

CHAPTER 800. GENERAL ADMINISTRATION

PROPOSED RULES WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*. THIS DOCUMENT WILL HAVE NO SUBSTANTIVE CHANGES BUT IS SUBJECT TO FORMATTING CHANGES AS REQUIRED BY THE *TEXAS REGISTER*.

ON **JUNE 26, 2007**, THE TEXAS WORKFORCE COMMISSION PROPOSED THE BELOW RULES WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*.

Estimated Publication Date of the Proposal in the *Texas Register*: **July 13, 2007**

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The Texas Workforce Commission (Commission) proposes to amend the following sections of Chapter 800 relating to General Administration:

Subchapter E, Sanctions, §800.152 and §800.191

The Commission proposes the following new sections to Chapter 800, relating to General Administration:

Subchapter E, Sanctions, §§800.192–800.200

- PART I. PURPOSE, BACKGROUND, AND AUTHORITY
- PART II. EXPLANATION OF INDIVIDUAL PROVISIONS
- PART III. IMPACT STATEMENTS
- PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the proposed rule change is to establish streamlined and administratively efficient appeals procedures for Local Workforce Development Boards (Boards) sanction hearings.

Under a separate, but concurrent, rulemaking proposal, the Commission is proposing the repeal of Chapter 823, General Hearings rules, and is proposing new Chapter 823, Integrated Complaints, Hearings, and Appeals rules. Certain sections of repealed Chapter 823 have been modified and incorporated into this chapter, which sets forth procedures for appeals of Board sanction determinations.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor, nonsubstantive editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER E. SANCTIONS

The Commission proposes amendments to Subchapter E, as follows:

§800.152. Definitions

Section 800.152 adds new definitions, which are retained with minor modifications, from the concurrent repeal of Chapter 823.

Section 800.152(2) defines a "hearing" as an informal, orderly, and readily available proceeding held before an impartial hearing officer at which a party or hearing representative may present evidence to show that the Agency's determination of sanctions shall be reversed, affirmed, or modified.

Section 800.152(3) defines a "hearing officer" as an Agency employee designated to conduct hearings and issue proposals for decisions.

Section 800.152(4) defines a "hearing representative" as any individual authorized by a party to assist the party in presenting the party's appeal. A hearing representative may be legal counsel or another individual. Each party may have a hearing representative to assist in presenting the party's appeal.

Section 800.152(8) defines a "party" as the person or entity with the right to participate in a hearing authorized by applicable statute or rule.

Certain subsections in §800.152 have been renumbered to accommodate additions or deletions.

§800.191. Appeal

Section 800.191(b) adds that an appeal shall be in writing.

Section 800.191(c) clarifies that the Agency shall refer the request for appeal to an impartial hearing officer. The requirement of the hearing officer to receive oral and written evidence and to prepare a written proposal for a decision to be submitted to the executive director for a final decision is removed and relocated in new §800.197.

Section 800.191(d) states that the decision of the Agency's executive director shall be final. This requirement is removed and relocated in new §800.200.

New §800.191(d) provides that the Agency shall mail a written notice of hearing to the Board (and its representative, if any), which contains:

- (1) the date, time, place, and nature of the hearing;
- (2) the legal authority under which the hearing is to be held; and
- (3) a brief summary of the issues to be considered during the hearing.

§800.192. Hearing Procedures

New §800.192 sets forth procedures for conducting Board sanction hearings.

Section 800.192(a) provides that the hearing must be held in person in Austin, Texas, unless the parties agree to a telephonic hearing or request a different location.

Section 800.192(b) requires that the hearing be conducted informally to determine the substantial rights of the parties. This subsection also states that all issues relevant to the appeal must be considered and addressed, and may include:

- (1) presentation of evidence;
- (2) examination of witnesses and parties;
- (3) additional evidence; and
- (4) appropriate hearing behavior.

Section 800.192(c) states that:

- (1) the hearing record must include the audio recording of the proceeding and any other relevant evidence relied on by the hearing officer, including documents and physical evidence entered as exhibits;
- (2) the hearing record must be maintained according to federal and state law; and
- (3) the confidentiality of information contained in the hearing record must be maintained according to federal and state law.

§800.193. Postponements, Continuances, and Withdrawals

New §800.193 authorizes the hearing officer to grant a hearing postponement, continuance, or withdrawal.

Section 800.193(a) allows the hearing officer to grant a postponement of the hearing for good cause, at the party's request.

Section 800.193(b) states that a continuance may be ordered at the discretion of the hearing officer to consider additional, necessary evidence or for any other reason the hearing officer deems appropriate.

