

The Texas Forensic Science Commission met on July 22, 2022 at 9:00am at the Stephen F. Austin Building, 1700 North Congress Avenue, Room 170, Austin, Texas 78701

Members Present: Dr. Bruce Budowle
Dr. Patrick Buzzini
Dr. Michael Coble
Mr. Mark Daniel
Dr. Nancy Downing
Dr. Jasmine Drake (via Zoom)
Dr. Sarah Kerrigan (via Zoom)
Mr. Jarvis Parsons

Members Absent: None

Staff Present: Lynn Garcia, General Counsel
Leigh Tomlin, Associate General Counsel
Robert Smith, Senior Staff Attorney
Kathryn Adams, Commission Coordinator
Maggie Sowatzka, Program Specialist

During this meeting, the Commission considered and acted on the following items. The Commission took breaks as necessary.

1. Call meeting to order. Roll call for members.

Barnard called the meeting to order and counted a quorum of members present as indicated above.

2. Review and adopt minutes from April 22, 2022 Forensic Science Commission Quarterly meeting.

MOTION AND VOTE: *Parsons moved to adopt the meeting minutes draft. Budowle seconded the motion. The Commission unanimously adopted the motion.*

3. Office administrative update (FY2022 fourth quarter budget status report; updates from conferences and trainings by staff; launch of database accreditation and licensing features with Office of Court Administration IT; discuss hiring of part-time employee for coordination of training projects).

Garcia gave an update on the revised budget noting changes as follows: allocation of funds to (1) send an expert and/or staff member to an ANAB reaccreditation assessment at the Fort Worth Police Department Crime Laboratory; (2) payment to an outside subject matter expert retained for the ExperTox investigation; (3) and part-time employee for coordination of training projects.

MOTION AND VOTE: *Daniel moved to adopt the budget with the added provisions, including hiring a part-time employee to coordinate training projects for the Commission. Coble seconded the motion. The Commission unanimously adopted the motion.*

Garcia gave an update on the database project with OCA. The database is currently in beta testing on the staff side. The licensing and accreditation sections for staff have been launched on the backend for staff testing, updates, edits, and general use. Because the OCA IT and software programming staff are limited and committed to other projects with urgent legislative deadlines, the Commission's database project has a projected finalization date that may carry into early 2023. Staff hopes to launch the laboratory accreditation piece for testing by laboratories this Fall.

4. Discuss and consider pending complaints and laboratory self-disclosures as well as new complaints and self-disclosures received through July 1, 2022.

Disclosure Pending from April 22, 2022

- (1) No. 22.17; Fort Worth Police Department Crime Laboratory (Multiple Disciplines; Proficiency Testing)

A self-disclosure by the Fort Worth Police Department Crime Laboratory ("FWPDCL") reporting observations by ANAB that certain proficiency test participants submitted proficiency test results after publication of the manufacturer's consensus results, and that certain proficiency test results were inconsistent with consensus.

MOTION AND VOTE: *Daniel moved accept the self-disclosure for investigation to determine the facts underlying the proficiency testing nonconformities and the extent to which they may have impacted casework by the laboratory. Parsons seconded the motion. The Commission unanimously adopted the motion.*

MOTION AND VOTE: *Daniel moved establish an investigative panel consisting of members Buzzini, Coble, and Drake. Kerrigan seconded the motion. The Commission unanimously adopted the motion.*

MOTION AND VOTE: *Daniel moved to contract with firearms expert Timothy Scanlan to observe the laboratory's reaccreditation assessment scheduled for August 23-25, 2022 and provide observations and recommendations to the Commission. Parsons seconded the motion. The Commission unanimously adopted the motion.*

Disclosures Received as of July 1, 2022

- (2) No. 22.08; Bexar County Criminal Investigation Laboratory (Forensic Biology/DNA; CODIS)

A self-disclosure by the Bexar County Criminal Investigation Laboratory reporting an incident in its forensic biology/DNA section where the laboratory discovered an analyst failed to properly document reasons certain samples were not entered into CODIS in several cases leading the laboratory to discover significant gaps in its CODIS documentation procedures.

