

## **CHAPTER 823. GENERAL HEARINGS**

**PROPOSED RULES WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*. THIS DOCUMENT WILL NOT HAVE ANY 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**

Estimated End of Comment Period: **August 13, 2007**

The Texas Workforce Commission (Commission) proposes the repeal of Chapter 823, relating to General Hearings, in its entirety.

The Commission proposes new Chapter 823, relating to Integrated Complaints, Hearings, and Appeals, as follows:

Subchapter A. General Provisions

Subchapter B. Board Complaint and Appeal Procedures

Subchapter C. Agency Complaint and Appeal Procedures

Subchapter D. Agency-Level Decisions, Reopenings, and Rehearings

**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 repeal of Chapter 823 and proposed new Chapter 823 is to:

- establish uniform procedures and time frames;
- clarify additional Local Workforce Development Board (Board) responsibilities relating to appeals of Board decisions;
- simplify rule language and definitions;
- remove obsolete provisions; and
- promote operational efficiencies.

Texas Government Code §2001.039 requires that each state agency review and consider for re-adoption each rule adopted by that agency every four years. The Commission's General Hearings Rules, Chapter 823, were reviewed in 2006 with the goals of:

- promoting integrated workforce services;
- simplifying rule language;
- streamlining Board appeals processes and responsibilities;
- updating terminology and definitions; and

—removing obsolete provisions.

Texas Labor Code §302.065 directs the Commission to integrate the administration of four federal block grant programs with the goal of streamlining the delivery of services provided in the local career development one-stops. These programs include child care, Temporary Assistance for Needy Families (TANF), Food Stamp Employment and Training (FSE&T), and Workforce Investment Act (WIA). The Commission expanded this integration to include all Board-administered workforce services. Furthermore, the law directs the Commission to conduct a review of its programs, rules, policies, procedures, and organizational structure to identify specific barriers to the integration. The Commission has identified policy changes that support this integration by examining the existing complaints and appeals processes for workforce services administered by the Boards. The absence of unified and integrated rules on complaints, hearings, and appeals related to workforce services makes the existing rules difficult to understand or to interpret consistently and works as a barrier to integrating workforce services.

Moreover, the existing rules do not fully reinforce the principles of local flexibility and, instead, shift appeals processes from the local to the state level. The Commission has identified policy changes that enhance local flexibility by vesting local Boards with responsibility to provide opportunity for informal resolution, as well as conducting hearings, as necessary. These modifications will primarily affect childcare complaints, as most Boards currently address most other complaints under WIA.

The Commission has reviewed the following rules governing complaints, hearings, and appeals for workforce services administered by the Boards:

- Child Care Services Rules: 40 TAC Chapter 809, Subchapters D and G
- Choices Rules: 40 TAC Chapter 811, Subchapter F
- Food Stamp Employment and Training Rules: 40 TAC Chapter 813, Subchapter F
- Workforce Investment Act Rules: 40 TAC Chapter 841, Subchapters C, D, and E

While the chapters are similar in scope, each one established different procedures for individuals who wish to file a complaint, with inconsistent instructions regarding filing complaints, opportunities for informal reviews, and the right to file an appeal. The lack of continuity among the chapters complicates co-enrollment and service integration. In addition, the timelines for these procedures are inconsistent across the chapters.

Additionally, the Project Reintegration of Offenders (Project RIO) rules, 40 TAC Chapter 847, do not address Board review or notice of the right to file a complaint. Therefore, the new Chapter 823 rules include processes for Board hearings and notices of the right to file a complaint under the Project RIO rules.

New Chapter 823 follows the complaints and appeals process established in WIA regulations, 20 C.F.R. §§667.600 and 667.640, which provide federally mandated procedures and time frames for complaints and appeals. The WIA procedures in Chapter 841 of this title are the only rules that have federal requirements; other Board-administered workforce services are not federally guided, but instead are governed by Commission rules.

To maintain uniformity and consistency across all Board-administered workforce services and to protect due process rights, the new Chapter 823 rules require Boards to establish local policy to ensure that Texas Workforce Center customers are notified, in writing, of any adverse actions and are provided with information on appeal rights and the right to file a complaint regarding their workforce services. Boards that do not advise Texas Workforce Centers of the requirement to inform customers of their right to file a complaint or to appeal the written notice of an adverse action risk violating due process principles, which require notice of these rights.

This chapter establishes a dispute resolution process that can be started in one of two ways. The first allows a person to file an appeal following a written determination issued by a Board or its designee. If a written determination has been issued, an appeal must be filed with the Board within 14 calendar days. The other method of initiating the process is for a person to complain of alleged violations of any law, rule, or regulation relating to any federal or state-funded workforce service. If no written determination is issued regarding an adverse action or perceived violation, a person may file a complaint within 180 days of the adverse action or violation.

