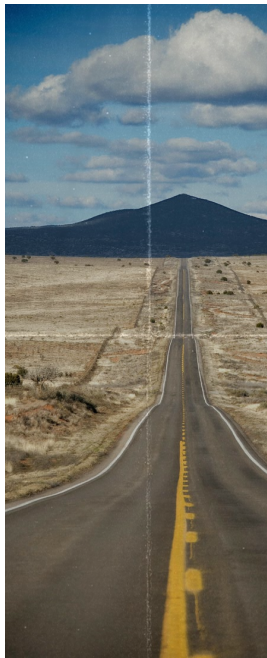


# Physical and Mental Fitness Under LGC 143



**TMHRA**



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**CEDAR PARK**

# ADA Job Descriptions are Key



MUST DESCRIBE  
**ESSENTIAL** JOB  
DUTIES



IF IT IS ESSENTIAL—  
SAY SO!



# Direct Threat Defense Fire & Police

- IDLH (Immediately Dangerous to Life and Health)
- The ADA creates an exception for employers who fire or refuse to hire an employee who poses a direct threat. A direct threat is defined as a significant risk of substantial harm to the health or safety of that employee or others, ***which cannot be eliminated or reduced by a reasonable accommodation.***




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## Direct Threat Defense Fire & Police


This defense is intended to shield employers who must take an employee's disability into account in order to protect employees from significant danger. For example, an employee with uncontrolled epilepsy and frequent seizures might not be able to safely operate heavy machinery. Even though the safety risk is caused directly by the employee's disability, the employer can fire the employee if he or she poses a direct threat, as defined above.

# Direct Threat is Difficult to Prove


1<sup>st</sup> - Must be able to show that there is a significant risk of substantial harm to the health or safety of the disabled individual or others.



2<sup>nd</sup> - Must be able to demonstrate that the threat cannot be eliminated or reduced by reasonable accommodation.



3<sup>rd</sup> - Determination that an individual poses a direct threat must be based on reasonable medical judgment that relies on the most current medical knowledge available and that takes into account:



1. The duration of the risk;
2. The nature and severity of the potential harm;
3. The likelihood that the potential harm will occur; and
4. The imminence of potential harm.



# SB 1445 – TCOLE Overhaul

## Tex. Occ. Code § 1701.167

- TCOLE must adopt a model policy prescribing standards and procedures for the medical and psychological examination of a license holder or person for whom a license is sought by a law enforcement agency to ensure the [officer] is able to perform the duties
- Policy must provide written notice of the examination that includes the reasons for the examination with at least 10 business days notice before the deadline to submit to the examination
- If the [officer] refuses to submit to the examination – the agency must report that to TCOLE
- Must report failures to TCOLE “unless the license holder submits to and successfully completes an applicable treatment program within a reasonable time” as prescribed by TCOLE



## SB 1445 – TCOLE Overhaul Tex. Occ. Code § 1701.167 Cont'd.

- “Each law enforcement agency in this state must adopt the model policy or a substantively similar policy.”
- The policy adopted by a law enforcement agency under this subsection must be submitted to TCOLE, and TCOLE shall maintain a copy of the policy.
- The agency is not precluded from taking disciplinary action against the officer



## SB 1445 – TCOLE Overhaul Tex. Occ. Code § 1701.167 Cont'd.

- If officer refuses to submit to an examination required by the policy, TCOLE “shall” issue an order to show cause for the officer’s refusal and schedule a hearing not later than the 30th day after the date notice is served on the officer.
- TCOLE provides notice by personal service or by registered mail, return receipt requested.
- Officer has a right to a hearing and may present evidence to justify the refusal to submit to examination.