MOTION AND VOTE: *Daniel moved to take no further action on the self-disclosure given the root cause analysis and corrective actions taken by the laboratory. Parsons seconded the motion. The Commission unanimously adopted the motion.*

- (3) No. 22.23; Brazoria County Sheriff's Office Crime Laboratory (Seized Drugs/Expired Chemicals)

A self-disclosure by the Brazoria County Sheriff's Office Crime Laboratory reporting an incident in the laboratory's seized drugs section where the laboratory discovered the current stock solution of formaldehyde expired October 31, 1998.

MOTION AND VOTE: *Daniel moved to accept the self-disclosure for investigation and combine it with the investigation of case no. 21.72. Parsons seconded the motion. The Commission unanimously adopted the motion.*

- (4) No. 22.24; Brazoria County Sheriff's Office Crime Laboratory (Seized Drugs/Traceability)

A self-disclosure by the Brazoria County Sheriff's Office Crime Laboratory reporting an incident in the laboratory's seized drugs section where an analyst diluted a new standard that was used as reference material for laboratory casework that week without updating the lot number on the traceability form for each case; analysts did not realize they were using the incorrect lot number in casework until the following week.

MOTION AND VOTE: *Daniel moved to take no further action on the self-disclosure given the root cause analysis and corrective actions taken by the laboratory. Budowle seconded the motion. The Commission unanimously adopted the motion.*

- (5) No. 22.25; Brazoria County Sheriff's Office Crime Laboratory (Seized Drugs/Standard Verification)

A self-disclosure by the Brazoria County Sheriff's Office Crime Laboratory reporting an incident in its seized drugs section where quality staff discovered analysts in 2021 did not always separately record verification of drug reference material. Instead, staff recorded verifications with the same document used to document verification of the retention time of the standard used against samples from casework.

MOTION AND VOTE: *Daniel moved to take no further action on the self-disclosure given the root cause analysis and corrective actions taken by the laboratory. Parsons seconded the motion. The Commission unanimously adopted the motion.*

- (6) No. 22.29; NMS Labs Grand Prairie (Seized Drugs; Missing Evidence)

A self-disclosure by NMS Labs Grand Prairie reporting an incident in the laboratory's seized drugs section where the Department of Public Safety Weslaco notified NMS Labs

that an evidence package it received from NMS was not in its container upon arrival at the Weslaco facility.

MOTION AND VOTE: *Daniel moved to take no further action on the self-disclosure given the root cause analysis and corrective actions taken by the laboratory. Parsons seconded the motion. The Commission unanimously adopted the motion.*

(7) No. 22.32; Houston Forensic Science Center (Forensic Biology/DNA; CODIS)

A self-disclosure by the Houston Forensic Science Center reporting an incident in the laboratory's forensic biology/DNA section where analysts accidentally uploaded three blind quality control DNA profiles to NDIS. Stout addressed commissioners about the case.

MOTION AND VOTE: *Daniel moved to take no further action on the self-disclosure given the root cause analysis and corrective actions taken by the laboratory. Parsons seconded the motion. The Commission unanimously adopted the motion.*

(8) No. 22.33; Department of Public Safety – Weslaco (Forensic Biology/DNA)

A self-disclosure by the Department of Public Safety (Weslaco) reporting the discovery of several instances of lost or missing extracts/cuttings in the laboratory's forensic biology/DNA section.

MOTION AND VOTE: *Daniel moved to take no further action on the self-disclosure given the root cause analysis and corrective actions taken by the laboratory. Budowle seconded the motion. The Commission unanimously adopted the motion.*

Complaints Received as of July 1, 2022

(9) No. 22.20; Patz, Richard James (Harris County Institute of Forensic Sciences; Forensic Biology/DNA)

A complaint by defendant Richard Patz alleging a Harris County Institute of Forensic Science DNA analyst incorrectly asserted an area of a latex glove recovered from the crime scene containing a fingerprint impression in a substance was previously tested for the presumptive presence of blood by the serologist who handled the case.