Section 800.193(c) provides that a Board may withdraw an appeal at any time prior to the issuance of the final decision.

§800.194. Evidence

New §800.194 sets forth the evidence procedures for hearings.

Section 800.194(a), Evidence Generally, provides that evidence, including hearsay evidence, shall be admitted if it is relevant and if in the judgment of the hearing officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. However, the hearing officer may exclude evidence if its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues, or by reasonable concern for undue delay, waste of time, or needless presentation of cumulative evidence.

Section 800.194(b), Exchange of Exhibits, states that any documentary evidence to be presented during a telephonic hearing shall be exchanged with all parties with a copy given to the hearing officer in advance of the hearing. Any documentary evidence to be presented at an in-person hearing shall be exchanged at the hearing.

Section 800.194(c), Stipulations, states that parties, with the consent of the hearing officer, may agree in writing to relevant facts. The hearing officer may decide the appeal on the basis of such stipulations or, at the hearing officer's discretion, may set the appeal for hearing and take such further evidence as the hearing officer deems necessary.

Section 800.194(d), Experts and Evaluations, states that if relevant and useful—testimony from an independent expert or a professional evaluation from a source satisfactory to the parties and the Agency may be ordered by the hearing officers, on their own motion, or at a party's request. Any such expert or evaluation shall be at the expense of one of the parties.

Section 800.194(e), Subpoenas, states that:

- (1) The hearing officer may issue subpoenas to compel the attendance of witnesses and the production of records. A subpoena may be issued either at the request of a party or on the hearing officer's own motion.
- (2) A party requesting a subpoena shall state the nature of the information desired, including names of any witnesses and the records that the requestor feels are necessary for the proper presentation of the case.
- (3) The request shall be granted only to the extent the records or the testimony of the requested witnesses appears to be relevant to the issues on appeal.
- (4) A denial of a subpoena request shall be made in writing or on the record, stating the reasons for such denial.

§800.195. Hearing Officer Independence and Impartiality

New §800.195 relates to the Agency's hearing officers' powers and impartiality and the grounds and process for the disqualification and withdrawal of hearing officers.

Section 800.195(a) provides that a hearing officer has all necessary powers to conduct a full, fair, and impartial hearing. Hearing officers shall remain independent and impartial in all matters regarding handling of any issues during the pendency of a case and in issuing their written proposals for decisions.

Section 800.195(b) specifies that a hearing officer shall be disqualified if the hearing officer has a personal interest in the outcome of the appeal or if the hearing officer directly or indirectly participated in the determination on appeal. Any party may present facts to the Agency in support of a request to disqualify a hearing officer.

Section 800.195(c) allows the hearing officer to withdraw from a hearing to avoid the appearance of impropriety or partiality.

Section 800.195(d) provides that upon disqualification or withdrawal, the Agency shall assign an alternate hearing officer to the case. This alternate hearing officer is not bound by any findings or conclusions made by the disqualified or withdrawn hearing officer.

§800.196. Ex Parte Communications

New §800.196 is intended to prevent improper communication with hearing officers and to ensure that their decisions are based solely on the evidence and arguments presented at the hearing. The section states that:

(a) The hearing officer shall not participate in ex parte communications, directly or indirectly, in any matter in connection with any substantive issue, with any interested person or party. Likewise, no person shall attempt to engage in ex parte communications with the hearing officer on behalf of any interested person or party.

(b) If the hearing officer receives any such ex parte communication, the other parties shall be given an opportunity to review that communication.

(c) Nothing shall prevent the hearing officer from communicating with parties or their representatives about routine matters such as requests for continuances or opportunities to inspect the file.

(d) The hearing officer may initiate communications with an Agency employee who has not participated in a hearing or any determination in the case for the limited purpose of using the special skills or knowledge of the Agency and its staff in evaluating the evidence.

§800.197. Hearing Decision

New §800.197 sets out the Agency's procedures related to the preparation of a written proposal for a decision.

Section 800.197(a) requires the hearing officer to promptly prepare a written proposal for decision following the conclusion of the hearing.

Section 800.197(b) provides that the proposal for decision shall be based exclusively on the evidence of record in the hearing and on matters officially noticed in the hearing and state:

- (1) a list of individuals who appeared at the hearing;
- (2) the findings of fact and conclusions of law reached on the issues; and
- (3) the affirmation, reversal, or modification of the sanctions.

Section 800.197(c) provides that the proposal for decision shall be submitted to the Agency's executive director for issuance of a written decision on behalf of the Agency.

Section 800.197(d) provides that unless a party files a timely motion for rehearing, the Agency may assume continuing jurisdiction to modify or correct a decision until the expiration of 30 calendar days from the mailing date of the decision.

