MINUTES
PUBLIC SAFETY COMMISSION
June 16, 2004
Austin, Texas

The Public Safety Commission met in Austin, Texas on June 16, 2004. Attending the meeting were Chairman Colleen McHugh and Commissioners Robert Holt and Carlos Cascos.

DPS Staff members present:
Tommy Davis, Director
Tom Haas, Accounting & Budget Control
Bob Burroughs & Mark Rogers, Highway Patrol Division
Earl Pearson & Ray Coffman, Rangers
Marshall Caskey, Criminal Law Enforcement
Burt Christian and Valerie Fulmer, Administration
Judy Brown, Greg Gloria & Frank Elder, Driver License
Farrell Walker & Ray Perez, Audit & Inspection
Mary Ann Courter, General Counsel
Mary Lauderdale & Ed Kelly, Information Management Service
Tela Mange, Public Information
David Outon, Internal Affairs
Steve Powell, Aircraft
Rick Kautz, Information Resource
Michael Kelley, Legislative Liaison
Dorothy Wright, Secretary

Guests present:
Alfonso Royal, Legislative Budget Board
Stacy Gunkel, Lt. Governor Dewhurst's office
Janna Burleson, Governor's Office
Jim Hetchler and Jim Warren, Texas Locksmith Assn.
George Craig & Mike Samulin, Texas Private Security Board
J. D. Benefer, TBFAA

The meeting was called to order by Chairman McHugh. Proper notice had been posted. A moment of silence was observed for Trooper Stan Avery who had been killed in an off duty traffic accident.

I. **Minutes.** Upon motion by Commissioner Cascos and seconded by Commissioner Holt, the minutes of the May 26, 2004 meeting were approved.

II. **Public comment.** Jim Heschler, Texas Locksmith Association, addressed the Commission reference the status of some rules they had prepared for the Private Security Commission in January. Commissioner McHugh advised the Commission could not respond at this time, but that she would be glad to discuss this with Mr. Heschler after the meeting or he could visit with Valerie Fulmer reference his concerns.

III. **Budget matters.** Tom Haas briefed the Commission on the Legislative Appropriation Request submission guidelines, agency vacancies, and increasing gasoline prices.

A. **Approval of proposed seized fund purchases.** Colonel Davis briefed the Commission on the proposed seized fund purchases. There was some discussion on these purchases. Upon motion by Commissioner Cascos and seconded by Commissioner Holt, the attached purchases were unanimously approved.

IV. **Audit & Inspection Report.** Farrell Walker gave the Audit & Inspection report. There was some discussion on accountability for missing fixed assets and the inventory process.

V. **Approval of DPS Strategic Plan for FY2005-2009.** Farrell Walker briefed the Commission on the proposed Strategic Plan for FY2005-2009. There was some discussion on the propose plan. Upon motion by Commissioner Holt and seconded by Commissioner Cascos, the proposed plan was unanimouslsy approved.

VI. **Division reports.** Burt Christian gave the Administration Division report. There was some discussion on backlogs for paper disposition reporting, sex offender registration, and processing of Private Security non-commission applications; and the fleet vehicle issuance program. Bob Burroughs gave the Texas Highway Patrol Division report. There was some discussion on ongoing bus inspections and drug interdiction programs. Mark Rogers gave the Border Safety Inspection Station update. The Driver License Division report was given by Judy Brown. There was some discussion on the DL reengineering, driver responsibility and CRIS projects; the customer service survey; the Click-it or Ticket program; and increased seatbelt usage. Marshall Caskey gave the Criminal Law Enforcement Division report. There was some discussion on ongoing activities of the various services, narcotics task forces and the identity theft problem. The Ranger report was given by Earl Pearson. Mary Lauderdale gave the Information Management Service report. Bob Burroughs gave an update on joint efforts between DPS and the Texas Commission on Environmental Quality (TCEQ) for implementation of the State's vehicle emissions inspection/maintenance program. Commissioner McHugh announced this agenda item could be incorporated into the THP report for future meetings.

VII. **For publication for public comment**

A. **Proposed amendment to Rule 1.52, 37 TAC Sec. 1.52, relating to release of information in criminal investigations.** Tela Mange briefed the Commission on the proposed amendment. Upon motion by Commissioner Holt and seconded by Commissioner Cascos, the attached amendment was unanimously approved for publication for public comment.

B. **Proposed repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapters 421-437, 440-442 & 449, Sections 421.1-422.4, 423.1-423.3, 424.1-424.12, 425.1, 425.33, 426.1-426.15, 427.1-427.6, 428.1-428.7, 429.1, 430.1-430.6, 430.55, 431.1-431.3, 432.1, 432.2, 433.1-433.6, 434.1-434.5, 435.1, 435.2, 436.1, 437.1, 440.1, 440.2, 440-4-440.19, 441.1, 442.1 &**

449.1, relating to implementation of the transfer of the Texas Private Security Board to DPS

C. **Proposed Rules 35.01, 35.11-35.14, 35.31-35.40, 35.51, 35.61-35.75, 35.91-35.96, 35.111-35.117, 35.131, 35.141-35.146, 35.161-35.163, 35.171, 35.172, 35.181-35.186, 35.201-35.205, 35.221, 35.222, 35.231-35.233, 35.241, 35.251-35.268, 35.281, 35.291 & 35.301, 37 TAC Secs. 35.01, 35.11-35.14, 35.31-35.40, 35.51, 35.61-35.75, 35.91-35.96, 35.111-35.117, 35.131, 35.141-35.146, 35.161-35.163, 35.171, 35.172, 35.181-35.186, 35.201-35.205, 35.221, 35.222, 35.231-35.233, 35.241, 35.251-35.268, 35.281, 35.291 & 35.301, relating to implementation of the transfer of the Texas Private Security Board to DPS** Valerie Fulmer briefed the Commission on the proposed repeal and rules. There was some discussion on these rules. Mary Ann Courter clarified that there is no proposed Rule 35.233 as posted on the agenda. Upon motion by Commissioner Holt and seconded by Commissioner Cascos, the attached repeal and new rules (excepting Rule 35.233 as clarified) were unanimously approved for publication for public comment.

