



INTEROFFICE MEMO


Gary Grief, Executive Director

Alfonso D. Royal III, Charitable Bingo Operations Director

Approved

Denied

To: J. Winston Krause, Chairman
Carmen Arrieta-Candelaria, Commissioner
Peggy A. Heeg, Commissioner
Doug Lowe, Commissioner
Robert Rivera, Commissioner

From: 
Stephen White, Assistant General Counsel

Date: August 8, 2017

Re: Consideration of and possible discussion and/or action, including proposal, on new §401.207 (Written Answer; Default Proceedings)

Attached for your consideration is Commission staff's proposal for new §401.207 (Written Answer; Default Proceedings). The purpose of the proposed new rule is to set forth in a rule the Commission's process for handling default contested case proceedings. In addition to describing the Commission's recently developed default process, the proposed rule requires a respondent or applicant file a written response to the Commission's notice of hearing with the State Office of Administrative Hearings (SOAH) at least 10 calendar days prior to the date of the hearing (or at least 5 calendar days prior to the date of the hearing in lottery summary suspension cases) if the respondent/applicant intends to appear at the hearing and contest the allegations in the notice of hearing. If no response is filed, or if the respondent/applicant does not appear at the hearing, SOAH and the Commission staff may proceed to dispose of the case by default. If an applicant or respondent appears at a hearing without first filing a written response, the rule contemplates that Commission staff generally would request a continuance of the hearing in order to prepare for a fully litigated contested case.

Staff anticipates this rule will result in a more efficient use of state resources by preparing for a fully litigated contested case hearing only in instances where a respondent or applicant intends to appear at the hearing and contest the allegations in the notice of hearing.

Recommendation: Staff recommends the Commission initiate the rulemaking process by publishing the attached proposal in the *Texas Register* to receive public comment for a period of 30 days.

1 The Texas Lottery Commission (Commission) proposes new 16 TAC §401.207 (Written
2 Answer; Default Proceedings). The purpose of the proposed new rule is to set forth in a rule the
3 Commission's process for handling default contested case proceedings. In addition to describing
4 the Commission's recently developed default process, the proposed rule requires a respondent or
5 applicant file a written response to the Commission's notice of hearing with the State Office of
6 Administrative Hearings (SOAH) at least 10 calendar days prior to the date of the hearing (or at
7 least 5 calendar days prior to the date of the hearing in lottery summary suspension cases) if the
8 respondent/applicant intends to appear at the hearing and contest the allegations in the notice of
9 hearing. If no response is filed, or if the respondent/applicant does not appear at the hearing,
10 SOAH and the Commission staff may proceed to dispose of the case by default. If an applicant or
11 respondent appears at a hearing without first filing a written response, the rule contemplates that
12 Commission staff generally would request a continuance of the hearing in order to prepare for a
13 fully litigated contested case.

14 Kathy Pyka, Controller, has determined that for each year of the first five years the new
15 rule will be in effect, there will be no significant fiscal impact for state or local governments as a
16 result of the proposed new rule. There will be no adverse effect on small businesses, micro
17 businesses, or local or state employment. There will be no additional economic cost to persons
18 required to comply with the new rule, as proposed. Furthermore, an Economic Impact Statement
19 and Regulatory Flexibility Analysis is not required because the proposed new rule will not have
20 an adverse economic effect on small businesses as defined in Texas Government Code
21 §2006.001(2).

22 Bob Biard, General Counsel, has determined that for each year of the first five years the
23 proposed new rule will be in effect, the public benefit anticipated is a more efficient use of state

1 resources by preparing for a fully litigated contested case hearing only in instances where a
2 respondent or applicant intends to appear at the hearing and contest the allegations in the notice of
3 hearing.

4 The Commission requests comments on the proposed new rule from any interested person.
5 Comments on the proposed new rule may be submitted to Stephen White, Assistant General
6 Counsel, by mail, at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by
7 facsimile at (512) 344-5189; or by email at *legal.input@lottery.state.tx.us*. Comments must be
8 received within 30 days after publication of this proposal in the Texas Register in order to be
9 considered.

10 The new rule is proposed pursuant to Texas Government Code §467.102, which authorizes
11 the Commission to adopt rules for the enforcement and administration of the laws under the
12 Commission's jurisdiction, §466.015(a), which authorizes the Commission to adopt rules
13 necessary to administer Chapter 466, and §2001.004(1) of the Texas Government Code, which
14 requires state agencies to adopt rules of practice stating the nature and requirements of all available
15 formal and informal procedures.

16 §401.207. Written Answer; Default Proceedings.

17 (a) The Commission may dispose of a contested case by default if a State Office of Administrative
18 Hearings (SOAH) administrative law judge (ALJ) remands the case to the Commission for
19 informal disposition upon proof that adequate and sufficient notice of hearing was mailed to, or
20 personally served on, the respondent or applicant, and the respondent or applicant failed to either:

21 (1) file a written response to a notice of hearing in accordance with subsection (d) of this
22 section; or

1 (2) appear in person or through an authorized representative on the day and at the time set
2 for the hearing of the case, regardless of whether a written response has been filed.

3 (b) In addition to providing service of notice of hearing by mail or personal service, the
4 Commission shall send a copy of a notice of hearing to a respondent or applicant by email if the
5 respondent or applicant has provided the Commission with their email address.

6 (c) The Commission's default order shall state that the matters set forth in the notice of hearing
7 are deemed admitted as true, and may grant the relief requested in the notice.

8 (d) A respondent or applicant must file a written answer to a Commission notice of hearing with
9 SOAH at least 10 calendar days prior to the date of the hearing set forth in the notice (or at least 5
10 calendar days prior to the date of the hearing in lottery summary suspension cases conducted
11 pursuant to Texas Government Code §466.160), and must provide the Commission with a copy of
12 the answer provided to SOAH. A general denial of matters pleaded by the Commission in the
13 notice shall be sufficient to comply with this subsection.

14 (e) If a respondent or applicant fails to file a written answer to a notice of hearing as required by
15 this section, but appears in person or through an authorized representative on the day and at the
16 time set for the hearing of the case, good cause exists for the ALJ to grant a continuance to schedule
17 an evidentiary hearing at the request of the Commission.

18 (f) Following the Commission's issuance of a default order, and upon the timely filing of a motion
19 for rehearing by the respondent or applicant in the contested case, the Commission, for good cause
20 shown, may grant rehearing and request that SOAH schedule an evidentiary hearing in the case.