§800.198. Motion for Reopening

New §800.198 sets forth the procedures for requesting a reopening of a hearing if a party is not able to participate in a hearing.

Section 800.198(a) provides that a party who fails to appear at a hearing may request to reopen the hearing within 30 calendar days from the date the decision is mailed.

Section 800.198(b) states that the motion for reopening must be in writing and detail the reason for failing to appear at the hearing.

Section 800.198(c) provides that the hearing officer may schedule a hearing to consider granting the motion for reopening.

Section 800.198(d) allows that if the hearing officer determines the party has shown good cause for failing to appear, the hearing officer may grant the motion.

§800.199. Motion for Rehearing

New §800.199 sets forth the Agency's procedures for requesting a rehearing and the conditions under which a rehearing may be granted.

Section 800.199(a) provides that a Board may file a motion for rehearing within 30 days from the date the decision is mailed. A rehearing shall be granted only for the presentation of new evidence.

Section 800.199(b) requires that a motion for rehearing be in writing and set forth the new evidence for consideration.

Section 800.199(c) states that if the hearing officer determines a rehearing is warranted, it shall be scheduled at a reasonable time and place.

Section 800.199(d) requires the hearing officer to issue a written proposal for decision in response to a timely filed motion for rehearing. The proposal for decision shall be submitted to the Agency's executive director for issuance of a final decision.

§800.200. Finality of Decision

New §800.200 sets forth the conditions under which the Agency's decision is finalized.

Section 800.200(a) states that the decision of the executive director is the final administrative decision of the Agency after the expiration of 30 calendar days from the mailing date of the decision unless within that time:

- (1) a request for reopening is filed with the Agency;
- (2) a request for rehearing is filed with the Agency; or
- (3) the Agency assumes continuing jurisdiction to modify or correct the decision.

Section 800.200(b) provides that any decision issued in response to a request for reopening or rehearing or a modification or correction issued by the Agency shall be final on the expiration of 30 calendar days from the mailing date of the decision, modification, or correction.

PART III. IMPACT STATEMENTS

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and local governments expected as a result of enforcing or administering the rules.

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to persons required to comply with the rules.

There is no anticipated adverse economic impact on small or microbusinesses as a result of enforcing or administering the rules.

Mark Hughes, Director of Labor Market Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

Laurence M. Jones, Director, Workforce Development Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the proposed rules will be to clarify the process for appealing Board sanction determinations and to ensure that such appeals satisfy procedural due process requirements.

The Agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

PART IV. COORDINATION ACTIVITIES

Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce and UI Policy, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to 512-475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us. The Commission must receive comments postmarked no later than 30 days from the date this proposal is published in the *Texas Register*.

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Human Resources Code §44.002, regarding Administrative Rules.

The rules will affect Texas Labor Code, Title 4, particularly Chapter 301 and 302, as well as Texas Government Code, Chapter 2308.

Chapter 800. GENERAL ADMINISTRATION

SUBCHAPTER E. SANCTIONS

§800.152. Definitions

The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Corrective Action Plan -- A plan developed and imposed by the Agency that requires a Board or other entity to take Agency-identified actions within a specified time frame designed to correct specific instances of noncompliance or other failures.
- (2) Hearing -- An informal, orderly, and readily available proceeding held before an impartial hearing officer at which a party or hearing representative may present evidence to show that the Agency's determination of sanctions shall be reversed, affirmed, or modified.
- (3) Hearing officer -- An Agency employee designated to conduct hearings and issue proposals for decision.
- (4) Hearing representative -- Any individual authorized by a party to assist the party in presenting the party's appeal. A hearing representative may be legal counsel or another individual. Each party may have a hearing representative to assist in presenting the party's appeal.
- (5)(2) Level One Sanction Status -- A sanction status assigned by the Agency to a Board or other subrecipient of the Agency for significant inability or failure to perform as required by the Agency, including performing or failing to perform due to a sanctionable act as described in this subchapter. A Level One Sanction Status may be associated with the assessment of one or more penalties as referenced in this subchapter.
- (6)(3) Level Two Sanction Status -- A higher sanction status than Level One assigned by the Agency to a Board or other subrecipient of the Agency for severe inability or failure to perform as required by the Agency, including performing or failing to perform due to a sanctionable act as described in this subchapter. A Level Two sanction may be associated with the assessment of more severe penalties than those assessed to a Board or subrecipient of the Agency in Level One Sanction Status.
- (7)(4) Level Three Sanction Status -- The highest sanction status assigned by the Agency to a Board or other subrecipient of the Agency for extreme inability or

failure to perform as required by the Agency, including performing or failing to perform due to a sanctionable act as described in this subchapter. A ~~level three sanction~~Level Three Sanction may be associated with the assessment of the most severe penalties being assessed against the Board or subrecipient of the Agency.