# SB 1445 – TCOLE Overhaul

## Tex. Occ. Code § 1701.167 Cont'd.

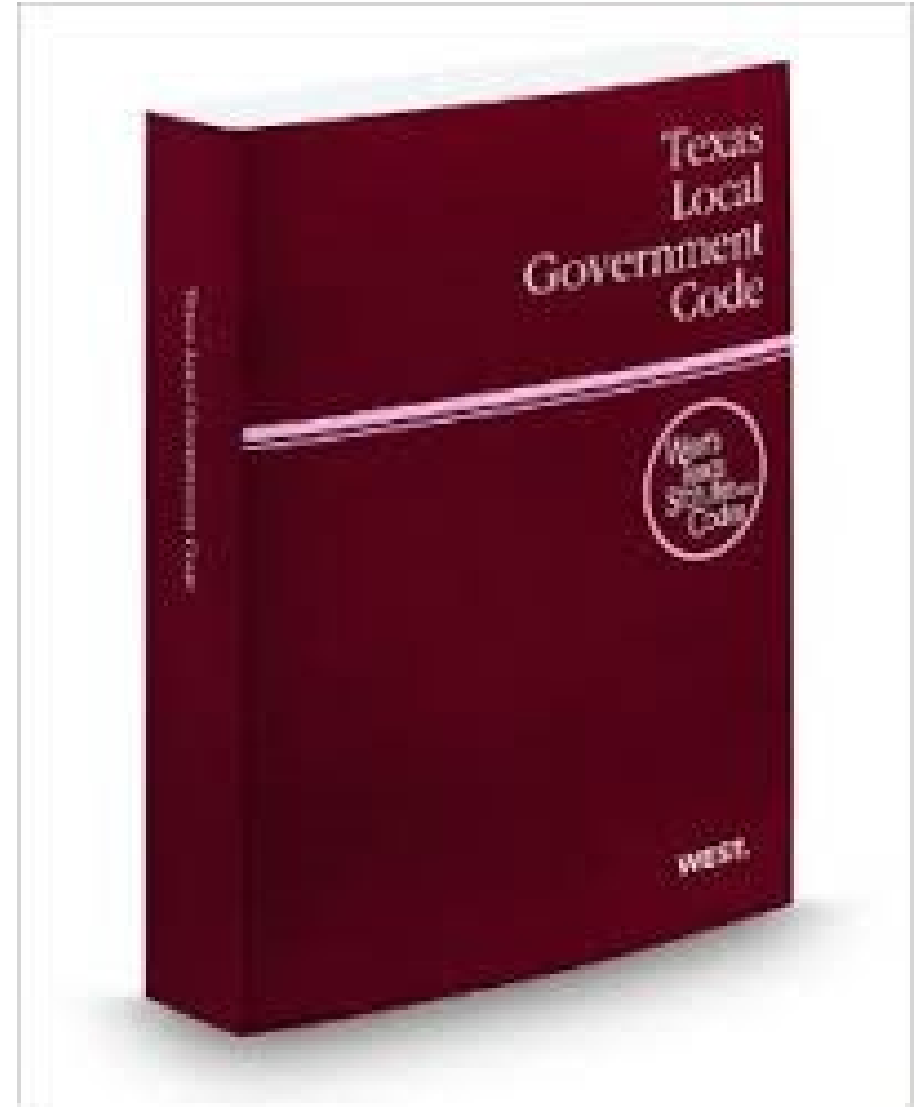
- After the hearing, TCOLE either issues order to submit to examination or withdraw the request for examination
- If officer still refuses to submit to the examination, TCOLE may suspend license
- If examination shows the officer does not meet the TCOLE standards of the model policy, TCOLE “shall” suspend the officer’s license.
- Records relating to this are confidential and not subject to Public Information Act.



