of dept certification

Director Tim Rutland,

Thank you for your update at yesterday's TFCA meeting at the SFFMA building. I am writing you to consider the suggested language change below. I would like to attend the next meeting this is being discussed, but could not locate that information on the web site. Please contact me should you have any questions or need any clarification.

§449.3 - Minimum Standards for [~~Certification as~~] Basic Head of a Suppression Fire Department Certification

- (a) Applicants for Basic Head of a Suppression Fire Department Certification must complete the following requirements:
- (1) must be appointed as head of a suppression fire department; and
 - (2) complete the Standards Review Assignment for Head of a Fire Department identified in the applicable chapter of the Certification Curriculum Manual; and
 - (3) meet with a Texas Commission on Fire Protection Compliance Section representative for review and approval of the Standards Review Assignment; and
 - (4) attend at least one Texas Commission on Fire Protection regularly scheduled commission meeting or one regularly scheduled fire fighter advisory committee meeting in the first year of appointment; and
 - (5) document completion of the National Incident Management System courses 100, 200, 700, and 800; and
 - (6) hold a Texas Commission on Fire Protection certification as a fire protection personnel in any discipline that has a commission approved curriculum that requires structural fire protection personnel certification and five years experience within the last ten years in a full-time fire suppression position department; or
 - (7) an individual from another jurisdiction who possesses valid documentation of accreditation from the International Fire Service Accreditation Congress that is deemed equivalent to the commission's approved basic fire suppression curriculum and provide documentation in the form of a sworn nonself serving affidavit of five years experience within the last ten years in a full-time fire suppression position department; or
 - (8) provide documentation in the form of a nonself serving sworn affidavit of ten years experience within the last fifteen years as an employee of a local governmental entity in a full-time structural fire protection personnel position in a jurisdiction other than Texas; or
 - (9) provide documentation in the form of a sworn nonself serving affidavit of ten years of experience within the last fifteen years as a certified structural part-time fire protection employee; or
 - (10) provide documentation in the form of a sworn nonself serving affidavit of ten years experience within the last fifteen years as an active volunteer fire fighter in one or more volunteer fire departments that meet the requirements of subsection (b) of this section.
- (b) The ten years of volunteer service referenced in subsection (a)(10) must include documentation of attendance at 40% of the drills for each year and attendance of at least 25% of a department's emergencies in a calendar year while a member of a volunteer fire department or departments with ten or more active members that conducts a minimum of 48 hours of drills in a calendar year.

In Public Service,

Billy Wusterhausen
 Assistant Chief
 Round Rock Fire Department



September 12, 2014

Tim Rutland
 Executive Director
 Texas Commission on Fire Protection
 P.O. Box 2286
 Austin, Texas 78768

RE: Proposed Rule Changes to Texas Administrative Code, Title 37, part 13, chapter 449

Dear Executive Director Tim Rutland,

Through Texas Government Code chapter 419, Cedar Park Fire Department (Department) falls under the jurisdiction of the Texas Commission on Fire Protection (Commission). Cedar Park Fire Department has a strong compliance record with the Commission and has remedied any compliance issues promptly when identified. As evidenced by the Center for Public Safety Excellence accreditation and Insurance Services Office Class 1 rating, the Department has placed a priority in administrative and operational effectiveness. In these efforts, staff has monitored potential changes that may affect the Department's regulation. Cedar Park Fire Department, therefore, would like to express its reservations regarding the proposed rule changes posted in the August 29, 2014 edition of the Texas Register. Multiple sections of the proposed language affecting Texas Administrative Code, Title 37, part 13, chapter 449 (Head of a Fire Department) specifically drew the Department's attention.