Under the processes set forth in this chapter, following the receipt of an appeal or a complaint at the Board level, the Board will provide an opportunity for informal resolution. In the informal resolution process, Boards will have the flexibility to utilize such diverse procedures as informal meetings with case managers, reviews of case files, conference calls, interviews, or written explanations, as appropriate for the situation. While this may represent additional responsibilities for some Boards, it is the intent and expectation of the Commission that the majority of appeals and complaints will be resolved informally in this manner, without the necessity of holding a hearing.

However, if no successful informal resolution can be reached, the Board shall hold a hearing and issue a written decision that includes information about filing an appeal with the Agency. If a Board's written decision is appealed to the Agency, an Agency hearing officer will conduct a hearing and issue a decision on behalf of the Agency. Although requiring Boards to issue written decisions may result in supplementary efforts by Boards initially, the Commission expects greater customer satisfaction at the local level and potentially system-wide savings as formal proceedings at the state level are minimized.

There also may be circumstances in which an appeal or complaint may be filed directly with the Agency. In such a case, the Agency has the discretion to refer the appeal or complaint back to the Board, if appropriate. If an appeal is based on a determination issued by the Agency itself, however, or if a complaint is about the statewide provision of services rather than a local service issue, the Agency will provide an opportunity for informal resolution and a hearing, following the same kind of procedure as the Boards.

To assist Boards with the implementation of these rules, the Commission intends to provide training for Board personnel and support for development of Board processes. This technical assistance may include training on informal resolution procedures, hearing officer training, sample forms for Boards to use for complaints or determinations, and other assistance as needed to enable Boards to develop their own procedures.

The Commission retains the requirement that the Agency hearing officer shall be the final decision maker for state-level appeals. Federal WIA regulations require the Agency to complete its decision within 60 days of receipt of an appeal or complaint, leaving little time for an appeal process within the Agency. Therefore, pursuant to 20 C.F.R. §667.610, if a party wishes to appeal a decision of an Agency hearing officer under the federal WIA regulations, the appeal must be filed with the U.S. Department of Labor (DOL).

The Commission maintains separate procedures to resolve complaints concerning the basic labor exchange, as those procedures and timelines are dictated by 20 C.F.R. Part 658, Subpart E, §§400–418 and federal Employment Service law. Basic labor exchange complaints include those related to:

- violations of the terms and conditions of a job order;
- noncriminal complaints alleging acts or omissions by Texas Workforce Center staff; and
- complaints affecting migrant and seasonal farmworkers (MSFWs).

The Commission also maintains separate procedures for hearings and appeals under Chapter 807, relating to Career Schools and Colleges, and under Chapter 800, the General Administration rules relating to Board Sanctions. Hearings and appeals for Agency-administered programs are determined separately and distinctly from Board-administered workforce services. The repeal of Chapter 823 affects the hearings and appeals processes for each of these chapters; therefore, in separate, but concurrent, rulemaking proposals, certain sections of repealed Chapter 823 have been modified and incorporated into Chapter 800 and Chapter 807.

## **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS**

### **SUBCHAPTER A. GENERAL PROVISIONS**

**The Commission proposes new Subchapter A, General Provisions, as follows:**

Subchapter A contains the general provisions of the Integrated Complaints, Hearings, and Appeals rules, which include the short title and purpose; definitions of terms used throughout Chapter 823; and provisions related to appeal representation.

Subchapter A also adds a detailed process related to deadlines after a determination is mailed to each party to a complaint or appeal. This provision applies to Boards, their designees, and the Agency.

#### **§823.1. Short Title and Purpose**

Section 823.1(a) states that Chapter 823 provides for an appeals process to the extent authorized by federal and state law, by rules administered by the Commission. The purpose remains the same as the purpose stated in repealed Chapter 823.

Section 823.1(b) specifically lists the types of complaints or determinations that are covered by Chapter 823. These pertain only to federal- or state-funded workforce services administered by the Agency or the Boards. These services include child care; TANF Choices; FSE&T; Project RIO; WIA Adult, Dislocated Worker, and Youth; and Eligible Training Providers receiving WIA funds or other funds for training services.

Section 823.1(c)(1)–(7) lists determinations or complaints that are not covered under new Chapter 823, including:

- (1) Across-the-board reductions in services, benefits, or assistance to a class of recipients.
- (2) Matters governed by hearings procedures otherwise provided for in this title. This includes Board sanction hearings under Chapter 800, Subchapter E; hearings resulting from Agency monitoring activities under Chapter 800, Subchapter H; hearings regarding alleged breach of contract under Chapter 800, Subchapter K; career school cease and desist order hearings under Chapter 807, Subchapter S; career school licensing hearings under proposed Chapter 807, Subchapter T; Unemployment Insurance (UI) hearings under Chapter 815; child labor hearings under Chapters 815 and 817; Fair Housing Act hearings under Chapter 819; wage claim hearings under Chapters 815 and 821; and hearings regarding Trade Act activities or services under Chapter 815 and Chapter 849, Subchapter E.
- (3) Alleged violations of nondiscrimination and equal opportunity requirements. Complaints regarding alleged violations of the nondiscrimination and equal opportunity requirements of WIA are handled by the Equal Opportunity Compliance Section of the Commission under Chapter 841, Subchapter F.
- (4) Denial of benefits as it relates to mandatory work requirements for individuals receiving Choices and FSE&T services administered through the Texas Health and Human Services Commission (HHSC).
- (5) Matters governing job service–related complaints as referenced in 20 C.F.R. Part 658, Subpart E, §§400–418 and federal Employment Service law.
- (6) Services provided by the Agency pursuant to Texas Labor Code §301.023, Complaints Against the Commission.
- (7) Alleged criminal violations of any services referenced in §823.1(b).

### **§823.2. Definitions**

Section 823.2 sets forth the definitions for terms used throughout Chapter 823. The section incorporates definitions from repealed Chapter 823, and adds new terms and definitions.

Section 823.2(1) defines "Adverse action" as any denial or reduction of benefits or services to a party. This definition applies to individuals who are adversely affected by the type or level of services received from a Board or statewide One-Stop Service Delivery Network, including those individuals displaced from current employment by Texas Workforce Center customers.

Section 823.2(2) defines "Agency decision" as a written finding issued by an Agency hearing officer following a hearing before that hearing officer. The intent is to distinguish in rule, when necessary, the difference between a Board decision and an Agency decision.

Section 823.2(3) defines "Appeal" as a written request for a review filed with the Board or Agency by a person in response to a determination or decision. The intent of this definition is to be consistent with other Commission rules that govern hearings and appeals.

Section 823.2(4) defines "Board decision" as a written finding issued by a Board following a hearing by a Board hearing officer. The intent is to distinguish in rule, when necessary, the difference between a Board decision and an Agency decision.

Section 823.2(5) defines "Complaint" as a written statement alleging a violation of any law, regulation, or rule relating to any federal- or state-funded workforce service. This definition is consistent with other definitions of complaint in this title. Boards also may receive objections regarding direct provision of workforce-related services that do not allege a violation of law or regulations, but rather concern dissatisfaction with the behavior of Board or contractor employees, or other matters not concerning the services themselves. These objections are handled through informal resolutions at the Board and contractor levels; they are not covered under this chapter and are not appealable to the Agency.

Section 823.2(6) defines "Determination" as a written statement issued by a Board, its designee, or the Agency relating to an adverse action, or to a provider or a contractor relating to denial or termination of eligibility, under programs administered by the Agency or Boards listed in §823.1(b).

Section 823.2(7) defines "Hearing officer" as an impartial individual designated by either the Board or the Agency to conduct hearings and issue administrative decisions. This new definition provides for the designation of hearing officers by both the Board and the Agency and is similar to the definition in repealed Chapter 823. A hearing officer need not be an attorney.

Section 823.2(8) defines "Informal resolution" as any procedure that results in an agreed final settlement between all parties to a complaint or an appeal. The Commission adds rules in new Subchapters B and C requiring the Boards and the Agency to provide an opportunity for informal resolution to resolve disputes resulting from either a complaint or an appeal to a determination.

Section 823.2(9) defines "Party" as a person who files a complaint or who appeals a determination, or the entity against which the complaint is filed or that issued the determination. This definition is found in repealed Chapter 823 but has been modified to reflect other changes in new Chapter 823.

### **§823.3. Agency and Board Timeliness**

Section 823.3 provides an efficient context, based on established principles of due process, for adjudicating late appeals and holding some late appeals timely. The principles are drawn from Chapter 815 of this title, related to UI, case law, and experience.

Section 823.3 also adds a detailed process related to deadlines after a determination is mailed to a party. This provision applies to Boards, their designees, and the Agency.

Section 823.3(a) states that a properly addressed determination or decision is final for all purposes unless the party to whom it is mailed files an appeal no later than the fourteenth calendar day after the mailing date.

Section 823.3(b) states that each party to a complaint or an appeal must promptly notify, in writing, the Board, Board's designee, or the Agency with which the complaint or appeal was filed of any change of mailing address. Determinations and decisions shall be mailed to this address.

Section 823.3(b)(1) states that a copy of the determination or decision must be mailed to a properly designated party representative in order for it to become final.

Section 823.3(b)(2) states that the Board or Agency is responsible for making an address change only if the Board or Agency is specifically directed by the party to mail subsequent correspondence to the new address.

Section 823.3(b)(3) states that if the Board, Board's designee, or Agency addresses a document incorrectly, but the party receives the document, the time frame for filing an appeal shall begin as of the actual date of receipt by the party, whether or not the party receives the document within the appeal time frame set forth in §823.3(a). However, this requirement does not apply if the party fails to provide a current address or provides an incorrect address.