## Model Policy: Chief Harmon

# State Law

- Section 143.081, Texas Local Government Code
- Section 143.073, Texas Local Government Code
- Section 143.074, Texas Local Government Code
- Section 143.045, Texas Local Government Code



# §143.081 Process

Civil Service Commissioners/Commission

Preserve integrity of the process; must maintain quasi-judicial role

Civil Service Directors – usually wearing two hats here

Gatekeeper/ensure everyone observes roles

Department Head /Chiefs

Ultimate Decisionmakers—Only Chiefs have right of assignment

Exhaust §143.081, §143.073 and then transition to ADA/ADAAA

# Section 143.081(b)

*"If a question arises as to whether a fire fighter or police officer is sufficiently physically or mentally fit to continue that person's duties, the fire fighter or police officer shall submit to the commission a report from the person's personal physician, psychiatrist, or psychologist, as appropriate."*

- Who raises the question?
  - Generally, the Chief
- Who orders the employee?
  - Generally, the Chief
- Who is appropriate for mental fitness?
  - Psychologist or psychiatrist?

Employee is ordered to see his/her doctor and to submit a report to the Commission

# Report Should Be Limited in Scope and Clearly Answer:

**FFD**



**Not FFD**



# Section 143.081(b)

What the Order should look like?

- Memo from Chief to PO/FF; CC to Director

What does it contain?

- Sets out facts and circumstances that raised the issue; re-affirms the job-relatedness of the concern; references job description; sets the date/time for report to be completed; *be clear to the medical provider that we need a "yes" or "no" to the question of fitness for duty*, and contains order for PO/FF to execute release/authorization to review medical records

Who needs to be included in authorization?

- Chief, Commissioners, Director and Attorney(s)

# Employee's Report Received

- Report turned into Chief and to Director
- Director:
  - Schedules meeting with Commission
  - Posts meeting—executive session/personnel §551.074 (confidential medical information)

OR . . .

- If no one (meaning Chief or FF/PO) questions report . . .
- And Employee is Fit:
  - Return to duty (and if misconduct is involved—proceed with internal investigation)
- And Employee is Unfit:
  - Put on leave (their own) under §143.073(d), or
  - Schedule a meeting/proceed under next step of §143.081, which is, §143.081(c)



# Section 143.081(c)

- “If the commission, department head, or the FF/PO *questions the report*, the commission *shall* appoint a physician, psychiatrist, or psychologist, as appropriate, to examine the FF/PO *and* to submit a report to the Commission, the department head, and the person.”
- Chief: Generally, it's the department head who *questions* the report, because s/he's the first to look at it
- The Director: Find/research the appropriate medical provider to recommend *to* the Commission
- The Commission: Review and participate in decision regarding appointment and issue Order to FF/PO

# Section 143.081(c)

- What should the Order contain?
  - Require employee to cooperate in all phases of the examination, including participation in additional testing
  - Order/instruction to share the results of employee's personal provider to Commission's provider- at a minimum, the Commission's doctor must have the same information that employee's doctor possessed, including initial memo to employee (calling the "question") and job description
  - Request Commission's doctor to answer ***only the question: is employee fit for duty or not?***
  - Include re-affirmation of continued viability of medical authorization
  - It should be as comprehensive as possible to avoid problems down the road
  - Include a date for report to be completed

# Receive Commission's Report

- Director: Schedules meeting
- Commission, Director, Chief and Employee:
  - Review report and attend meeting
- All parties consider reports
- Issue for Commission:
  - Do the reports agree or disagree?

# FFD Reports: Agree or Disagree?

## If Reports Agree

- Returns to Chief for assignment
- Neither Commission nor the Board of Three have authority to make assignments.
- If Unfit, Chief will work with HR and comply with ADA/ADAAA obligations

# If/When Reports Disagree

## §143.081(d)

- If the report of the appointed physician, psychiatrist, or psychologist, as appropriate, disagrees with the report of the FF/PO personal medical provider . . .  
“ . . . the commission *shall* appoint a three-member board composed of a physician, psychiatrist, and a psychologist, or any combination, as appropriate, to examine the fire fighter or police officer. The board's findings as to the person's fitness for duty shall determine the issue.”