MOTION AND VOTE: *Daniel moved to dismiss the complaint because the allegations are inconsistent with the record. Budowle seconded the motion. The Commission unanimously adopted the motion.*

(10) No. 22.21; Webb, Andre Demond (Austin Police Department Forensic Science Bureau; Forensic Biology/DNA)

A complaint filed by defendant Andre Webb alleging Austin police fabricated or planted his DNA on the robbery victim's shirt.

MOTION AND VOTE: *Daniel moved to dismiss the complaint because blanket allegations that law enforcement falsified or planted evidence are insufficient to warrant an investigation. Buzzini seconded the motion. The Commission unanimously adopted the motion.*

- (11) No. 22.22; St. Clair, Daniel (Fort Worth Police Department Crime Laboratory; Firearms/Toolmarks)

A complaint by Fort Worth Police Department Officer Daniel St. Clair against the Fort Worth Police Department Crime Laboratory, alleging the unauthorized disassembly of a weapon and refusal of the laboratory to provide all discoverable materials which prevented federal prosecution of a defendant.

MOTION AND VOTE: *Daniel moved to dismiss the complaint because the facts concerning the case do not support allegations made in the complaint. Parsons seconded the motion. The Commission unanimously adopted the motion.*

- (12) No. 22.30; Thiessen, Mark (Department of Public Safety; Blood Alcohol)

A complaint by attorney Mark Thiessen alleging multiple instances of “failed” sample analysis due to possible sample switching or possible pipetting errors. The complaint alleges there was no quality investigation into the issue by the laboratory.

Kerrigan commented that materials received from the laboratory reflected it properly followed its own SOP’s after 3 failed samples were correctly marked on the batch list, re-run and new results were within the 5% acceptance window. Kerrigan noted that because the laboratory properly followed its SOP’s, the incident did not rise to the level of a nonconformity or a disclosure.

MOTION AND VOTE: *Daniel moved to dismiss the complaint. Budowle seconded the motion. The Commission unanimously adopted the motion.*

- (13) No. 22.34; Ivory, Shakivia for Adrian Rashun Gaston (Houston Forensic Science Center; Forensic Biology/DNA)

A complaint filed on behalf of defendant Adrian Gaston alleging DNA mixture results obtained from the victim’s fingernail scrapings were “used to convict” the defendant.

MOTION AND VOTE: *Daniel moved to dismiss the complaint and refer it to the DNA Mixture Project. Parsons seconded the motion. The Commission unanimously adopted the motion.*

Staff Dismissals

Daniel provided a brief synopsis of complaints dismissed by Commission staff.

MOTION AND VOTE: *Daniel moved to accept staff's complaint dismissal recommendations. Parsons seconded the motion. The Commission unanimously adopted the motion.*

- 5. Discuss status of crime laboratory accreditation program, including accreditation non-conformances and reports received since April 22, 2022 quarterly meeting; discuss status of CAP and SAMHSA accreditation recognition and recent correspondence with CAP and CAP and/or SAMHSA-accredited laboratories; discuss and vote on approval of incorporation of TFSC recommendations in ANAB assessment checklist.**

Tomlin gave an update on the laboratory accreditation program. Tomlin briefly described seven accreditation activities or nonconformances addressed by Commission staff this quarter.

The Commission reviewed a rulemaking removing the College of American Pathologists (“CAP”) Forensic Drug Testing Program and the Substance Abuse and Mental Health Services Administration (“SAMHSA”) of the Department of Health and Human Services Administration of the Department of Health and Human Services from the State’s list of recognized accrediting programs for purposes of “criminal actions” involving “forensic analysis,” as those terms are defined in the Texas Code of Criminal Procedure. Garcia emphasized that the Code of Criminal Procedure defines “forensic analysis” as a medical, chemical, toxicologic, ballistic or other expert examination or test performed on physical evidence, *for the purpose of determining the connection of the evidence to a criminal action.* TEX. CODE CRIM. PROC. art. 38.35 (a)(4). The term *does not include* testing conducted principally for the purpose of medical practice, civil or administrative litigation, or other purposes unrelated to determining the connection of physical evidence to a criminal action. *Id.* at (a)(4)(F). She explained most Texas-accredited laboratories with CAP or SAMHSA accreditation conduct testing primarily under these *exempt* categories, (e.g., clinical or medical purposes).