Section 823.3(c) states that a determination or decision mailed to a party shall be presumed to have been delivered if the document was mailed as specified in §823.3(b).

Section 823.3(c)(1) states in subparagraphs (A) and (B) that the determination or decision shall not be presumed to have been delivered:

- (A) if there is tangible evidence of nondelivery, such as being returned to sender by the U.S. Postal Service; or
- (B) if credible and persuasive evidence is submitted to establish nondelivery or delayed delivery to the proper address.

Section 823.3(c)(2) states that if a party provides the Board or Agency with an incorrect mailing address, a mailing to that address must be considered a proper mailing, even if there is proof that the party never received the document.

Section 823.3(d) states that a complaint or an appeal must be in writing. Complaints or appeals may be filed electronically only if filed in a form approved by the Agency in writing.

Section 823.3(d)(1)–(7) specifies that the filing date for a complaint or an appeal is:

- (1) the postmarked date or the postal meter date (where there is only one or the other);
- (2) the postmarked date, if there is both a postmarked date and a postal meter date;
- (3) the date the document was delivered to a common carrier, which is equivalent to the postmarked date;
- (4) three business days before receipt by the Board or Agency, if the document was received in an envelope bearing no legible postmark, postal meter date, or date of delivery by a common carrier;
- (5) the date of the document itself, if the document date is fewer than three days earlier than the date of receipt and the document was received in an envelope bearing no legible postmark, postal meter date, or date of delivery by a common carrier;
- (6) the date of the document itself, if the mailing envelope containing the complaint or appeal is lost after delivery to the Board or Agency. If the document is undated, the filing date must be deemed to be three business days before receipt by the Board or Agency; or
- (7) the date of receipt by the Board or Agency, if the document was filed by fax.

Section 823.3(e) states that credible and persuasive testimony under oath, subject to cross-examination, may establish a filing date that is earlier than the dates established under §823.3(d). A party may be allowed to establish a filing date earlier than a postal meter date or the date of the document itself only upon a showing of extremely credible and persuasive evidence. Likewise, when a party alleges that a complaint or appeal has been filed that the Board or Agency has never received, the party must present extremely credible and persuasive evidence to support the allegation.

Section 823.3(f)(1) and (2) states that a decision or determination shall not be deemed final if a party shows that a representative of the Board, Board's designee, or Agency has given misleading information on appeal rights to the party. The party shall specifically establish:

- (1) how the party was misled; or
- (2) what misleading information the party was given, and, if possible, by whom the party was misled.

Section 823.3(g) states that there is no good cause exception to the timeliness rules.

#### **§823.4. Representation**

Section 823.4 states that each party may authorize a hearing representative to assist in presenting a complaint or an appeal on behalf of the party under this chapter. The Agency or Board may require authorization to be in writing. On behalf of the party, the representative may exercise any of a party's rights under this chapter. Information from repealed Chapter 823 relating to Information on Right of Appeal is incorporated throughout new Chapter 823, where appropriate.

### **SUBCHAPTER B. BOARD COMPLAINT AND APPEAL PROCEDURES**

**The Commission proposes new Subchapter B, Board Complaint and Appeal Procedures, as follows:**

Subchapter B contains Board-level complaint and appeal procedures related to all workforce services administered by the Boards.

The WIA regulations require that procedures be developed related to processes dealing with complaints, appeals, and hearings at both the local level and the state level. In addition, WIA also provides that eligible training providers denied WIA funding for training services be given the right to appeal the denial to the Board or the Agency. These procedures are currently set forth in Chapter 841 of this title. Under a separate, but concurrent, rulemaking proposal, the Commission proposes to repeal the Chapter 841 rules related to local and state appeals; local-level complaint procedures; and state-level hearing procedures. The repealed Chapter 841 sections have been incorporated in new Chapter 823. This new provision related to processes dealing with complaints, appeals, and hearings applies to the workforce services administered by the Agency or Board as listed in §823.1(b).

Subchapter B includes a new provision related to informal resolution. Once a complaint has been filed, an opportunity for informal resolution will be offered by the Board or its designee and the Agency. This provision is currently located in Chapter 841 of this title relating to complaints

filed with the Board; however, there is no informal resolution provision offered by the Agency. New Chapter 823 allows the Boards and the Agency to resolve customers' issues in an informal manner in advance of a Board or Agency hearing. Under a separate, but concurrent, rulemaking proposal, the Commission proposes to repeal the Chapter 841 rules related to local-level informal resolution. New Chapter 823 modifies and incorporates these repealed Chapter 841 rules. The informal resolution provision applies to workforce services administered by the Boards or the Agency as listed in §823.1(b).