VIII. **For final adoption**

A. **Proposed amendments to Rule 21.1, 37 TAC Sec. 21.1, relating to specifications and performance standards for vehicle equipment, as published in 29 TexReg 2261, March 5, 2004**

B. **Proposed amendments to Rules 23.15, 37 TAC Sec. 23.15, relating to inspection station and certified inspector denial, revocation, suspensions and administrative hearings, as published in 29 TexReg 2265, March 5, 2004** Bob Burroughs briefed the Commission on the above proposed amendments. Upon motion by Commissioner Cascos and seconded by Commissioner Holt, the attached amendments were unanimously approved for final adoption.

IX. **Personnel matters, pending and contemplated litigation, ongoing criminal investigations, status of purchase of real property.** The Commission went into Executive Session pursuant to Tex. Gov. Code Secs. 551.071, 551.074, 551.072 & 411.0041 to discuss personnel matters, including the Director's action of discharging probationary employee Sonja Landry; Special Ranger and Special Texas Ranger commissions; pending and contemplated litigation; status of purchase of real property; and ongoing criminal investigations. Upon reconvening Regular Session, Commissioner McHugh announced that the Commission had discussed personnel matters, pending and contemplated litigation and ongoing criminal investigations. Upon motion by Commissioner Holt and seconded by Commissioner Cascos, the Commission unanimously consented to the Director's discharge of probationary employee Sonja Landry. A Special Ranger commission had been considered for DPS retiree Terry Wayne Roach. Upon motion by Commissioner Cascos and seconded by Commissioner Holt, a Special Ranger commission was approved for Terry Roach.

A motion was made by Commissioner Cascos and seconded by Commissioner Holt adjourning the meeting.

Read and approved this 6th day of August, 2004.

Chairman

Member

Member

FORFEITED FUNDS EXPENDITURE REVIEW COMMITTEE
COMMITTEE ACTION REPORT

Date: 04/20/04

Division/Service/Section making request:

Director's Staff, Information Management Service

Description of Item(s) requested (attach request memo):

Systems Management Server 2003

Describe Overall Impact of Request:

To provide an enterprise solution for patch and configuration management for TXDPS desktops and servers.

Equipment Location (circle one): **Field** **Headquarters** **Both**

Estimated Cost of this Request: **$116,000**

RECOMMENDATION OF COMMITTEE:

__X__ Approved

_____ Not Approved

Fund _____
Budget No. _____
Control Number **04-015**

Reason if NOT Approved:

Colleen McHugh
Chairman

6-16-04
Date

Thomas A. Davis
Director

6-16-04
Date

_____

_____
Date

FORFEITED FUNDS EXPENDITURE REVIEW COMMITTEE
COMMITTEE ACTION REPORT

Date: 04/20/04

Division/Service/Section making request:

Texas Highway Patrol

Description of Item(s) requested (attach request memo):

In-Car Video Camera, 5-year replacement

Describe Overall Impact of Request:

Vital for officer safety and enhance enforcement

Equipment Location (circle one): **Field** **Headquarters** **Both**

Estimated Cost of this Request: **$1,005,138**
x 5 years = $6,705,260

RECOMMENDATION OF COMMITTEE:

__X__ Approved

_____ Not Approved

Fund _____
Budget No. _____
Control Number **04-011**

Reason if NOT Approved:

Chairman — 6-16-04 Date

Director — 6-16-04 Date

_____ Date

FORFEITED FUNDS EXPENDITURE REVIEW COMMITTEE
COMMITTEE ACTION REPORT

Date: 04/20/04

Division/Service/Section making request:

Criminal Law Enforcement

Description of Item(s) requested (attach request memo):

Emergency Power System

Describe Overall Impact of Request:

Equipment Location (circle one): **Field** **(Headquarters)** **Both**

Estimated Cost of this Request: **$790,000**

RECOMMENDATION OF COMMITTEE:

__X__ Approved

_____ Not Approved

Fund _____
Budget No. _____
Control Number **04-016**

Reason if NOT Approved:

Coleeen Dr Hughes
Chairman — 6-16-04 Date

Thomas D. Davis, J
Director — 6-16-04 Date

_____ Date

FORFEITED FUNDS EXPENDITURE REVIEW COMMITTEE
COMMITTEE ACTION REPORT

Date: 04/20/04

Division/Service/Section making request:

Criminal Law Enforcement, Narcotics Service

Description of Item(s) requested (attach request memo):

Chemical Biological Radiological and Nuclear (CBRN) Self-Contained Breathing Apparatus (SCBA)

Upgrade to current SCBA's

Describe Overall Impact of Request:

Industry standards have changed and the current model is no longer being produced. Service and parts availability is expected to expire in 2009. Masks are used in methamphetamine lab investigations and will provide proper protection to officers.

Equipment Location (circle one): **Field** **Headquarters** **Both** (circled)

Estimated Cost of this Request: **$119,250**

RECOMMENDATION OF COMMITTEE:

__X__ Approved

_____ Not Approved

Fund ________
Budget No. ________
Control Number **04-014**

Reason if NOT Approved:

[signature] 6-16-04
Chairman Date

[signature] 6-16-04
Director Date

________ ________
Date

FORFEITED FUNDS EXPENDITURE REVIEW COMMITTEE
COMMITTEE ACTION REPORT

Date: 04/20/04

Division/Service/Section making request:

Driver License Division, Fraud Unit

Description of Item(s) requested (attach request memo):

Equipment providing safety and security – including guns, clothing, tools, and electronics.

Describe Overall Impact of Request:

To provide DL Fraud Unit troopers equipment to perform their duties.

