

Title 7. Texas Administrative Code
Part 1. Finance Commission of Texas
Chapter 9. Rules of Procedure for Contested Case Hearings, Appeals, and Rulemakings
§9.1 and §9.12

The Finance Commission of Texas (commission) adopts amendments to §9.1, concerning Application, Construction, and Definitions; and §9.12, concerning Default in 7 TAC, Chapter 9, concerning Rules of Procedure for Contested Case Hearings, Appeals, and Rulemakings.

The commission adopts the amendments to §9.1 and §9.12, without changes to the proposed text as published in the June 30, 2017, issue of the *Texas Register* (42 TexReg 3329).

The commission received one written comment on the proposal from the Consumer Service Alliance of Texas (CSAT). The commission's responses to the official comment received are included after the purpose discussions following each respective rule provision receiving comments.

The purpose of the adopted amendments is to clarify the procedures used by the finance agencies to dispose of a contested case in the event of default. The finance agencies are the Texas Department of Banking (DOB), the Texas Department of Savings and Mortgage Lending (SML), and the Office of Consumer Credit Commissioner (OCCC). The updates are necessary to reflect new default procedures enacted by the State Office of Administrative Hearings (SOAH), which became effective on January 1, 2017.

As a note of background, SOAH recently amended its procedural rules, found in Title 1, Chapter 155 of the Texas

Administrative Code. The amendments were made in response to recommendations from the Sunset Advisory Commission. The Sunset Advisory Commission recommended that SOAH be specifically authorized to remand default cases back to the referring agencies for informal disposition. In 2015, the Texas Legislature adopted this recommendation by enacting HB 2154, codified at Texas Government Code, §2001.058(d-1).

The adopted amendments to the default rules provide the finance agencies with specific procedures for resolving default cases that are remanded back to the agencies by SOAH. The agencies already have a default rule that applies to in-house contested case hearings.

The finance agencies circulated an early draft of proposed changes to interested stakeholders. The agencies received two informal written precomments. Certain recommendations by the precommenters were incorporated into the proposal and those suggestions have been maintained for this adoption.

The individual purposes of the amendments are provided in the following paragraphs.

The purpose of the adopted amendment to §9.1 is to clarify that an agency must follow the requirements of new subsection (b) of §9.12 for disposing of a default in a contested case hearing conducted by SOAH.

Regarding §9.1, the rule currently states that the SOAH rules of procedure govern contested case hearings conducted by SOAH. To create analogous procedures for resolving default cases remanded back to the agencies, the adopted amendment to §9.1 states that new §9.12(b) also governs contested case hearings conducted by SOAH.

The purpose of the amendments to §9.12 is to clarify the procedures for disposing of a contested case by default, as authorized by Texas Government Code, §2001.056 and §2001.058(d-1).

Regarding §9.12, the adopted amendments maintain the current rule language in relettered subsection (a). An additional phrase is added to the beginning of subsection (a), specifying that the procedures in this subsection apply to hearings conducted by an administrative law judge employed or contracted by an agency.

The adopted amendments also add a new subsection (b) to §9.12. Subsection (b) specifies the default procedures that apply to hearings conducted by SOAH. The amendments: (1) specify how an agency may notify a party of a contested case hearing, (2) require the agency to prove that it provided proper notice to the defaulting party, and (3) provide procedures for agencies to follow when resolving default cases. The amendments do not affect a party's right to a hearing or impose additional requirements on the party.

Subsection (b) states that an agency may request that an administrative law judge make a finding of default in a hearing conducted by SOAH. Subsection (b)(1) describes the mailing address and method of service that the agency must use to serve the

notice of hearing. Subsection (b)(2) requires the agency to present adequate proof that it properly served the opposing party with the notice of hearing. Subsection (b)(3) describes the effect of default, which includes deeming admitted the allegations in the notice of hearing and granting the relief sought in the notice.

Subsection (b)(4) states that the agency may request that a defaulted case be dismissed and remand to the agency for informal disposition. Subsection (b)(5) describes the content of the final order that the agency may issue, after a default case is dismissed and remanded to the agency.