- (8) Party -- The person or entity with the right to participate in a hearing authorized by applicable statute or rule.

§800.191. Appeal

- (a) A Board may appeal a Sanction Determination; however, a recommendation to another entity by the Agency or Commission under §800.174 and §800.175 of this chapter, may not be appealed under this section.
- (b) A request for appeal of a ~~Notice of Sanction Determination (Sanction Determination)~~ shall be filed submitted within 10 ten working days following the receipt of the Sanction Determination. The appeal ~~shall~~must be in writing and filed with submitted to the General Counsel, Texas Workforce Commission, 101 East 15th Street, Room ~~614608~~, Austin, Texas 78778.
- (c) The Agency shall refer the request for appeal to an impartial a hearing officer for a hearing. ~~The hearing officer shall receive oral and written evidence, as deemed appropriate by the hearing officer, from both parties and prepare a written proposal for decision to be submitted to the Agency's Executive Director for final decision.~~
- (d) The Agency shall mail a notice of hearing to the Board as provided in §800.181(c) and to its representative, if any. The notice of hearing shall be in writing and include:
- (1) a statement of the date, time, place, and nature of the hearing;
 - (2) a statement of the legal authority under which the hearing is to be held; and
 - (3) a short and plain statement of the issues to be considered during the hearing.
- ~~(d) The decision of the Agency's Executive Director shall be final.~~

§800.192. Hearing Procedures

- (a) The sanction determination hearing shall be conducted in person in Austin, Texas, unless the parties agree to a telephonic hearing or request a different location.
- (b) The hearing shall be conducted informally and in such manner as to ascertain the substantial rights of the parties. All issues relevant to the appeal shall be considered and addressed, and may include:
- (1) Presentation of Evidence. The parties to an appeal may present evidence that is material and relevant, as determined by the hearing officer. In conducting a hearing, the hearing officer shall actively develop the record on the relevant

circumstances and facts to resolve all issues. To be considered as evidence in a decision, any document or physical evidence must be entered as an exhibit at the hearing.

- (2) Examination of Parties and Witnesses. The hearing officer shall examine parties and any witnesses, and shall allow cross-examination to the extent the hearing officer deems necessary to afford the parties due process.
- (3) Additional Evidence. The hearing officer, with or without notice to any of the parties, may take additional evidence as deemed necessary, provided that a party shall be given an opportunity to rebut the evidence if it is to be used against the party's interest.
- (4) Appropriate Hearing Behavior. All parties shall conduct themselves in an appropriate manner. The hearing officer may expel any individual, including a party, who fails to correct behavior the hearing officer identifies as disruptive. After expulsion, the hearing officer may proceed with the hearing and render a decision.

(c) Records.

- (1) The hearing record shall include the audio recording of the proceeding and any other relevant evidence relied on by the hearing officer, including documents and other physical evidence entered as exhibits.
- (2) The hearing record shall be maintained in accordance with federal and state law.
- (3) Confidentiality of information contained in the hearing record shall be maintained in accordance with state and federal law.

§800.193. Postponements, Continuances, and Withdrawals

- (a) The hearing officer may grant a postponement of a sanction determination hearing for good cause at a party's request.
- (b) A continuance of a hearing may be ordered at the discretion of the hearing officer to consider additional, necessary evidence or for any other reason the hearing officer deems appropriate.
- (c) A Board may withdraw an appeal at any time prior to the issuance of the final decision.

§800.194. Evidence

- (a) Evidence Generally. Evidence, including hearsay evidence, shall be admitted if it is relevant and if in the judgment of the hearing officer it is the kind of evidence on

which reasonably prudent persons are accustomed to rely in the conduct of their affairs. However, the hearing officer may exclude evidence if its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues, or by reasonable concern for undue delay, waste of time, or needless presentation of cumulative evidence.

(b) Exchange of Exhibits. Any documentary evidence to be presented during a telephonic hearing shall be exchanged with all parties and a copy shall be provided to the hearing officer in advance of the hearing. Any documentary evidence to be presented at an in-person hearing shall be exchanged at the hearing.

(c) Stipulations. The parties, with the consent of the hearing officer, may agree in writing to relevant facts. The hearing officer may decide the appeal based on such stipulations or, at the hearing officer's discretion, may set the appeal for hearing and take such further evidence as the hearing officer deems necessary.