Equipment Location (circle one): **Field** **Headquarters** **(Both)**

Estimated Cost of this Request: **$20,880**

RECOMMENDATION OF COMMITTEE:

__X__ Approved

_____ Not Approved

Fund _____
Budget No. _____
Control Number **04-008**

Reason if NOT Approved:

Colleen McHugh
Chairman — 6-16-04 Date

Thomas A. Davis Jr.
Director — 6-16-04 Date

_____ Commission — _____ Date

FORFEITED FUNDS EXPENDITURE REVIEW COMMITTEE
COMMITTEE ACTION REPORT

Date: 04/20/04

Division/Service/Section making request:

Criminal Law Enforcement, Crime Laboratory Service

Description of Item(s) requested (attach request memo):

ABI 7000 Real-time PCR (Polymerase Chain Reaction) Instruments

Describe Overall Impact of Request:

Equipment Location (circle one): **Field** **Headquarters** **(Both)**

Estimated Cost of this Request: **$120,000**

RECOMMENDATION OF COMMITTEE:

__X__ Approved

_____ Not Approved

Fund _____
Budget No. _____
Control Number **04-012**

Reason if NOT Approved:

Chairman — 6-16-04 Date

Director — 6-16-04 Date

_____ — Date

FORFEITED FUNDS EXPENDITURE REVIEW COMMITTEE
COMMITTEE ACTION REPORT

Date: 04/20/04

Division/Service/Section making request:

Criminal Law Enforcement, Texas Highway Patrol

Description of Item(s) requested (attach request memo):

Hand-held radio replacement, 5-year plan

Describe Overall Impact of Request:

Vital for officer safety and enhance enforcement

Equipment Location (circle one): **Field** **Headquarters** **Both**

Estimated Cost of this Request: **$1,341,052**
CLE $388,800/year + THP $952,252/year x 5 = $6,705,260

RECOMMENDATION OF COMMITTEE:

__X__ Approved

_____ Not Approved

Fund _____
Budget No. _____
Control Number **04-010**

Reason if NOT Approved:

Colleen McHugh
Chairman — 6-16-04 Date

Thomas A. Davis
Director — 6-16-04 Date

for the Public Safety Commission — Date

FORFEITED FUNDS EXPENDITURE REVIEW COMMITTEE
COMMITTEE ACTION REPORT

Date: 04/20/04

Division/Service/Section making request:

Criminal Law Enforcement, Texas Highway Patrol, Texas Rangers

Description of Item(s) requested (attach request memo):

Body Armor, 5-year replacement

Describe Overall Impact of Request:

Vital for officer safety and enhance enforcement

Equipment Location (circle one): **Field** **Headquarters** **Both**

Estimated Cost of this Request: **$260,902**
CLE $72,581/yr + THP $174,293/yr x 5 + Rangers $14,028-$14,028-$8,768-$0-$0/yr = 5-year total of $1,271,194

RECOMMENDATION OF COMMITTEE:

__X__ Approved

_____ Not Approved

Fund _____
Budget No. _____
Control Number **04-009**

Reason if NOT Approved:

_____ Chairman — 6-16-04 Date

_____ Director — 6-16-04 Date

_____ — Date

FORFEITED FUNDS EXPENDITURE REVIEW COMMITTEE
COMMITTEE ACTION REPORT

Date: 04/20/04

Division/Service/Section making request:

Director's Staff, Aircraft Section

Description of Item(s) requested (attach request memo):

Dual Imaging Systems

Describe Overall Impact of Request:

Equipment Location (circle one): (**Field**) **Headquarters** **Both**

Estimated Cost of this Request: **$450,000**

RECOMMENDATION OF COMMITTEE:

__X__ Approved

_____ Not Approved

Fund _____
Budget No. _____
Control Number **04-013**

Reason if NOT Approved:

_____ Chairman — 6-16-04 Date

_____ Director — 6-16-04 Date

_____ — _____ Date

TEXAS DEPARTMENT OF PUBLIC SAFETY
ORDER ADOPTING A RULE

On June 16, 2004, the Public Safety Commission (Commission) by majority vote approved rules concerning:

Equipment and Vehicle Standards
Title 37 T.A.C. Part I, Chapter 21
Section Number 21.1

The Texas Department of Public Safety adopts amendments to Section 21.1, concerning Standards for Vehicle Equipment, without changes to the proposed text as published in the March 5, 2004, issue of the Texas Register (29 TexReg 2261).

The section provides specifications and performance standards for vehicle equipment to include: lamps, reflective devices, and other lighting devices; sunscreening and reflective window devices; and safety guards or flaps. The main purpose of this rulemaking is to implement changes resulting from the passage of Tex. S.B. 345, 78th Leg., R.S. (2003), Ch. 136.

Senate Bill 345 amends Texas Transportation Code, Section 547.613, which restricts sunscreening devices on certain vehicle windows to at least 25 percent light transmission measured in combination with both the window glass and the sunscreening device. Additional amendments to Section 21.1 provide clarifying language explaining preemptive federal window glazing (sunscreening/window tint) standards and the procedure to obtain a medical exemption from the department for sunscreening devices and its limitations.

The department held a public hearing on the proposal in Austin on April 13, 2004, and the extended comment period closed on April 13, 2004. The department received several comments concerning the proposal. Following each comment summary is the department's response and any resulting change(s).

COMMENT: The International Window Film Association and Enpro Distributing, Inc. made comments referencing Section 547.613(d) which permits the department to allow a three percent tolerance from the standard on light transmission and luminous reflectance on after-market sunscreening materials. These comments include statements regarding meter accuracy used to test these materials when installed as plus or minus two percent. The comments suggested incorporation of this tolerance into the after-market window sunscreening device standard.

RESPONSE: These comments are outside the scope of this rule. This rule, regarding sunscreening devices (window tint), states the legal standard for after-market sunscreening devices. The measurement of window tint on motor vehicles generally occurs under two circumstances. The most frequent is during the annual safety inspection. The department rule administering that measurement is 37 TAC Section 23.42, Inspection of Sunscreening Devices (Glass Tinting) by Official Vehicle Inspection Stations. Section 23.42 currently provides inspection criteria compensating for meter accuracy. The second and less frequent occasion is during a traffic stop by law enforcement personnel. The applicable department rule for the second circumstance is 37 TAC Section 3.26, Inspection of Drivers and Vehicles. In the latter, law enforcement personnel inspect "as outlined in the statutes." These comments resulted in no changes to the proposal.