The official commenter recommended adding a provision stating that "[a]n order issued by an agency after default has no precedential or evidentiary value in a subsequent action against another licensee alleging the same, or similar, violations." The commission disagrees with this suggestion for the following reasons.

The commenter cites to a 1996 Texas Supreme Court case regarding the use of an uncontested judgment against a third party insurance company. *See State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996). The commenter summarizes the *Gandy* holding as "a default judgment against licensee A has no precedential or evidentiary value against Licensee B in a subsequent, similar case." The agencies disagree with the commenter's interpretation of the *Gandy* case. The agencies believe the *Gandy* case supports a different, more narrow conclusion: that it would violate public policy to allow a defendant to enter into an uncontested judgment with a plaintiff and assign to the plaintiff the defendant's cause of action against his insurance company, using the judgment as evidence

against the insurance company. *Id.* at 710 (citing *International Proteins Corp. v. Ralston-Purina Co.*, 744 S.W.2d 932, 934 (Tex. 1988)).

The commenter also states that it would be unfair to give precedential value to default orders because they are not published and cannot be discovered or reviewed by licensees. In fact, a list of all OCCC and SML orders are published on their respective websites, and a copy of each order may be obtained by written request. Therefore, it is fair and consistent to give all final orders proper effect. It is the role of the administrative law judge, and reviewing courts, to determine the proper evidentiary and precedential value of individual orders.

Finally, the commenter states: "A case prepared, and a final order issued, without a fully adversarial trial should not be admissible as evidence against another licensee at a later date." The OCCC and SML issue hundreds of orders each year, but only a few after a full adversarial trial. Again, it is fair and consistent to give all final orders proper effect, which should be determined by an administrative law judge and reviewing courts.

Allowing a court to recognize the precedential or evidentiary value of default orders reduces the need to use substantial agency resources to relitigate facts and issues. This is consistent with the purpose of the default rule, which is to best utilize agency resources by efficiently disposing of defaulted cases.

Therefore, for the reasons outlined in the preceding paragraphs, the commission maintains the proposed language for this adoption and declines to add the commenter's suggestion.

The amendments are adopted under Texas Government Code, §2001.004(1), which requires all administrative agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

The amendments are also adopted under specific rulemaking authority in the substantive statutes administered by the agencies. Texas Finance Code, §11.301 and §31.003(a)(5) authorize the finance commission to adopt rules necessary or reasonable to facilitate the fair hearing and adjudication of matters before the banking commissioner and the finance commission. Texas Finance Code, §151.102(a)(1) authorizes the finance commission to adopt rules necessary to implement and clarify Chapter 151. Texas Finance Code, §154.051(b) authorizes the Department of Banking to adopt rules concerning matters incidental to the enforcement and orderly administration of Chapter 154.

Texas Finance Code, §11.302 authorizes the finance commission to adopt rules applicable to state savings associations or to savings banks. Texas Finance Code, §96.002(a)(2) authorizes the savings and mortgage lending commissioner and the finance commission to adopt procedural rules for deciding applications filed with the savings and mortgage lending commissioner or the Department of Savings and Mortgage Lending.

Texas Finance Code, §11.304 authorizes the finance commission to adopt rules necessary for supervising the consumer credit commissioner and for ensuring compliance with Texas Finance Code, Chapter 14 and Title 4. Texas Finance Code, §371.006 authorizes the consumer credit commissioner to adopt rules necessary for

the enforcement of Texas Finance Code, Chapter 371. Texas Finance Code, §11.306 authorizes the commission to adopt residential mortgage loan origination rules as provided by Chapter 156. Texas Finance Code, §180.004 authorizes the commission to adopt rules to enforce Chapter 180. Texas Finance Code, §393.622 authorizes the commission to adopt rules to enforce Chapter 393. Texas Occupations Code, §1956.0611 authorizes the commission to adopt rules to enforce Subchapter B, Chapter 1956.

The statutory provisions affected by the adoption are contained in Texas Finance Code, Chapters 14, 154, 156, 157, 180, 393, 394, and Title 4, and Texas Occupations Code, Chapter 1956.

§9.1. Application, Construction, and Definitions.