Garcia explained the Commission has further exempted from the accreditation requirement confirmatory testing of a human specimen in a laboratory certified by the Centers for Medicare and Medicaid Services of the Department of Health and Human Services (HHS/CMS) under the Clinical Laboratory Improvements Amendments of 1988 (CLIA) for the purposes of referring, offering, or making available treatment or monitoring, conducted by or under a contract with a community supervision and corrections department, the parole division of the Texas Department of Criminal Justice, or Board of Pardons and Paroles, and the results of such testing are subsequently entered into evidence in an action to revise or revoke the terms of an individual’s community supervision or parole—another area under which many of the laboratories are already exempt from accreditation and licensing requirements. 37 Tex. Admin. Code § 651.7 (2021).

MOTION AND VOTE: *Daniel moved to approve the rulemaking removing recognition of CAP and SAMHSA from the Commission’s list of recognized accreditation programs. Budowle seconded the motion. The Commission unanimously adopted the motion.*

Staff will publish the proposed rule change for comment prior to adoption. Staff expects the rule to take effect sometime in October 2022 pursuant to the State's timeline for administrative rulemaking.

Members, Garcia and staff discussed the Commission's partnership with ANAB on the possibility of a supplemental Commission accreditation checklist to be included as part of the regular ANAB on-site assessment for re-accreditation each cycle. In the checklist, laboratories will provide updates such as confirmation of reading relevant Commission reports that include best practices recommendations and guidelines important to the work at the laboratory. Laboratories may further be asked to demonstrate an understanding of the recommendations in the report and plans for implementing the necessary recommendations where appropriate, feasible and necessary. Garcia and staff will seek feedback from the Texas Association of Forensic Quality Assurance Managers (TAFQAM) group on the ANAB/TFSC checklist plans between now and the October 7 quarterly meeting.

MOTION AND VOTE: *Buzzini moved to direct staff to work with ANAB executive staff with feedback from the TAFQAM to create recommendations for an ANAB/TFSC collaborative accreditation assessment checklist. Budowle seconded the motion. The Commission unanimously adopted the motion.*

6. Discuss licensing advisory committee update, including:

- a. Update on licenses issued and renewed;**
- b. Consider re-appointments to Licensing Advisory Committee seats;**
- c. Review and adopt rule addressing the amount of casework or casework-like analysis a manager must be performing to maintain licensure; and**
- d. Update on pilot of General Forensic Analyst Licensing Exam II.
(Garcia/Tomlin) (30 min)**

Tomlin updated members on the current total number of licenses issued (1,374) and renewals processed to date. Licensing staff is diligently working on renewals and expects to process around 694 through the end of the year. The largest portion of the Commission's licensees renew in even-numbered years since the Commission first began issuing licenses in Fall 2018 and licenses generally have two-year terms.

Four LAC member seats are up for re-appointment including Cogliano, Bailey, Parent and Smith.

MOTION AND VOTE: *Parsons moved to re-appoint Angelica Cogliano, Calli Bailey, Sandy Parent, and Deborah Smith for two-year terms, beginning September 1, 2022. Daniel seconded the motion. The Commission unanimously adopted the motion.*

Tomlin described proposed changes to rules 651.208 and 651.222 regarding four key items: 1) analysts must performing active casework to continue licensure at renewal; 2) clarification on the Commission's required proficiency testing certification form to indicate that compliance with accreditation rules does not necessarily require external proficiency testing but may require other types of performance monitoring activities (*i.e., interlaboratory comparison exercises,*

intralaboratory comparison exercises, or other observation-based training exercises); 3) managers must designate the specific discipline that applies to a person’s current job duties on the performance monitoring certification form; and 4) clarification that analysts have an obligation to provide current name, address and email information to the Commission in order to receive timely notice.

