

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.]~~