

PUBLICATION IN *TEXAS REGISTER*

The Texas Commission on Law Enforcement (Commission) adopts new 37 Texas Administrative Code §217.9, Refusal by Licensee to Submit to Medical or Psychological Examination, with changes to the proposed text as published in the March 22, 2024 issue of the *Texas Register* (49 TexReg 1881-1882). The rule will be republished.

This adopted new rule conforms with the addition of Texas Occupations Code §1701.167 made by Senate Bill 1445 (88R). Texas Occupations Code §1701.167 requires a law enforcement agency to report to the Commission a refusal by a licensee to submit to a fitness-for-duty medical or psychological examination. After receiving the report of refusal, the Commission shall issue an order requiring the licensee to show cause for the refusal. If the licensee did not have good cause to refuse the examination, the Commission may suspend indefinitely or otherwise restrict the licensee's license until the licensee submits to the examination. If the licensee did have good cause to refuse the examination, the Commission shall withdraw the request for the examination. This adopted new rule outlines the process for determining whether a licensee had good cause to refuse to submit to a requested fitness-for-duty medical or psychological examination following submission of a report of refusal from a law enforcement agency to the Commission.

The public comment period began on March 22, 2024, and ended on April 29, 2024, at the conclusion of the public meeting of the Commission. The following is a summary of the public comments received and Commission responses.

Comment: Shane Linkous, General Counsel with the State Office of Administrative Hearings (SOAH), commented that SOAH interprets §217.9(a) to require exhaustion of administrative remedies at the local level before reporting the refusal to the Commission.

Response: The Commission agrees.

Comment: Shane Linkous, General Counsel with SOAH, commented that SOAH interprets §217.9(b) to only apply to the Commission's service of the show cause order and not to the service of documents once SOAH has acquired jurisdiction.

Response: The Commission agrees.

Comment: Shane Linkous, General Counsel with SOAH, commented that SOAH interprets the first sentence in adopted §217.9(c) as consistent with Texas Government Code §2001.053 and presumes this subsection is not intended to require a particular venue or method of appearance which may conflict with 1 Texas Administrative Code §§155.403-.405.

Response: The Commission generally agrees. The first sentence in adopted §217.9(c) is taken almost directly from Texas Occupations Code §1701.167(e).

Comment: Shane Linkous, General Counsel with SOAH, commented that SOAH interprets §217.9(d) to mean that the licensee carries the burden of proof at SOAH to establish by a preponderance of the evidence that the licensee had good cause to refuse the requested examination

and that the hearing is limited in scope to only the issue of whether good cause exists for the licensee's refusal. The SOAH administrative law judge will issue a proposal for decision to be reviewed for final action by the Commission.

Response: The Commission agrees.

Comment: Shane Linkous, General Counsel with SOAH, suggested adding a provision to address the confidentiality of information relating to the fitness for duty process. SOAH interprets Texas Occupations Code §1701.167(i) to mean that these refusal hearings should be confidential and closed to the public.

Response: The Commission agrees and has added the confidentiality provision as a second sentence to §217.9(c), which states: "Pursuant to Texas Occupations Code §1701.167(i), records relating to a request or order of the commission or a hearing or examination conducted under Texas Occupations Code §1701.167, including, if applicable, the identity of the person notifying the commission that a licensee may not meet the standards required under the adopted agency policy, are confidential."

The new rule is adopted under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority. Texas Occupations Code §1701.151 authorizes the Commission to adopt rules for the administration of Occupations Code Chapter 1701.

The new rule as adopted affects or implements Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority, and §1701.167, Policy Regarding Examination of License Holder or Applicant. No other code, article, or statute is affected by this adoption.

The adopted new rule has been reviewed by legal counsel and found to be a valid exercise of the Commission's legal authority.

§217.9. Refusal by Licensee to Submit to Medical or Psychological Examination.

(a) After receiving a report of a refusal by a licensee to submit to a requested medical or psychological examination, the commission shall issue a show cause order requiring the licensee to show cause for the refusal at a contested case hearing before SOAH.

(b) The contested case hearing shall be scheduled not later than the 30th day after the date notice of the show cause order is served on the licensee, which shall be provided by personal service or by registered mail, return receipt requested.

(c) The licensee may appear at the contested case hearing in person and by counsel and present evidence to justify the licensee's refusal to submit to the requested examination. Pursuant to Texas Occupations Code §1701.167(i), records relating to a request or order of the commission or a hearing or examination conducted under Texas Occupations Code §1701.167, including, if applicable, the identity of the person notifying the commission that a licensee may not meet the standards required under the adopted agency policy, are confidential.

(d) If it is determined that the licensee did not have good cause to refuse the medical or psychological examination, the commission shall issue an order suspending indefinitely or otherwise restricting the licensee's license until the licensee submits to the requested examination.

If it is determined that the licensee did have good cause to refuse the medical or psychological examination, the commission shall issue an order withdrawing the request for the examination.

(e) The commission's order is subject to judicial review under Chapter 2001, Government Code.

(f) The effective date of this section is September 1, 2024.