MOTION AND VOTE: *Daniel moved adopt the proposed rulemaking addressing the changes above in Texas Administrative Code § 651.208. Parsons seconded the motion. The Commission unanimously adopted the motion.*

MOTION AND VOTE: *Daniel moved adopt the proposed rulemaking addressing the changes above in Texas Administrative Code § 651.222. Parsons seconded the motion. The Commission unanimously adopted the motion.*

Tomlin reported staff administered an operational “pilot” exam of the updated version of the Commission’s general forensic analyst exam, adopted as the “General Forensic Analyst Licensing Exam II” or “GFALE II” in five different sessions over June and July 2022 to 95 participants across the State, including one in-person session at the Texas Division of the International Association for Identification’s (TDIAI) annual conference in June 2022 and the remaining sessions remotely through secure software administered through Sam Houston State University’s Blackboard system. The Commission’s contracted psychometrician agency, ACS, compiled data from the pilot into a standard setting report for the licensing committee’s subject matter experts who assisted in question-writing for the exam. The group will review the evaluations and recommendations by ACS to determine a passing score for the GFALE II pilot and to determine whether performance results from the operational pilot reflect expected results from the new content and framework as designed by the group for the GFALE II. The group will also establish the final cut score and minimum number of questions per domain a test taker must get correct to achieve a passing score on the GFALE II going forward.

Staff will give an update to the licensing board on the final cut score on the decisions by the subject matter expert group for future exam scoring and the finalization and launch of the GFALE II at the October 6, 2022 quarterly Licensing Advisory Committee meeting and the October 7, 2022 Commission quarterly meeting.

7. Review and adopt final report regarding ExperTox complaint #20.55. (Kerrigan/Downing/Parsons/Daniel) (5 min)

Smith presented a PowerPoint on the investigation and findings in the case. The investigative panel concluded the information reviewed during its investigation sufficient to support a finding of professional misconduct, specifically when Dr. Lykissa: 1) failed to obtain a forensic analyst license before performing a forensic analysis; 2) issued results of a forensic analysis without a prior forensically validated method; 3) issued an interpretive toxicology opinion lacking scientific support; and 4) produced a “forensic” version of the original “clinical” testing results removing a report disclaimer for an additional fee without any substantive difference in the report or related forensic testing. The Commission also voted to withdraw Expertox’s accreditation recognition of forensic toxicology for a period of two years from the date the Commission’s corresponding Final

Report is published, as a result of ExperTox's failure to demonstrate its ability to reliably and accurately perform forensic analysis in the discipline of forensic toxicology. Smith emphasized that the Commission's jurisdiction applies to criminal actions only.

Final reports by the Commission may be appealed within thirty (30) days of the date the subject of the report receives notice of the report or the right to a hearing is waived and the Final Report stands.¹ Final investigative reports by the Commission issued pursuant to the Commission's investigative authority under Code of Criminal Procedure, Article 38.01 § 4(b) that concern an individual not licensed under the Commission's forensic analyst licensing authority² (such as Lykissa) and any accreditation decisions or actions³ are conducted by an administrative law judge of the State Office of Administrative Hearings ("SOAH") and are governed by Chapter 2001, Government Code.

MOTION AND VOTE: *Daniel moved to adopt the findings in the draft final investigative report. Parsons seconded the motion. The Commission unanimously adopted the motion.*

MOTION AND VOTE: *Daniel moved to adopt the finding of professional misconduct against Dr. Ernest Lykissa. Coble seconded the motion. The Commission unanimously adopted the motion.*

MOTION AND VOTE: *Daniel moved to withdraw ExperTox's accreditation status. Parsons seconded the motion. The Commission unanimously adopted the motion.*

8. Update regarding complaint #21.27 University of Colorado, National Innocence Project on behalf of Nanon Williams (Houston PD/Houston Forensic Science Center; Firearms/Toolmarks).