Subchapter B also adds a new provision that incorporates similar information related to determinations found throughout repealed Chapter 823. A determination is provided to any person affected by a Board or Board contractor's adverse action. Boards will be required to establish policies to ensure Texas Workforce Center customers receive a written determination notifying them of any adverse actions and to provide these customers with information on complaints and appeal rights. The intent of the Commission is to ensure the protection of the due process rights of Texas Workforce Center customers.

Subchapter B includes a new provision related to Board hearings. Board hearings or "Board reviews" are addressed in Chapters 809, 811, and 841. The sections in each of these chapters related to Board reviews are proposed for repeal under separate, but concurrent, rulemaking proposals. New Chapter 823 contains a single process for Board hearings and provides specific and consistent guidance for Boards to conduct hearings when a customer or provider appeals a determination.

#### **§823.10. Board-Level Complaints**

Section 823.10 contains specific responsibilities regarding filing complaints with a Board.

Section 823.10(a)(1)–(3) identifies persons who may file a complaint, including:

- (1) Texas Workforce Center customers. These are individuals who have applied for or are eligible to receive federal- and state-funded workforce services administered by the Agency or Boards listed in §823.1(b).
- (2) other interested persons affected by the One-Stop Service Delivery Network, including subrecipients. These persons may include child care or other service providers that have received a determination issued by a Board.
- (3) previously employed individuals who believe they were displaced by a Texas Workforce Center customer participating in work-based services such as subsidized employment, work experience, or workfare. This subparagraph complies with the nondisplacement rules required by several federal agencies.

The U.S. Department of Health and Human Services (DHHS) regulations at 45 C.F.R. §261.70 require that safeguards be in place to ensure that TANF individuals do not displace other workers. In addition, states must establish and maintain procedures to resolve complaints of alleged violations of the displacement rule.

DOL regulations at 20 C.F.R. §667.270(a) require that safeguards be in place to ensure that participants in WIA employment and training activities do not displace other employees. Both regular employees and program participants may file a complaint.

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) requires states to have a nondisplacement rule. The statute at 7 C.F.R. §273.7(m)(6)(i)(H) states that agencies must not place an FSE&T workfare participant in a work position that has the effect of replacing or preventing the employment of an individual not participating in the workfare program. In addition, 7 C.F.R. §273.7(e)(1)(iv)(A) and (B) states that agencies must not place FSE&T individuals participating in workfare or work experience in an employment and training activity that has the effect of replacing the employment of an individual not participating in the employment and training experience program. The regulations go on to state that employers must provide the same benefits and working conditions that are provided at the job site to employees performing comparable work for comparable hours. Although FNS does not require states to establish procedures to resolve complaints alleging violations of the displacement rule, the Commission includes the FNS displacement rule as part of service integration for workforce services.

Section 823.10(b) states that a complaint is required to be in writing and to be filed within 180 days of the alleged violation. This requirement, located in §841.63, Time Limitations at Local Level, which is concurrently proposed for repeal, is modified and incorporated in new Chapter 823.

Section 823.10(c) requires the complaint to contain the party's name, current mailing address, and a brief statement of the alleged violation identifying the facts on which the complaint is based. Portions of this requirement are found in §841.62, Grievance Filing Procedures at the Local Level, which is concurrently proposed for repeal. The requirement is modified and incorporated in new Chapter 823.

Section 823.10(d)(1)–(4) requires Boards to ensure that information about complaint procedures is provided to individuals, eligible training providers, and subrecipients. Information must be presented in a manner that is easily understood by the affected individuals, including youth, individuals with disabilities, and individuals with limited English proficiency, and must be:

- (1) posted in a conspicuous public location at each Texas Workforce Center;
- (2) provided in writing to any customer;
- (3) made available in writing to any individual upon request; and
- (4) placed in each Texas Workforce Center customer's file.

This provision follows federal WIA requirements set forth in §841.64, LWDB Responsibilities, which is concurrently proposed for repeal, and is modified and incorporated in new Chapter 823.

### **§823.11. Determinations**

Section 823.11 relates to Boards and their designees issuing determinations regarding actions that affect the type and level of workforce services provided. This section includes the information required when issuing a determination to training providers found by the Boards to be ineligible to receive WIA funding for training services. Additionally, this section retains

provisions from §841.48, Local Appeals, concurrently proposed for repeal, which requires that a written decision on an appeal be provided to an eligible training provider whose eligibility has been terminated.

Section 823.11(a) requires that a Board or its designee must promptly issue a written determination regarding any action adversely affecting the type and level of services to any person directly affected. The intent of the Commission is to ensure the protection of due process and other legal rights of Texas Workforce Center customers and other persons.

Section 823.11(b)(1)–(6) requires that the determination include the following information:

- (1) A brief statement of the adverse action;
- (2) The mailing date of the determination;
- (3) An explanation of the individual's right to an appeal;
- (4) The procedures for filing an appeal to the Board, including applicable time frames as required in §823.3;
- (5) The right to have a hearing representative, including legal counsel; and
- (6) The address or fax number to which the appeal must be sent.