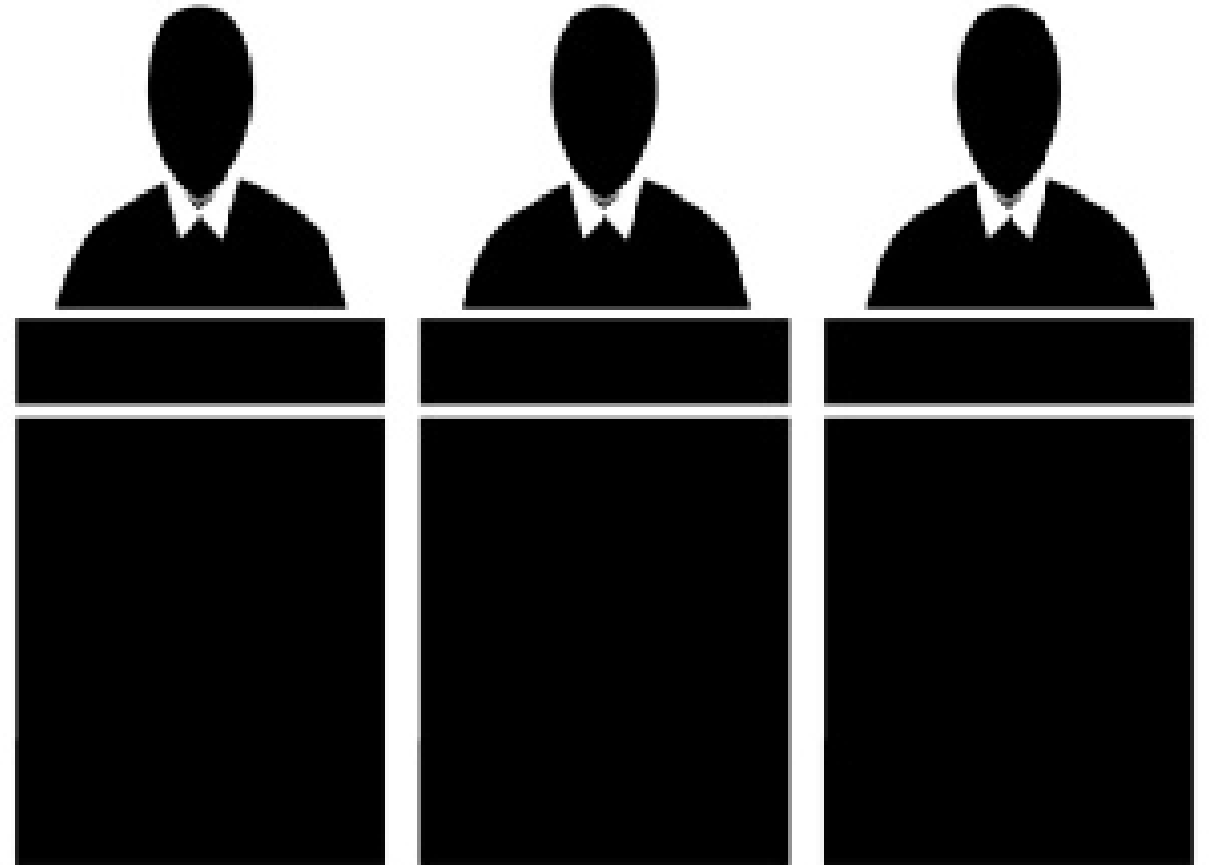
Board's decision is final . . .

On the issue of whether FF/PO is fit or unfit

# Process With Board of Three

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- Chief: No role other than continued participation
- Commission/Director:
  - Meet to receive Commission's report
  - Appoint three-member panel
  - Make-up of panel is discretionary
  - Need a specific order for Board of Three
  - Do NOT assume you can work it out with the FF/PO



# Commission's Instructions to Board of Three

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- Via Order, which should include:
  - Communication to the board of need to issue ONE decision
  - That FF/PO take (or Director send) all information obtained in this process to the Board: FF/PO's doctor's report, Commission's doctor's report; Chief's memo, job description, and any other related documents
  - Instruction to FF/PO to cooperate in further tests and/or any requests from the Board
  - Include re-affirmation of continued viability of medical authorization
  - Determine the length of time the Board may have jurisdiction over fitness issue