Garcia informed members that staff is waiting on NIST's foundational scientific literature review before drafting a final report. There is a key issue in the case regarding the expression of inconclusive vs. exclusive results that will be directly addressed in the report. Garcia, staff and commissioners would like to hear from the broader community before issuing a Texas recommendation on the issues observed in the case.

9. Update from investigative panel for self-disclosure #21.72 Brazoria County Crime Laboratory (Toxicology).

The investigative panel hopes to contract with expert Marc A. LeBeau, Ph.D., F-ABFT, a Senior Forensic Scientist/Forensic Chemist and Toxicologist of the FBI Laboratory to assist in the investigation. Garcia plans to reach out to LeBeau before the October 7 quarterly meeting and will report back. The Brazoria County laboratory director, Derek Sanders, is currently diligently working on overhauling the laboratory's SOP's.

10. Update from investigative panel for complaint #22.16 Webster, Joseph (Ron Smith & Associates; Latent Prints).

¹ See, 37 Tex. Admin. Code § 651.309(a)(3) (2020); Tex. Admin. Code §651.105(a)(2) (2020).

² See, 37 Tex. Admin. Code § 651.309(a)(4) (2020).

³ See, 37 Tex. Admin. Code §651.105(a)(3) (2020).

Staff received a response to the complaint from Ron Smith & Associates (RSA), asserting RSA stands by the conclusions reported in the case. The Commission will contract with Friction Ridge expert Glenn Langenburg to assist the Commission in the development of its report that will highlight key issues and recommendations that address the historical background and evolution of the friction ridge discipline, identify methods for avoiding cognitive bias in the discipline, and recommend changes for a positive impact on the field in Texas and nationwide.

11. Update from investigative panel for self-disclosure #22.18 Houston Forensic Science Center (Forensic Biology/DNA)

Garcia reported the investigative panel and staff requested DPS revise its corrective action in this self-disclosure. Staff expects to have the revised corrective action and a final report draft by the October 7 quarterly meeting.

12. Default Order for #21.49 Fort Worth Police Department Crime Laboratory (Forensic Biology/DNA) regarding disciplinary action against former licensee Andrea Morrison.

Tomlin reported staff sent Morrison notice on May 2, 2022 via certified mail. Her appeal deadline passed and the final investigative report is published.

13. Discuss current forensic development training and education projects.

Garcia reported the DNA Training for lawyers in collaboration with Court of Criminal Appeals and Judge Barbara Hervey has been delayed due to space issues, staff should have an update for the October 7 meeting and expects the new part-time Commission forensic training coordinator will lead the project moving forward. The forensic training coordinator will also focus on a training for DNA analysts specifically on reporting exclusions.

14. Update from the Texas Association of Crime Laboratory Directors

Stout provided an update on issues from TACLD's July 21st meeting. Three new members were added for a total 56 crime laboratory directors; 18 are voting members. Members discussed the possible ANAB/TFSC combine assessment checklist and how laboratories can better meet Brady/MMA disclosure requirements via statewide technology advancements in the form of a lab portal. The quality manager's group plans to provide questions on the assessment checklist before the Commission's next meeting. The group also voted to become an unincorporated, non-profit association and is creating an official website.

15. Consider proposed agenda items for next quarterly meeting.

No discussion occurred at this agenda item.

16. Schedule and location of future panel and quarterly meetings, including the October 7, 2022 and January 2023 quarterly meetings.

The next Commission meeting will be held on October 7, 2022. The date for the January meeting has not been set.

17. Hear public comment.

Staff noted no public comment other than that noted throughout the agenda.

18. Adjourn.

MOTION AND VOTE: *Parsons moved to adjourn the meeting at 11:20 am. Buzzini seconded the motion. The Commission unanimously voted to adjourn the meeting.*