This subsection incorporates similar provisions related to determinations found throughout repealed Chapter 823.

Section 823.11(c)(1)–(3) requires Boards to allow providers of training services the opportunity to appeal a determination related to the:

- (1) denial of eligibility as a training provider under WIA §122(b), §122(c), or §122(e);
- (2) termination of eligibility as a training provider or other action under WIA §122(f); or
- (3) denial of eligibility as a training provider of on-the-job or customized training by the operator of a Texas Workforce Center under WIA §122(h).

This section retains certain provisions from §841.48, Local Appeals, which is concurrently proposed for repeal. In addition, this provision references the WIA requirements at 20 C.F.R. §667.640(b) relating to "denial or termination of eligibility as a training provider." States are required to provide an opportunity to appeal a denial or termination of eligibility by Boards.

Section 823.11(d) states that a person who receives a determination from a Board or a Board's designee may file an appeal with the Board requesting a review of the determination. The appeal must be submitted in writing and filed within 14 calendar days of the mailing date of the determination. The appeal must include the party's proper mailing address. This provision is located in the Commission's Child Care Services, Choices, and WIA rules in §809.131 and §809.132; §§811.71–811.73; and §§841.48, 841.49, 841.61–841.69, 841.91–841.93, 841.95, and 841.96, respectively. These sections are proposed for repeal, and one single uniform procedure for appealing a determination is included in new Chapter 823.

### **§823.12. Board Informal Resolution Procedure**

Section 823.12 identifies the specific responsibilities of a Board to conduct informal resolution. This new provision also includes recommendations on how to conduct informal resolution.

Section 823.12(a) states that a Board shall provide the opportunity for informal resolution of a complaint or appeal. This provision allows Boards or their designees the opportunity to resolve customers' issues in an informal manner in lieu of a Board hearing. This subsection follows federal WIA requirements set forth in §841.65, Local Level Informal Conference Procedure, which is concurrently proposed for repeal. This information is modified and incorporated in new Chapter 823.

Section 823.12(b)(1)–(5) provides recommendations on how informal resolution may be conducted, including but not limited to:

- (1) informal meetings with case managers or their supervisors;
- (2) second reviews of the case file;
- (3) telephone calls or conference calls to the affected parties;
- (4) in-person interviews with all affected parties; or
- (5) written explanations or summaries of the laws or regulations involved in the complaint.

This provision allows Boards or their designees to determine the most expeditious and practical method of resolving complaints or appeals in an informal manner, thereby possibly precluding the necessity of a Board hearing.

### **§823.13. Board Hearings**

Section 823.13 provides the requirements for Board hearings for resolving complaints or appeals filed from a determination. The provisions in this section are retained, with modifications, from certain rules in Chapters 809, 811, 813, and 841 of this title, which are concurrently proposed for repeal.

Section 823.13(a) states that if the parties reach a final agreement through informal resolution, no hearing shall be held. It is not necessary for a complaint or appeal to proceed to a Board hearing if all parties reach an agreement through the informal resolution procedure.

Section 823.13(b) requires Boards to provide an opportunity for a hearing to resolve an appeal or complaint, if not successfully resolved through the informal resolution procedure. This provision is found in §841.66, Local Level Hearing Procedure, which is proposed for repeal. The language is modified and included in new Chapter 823.

Section 823.13(c) requires Boards to complete either an agreement resulting from informal resolution or a hearing and Board decision within 60 calendar days of the original filing of an appeal or complaint. This follows federal WIA requirements, set forth in §841.66, Local Level Hearing Procedure, which is concurrently proposed for repeal. The language is modified and incorporated in new Chapter 823.

Section 823.13(d) requires Boards to provide a process that allows an individual alleging a labor standards violation to submit a complaint through a binding arbitration procedure. Examples of labor standards violations might include infringement on the right to collective bargaining, pay disputes, employment discrimination, or disputes as to employee benefits. Most collective bargaining agreements have specific provisions covering such violations and specific grievance procedures to address them. These procedures frequently include binding arbitration under the

Federal Arbitration Act (Title 9, U.S.C., §§1–16) in which both parties agree to submit the dispute to a neutral arbitrator. The arbitrator's decision is final and binding upon both parties. This section follows federal WIA requirements to ensure that arbitration rights under collective bargaining agreements are enforced. In such a case, the Board may be required to follow the provisions of the applicable collective bargaining agreement with respect to its arbitration procedure.

Section 823.13(e) states that within 60 calendar days of the filing of the appeal or complaint, the Board shall send the parties a decision setting forth the results of the Board hearing. This decision shall be issued by a Board hearing officer, shall include findings of fact and conclusions of law, and shall provide information about appeal rights. This requirement follows federal WIA requirements and is located in §841.66, Local Level Hearing Procedure, which is concurrently proposed for repeal. This language is modified and incorporated in new Chapter 823.