(d) Experts and Evaluations. If relevant and useful, testimony from an independent expert or a professional evaluation from a source satisfactory to the parties and the Agency may be ordered by hearing officers, on their own motion, or at a party's request. Any such expert or evaluation shall be at the expense of one or more of the parties.

(e) Subpoenas.

(1) The hearing officer may issue subpoenas to compel the attendance of witnesses and the production of records. A subpoena may be issued either at the request of a party or on the hearing officer's own motion.

(2) A party requesting a subpoena shall state the nature of the information desired, including names of any witnesses and the records that the requestor feels are necessary for the proper presentation of the case.

(3) The request shall be granted only to the extent the records or the testimony of the requested witnesses appears to be relevant to the issues on appeal.

(4) A denial of a subpoena request shall be made in writing or on the record, stating the reasons for such denial.

§800.195. Hearing Officer Independence and Impartiality

(a) A hearing officer presiding over a hearing shall have all powers necessary and appropriate to conduct a full, fair, and impartial hearing. Hearing officers shall remain independent and impartial in all matters regarding the handling of any issues during the pendency of a case and in issuing their written proposals for decision.

- (b) A hearing officer shall be disqualified if the hearing officer has a personal interest in the outcome of the appeal or if the hearing officer directly or indirectly participated in the determination on appeal. Any party may present facts to the Agency in support of a request to disqualify a hearing officer.
- (c) The hearing officer may withdraw from a hearing to avoid the appearance of impropriety or partiality.
- (d) Following any disqualification or withdrawal of a hearing officer, the Agency shall assign an alternate hearing officer to the case. The alternate hearing officer shall not be bound by any findings or conclusions made by the disqualified or withdrawn hearing officer.

§800.196. Ex Parte Communications

- (a) The hearing officer shall not participate in ex parte communications, directly or indirectly, in any matter in connection with any substantive issue, with any interested person or party. Likewise, no person shall attempt to engage in ex parte communications with the hearing officer on behalf of any interested person or party.
- (b) If the hearing officer receives any such ex parte communication, the other parties shall be given an opportunity to review any such ex parte communication.
- (c) Nothing shall prevent the hearing officer from communicating with parties or their representatives about routine matters such as requests for continuances or opportunities to inspect the file.
- (d) The hearing officer may initiate communications with an Agency employee who has not participated in a hearing or any determination in the case for the limited purpose of using the special skills or knowledge of the Agency and its staff in evaluating the evidence.

§800.197. Hearing Decision

- (a) Following the conclusion of the hearing, the hearing officer shall promptly prepare a written proposal for decision.
- (b) The proposal for decision shall be based exclusively on the evidence of record in the hearing and on matters officially noticed in the hearing. The decision shall include:
 - (1) a list of the individuals who appeared at the hearing;
 - (2) the findings of fact and conclusions of law reached on the issues; and
 - (3) the affirmation, reversal, or modification of the sanctions.

(c) The proposal for decision shall be submitted to the Agency's executive director for issuance of a written decision on behalf of the Agency.

(d) Unless a party files a timely motion for rehearing, the Agency may assume continuing jurisdiction to modify or correct a decision until the expiration of 30 calendar days from the mailing date of the decision.

§800.198. Motion for Reopening

(a) If a party does not appear for a hearing, the party may request a reopening of the hearing within 30 calendar days from the date the decision is mailed.

(b) The motion for reopening shall be in writing and detail the reason for failing to appear at the hearing.

(c) The hearing officer may schedule a hearing on whether to grant the reopening.

(d) The motion may be granted if the hearing officer determines that the party has shown good cause for failing to appear at the hearing.

§800.199. Motion for Rehearing

(a) A Board may file a motion for rehearing for the presentation of new evidence within 30 days from the date the decision is mailed. A rehearing shall be granted only for the presentation of new evidence.

(b) A motion for rehearing shall be in writing and allege the new evidence to be considered.

(c) If the hearing officer determines that the alleged new evidence warrants a rehearing, a rehearing shall be scheduled at a reasonable time and place.

(d) The hearing officer shall issue a written proposal for decision in response to a timely filed motion for rehearing. The proposal for decision shall be submitted to the Agency's executive director for issuance of a final decision.

§800.200. Finality of Decision

(a) The decision of the executive director is the final administrative decision of the Agency after the expiration of 30 calendar days from the mailing date of the decision, unless within that time:

(1) a request for reopening is filed with the Agency;

(2) a request for rehearing is filed with the Agency; or

(3) the Agency assumes continuing jurisdiction to modify or correct the decision.

(b) Any decision issued in response to a request for reopening or rehearing or a modification or correction issued by the Agency shall be final on the expiration of 30 calendar days from the mailing date of the decision, modification, or correction.