

## PUBLICATION IN *TEXAS REGISTER*

### **Texas Commission on Law Enforcement**

State of Texas Model Policy: Misconduct Allegations

State of Texas Model Policy: Hiring Procedures

State of Texas Model Policy: Personnel Files

State of Texas Model Policy: Medical and Psychological Examination of a Licensee

Pursuant to Texas Occupations Code §§1701.167, 1701.4522, and 1701.4535 as added by Senate Bill 1445 (88R), the Texas Commission on Law Enforcement (Commission) has adopted model policies regarding Misconduct Allegations, Hiring Procedures, Personnel Files, and the Medical and Psychological Examination of a Licensee. These model policies were developed with input from advisory committees and finally adopted by the Commission at the public meeting of the Commission on April 29, 2024.

The Misconduct Investigation, Hiring Procedures, and Personnel Files Advisory Committee was charged under Texas Occupations Code §§1701.4522 and 1701.4535 with developing model policies establishing procedures applicable to a law enforcement agency investigating alleged misconduct by a license holder employed by the agency, hiring a license holder, and maintaining personnel files with respect to a license holder.

The Examination of a Licensee Advisory Committee was charged under Texas Occupations Code §1701.167 with developing a model policy prescribing standards and procedures for the medical and psychological examination of new licensees, existing licensees, and licensees whose employing agency has reason to believe that a new examination is necessary (fitness-for-duty examination) to ensure the individuals are able to perform the duties for which the license is required.

Each law enforcement agency in Texas will be required to adopt and submit to the Commission these model policies, or a substantively similar policy, by their respective adoption dates. The Medical and Psychological Examination of a Licensee Model Policy is to be adopted by September 1, 2024. The Misconduct Allegations, Hiring Procedures, and Personnel Files Model Policies are to be adopted by June 1, 2025.

These adopted model policies can be accessed through the Commission's website at <https://www.tcole.texas.gov/>, selecting About Us, then selecting The TCOLE Commission and its Members, and navigating down the page to the Adopted Model Policies section, or by using the below links.

<https://www.tcole.texas.gov/document/mp-ma.pdf>

<https://www.tcole.texas.gov/document/mp-hp.pdf>

<https://www.tcole.texas.gov/document/mp-pf.pdf>

<https://www.tcole.texas.gov/document/mp-mpel.pdf>

The following is a summary of the most relevant public comments received and Commission responses.

## **State of Texas Model Policy: Misconduct Allegations**

Comment: Brian Redburn, Chief of the Dallas Fort Worth International Airport Department of Public Safety, suggested changing "signed by the complainant" in Misconduct Allegations Model Policy §1.2 to "signed by the person making the complaint" to incorporate the language used in Texas Government Code §614.022(2) and litigated in *Colorado Cnty. v. Staff*, 510 S.W.3d 435 (Tex. 2017).

Response: In order to align with the text of the statute, the requested change has been made. It should be noted that the court case determined that "the person making the complaint" does not have to be "the victim of the alleged misconduct."

Comment: Shaun Short, Chief of the Cross Roads Police Department, suggested that complainants be a directly involved witness of an agency supervisor of the officer.

Response: The Misconduct Allegations Model Policy §1.2 requires that the complaint be written and signed by the person making the complaint which conforms with Texas Government Code §614.022.

Comment: Brian Redburn, Chief of the Dallas Fort Worth International Airport Department of Public Safety, suggested adding "Conduct that constitutes a violation..." to the beginning of the definition of misconduct in Misconduct Allegations Model Policy §1.3 and to limit the violations that must be investigated to Class B misdemeanors and above, statutory violations that discredit a licensee, and Class C misdemeanors for crimes of moral turpitude, assault, theft, drug violations, public intoxication, disorderly conduct, and repeated violations.

Response: The definition of misconduct in Texas Occupations Code §1701.001(2-a) defines misconduct as more than violations of law, including sustained violations of agency policy for which the agency may suspend, demote, or terminate and untruthfulness. Also, the statutory definition of misconduct does not limit the violations of law as requested.

Comment: Kyle Taliaferro, Deputy Chief with the Allen Police Department, asked if Misconduct Allegations Model Policy §§2.1-2.2 could violate civil service laws regarding the length of time a complaint can be investigated, specifically regarding Texas Local Government Code §143.117.

Response: Civil service law for certain municipalities prohibits an agency head from suspending a peace officer later than the 180th day after the agency discovers or becomes aware of a civil service rule violation. An agency's ability to suspend an officer does not affect the Misconduct Allegations Model Policy's requirement to investigate alleged misconduct and submit a summary report to TCOLE.