Section 823.13(f) provides that a party may file an appeal with the Agency if a Board decision is not mailed within the 60-calendar-day time frame described in subsection (e) of this section or if any party disagrees with a timely Board decision. This follows federal WIA requirements and is contained in the proposed repeal of §841.66, Local Level Hearing Procedure. The language is modified and incorporated in new Chapter 823.

Section 823.13(g) notifies parties that an appeal to the Agency must be filed in writing with TWC Appeals, Texas Workforce Commission, 101 East 15th St., Room 410, Austin, Texas 78778-0001, within 14 calendar days after the mailing date of the Board's decision. If the Board does not issue a decision within 60 calendar days of the date of the filing of the original appeal or complaint, an appeal to the Agency must be filed no later than 90 calendar days after the filing date of the original appeal or complaint. This requirement is found in §841.69, Appeal, which is concurrently proposed for repeal. The language is modified and incorporated in new Chapter 823.

#### **§823.14. Board Policies for Resolving Complaints and Appeals of Determinations**

Section 823.14 relates to Boards' policies for complaints and appeals of determinations, informal resolution, and hearings at the Board level. This requirement located in Chapter 841, Subchapter D, which is concurrently proposed for repeal, is modified and incorporated in new Chapter 823.

Section 823.14(a) requires Boards to develop written policies to handle complaints and appeals, provide the opportunity for informal resolution, and conduct hearings in accordance with this subchapter for individuals, eligible training providers, and other persons affected by the One-Stop Service Delivery Network, including subrecipients.

Section 823.14(b) requires a Board and its subrecipients to maintain written copies of these policies and make them available to the Agency, Texas Workforce Center customers, and other interested persons upon request. This provision is modified and retained from Chapter 841, Subchapter D, which is concurrently proposed for repeal.

Section 823.14(c)(1)–(8) lists the minimum requirements for Board policies relating to complaints, informal resolution, and hearings. Required Board policies are found throughout

other referenced rules, which are concurrently proposed for repeal. New §823.14(c) provides an itemized list of required policies in one subsection. Boards must develop and approve policies to:

- (1) ensure that determinations are provided as specified in §823.11;
- (2) ensure that information about complaint procedures is available as described in §823.10(d);
- (3) notify persons that complaints must be submitted in writing and set forth the facts on which the complaint is based, and notify individuals of the time limit in which to file a complaint;
- (4) maintain a complaint log and all complaint-related materials in a secure file for a period of three years;
- (5) designate an individual to be responsible for investigating, documenting, monitoring, and following up on complaints;
- (6) inform persons of the:
  - (A) right to file a complaint;
  - (B) right to appeal a determination;
  - (C) opportunity for informal resolution and a Board hearing;
  - (D) Boards' time frames for either reaching informal resolution or issuing a decision; and
  - (E) right to file an appeal to the Agency, including information on where to file the appeal;
- (7) designate hearing officers to conduct Board hearings, document actions taken, and render decisions; and
- (8) ensure that complaints remanded from the Agency to the Board for resolution are handled in a timely fashion and follow established Board policies and time frames.

Section 823.14(d) notifies Boards that complaints filed directly with the Agency may be remanded to the appropriate Board to be processed in accordance with the Board's policies for resolving complaints. The new subsection, which complies with WIA regulations allowing complaints to be remanded first to the appropriate Board for resolution, provides that a customer can file a complaint directly with the Agency and that the Agency then may choose to remand a complaint to the Board for resolution.

### **SUBCHAPTER C. AGENCY COMPLAINT AND APPEAL PROCEDURES**

**The Commission proposes new Subchapter C, Agency Complaint and Appeal Procedures, as follows:**

Subchapter C contains the Agency's complaint and appeal procedures. Similar to repealed Subchapters B and C, new Subchapter C contains rule provisions related to the setting of hearings, postponement and continuance of hearings, evidence presented for hearings, hearing officer disqualification, recusal and reassignment, hearing procedures, and withdrawal of complaints and appeals. New Subchapter C contains many of the provisions related to general hearings found throughout repealed Chapter 823.

Subchapter C adds a new provision related to state-level complaints. WIA regulations require that procedures be developed related to processes for complaints, hearings, and appeals at the state level. The Commission's WIA rules, Chapter 841, currently do not specify that a customer can file a complaint directly with the Agency, nor do these rules specify that the Agency may remand a complaint to the Boards for resolution. Instead, Chapter 841 indicates that complaints first must be addressed by the Boards before an appeal may be made to the Agency. This new

Chapter 823 provision complies with WIA regulations and provides specific processes related to complaints filed directly with the Agency.

### **§823.20. State-Level Complaints**

Section 823.20 relates to the responsibilities of the Agency to establish procedures regarding complaints received at the state level. The provisions in this section are retained and modified from other rules in this title, which are proposed for repeal.