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# Board of Three: Don'ts

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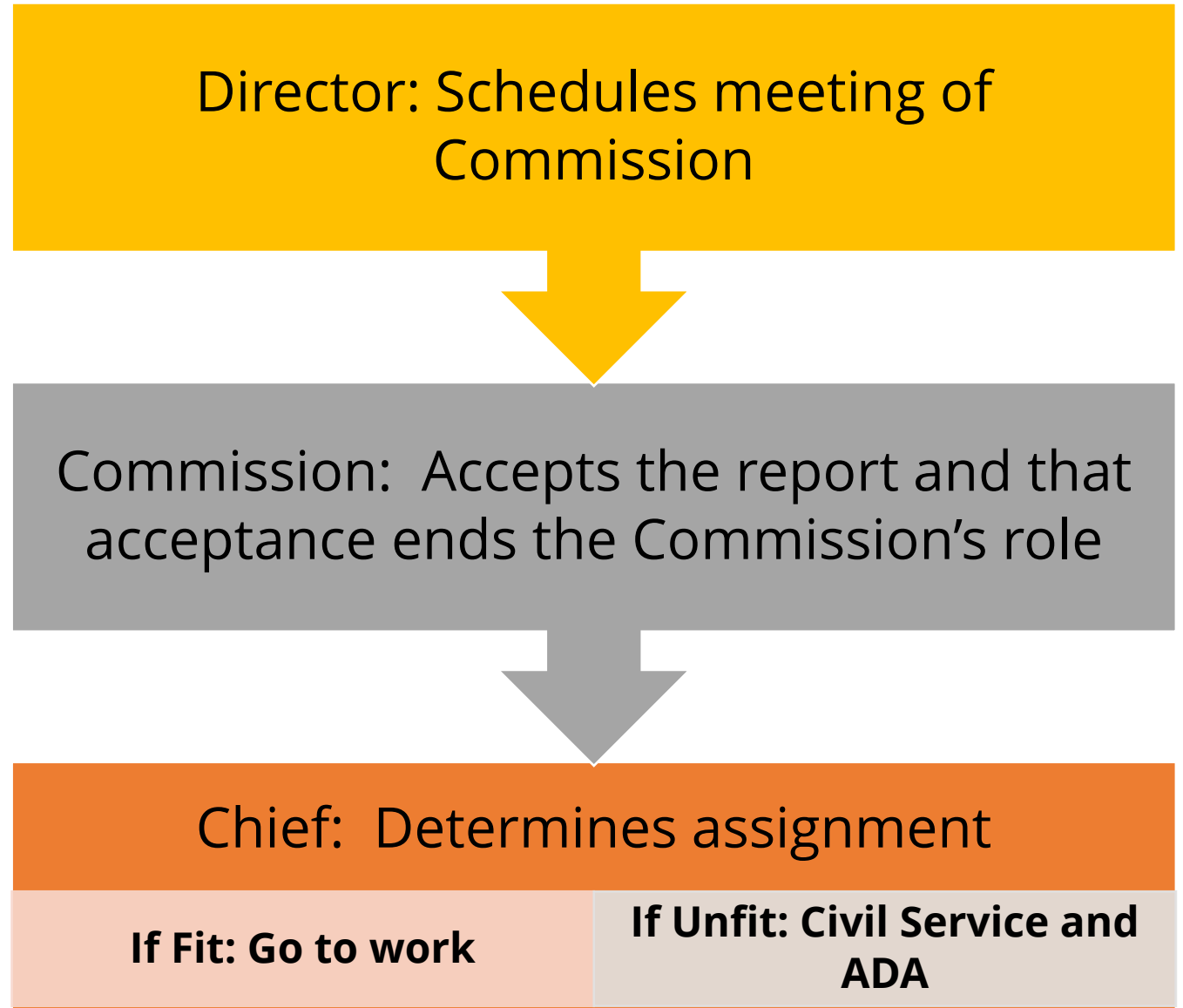
Make sure that Board of Three know you are NOT seeking:

- A diagnosis
- Whether they believe FF/PO can do job with or without a reasonable accommodation
- What they believe the assignment should be





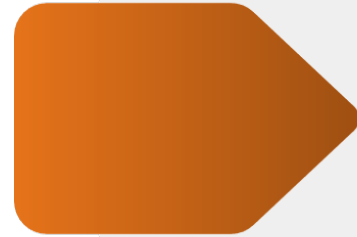
# Receipt of Board of Three's Report



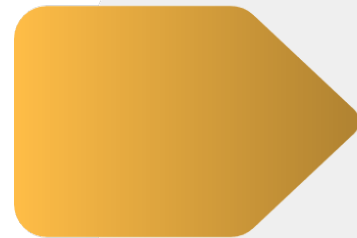
# Section 143.073 TLGC



Line of duty injury/illness leave



Full pay “commensurate” with nature of line of duty illness/injury-up to 1 year



If temporarily disabled, not “related to” line of duty, placed on all paid leave and then “temporary” leave until recovery



No specific time limit

# Not Fit - “Non-Work Related”

- Section 143.073, “Line of Duty Illness or Injury Leave of Absence”
- Off-Duty: §143.073(d): If “temporarily disabled” by injury/illness *not related to the person’s line of duty*, he/she may use all accumulated sick leave, vacation time, and other accumulated time before being placed on *temporary leave*.
- “Temporary leave” – continues until employee retires, resigns, or recovers from “temporary disability.” §143.073(e).
- No specific time limit in statute

# Not Fit - “Work Related”

Section 143.073(a):

- “A municipality *shall* provide to a firefighter/police officer a leave of absence for an illness or injury *related to* the person’s line of duty. The leave is with *full pay* for a period “commensurate with the nature of the line of duty illness or injury.”
- If “necessary,” the leave *shall* continue for at “least one year.”

How is “year” measured?

- (A) one calendar year from date of injury, or
- (B) the aggregate of leave taken?

# What Is “Work Related”?

- “Related to line of duty” is not defined in Chapter 143
- Is it the same standard as workers’ compensation, or different?
- Only two reported cases, neither city invoked workers’ compensation process
  - *City of Houston v. Caldwell*
  - *City of Lubbock v. Goodwin*
- *DO NOT expand leave entitlements through local civil service rules*

# **Sick Leave Subsection Implicated if “Work- Related”**

Section 143.045(b) “. . . If an ill firefighter or police officer exhausts the sick leave and *can conclusively prove* that the illness was incurred in the performance of duties, an extension of sick leave *shall* be granted.” - *But what does that mean?*

Who determines if it’s “work-related” or not?

How do the parties determine causation?

*Mandate employees file First Report of Injury to ensure notification made*

# Is “Work-Related” under Civil Service Separate & Distinct from Workers’ Compensation?

Legislature intended separate process – see §504.051 (Off-set provision) of the Texas Labor Code, “Offset Against Payments for Incapacity:”

(a) Benefits provided under this chapter shall be offset:

(1) to the extent applicable, by any amount for incapacity received as provided by:

(A) Chapter 143 or 177A of the Local Government Code; or

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(b) If benefits are offset, the employer may not withhold the offset portion of the employee’s wages until the time that benefits under this chapter are received.

## What if Issue *is* Medication?

- Require FF/PO to report medication that they are taking
- Work with doctor to ensure medication will not affect essential job functions
- Ensure that anyone involved in this decision is on a “need to know” basis
- Substance Abuse v. Use of Prescriptions
- Don't forget about ADA/FMLA when considering leave issues



# TLGC 177A

Applies to all police, fire and EMS

Uses language similar to Section 143.073

Return to Duty – “may return to light duty while recovering from a temporary disability”

Questions?



thank  
you!



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