Comment: Brian Redburn, Chief of the Dallas Fort Worth International Airport Department of Public Safety, suggested changing Misconduct Allegations Model Policy §2.1 by adding "unless the agency head determines that a reasonable delay is necessary to preserve the integrity of an ongoing criminal investigation" to the end of the sentence.

Response: The specific investigative strategy and tactics have been left to the discretion of the agency. The model policy cannot capture every possible scenario.

Comment: Kyle Taliaferro, Deputy Chief with the Allen Police Department, asked how do you complete an investigation of alleged misconduct after the licensee separates from the agency.

Response: The agency must gather as much evidence as possible and make a determination based off of that evidence. This is not much different than a criminal investigation in which the suspect refuses to provide information.

Comment: Steve Dye, Chief of the Allen Police Department, suggested that agencies be allowed to send to TCOLE their investigations in the format used by the agency because reformatting the investigation into a TCOLE specific form could be a lot of extra work.

Response: In order to provide consistency across all agencies and ensure that all required information is transmitted to TCOLE, the summary report required by Misconduct Allegations Model Policy §2.5 will be a template provided by TCOLE. Texas Occupations Code §1701.4522(b)(1)(D) requires that the summary report be in a format prescribed by TCOLE.

Comment: Dr. Jay Hall asked if an agency can retain records of an investigation of alleged misconduct that is not sustained.

Response: Agencies should follow their applicable retention schedules. An agency is required to place investigative documents and misconduct investigation reports for sustained misconduct allegations into the officer's personnel file. For alleged misconduct that is not sustained, the agency is required to place the investigative documents and misconduct investigation report into the department file.

### **State of Texas Model Policy: Hiring Procedures**

Comment: William Hibbits, Baytown Police Department, Danny Brown, Chief of the Tyler ISD Police Department, and Robert Morrell, Lieutenant with the Tye Police Department, asked if the Hiring Procedures Model Policy §§5.1, 6.1, and 7.1 require a new medical examination (L-2), new psychological examination (L-3), and new fingerprints for every new hire. It was also asked how long an L-2 or L-3 is valid.

Response: The model policy contains the best practices recommendation from the advisory committee that a new L-2, L-3, and fingerprints should be received for each new hire. If the agency adopts the model policy as is, the agency will be required to send a prospective hire to the agency's practitioner for a new L-2 and L-3. The agency will also need new fingerprints for every new hire. However, Texas Occupations Code §1701.303(b) only requires that a new L-2, L-3, and fingerprints be obtained if there is more than a 180-day break in service for officers and jailers. Current policy provides that an L-2 or L-3 is valid for 180 days from the date signed or from the date of graduation from an academy.

Comment: Kyle Taliaferro, Deputy Chief with the Allen Police Department, asked if the confidential information contained in a personal history statement and background investigation report can be released to a psychologist or psychiatrist performing a psychological examination (L-3) as indicated in Hiring Procedures Model Policy §6.4.

Response: 37 Texas Administrative Code §217.1(b)(12) already requires the release of this information to the psychologist or psychiatrist for purposes of a psychological examination (L-3).

Comment: Kyle Taliaferro, Deputy Chief with the Allen Police Department, asked if an applicant can submit a record of annual firearms qualifications within the past 12 months from an out-of-state agency.

Response: Hiring Procedures Model Policy §8.1 and TCOLE rules do not limit the record of annual firearms qualifications to Texas agencies.

Comment: Kyle Taliaferro, Deputy Chief with the Allen Police Department, asked if TCOLE can force an agency to terminate an officer during the provisional employment period based off of misconduct investigation reports submitting by a previous employing agency.

Response: No, TCOLE will not force an agency to terminate the officer. It is within the employing agency's discretion to terminate within the provisional employment period.

### **State of Texas Model Policy: Personnel Files**

Comment: Steve Dye, Chief of the Allen Police Department, asked if written warnings that are not discipline are considered a notation of negative impact under the Personnel Files Model Policy §2.2 and if these written warnings can be purged.

Response: Agencies should follow their applicable retention schedules. Only documents that are required to be included in an officer's personnel file (as opposed to an agency's department file for an officer) can be considered a notation of negative impact that triggers the required notification in §2.2.

Comment: Chad Allen, Chief of the Athens Police Department, asked if you can serve in person instead of by certified mail if email service is not confirmed for purposes of Personnel Files Model Policy §2.2(c).

Response: Yes, personal service is permitted under §2.2(a). The certified mail requirement in §2.2(c) only applies when other methods fail.