COMMENT: A station operator representing the Texas State Inspection Association members in San Antonio supported amendment of the rule, but expressed concern regarding the luminance reflectance specification. The speaker wanted to know if this specification would be part of the inspection criteria found

under Chapter 23. If so, the speaker was concerned over the cost of new inspection equipment and the department to address the economics of time and cost requirements to inspection stations.

RESPONSE: These comments are outside the scope of this rule. As previously stated, 37 TAC Section 23.42 is the applicable rule for "Inspection of Sunscreening Devices (Glass Tinting) by Official Vehicle Inspection Stations." Texas Transportation Code, Section 547.613 contained restrictions for luminous reflectance before its revision during the last legislative session. In any event, Texas Transportation Code, Section 548.501 regulates the fee inspection stations may charge for the state's compulsory vehicle inspection. This comment resulted in no changes to the proposal.

The amendments are adopted pursuant to Texas Government Code, Section 411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Transportation Code, Section 547.101, which authorizes the Department of Public Safety to adopt standards for vehicle equipment; and the provisions of Tex. S.B. 345, 78th Leg., R.S. (2003), Ch. 136.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

The effective date of the rules is 20 days after the rules are filed with the Texas Register Division, Office of the Secretary of State.

This order constitutes the order of the Commission required by the Administrative Procedures Act, Government Code, Section 2001.033.

Colleen McHugh, Chairman
Public Safety Commission

MGC

TEXAS DEPARTMENT OF PUBLIC SAFETY
ORDER ADOPTING A RULE

On June 16, 2004, the Public Safety Commission (Commission) by majority vote approved rules concerning:

Vehicle Inspection
Title 37 T.A.C. Part I, Chapter 23
Subchapter A
Section Number 23.15

The Texas Department of Public Safety adopts amendments to Section 23.15, concerning Inspection Station and Certified Inspector Denial, Revocation, Suspensions, and Administrative Hearings, with changes to the proposed text as published in the March 5, 2004 issue of the Texas Register (29 TexReg 2265) and will be republished.

The amendments clarify grounds for denial, revocation, and suspension of certificates for inspection stations and inspectors. The amendments explicate that listed violations in the rule are not exclusive, includes additional minor violations generally requiring retraining and/or warning enforcement actions, and further adds other serious violations contained in other department rules.

The department held a public hearing in Austin on April 13, 2004, and the extended comment period closed on April 13, 2004. The department received both written and oral comments concerning this proposal. Summaries of the comments are arranged according to the applicable subject area within the rule. Changes to the proposed amendments are in response to comments received and follow the department responses where indicated. Additionally, there are corrections for slight typographical errors.

Written comments were received from the Executive VP/Chief Counsel of the Texas Automobile Dealers Association (TADA). Written and oral comments were received from an attorney representing Express Sticker, PitStop USA, Stickerstop, Stickerstop USA, and Vehicle Inspections by MOGO consisting of twelve vehicle inspections stations (Stations(12)) and members of the department staff (Staff). Oral comments were received from: a representative from the Texas State Inspection Association (TSIA-1); a spokesperson for San Antonio members of the Texas State Inspection Association (TSIA-2); a spokesperson representing Texas State Inspection Association and LoneStar Lubrication (TSIA-3); and the owner/operator of Mr. Sticker, Inc., (Mr. Sticker). The comments received were generally favorable to the rule as proposed; however, many of the commenters had questions, specific concerns, or offered suggestions for change.

The following comments were received concerning the proposed amendments. The comments are consolidated and summarized in the same order as the proposed language appears in the rule. Following each comment summary is the department's response.

COMMENT: Stations(12) noted that the amended text to subsection (d) creates an "overall catch-all" clause. This subsection allows the department to address those violations not specifically listed. Stations(12) expressed concern that the penalty for the resulting violations could be anything from re-education to lifetime revocation. The recommended language by Stations(12) would provide that all such violations be classified as "Category A" violations.

RESPONSE: Stations(12) correctly stated in its comments that while the department, after making the effort to enumerate every violation, could not possibly list all of them. The department never intended the rule to be an all-inclusive list. The amendments make this position clear to all. Categorizing the resulting penalty

for such a violation would be premature. When presented with circumstances where an inspector or inspection station violates a law, statute, or rule requiring administrative action against the license holder, the department during the review process will make a determination regarding the appropriate penalty category. No change was made based on this comment.

COMMENT: Stations(12) noted that subparagraph (e)(1)(B) uses the word "verifying" relating to the statutory requirement placed upon an inspection station and inspector regarding proof of financial responsibility during the vehicle inspection. With no definition given, "verifying" gives rise to doubt as to what measures are required. Stations(12) recommends use of language similar to that contained in department's manual, *Rules and Regulations Manual for Official Vehicle Inspection Stations and Certified Inspectors* (Manual).

RESPONSE: The department agrees. The use of the word "verifying" would indicate a duty above that which is statutorily required. The department is making the following minor change due to this comment to clarify the intent and improve the accuracy of subparagraph.

COMMENT: Stations(12) noted that subparagraph (e)(1)(G) does not define the term "properly safeguard" and does not provide guidance as to the actions necessary to meet the minimum "safeguard" threshold. Stations(12)'s comments focus on the PIN number used by inspectors and states that the lack of written password standards provides no quantifiable method for the department to categorically determine violations by inspectors. Stations(12) suggests that the department develop guidelines for the physical safeguarding of cards and PINs including password (PIN) selection standards similar to those in use in the private sector.