(a) This chapter governs contested case hearings conducted by an administrative law judge employed or contracted by an agency. All contested case hearings conducted by the State Office of Administrative Hearings (SOAH) are governed by SOAH's procedural rules found at Title 1, Chapter 155 of the Texas Administrative Code and §9.12(b) of this title (relating to Default).

(b) The same rules of construction that apply to interpretation of Texas statutes and codes, the definitions in Government Code, §2001.003, and the definitions in subsection (c) of this section govern the interpretation of this chapter. If any section of this chapter is found to conflict with an applicable and controlling provision of other state or federal law, the section involved shall be void to the extent of the conflict without affecting the validity of the rest of this chapter.

(c) The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Administrative law judge--The hearings officer employed by or contracted by an agency to conduct administrative hearings for the finance commission, the department of banking, the department of savings and mortgage lending, and the office of consumer credit commissioner.

(2) Agency--The finance commission, the department of banking, the department of savings and mortgage lending, or the office of consumer credit commissioner.

(3) Agency head(s)--Finance commission members, the banking commissioner, the savings and mortgage lending commissioner, or the consumer credit commissioner, or a designee if authorized by law.

(4) Applicant--A party seeking a license, registration, charter, or permit, or to amend its authority under an existing license, registration, charter or permit, or other action from an agency.

(5) Protestant--A party opposing an application for a license, registration, charter, permit, or other action filed with an agency who has paid any filing fees required by an applicable law.

(6) Respondent--A permittee, licensee, registrant, charter holder, or other party against whom a disciplinary proceeding is directed by an agency.

§9.12. Default

(a) In-house hearings. In a hearing conducted by an administrative law judge employed or contracted by an agency, if, [~~H,~~] after served with notice in compliance with §9.11 of this title (relating to Notice and Initiation of Proceedings), a party fails to attend a hearing, the administrative law judge may proceed in that party's absence and, where appropriate, may issue a proposal for decision against that party. The proposal for decision shall be served upon the defaulting party and the party will be afforded the opportunity to contest the law as stated in the proposal for decision, but shall be deemed to have waived the right to contest the evidence, cross-examine the witnesses, and present an affirmative case or defense. In the alternative, an agency may informally dispose of the matter as permitted by §2001.056 of the Texas Government Code, without the necessity of a hearing.

(b) SOAH hearings. In a hearing conducted by the State Office of Administrative Hearings (SOAH), the agency may request that the administrative law judge make a finding of default under 1 TAC §155.501 (relating to Default Proceedings).

(1) Service of notice of hearing. A notice of hearing may be served to the party's last known address. Applicants and holders of licenses, registrations, charters, and permits shall keep the agency informed as to their correct current mailing addresses and may be served with initial process by registered or certified mail, return receipt requested, to the address provided to the agency.

(2) Adequate proof of notice of hearing. At the time of the request, the

agency must present adequate proof to the administrative law judge that the agency properly served the party with the notice of hearing, as required by 1 TAC §155.501(b).

(3) Effect of default. If the administrative law judge receives the required showing of proof to support a default, the allegations contained in the notice of hearing may be deemed admitted, and the relief sought in the notice may be granted with respect to any party given proper notice of the hearing.

(4) Disposing of default case. The agency may request that the administrative law judge dismiss the case from the SOAH docket and remand it to the agency for informal disposition as permitted by Texas Government Code, §2001.056 and §2001.058(d-1).

(5) Final order after default. If the administrative law judge issues a conditional order of dismissal and remand that provides the defaulting party with adequate notice and opportunity to set aside the default under 1 TAC §155.501(e) and the conditional order of dismissal and remand has become final, the agency may issue a final order that:

(A) finds that the agency served the party with a notice of hearing stating that if the party failed to attend the hearing, then the allegations contained in the notice of hearing could be deemed admitted, and the relief sought might be granted;

(B) describes how the notice of hearing was served on the party;

(C) finds that the party failed to attend the hearing;

(D) finds that the allegations described in the notice are deemed admitted;

(E) concludes that the party has defaulted as a matter of law; and

(F) grants the relief described in the notice of hearing.

Certification

These agencies hereby certify that the adoption has been reviewed by legal counsel and found to be within the agencies' legal authority to adopt.

Issued in Austin, Texas on August 18, 2017.

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