Cedar Park Fire Department would like to first comment on the language under 37 TAC §449.3 (a)(6), which requires "five years experience within the last ten years in a full-time fire suppression position" for Basic Head of a Suppression Fire Department certification. The Department believes this language is excessively restrictive. According to 37 TAC §421.5, the Commission defines fire suppression to only pertain to the "engaging in the controlling or extinguishment of a fire or any type or performing activities which are required for and directly related to the control and extinguishment of a fire of any type or performing activities which apparatus or nearby in a state of readiness to perform these duties." Requiring personnel to serve in this capacity full-time for five years in the past ten years, rather than five years overall as previously required, eliminates potential candidates that have served or currently serve in training, administrative, or prevention functions. The Department recommends the use of the term "fire protection" in place of "fire suppression." "Fire protection personnel" as defined by 37 TAC §421.5 (19) refers to "any person who is a permanent full-time employee of a fire department or governmental entity and who is appointed duties in one of the following categories/disciplines: fire suppression, fire inspection, fire and arson investigation, marine fire fighting, aircraft rescue fire fighting, fire training, fire education, fire administration and others employed in related positions necessarily or customarily appertaining thereto." This recommendation would maintain the Commission's intent to ensure that a head of a department serving in more than an interim capacity has the sufficient experience while remaining attuned to current standards and practices.

Proposed rules in 37 TAC §449.1 (f) repeat existing language from 37 TAC §449.3 (d) that state "An individual certified as head of a fire department under this section may engage in fire fighting activities only as the head of a fire department. These activities include incident command, direction of fire fighting activities or other emergency activities typically associated with fire fighting duties, i.e. rescue, confined space and hazardous materials response." The Department understands that the language in



place intends to promote on-scene safety; however, the Department would like to seek clarification if this language affects training functions. In addition, the Department questions if this language places smaller departments in an untenable situation where the head of a department may need to engage in more intensive fire fighting activities when life safety is at risk.

Cedar Park Fire Department does not believe in the need for different levels of certification for head of a department. Regardless of the level of certification, a head of a department exercises the same level of authority as bestowed by his or her respective governing body. In addition, the Texas Sunset Advisory Commission's Occupational Licensing/Regulation Model strongly discourages additional regulation when none is needed. Implementing certifications for "basic," "intermediate," "advanced," and "expert" head of a department provides few discernible advantages to public safety while increasing the amount of certification fees collected. The Department appreciates the Commission's efforts in developing an education and career path for those who have become a head of a department, but other non-regulatory entities meet this need more appropriately such as the United States Fire Administration's Executive Fire Officer Program. Acquiring higher levels of certification may also represent double payment for the same set of training and credentials, including those from the Commission including Fire Officer certifications.

If the Commission intends to proceed in establishing different certification levels for head of a department, the Department wishes to address specific provisions regarding their minimum standards: 37 TAC §449.5 (5) and 37 TAC §449.7 (4). These sub-sections imply that a head of a department must complete these requirements following his or her initial certification as head of a department. A head of a department may have previously completed training specified in the proposed rules. Furthermore, individuals with a head of a department certification must already complete continuing education requirements as detailed in 37 TAC §441.19. The Department also recommends that an associate's, bachelor's, or master's degree may act as prima facie compliance with these requirements.

Cedar Park Fire Department deeply appreciates the opportunity to provide public comment for this set of proposed rule changes. Please do not hesitate to contact us at 512-401-5220 if there are any questions.

Respectfully,

A handwritten signature in blue ink, appearing to read "James Mallinger".

James Mallinger
Cedar Park Fire Department

From: James Mallinger

Sent: Monday, December 08, 2014 11:49 AM

To: Grace Wilson; Buddy Rice; Daniel Kistner; Gary Wisdom; Jason Collier; Jimmy Chew; Michael Brock; Pat McAuliff; Scott Kerwood; Sylvia Miller; Tim Rutland; Betty Wilkes; Jim Reidy; Billie Wusterhausen; Mike Montgomery; Robert Isebill; Mike Wisk; Brent Parker; Michael Neujahr; Scott Thompson; Levi Clements

Cc: Deborah Cowan

Subject: RE: Head of Dept ad hoc committee - discussion of issues and possible rule revision

All,

I apologize but after asking to be included with this, I have had something come up and I will not be in town for this meeting. Attached is the letter I wrote when the topic was up for adoption earlier this year. My understanding is that the strictly written requirement of "five years within the last ten years in a full-time fire suppression position" would have precluded me from obtaining a position as Fire Chief since I was assigned to administration for thirteen years before promoting to fire chief. I talked with others that are in the same position as I was and they also feel this strict interpretation is not what is best for the Texas Fire Service.

After more discussions with other Fire Chiefs, I would change the paragraph in the letter that discusses the different levels of certification for Head of Department. If the different levels had increasing education requirements, I would be in support of having multiple levels of certification. If the only difference is time of service, then I wouldn't agree with the different levels.