RESPONSE: The department disagrees with the comment. This violation stems from two separate department rules. First, 37 TAC Section 23.25, Safeguarding Certificates, defines properly safeguard as it relates to certificates: "The certificates shall be kept under lock and key at all times in a metal box or a secure container with a locking device." Second, 37 TAC Section 23.96, Emissions Analyzer Access/Identification Card concerns safeguarding the PIN number. Subsection (c)(3) of the latter rule states: "Inspectors may not give, share, lend, or divulge this PIN to another person without the explicit consent of appropriate department personnel. Failure to comply with this paragraph shall result in suspension or revocation of the inspector's certification as well as any appropriate criminal action or administrative disciplinary action. Inspectors are responsible for unauthorized access of the Texas Information Management System resulting from their negligence or carelessness in maintaining the confidentiality of their Personal Identification Number (PIN)." No change was made based on this comment.

COMMENT: TSIA-2 expressed concern about subparagraph (e)(1)(H) that was not affected by revision, but wants clarification because human errors do occur and sometimes numbers are transposed on the records.

RESPONSE: The comment is outside the scope of this rule making. Subparagraph (e)(1)(H) is a violation of an inspection station to follow department rules contained in 37 TAC Subchapter D and the department Manual. As stated in the previous department response, the inspection business exists because of state regulation and all highly regulated businesses are required to keep accurate records. This rule limits administrative punishment to a minor violation that would result in re-education, warnings, and finally license suspension for habitual violators.

COMMENT: TSIA-2 is concerned that subparagraph (e)(1)(J) penalizes small stations in rural areas where the station removes a bad employee or when they don't have anybody. (In both cases, the department assumes TSIA-2 means instances where the station has only one certified inspector.)

RESPONSE: The department disagrees. The station is not penalized because an inspection station without an inspector can not inspect vehicles. It is the duty of an inspection station to inspect vehicles for the public. This is a category A violation. The station operator is first re-educated on the requirement of an inspector on duty. Next, the operator may receive a warning for failing to heed the instruction. Finally, if another violation occurs within two years of the first, the operator receives a three months suspension. No change was made based on this comment.

COMMENT: TSIA-1 and TSIA-2 both commented on subparagraph (e)(1)(M). TSIA-1 states the violation is vague and results in adverse actions against the stations. The stations need to know the correct way to do it. As an example, stations performing emissions testing may have more than one inspection lane, but use only one book of certificates. Certificates issued from one book, entered into the analyzer in each lane then appear issued out of sequence. If stations are required to have a complete series of books of each type of certificate for each lane, it could double or triple the inventory cost of inspection certificates for which the station has to prepay. TSIA-2 states this often results from human mistakes with most stations usually having more than one book of certificates. One inspector issues from one book, returns it to the lock box and the next inspector on duty inadvertently picks up the other book of certificates resulting in a break in the sequence. TSIA-2 is concerned that this human error will be result in adverse action against the station. TSIA-2 states, based on monthly issuance of several thousands of certificates, there are printing errors in the certificate books, e.g., poor printing quality, portion of certificate missing, whole certificates missing, and certificates with duplicate numbers. TSIA-2 believes that these printing errors unfairly jeopardize stations.

RESPONSE: The department disagrees that the violation is vague. These comments are outside the scope of this rule. The subparagraph at issue details the penalty resulting from violation of 37 TAC Section 23.21, Issuance of Inspection Certificates. Section 23.21(a)(1) states: "An inspection certificate shall be issued in numerical sequence for every vehicle inspected and approved." Section 23.15 is not the procedural instruction for inspections or operation of a certified inspection station. The department and the Texas Department of Criminal Justice, which prints the inspection certificates, take great pains to prevent printing errors, but with tens of millions of certificates printed each year some mistakes will be present. As TSIA-2 indicates, each inspection station should routinely check all the inspection certificate books after purchase and notify the department of any errors found. This will prevent any adverse action against the station and further the quality control process for printing the certificates. Regarding TSIA-1's comments on multiple lane operations, the state inspection program design is based on one inspection area per station. With the advent of emission testing, many large-scale operators entered the program. The department allowed multiple lane operation under one inspection station license on the provision that each separate inspection area is complete, i.e., each inspection lane has an emissions analyzer. No change was made based on this comment.

COMMENT: TSIA-1 and Stations(12) both commented on subparagraph (e)(1)(R). TSIA-1 states it is vague and stations can not determine what careless or negligent means, since this is a rule and not a law. Stations(12) uses one recognized legal definition of negligence as "simple inadvertence" and suggests the standard of care is high as evidenced by references to the department Manual. Stations(12) suggests changing the standard from careless or negligent to recklessly indifferent and further define it as "as such

conduct that under the circumstances evinces disregard or indifference to consequences." Stations(12) also notes that the phrase "vehicle information" is not defined, however they assume the term encompasses all information required by the analyzer.

RESPONSE: The department disagrees with TSIA-1, generally agrees with Stations(12) definitional uses, but declines to lower the standard of care as suggested. First, administrative rules are a creation of the law, therefore legal terms apply, and as Stations(12) comments show the violation is not vague. This is a violation of Transportation Code Sections 548.601(a)(2), (3)(B), and (9). It occurs when an inspector enters vehicle information required by the emissions analyzer, with an additional opportunity to verify and correct that which is incorrect, and causes the vehicle to fail the emission test during the inspection. Entering the correct vehicle information is extremely important to the vehicle inspection and maintenance (I/M) program because: 1) federal and state regulations require this information for each vehicle; 2) accurate vehicle information is required for mobile emissions planning; and 3) false failures cause public resentment and distrust of the I/M program. No change was made based on this comment.

COMMENT: Staff requests, in reference to subparagraph (e)(1)(S), clarification in counting the two-year period for subsequent violations, i.e., if the license holder received a suspension for a third Category A violation, does the two-year period start on the date of that violation or when the three month suspension was over. TSIA-2 also requested the department to clarify this issue and recommended the two year period include the suspension period.

RESPONSE: The department agrees with Staff and TSIA-2 and will clarify the procedure for assessment of Category A violations, along with other categories, elsewhere in the rule resulting from these comments.