Comment: Martha Smith, Chief Deputy with the Grimes County Sheriff's Office, asked if the 30-day response timeline in Personnel Files Model Policy §2.2(d) keeps an investigation open.

Response: An officer's ability to file a written response within 30 days of a negative document does not impact the completion of a misconduct investigation.

Comment: Brian Redburn, Chief of the Dallas Fort Worth International Airport Department of Public Safety, asked how should the department file be treated for purposes of the Public Information Act.

Response: Designate it as stated in Personnel Files Model Policy §3.2. Regarding Public Information Act requests for information an agency seeks to withhold, including information described in Personnel Files Model Policy §3.2, an agency should request a letter ruling from the Attorney General. Further guidance will be available in a technical assistance bulletin issued by TCOLE.

Comment: Jason Brady, Chief of the Seguin Police Department, asked if the personnel file and department file can be stored electronically and stored in combination.

Response: Yes, personnel files and department files can be stored electronically and on the same database.

Comment: Jennifer Szimanski, Combined Law Enforcement Associations of Texas, suggested changing "unless the release is required by law" in Personnel Files Model Policy §3.3 to "unless the release is required by Texas Occupations Code §1701.451."

Response: The requested change has been made.

Comment: Kyle Taliaferro, Deputy Chief with the Allen Police Department, asked if the agency will provide the original or a copy of an officer's personnel file to TCOLE.

Response: The agency will submit an electronic copy of an officer's personnel file to TCOLE within 30 days of separation of the officer. The agency will retain the original personnel file according to applicable retention schedules.

Comment: Chad Allen, Chief of the Athens Police Department, asked which files are submitted to TCOLE.

Response: The personnel file and department file are both submitted to TCOLE within 30 days of separation of the officer.

### **State of Texas Model Policy: Medical and Psychological Examination of a Licensee**

Comment: Scott Gerdes, Chief of the West Lake Hills Police Department, and Kyle Taliaferro, Deputy Chief with the Allen Police Department, asked who pays for the fitness-for-duty-examination conducted by the non-sworn personnel's or officer's chosen practitioner.

Response: Regarding the Medical and Psychological Examination of a Licensee Model Policy §§7.1 and 8.1, the model policy does not prescribe who pays for the examinations.

Comment: Kyle Taliaferro, Deputy Chief with the Allen Police Department, asked why the officer gets to choose their practitioner for the initial fitness-for-duty examination under §8.1. Steve Dye,

Chief of the Allen Police Department, commented that it will be difficult to verify the credentials of the officer's chosen practitioner and the agency might have to send the officer for a second opinion to ensure accurate testing by a qualified practitioner. Brian Redburn, Chief of the Dallas Fort Worth International Airport Department of Public Safety, suggesting allowing employers to have the option of sending the licensee to the employer's practitioner first or give agencies input in a licensee's selection of a practitioner so that employers can reject practitioners who are not familiar with law enforcement duties.

Response: The Advisory Committee decided to follow the established procedure already in place for civil service agencies, which is contained in Texas Local Government Code §143.081 and takes this scenario into account by giving the agency the opportunity to have a second opinion. If the agency disagrees with the licensee's practitioner's report, the agency can send the licensee to the agency's practitioner for a second examination.

Comment: Kyle Taliaferro, Deputy Chief with the Allen Police Department, asked who can perform a fitness-for-duty examination.

Response: A medical fitness-for duty examination must be performed by a physician licensed by the Texas Medical Board and a psychological fitness-for-duty examination must be performed by a psychologist licensed by the Texas Board of Examiners of Psychologists or a psychiatrist licensed by the Texas Medical Board and certified by the American Board of Psychiatry and Neurology. Please see 37 Texas Administrative Code §§211.1(a)(29) and 217.1(b)(11)-(12), Hiring Procedures Model Policy §§5-6, and Medical and Psychological Examination of a Licensee Model Policy §10.1.

Comment: Kyle Taliaferro, Deputy Chief with the Allen Police Department, asked if a practitioner is required to follow the 2018 Psychological Fitness-for-Duty Examination Guidelines from the International Association of Chiefs of Police.

Response: Medical and Psychological Examination of a Licensee Model Policy §10.2 suggests that the range of methods and data sources used by a practitioner can vary, but such suggestions and further information can be found in these guidelines.

Comment: Kyle Taliaferro, Deputy Chief with the Allen Police Department, asked if the notification to TCOLE that a licensee failed a fitness-for-duty examination would be a release of protected information under the Health Insurance Portability and Accountability Act (HIPAA).

Response: Texas Occupations Code §1701.167(a)(3) requires an agency to notify TCOLE when a licensee fails a fitness-for-duty examination.