I am willing to provide feedback through email if anyone has any questions about the letter or my comments.

Once again, I apologize that I will miss next week's meeting.

James

James Mallinger
Fire Chief
Cedar Park Fire Department

From: Montgomery, Mike (Fire Marshal's Office)
Sent: Friday, September 26, 2014 5:18 PM
To: info
Subject: Proposed rules changes

Thank you for the opportunity to comment on these proposed changes. These comments are my personal opinion only, and do not represent the official view of Harris County or this agency.

Chapter 441. Continuing Education. No changes, recommend adoption.

Chapter 449. Head of Department. Proposed changes for both Suppression Department and Prevention Department requirements, recommend hold for additional discussion.

1. There may be some fiscal impact on local government due to costs associated with increased education requirements for higher levels of certification.
2. Recommend eliminating Fire Officer II, III, IV requirements from each level of higher certification and include them as A-list courses for listed Option 1, Option 2, or Option 3.
3. Master level: Recommend 60 college semester hours or an associate degree, which includes at least 18 hours in business or public administration subjects.

Chapter 457. Incident Safety Officer. No changes, recommend adoption.

Please contact me if you have any questions or would like to discuss any of these comments.

Regards,

Mike Montgomery
Harris County Fire Marshal's Office
Director/Fire Marshal
7701 Wilshire Place
Houston, TX 77040

Fire Chief Mike Wisko
2517 Ball Suite 206 Galveston, Tx. 77551
(409) 797-3850 Fax (409) 797-3855
www.galvestonfire.com

October 16, 2014

Mr. Tim Rutland
Executive Director
Texas Commission on Fire Protection
Austin, Texas

Re: Agenda Item 10a2

This morning you will be discussing and taking action on the revised Head of Department requirements. This issue has been at the forefront for almost three years now. The original requirement was developed in 1995 in response to a Texas Department hiring a non-certified Fire Chief. The outcry then was that we needed to have some type of certification required for all Fire Chiefs. Recently, adjustments have been made that require new Chiefs to attend meetings and gain a basic understanding of how the Texas Commission on Fire Protection functions.

An Ad Hoc committee was created with several knowledgeable and well respected Chiefs to review the requirements and develop something that would be reasonable and progressive but fits with current statutory requirements. The document in front of you is just that.

Currently any Texas City is able to hire whomever they choose to serve as their Fire Chief so long as they meet all statutory requirements. The TCFP requires the Head of Department certification. The recommended certification requirements in front of you today are no doubt a compromise of statutory requirements and professional standards. I support and encourage final adoption of these new requirements with the understanding just like any other standard, we can and ultimately will make needed changes when appropriate.

Thank you for your consideration in this matter

Mike Wisko
Fire Chief/Member of TCFP Firefighter Advisory Committee



1500 W. Wall St.
P.O. Box 1152
Midland Texas 79702
(432) 685-7332
Fax (432) 686-1638

Robert Isbell, Fire Chief
Midland Fire Department
1500 W. Wall St.
Midland, Texas 79701

October 15, 2014

Commissioner Tull
Presiding Officer
Texas Commission on Fire Protection
1701 North Congress, Suite 105
Austin, Texas 78701

Commissioner Tull,

I wanted to voice my opinion for the "head of department (HOD)" certification changes as listed on the agenda for the Commission meeting. I must admit, I was a big proponent to raising the bar for the HOD certification and pushed for a change to be made. After the last iteration came out, I was less enthused about the proposal.

My original desire was to see our profession come inline with a higher level of education. I had envisioned a training assuring new chiefs would be equipped with the necessary skills and training to be successful.

I believe this draft needs more work. I am hoping this committee will bring back a more robust offering for executive level fire chief. I do appreciate the hard work that has gone into the draft. I am respectfully requesting the draft proposal be sent back to committee for more refinement.

Respectfully Submitted,

Robert Isbell, Fire Chief

www.MidlandTexas.gov

From: Robert McConnaughay
Sent: Monday, November 24, 2014 1:27 PM
To: Info
Subject: Proposed rule revisions for head of department

To Whom It May Concern:

I have been reviewing the proposed rule revisions for Head of Department Certification, and would like to comment on them.