COMMENT: Stations(12) stated that the distinction between subparagraph (e)(2)(E), a Category B violation and subparagraph (e)(3)(H), a Category C violation, is unclear. The comment provides a semantical analysis focusing on the terms "allowing," "permitting," and "issuing." Stations(12) suggests the department: 1) clearly distinguish the criteria between the two violations; 2) define "allowing" by developing a set of minimum standards for owner/operator control procedures and policies over inspectors for which any violation would be considered "allowing" conduct in violation of these rules; and 3) add an element for knowledge and culpability on the part of the owner/operator resulting in a violation.

RESPONSE: The department disagrees that the distinction between the two violations is unclear and declines to define "allowing" as suggested. The department agrees that the words allowing and permitting are synonymous; redundant use was for emphasis. Unless defined otherwise, words have their common meanings when considered in the context in the rule. Within the context of this rule, the common meaning of "allow" is to neglect to restrain or prevent and "permit" is to consent or to make possible. For clarification, "issuing" a certificate by attaching it to the vehicle, is the culminating act incorporating the whole of the inspection procedure. Discussion of the subparagraph (e)(2)(E) violation was at some length during the prior rule making. It results from violating department rules on tag-team inspections and hands-on on-the-job training, both of which are strictly prohibited, where uncertified helpers perform some or all of the inspection and the certified inspector merely signs off on their work. The violation primarily focuses on the inspector, although a station operator with knowledge of this activity is responsible. The subparagraph (e)(3)(H) violation added, at the Category C level, focuses primarily on the station operator who authorizes an uncertified person to perform inspections. The use of the term issuing is key because the inspection station operator must allow (neglect to restrain, prevent, or permit) the uncertified person access to the

certificates which the station operator is charged to safeguard. The knowledge or culpability is clear. The department is making the following minor change due to this comment in order to clarify the intent and improve the accuracy of subparagraph.

COMMENT: TSIA-1 and TSIA-2 commented on subparagraph (e)(2)(I). TSIA-1 wants the department to define the term "gross negligence" and asks if it will stand up in district court. Both proffered questions regarding securing inspection certificates based on anecdotal situations, e.g., if a loss occurs is gross negligence assumed, inspectors keeping the certificates in their shirt pockets, leaving the book lying on the analyzer with no one present but the department technician while stepped away, and lock failure on safes, lock boxes, or cash drawers used.

RESPONSE: The majority of questions proffered are outside the scope of this rule. This subparagraph addresses the penalty for violation of 37 TAC Section 23.25, Safeguarding Certificates that requires: "Adequate facilities shall be provided for safeguarding all certificates. The certificates shall be kept under lock and key at all times in a metal box or a secure container with a locking device." The department uses the term "gross negligence" as is generally accepted in legal usage and defined in *BLACK'S LAW DICTIONARY 1057* (7th ed. 1999), to include the annotations. While the precautions are simple, the assumption of gross negligence is not predicated on loss of the certificate alone. No change was made based on this comment.

COMMENT: The Staff commented the rule does not include instances where the inspection station does not have a certified inspector available i.e., sole inspector quit, fired, or under suspension. Staff recommends it be Category D violation in paragraph (4). TSIA-2 appeared to support staff's recommendation. TSIA-3 stated closing a station is a concern. TSIA-3 comments it should not happen due to an inspector sick day where the department locks out the analyzer and it takes three days to unlock it (used for emissions testing), otherwise it would not be a problem.

RESPONSE: The department agrees with the comments. Category D violations are temporary eligibility situations where an inspection station or inspector is temporarily prohibited from inspecting vehicles until a prescribed department requirement is met. It is to put the inspector or inspection station on notice of the problem. Obviously, vehicle inspections performed by uncertified personnel would result in a more serious violation. It is the policy of the department to unlock emissions analyzers immediately when any problem is cleared. The department is making the following minor change to subparagraph (e)(4)(B) due to the comments to include this omission.

COMMENT: TSIA-1 and Stations(12) both commented on subparagraph (e)(5)(A)(xi). TSIA-1 agrees with the department if the violation defrauds the public or the state. Stations(12) noted that this violation is broader than contained in subparagraph (e)(1)(R) and as a result any mistake that results in the entry of incorrect, e.g. false, information, no matter the cause, is applicable. Stations(12) stated that it has no knowledge requirement, not even a careless or negligence aspect, in the violation. TSIA-1 also inquired about differentiating who did it and what was the intent. Stations(12) noted that as opposed to subparagraph (e)(1)(R), this violation concerns any type of information and not just vehicle information.

RESPONSE: The department agrees with most of the comments but declines to change the subparagraph because the violation goes to the heart of why and how the department administers an I/M (emissions testing) program. The Clean Air Act, both federal and state, requires vehicle emissions testing to find and fix

polluting vehicles. Under the State Implementation Plan (SIP), adopted by the State, prepared in accordance with federal rules, and adopted in the *Federal Register*, the requirement for enforcement against inspection stations and inspectors is clear: "Substantial penalties or retainage shall be imposed on the first offense for violations that directly affect emission reduction benefits. At a minimum, in test-and-repair programs inspector and station license suspension shall be imposed for at least 6 months whenever a vehicle is intentionally improperly passed for any required portion of the test. In test-only programs, inspectors shall be removed from inspector duty for at least 6 months (or a retainage penalty equivalent to the inspector's salary for that period shall be imposed)." (40 CFR 51.364(a)(2)) To answer TSIA-1's "who" question, the violation includes all information collected during the emissions test because a key informational item is the identity of the inspector as proven by use of the access card and PIN number. Inspector knowledge in this violation is clear since each inspector has two opportunities to ensure that the correct vehicle information is entered into the analyzer in order to conduct the emissions test. The intent is clear: "entering false information" "in order to issue an inspection certificate." The design of the emissions analyzer causes the testing of a vehicle based on the information the inspector is responsible for entering or verifying. A vehicle may only be issued a certificate is if it passes the emission test or, in other words, by entering the correct information to issue a certificate. The issue is whether the inspector has circumvented the test protocol to allow a polluting vehicle to continue to pollute, despite the entire vehicle emissions testing program instituted by the state. Above the cost of the annual safety inspection and based on the previous 12 months of certificate sales, the State, in round numbers, will require that approximately 5.5 million vehicles to be emissions tested at a cost to the public in excess of $147 million per year to find and fix vehicles polluting the air. The majority of these funds go to the inspection stations. Allowing an inspector to enter false information to circumvent the I/M program is a fraud perpetrated against the public and the state. Texas law contains no provision for monetary fines for inspection stations or inspectors, therefore any violators are suspended from inspecting for six months. No change was made based on this comment.

COMMENT: The department received numerous comments concerning subsection (f). Some of these comments also referred to subparagraph (e)(4)(D), which gives effect to subsection (f), while others did not. Stations(12) made mention of paragraph (f)(2), referring to criminal violations of deceptive trade practices, and use of subsection (d) to expand it to include violations as a result of civil suits based on the Texas Deceptive Trade Practices Act (DTPA). TADA expressed similar concerns about confusion over civil DTPA actions and suggested either strict adherence to the language of the statute and restricting those convicted of a felony or a Class A or B misdemeanor or changing paragraph (f)(2) to read: "a criminal conviction of a statute that protects a consumer against an unlawful business practice." TSIA-1 and TSIA-2 voiced their support for raising the "bar" and removing "bad actors," but paragraph (f)(15) incorporates the entire Transportation Code and the inclusion of Chapter 548 which does not apply to the "program" creates potential for "big dragnet" and could deliver the "death penalty" (lifetime revocation) to an inspector or station. TSIA-1 commented that a conviction of a person at age sixteen should not be held against them when they are thirty-five. TSIA-2 stated it contained no time limitation. TSIA-1 believed that the requirement is not evenly enforced since prospective employees they turndown because of criminal background appear in competitors' stations. TSIA-1 and TSIA-2 voiced concern about the economy impacts of the standard, paying for the background check and paying higher wages. TSIA-2 restated as two years ago, that this is an entry-level position and that 80% of the employees would not meet this standard and it is not doable at this time. TSIA-1 and TSIA-2 would like this paragraph removed.

RESPONSE: The department agrees with TADA that under Transportation Code, Section 548.405(a)(7)(A)-(D) the department can deny, revoke or suspend the certificate of a person either inspector or station operator

for the conviction of any felony, Class A, or B misdemeanor without time limitation. In addition to the legal authority cited by TADA, under Transportation Code, Section 548.407(d)(8)-(10), adverse action can be taken immediately without a prior notice or hearing for criminal violations of Subchapter F (emissions testing), Section 548.603, and conviction of a felony or a Class A or B misdemeanor directly relating to or affecting vehicle inspection station or inspector duties or responsibilities. Finally, a violation under Section 548.603 includes any violation under Chapter 548, any department rule; or a law of another state, the United States, the United Mexican States, a state of the United Mexican States, Canada, or a province of Canada. For all those who commented, subparagraph (e)(4)(D) provides for the temporary removal from the inspection program for a conviction of the crimes listed in subsection (f) until the court imposed punishment or supervision elapses. This means civil judgment under the Business & Commerce Code, Chapter 17, Deceptive Trade Practices are not applicable. However, a criminal conviction under that chapter would apply until any punishment is complete just as would a conviction under Penal Code Section 32.42, Deceptive Business Practices. Past convictions of other crimes listed in subsection (f) do not prohibit inspection activities after the sentence has been completed. The amendment of subsection (f) is minor, only for clarification purposes, and not a fundamental change. The concerns of TSIA-1 and TSIA-2 regarding this subsection are apparently the result of misunderstanding of reading subsection (f) alone. Subsection (f) must be read in conjunction with subparagraph (e)(4)(D). Regarding comments concerning paragraph (f)(15), this violation is not new; it is in the current rule in exactly the same form. Formatting used in publication in the *Texas Register* made paragraph (15) appear as added text instead of renumbered from paragraph (13). Including the chapter number in referring to one of its sections is a citation convention; however, as stated earlier in this response, Chapter 548 is included in the violation. No change was made based on these comments.

COMMENT: Staff asked that consideration be given for a time limitation for the other categories of violations, besides Category A. The difficulty of tracking violations more than five years old and after that time, the circumstances of the past violation may have little relevance to the current violation. TSIA-2 believes that five years may be too long to be held accountable for bad acts and because of employee turn-over three years may be better.

RESPONSE: The department agrees with Staff and believes that the turnover TSIA-2 indicates justifies establishing a period to consider past Category B, C, and E violations. While three years may appear appropriate for inspection stations with high employee turnover, the violation also applies to station operators as well as long time inspectors. Additionally a revocation carries a three year prohibition on reapplication, a three year limitation for subsequent violation allows a previous serious violator to start with a clean record under the penalty schedule, which is not desirous. The department is revising subsection (g) based on this comment and another regarding Category A violations to consolidate and clarify the manner in which subsequent penalties are calculated.

COMMENT: The department received numerous comments concerning subsection (h). Stations(12) stated a strict construction of the subsection would allow no family member to take over a station once the department has initiated action under any circumstance and previously the provision became applicable when an actual suspension or revocation became effective. Stations(12) believed the affidavit language does not modify family member takeovers but applies to non-family members and suggests revised language to clarify the affidavit applies to a family member takeover. TSIA-1 and TSIA-2 stated it closes a station without giving due process. TSIA-1 stated the expressed intent of HB 3071 is to prevent the department from making a rule to suspend due process. TSIA-2 stated that most inspection stations are family owned

businesses and contends that HB 3071 says that a family member "can be certified," however with requirements such as the affidavit, which TSIA-2 supports. TSIA-2 recommends removal of the subsection; but supports the affidavit requirement and even additional requirements such as additional audits by the department.