I do not believe there is a need to have different levels for Head of Department. (Basic, Intermediate, Advanced, Master). I believe in the future that it would cause perfectly qualified individuals being overlooked in an employment process, and could potentially create legal issues for Fire Departments or Cities down the road. And feel that it would be more adventitious that there be requirements to maintain Head of Department certification. For example, within 3 years of being appointed as Head of Department, the individual must obtain at minimum Fire Officer II, etc.

But, if you insist on having different levels (Basic, Intermediate, Advanced, Master), I feel that it is only right that you have time requirements just like Firefighter levels do. (4 years, 8 years, 12 years)

Thank you,

Robert McConnaughay

From: Wally Cox [<mailto:Wcox@gvps.org>]

Sent: Friday, October 17, 2014 10:11 AM

Subject: Ref: Comments on 449.1--Minimum Standards for Head of Department Certification

Let me begin by apologizing to the Commissioner's for not staying as informed as I should be on Commission activities that have a direct impact on my profession. As a newly appointed Head of Department I can only say that my first few months have been somewhat overwhelming with the number of documents that must be read critically. I do appreciate the time and effort you put in to improve our profession here in Texas.

After attending my required and first Commission meeting on 10-16-2014, as the Chief from Wylie stated "I picked a good day to come" with the Head of Department discussion taking center stage. Listening to the discussion and comments I can see where this would be a divisive issue. As you requested, I have a few limited comments to offer.

1. Years of fire suppression experience

I can see where in a larger department this could be a limitation for a person in a long duration assignment to prevention, training, or investigations. These personnel would likely not be responding in a "combat mode" on a regular basis. On the other hand, in smaller departments, all personnel in any assignment are fire suppression personnel first and foremost and their other assignment(s) are secondary due to the budgetary constraints on the number of personnel employed.

2. Volunteer years of experience

I understand that there are volunteer personnel who are dedicated students of the profession of firefighter and do everything they can to improve education in the art of firefighting. However, there are also those out there who "pencil whip" their documentation, are able to pass the commission exams, but have limited experience in fire suppression. The Commission has no oversight on these personnel and no means to document their experience.

3. What is the gauge of experience

Does the Commission look strictly at calendar years? I can see where a person could have ten years experience and had never held command at a high-rise fire incident. Conversely, there are people who have never had to run command on a multiple resource response over multiple days fighting a wild land fire incident.

4. Required attendance at one Commission meeting

Understanding that this sounds contradictory to my first statement, I have to question the reasoning for requiring a person applying for Head of Department certification to attend one Commission meeting. The idea sounds good on paper but the logistics of attending can be difficult for smaller entities with limited budgets. I see this as a waste of time and dollars for a person having to travel from far west Texas to attend a meeting where they will likely have no input and can read the minutes via the Commission website.

Once again, I apologize for the lateness of my comments.

Sincerely,

Wally Cox, Fire Chief / EMC
City of Gainesville

From: Robert Fite [<mailto:rfite@GPTX.org>]

Sent: Tuesday, December 16, 2014 10:10 AM

To: Info

Subject: Comments to the proposed Head of the Department change

I would like to voice my comments against the proposed changes to the department head certification. I do not understand why there needs to be four levels of Department Head certification with college and/or fire officer courses attached to each. A Fire Chief is an executive level position within City Government with numerous other responsibilities in addition to a fire department. To require mandatory meeting visits, mandatory meeting with TCFP, and certain training and/or college courses to obtain certification is ridiculous. In addition to my strong dislike of the changes, I also believe you are essentially eliminating quality out of state applicants as the requirements would be difficult to obtain. City Managers SHOULD NOT be limited by the TCFP in who they choose to lead their city fire department. City Managers and City Council need as much flexibility as possible to choose the right leader of the fire department and this proposed change will greatly limit this discretion and decision making of the elected body.

Robert Fite
Fire Chief
Grand Prairie Fire Dept.

From: Paulsgrove, Robin F. [<mailto:Robin.Paulsgrove@cityofdenton.com>]
Sent: Tuesday, December 16, 2014 11:46 AM
To: Tim Rutland
Cc: kswindle@krumfire.com; Hedges, Kenneth W
Subject: Proposed Standard for Head of Department - Texas Fire Service

I have had the opportunity to participate in two excellent discussions on this proposal – one at the Texas Fire Chiefs retreat in Bastrop and a second at a recent Denton County Fire Chiefs meeting. I think it is incumbent upon me to record the statements that I have made and ask that you forward them for consideration by the ad hoc committee.