RESPONSE: The department disagrees with the interpretations of HB 3071 by TSIA-1 and TSIA-2. The department agrees with TSIA-2 that a significant number of inspection stations are family businesses, with operational control shared in varying degrees by close family members. HB 3071 amended Transportation Code, Section 548.405, Denial, Revocation, or Suspension of Certificate, relating to inspection stations and inspectors. The purpose was to strengthen this law and include certain family members of the certificate holder as well as other individuals, such as partners and shareholders. The statute, as amended, clearly provides that a person who has an immediate family member suspended or revoked "may not" be granted certification at the same location. This prohibition is not total since it does not extend to another location. Additionally, the certificate seeker may overcome it with proof that the immediate family member whose certificate is suspended or revoked will not be involved in that place of business. Contrary to TSIA-1 and TSIA-2, HB 3071 does not address "due process." The department disagrees with TSIA-1 and TSIA-2; the subsection does not suspend due process. There are various legal principals concerning due process. Under administrative law, it is generally procedural due process where there are two requirements, notice and a hearing. This rule and individual notification of denial are notice and a hearing is available upon request with the State Office of Administrative Hearings (SOAH). Stations(12) generally reads the subsection correctly with two exceptions. First, Stations(12) overlooks the operative word "may" in the restriction, meaning that it can be overcome. Second, the affidavit later mentioned is the primary method to overcome this specific restriction, therefore the previous certificate holder must be an immediate family member whose certificate is suspended or revoked or for whom the suspension or revocation process has been initiated. By parsing the subsection, instead of reading it as a whole, Stations(12) applies the use of the affidavit in a circumstance addressed by 37 TAC Section 23.17, concerning the lease or sale of inspection station during suspension, rather than intra family transfers or the affidavit requirement. From this comment, the department recognizes that both cases of new certifications, with immediate family members and strangers or non-immediate family members, should be treated the same with certain obvious exceptions. The department is revising subsection (h) based on the Stations(12) comment to clarify new inspection station certification pending or during suspension or revocation.

COMMENT: During the public hearing, TSIA-1 made reference to his comments during the previous amendment of this rule and indicated submission of written comments.

RESPONSE: The department received no written comments from TSIA-1 but has included the substance of all oral comments made by TSIA-1. No change was made based on this comment.

COMMENT: TSIA-2 was curious as to the reason this rule is being revised after two years, because they thought that the issues have already been resolved. While supportive of removing bad actors quickly and fining them, TSIA-1 and TSIA-2 have concerns about due process, shutting down an entire business, or family business, and the many thousands of dollars if not tens of thousands of dollars for legal defense. TSIA-1 complained about SOAH rules of procedure, the length of the hearing process, and limited defenses available at SOAH.

RESPONSE: The reason for the amendment of the section is included in the preamble of the proposed amendment, to clarify the rule and include earlier oversights. The department has no authority to levy monetary fines, does not target businesses, family owned or otherwise. The costs of legal defense and SOAH rules of procedure are beyond the scope of this rule. No change was made based on this comment.

COMMENT: TSIA-3 commented that the livelihood of inspection stations is in the hands of the department (in Austin) and they have to trust the department not to write overly punitive rules and fairly implement them. For the most part, everything is fine except for "local rules" (local application of agency rules). Some of the non-commissioned department technicians don't have the training or temperament for the job. A small mistake, instead of being worked out, is turned into a big mistake and the technician becomes punitive, repeatedly trying to get the inspector or station. TSIA-3 recommends more training and some testing, like department troopers for the technicians.

RESPONSE: These comments regarding testing, training, and conduct of department personnel are generally outside the scope of this rule. The testing and training of department personnel is an internal matter. Complaints about department personnel should be addressed under 37 TAC Section 1.38. No change was made based on this comment.

COMMENT: Mr. Sticker agreed with TSIA-3 comments and recommendations. Noting a technician job is neither high paying nor one that he would want, it is, probably for some, the first with any kind of authority, complete control over your family's business, and a few abuse it extremely. They come to the station at the busiest time and stay there until customers and employees are mad or find something whether right or wrong. Mr. Sticker complained about the technician "clocking-in" on the station analyzer and tying it up for hours, while going over records from 3 months before, even on the busiest days, losing customers, until they leave. Mr. Sticker noted that a failing equipment audit results in immediate shut down and correction; however with a covert audit (undercover inspection to detect faults) the problem is not immediately brought to their attention for a response. Mr. Sticker recommends immediate notification while realizing that this would identify the covert auditor and counters that rotation would solve this issue.

RESPONSE: The comments, attitude, and conduct of department personnel are generally outside the scope of this rule. Complaints about department personnel should be addressed under 37 TAC Section 1.38. Federal and state regulations require use of covert audits and identification of the technician exclude their further use. The audit procedure, technician log-in, the timing of audits, and length of audits is outside the scope of this rule. No change was made based on this comment.

The amendments are adopted pursuant to Texas Government Code, Section 411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Transportation Code, Chapter 548, Subchapter A, Section 548.002, which authorizes the department to adopt rules to administer and enforce the compulsory inspection of vehicles, and Subchapter G, Section 548.405, which allows the department to deny, revoke or suspend the certificate of an inspection station and or inspector.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

The effective date of the rules is 20 days after the rules are filed with the Texas Register Division, Office of the Secretary of State.

This order constitutes the order of the Commission required by the Administrative Procedures Act, Government Code, Section 2001.033.

Colleen McHugh, Chairman
Public Safety Commission

IN THE MATTER OF	§	BEFORE THE
THE DISCHARGE OF	§	PUBLIC SAFETY COMMISSION
SONJA LANDRY, A PROBATIONARY EMPLOYEE	§	IN AUSTIN, TRAVIS COUNTY, TX

Advice and Consent

In accordance with Government Code Section 411.007(f), the Director found that the following named probationary employee was unsuitable for continued employment in the Department of Public Safety. The Public Safety Commission has consented to the discharge of this employee:

Employee Name	Employee Title/Division	Date of Discharge
Sonja Landry	Trooper Trainee/Administration	05/21/2004

Approved:

Colleen McHugh, Chairman
Public Safety Commission
Date: June 16, 2004