I absolutely support an effort to professionalize our industry at every level. While requirements for Fire Chief are specifically defined by statute in Chapter 143 cities and developed based on individual requirements in other Texas cities, I support efforts to extend our professional standards through every level of the Texas Fire Service. I am convinced that dedicated individuals have expended significant effort to develop this proposal. I admire and appreciate those efforts.

Respectfully, I am less convinced that the proposal accomplishes the stated objective. The criteria, in my view, read much more like a job description for an Incident Commander than they do for Chief of Department. While that may be the most critical criteria in some Texas jurisdictions, it absolutely does not apply to all. It is my understanding that adopting this proposal would apply this standard to all Texas jurisdictions not exempt by Chapter 143 restrictions. The overriding concern seems to be that an individual with an Administrative or Prevention background or career track will find his or her way into the position of Chief of Department. This is presented as either “unjust” or a “political appointment” without merit. It is further presented as likely being met with tragic consequences based on a failure to meet Operations qualifications. There is no equal concern expressed that an individual with an exclusive Operations background will find his or her way into a position of authority over administrative or prevention functions. Neither does the proposal make a provision for the fact that an individual with no experience in EMS may find his or her way into the position of head of department in an organization whose functions are 80% EMS.

I am personally very proud of my field background and I believe that I am effective because of my broad experience in many divisions and aspects of the extensive Texas Fire Service mission. As the Chief Executive Officer of three Texas Cities, I would also be quick to add that, in none of my positions, was Incident Commander the most critical measure of my service to the citizens or to my personnel. It is also my understanding that in no case was my Operations experience recent enough to meet some of the criteria as proposed.

I respect the challenges that are faced with efforts to develop and apply standards to an industry as diverse in size and mission as the Texas Fire Service jurisdictions. However, I much respectfully conclude that the proposal would do less to professionalize our industry than it would to codify a bias for a limited view of the qualifications and role of the Head of Department.

Robin Paulsgrove
Fire Chief
City of Denton, Texas

COMMENTS FROM COMMISSION MEETING, 10/16/14
REGARDING HEAD OF DEPARTMENT PROPOSED RULES

Commissioner Gonzalez:

- Does not support as written
- A lot of confusion concerning years of service language
- Not enough chiefs know about the proposed rules

Commissioner Gillette:

- Does not support
- Affects the hiring process of cities
- Large metro departments wouldn't (necessarily) need someone with suppression experience, because the person wouldn't be responding to fires
- Large metro departments not represented on ad hoc committee

Commissioner Ekiss:

- (as an example) the Advanced HOD certification doesn't look much different than an advanced structure certification

Levi Clements, Mansfield Fire Rescue:

- Should wait on this action.
- Many persons are on specific career path that has them working in different division in fire departments; this could jeopardize some people who could be well rounded candidates.
- In contrast, a 20-year tailboard man could become fire chief.

Scott Thompson, The Colony Fire Dept:

- Worked for Bill Peterson (Plano FD); everyone knows the positive impact that he has had on the Texas fire service; according to these [proposed] rules, he would not qualify.
- Rick Laskey (worked for him also at Lewisville) also would not qualify.
- This is too restrictive to out-of-state candidates.
- Chiefs Piland and Crawford (neighboring departments) also from out of state, and they will do great things for Texas fire service.
- If passed, cities could make the decision to consider only candidates with higher certification levels, unduly restricting the opportunities for out-of-state candidates.
- Don't see the benefit to the higher certification levels.

Mike Neujahr, Copperas Cove Fire Dept:

- I wouldn't qualify by these standards
- Creates undue restrictions for those aspiring to become fire chiefs

(James) Brent Parker, Wylie Fire Dept:

- Whether someone has primary experience in suppression, prevention, or otherwise should be a hiring decision left to the city manager.
- Previous Wylie FD chief had been out of fire service for probably 10-12 years – came back and was very successful at Wylie.
- Disappointed in the [low] educational requirements for the upper levels; consider what cities are requiring today for administrative positions; fire service has complained for years about not promoting formal educational credentials as important – now is an opportunity.