Section 823.20(a) specifies that a Texas Workforce Center customer or other interested person affected by the statewide One-Stop Service Delivery Network, including service providers alleging a noncriminal violation of the requirements of any federal- or state-funded workforce services, may file a complaint with the Agency. WIA regulations require states to develop procedures to deal with complaints from participants and other interested persons affected by the statewide workforce system. This new provision complies with federal WIA regulations and includes the workforce services referenced in §823.1(b).

Section 823.20(b) states that complaints shall be in writing and filed within 180 calendar days of the alleged violation. The complaint shall include the party's name, current mailing address, and a brief statement of the alleged violation identifying the facts on which the complaint is based. To maintain consistency for deadlines to file complaints, the Commission has aligned the complaint filing deadlines with the Board filing deadlines set forth in new Chapter 823.

Section 823.20(c) states that the complaint must be filed with TWC Appeals, Texas Workforce Commission, 101 East 15th St., Room 410, Austin, Texas 78778-0001. This subsection retains language from the concurrent proposed repeal of certain sections of the Commission's Child Care Services, Choices, FSE&T, and WIA rules.

Section 823.20(d) requires the Agency to provide an opportunity for informal resolution. This provision allows the Agency to resolve customers' issues in an informal manner in advance of the Agency's appeal procedures. This follows federal WIA requirements and also is located in §841.93, State Level Informal Resolution and Hearing for Alleged Violations of the Requirements of WIA by the State or for Complaints by Individuals Affected by the Statewide Program, concurrently proposed for repeal.

Section 823.20(e) provides that if the informal resolution procedure results in a final agreement between the parties, no hearing is required.

Section 823.20(f) states that a complaint not resolved by the informal resolution procedure shall be set for a hearing and a decision shall be issued in accordance with procedures for appeals under this subchapter. This provision is similar to language in the prehearing procedures section in repealed Chapter 823.

Section 823.20(g) notifies Boards that complaints filed directly with the Agency may be returned to the appropriate Board to be processed in accordance with the Board's hearing policies. The new subsection, which complies with WIA regulations allowing complaints to be remanded first to the appropriate Board for resolution, provides that a customer can file a complaint directly

with the Agency and that the Agency may remand the complaint to the Board for resolution. Thus, if a person files a complaint directly with the Agency regarding a concern with the local provision of services as opposed to the statewide service network, the Agency has the discretion to send the complaint to the appropriate Board.

### **§823.21. Setting a Hearing**

Section 823.21 identifies the necessary requirements to set an Agency hearing. The provisions in this section are retained from the repealed Chapter 823 with minor modifications.

Section 823.21(a) states that a WIA-funded training provider or other provider certified by the Agency and later found to be ineligible to receive funding as a training provider may file an appeal directly with the Agency. Section 823.21(a) retains certain provisions from §841.49, State Level Appeals, which is concurrently proposed for repeal. WIA regulations at 20 C.F.R. §667.640 require states to develop a written appeals process for appeals requested by providers found by the Agency to be ineligible to receive WIA funding for training services.

Section 823.21(b) states that upon receipt of the appeal from a Board decision, an appeal from a WIA-funded training provider found to be ineligible by the Agency, or if no informal resolution of a complaint is successfully reached, the Agency shall promptly assign a hearing officer and mail a notice of hearing to the parties and/or their designated representatives. The hearing shall be set and held promptly and in no case later than as provided by applicable statute or rule.

Section 823.21(c)(1)–(3) states that 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.

Section 823.21(d) provides that the notice of hearing shall be issued at least 10 calendar days before the date of the hearing unless a shorter period is permitted by statute.

Section 823.21(e) states that hearings shall be conducted by telephonic means, unless an in-person hearing is required by applicable statute or the Agency determines that an in-person hearing is necessary.

Section 823.21(f) states that parties needing special accommodations, including the need for a bilingual or sign language interpreter, shall make this request before the hearing is set, if possible, or as soon as practical.

### **§823.22. Postponement and Continuance**

Section 823.22 relates to the Agency's policies regarding the postponement and continuance of an Agency hearing. The provisions in this section are retained from the repealed Chapter 823 with minor modifications.

Section 823.22(a) states that the hearing officer may grant a postponement of a hearing for good cause at a party's request. Except in emergencies or unusual circumstances confirmed by a

telephone call or other means, postponements shall not be granted within two days of the scheduled hearing.

Section 823.22(b)(1)–(5) provides that a continuance of a hearing may be ordered at the discretion of the hearing officer if:

- (1) there is insufficient evidence upon which to make a decision;
- (2) a party needs additional time to examine evidence presented at the hearing;
- (3) the hearing officer considers it necessary to enter into evidence additional information or testimony;
- (4) an in-person hearing is necessary for proper presentation of the evidence; or
- (5) any other reason deemed appropriate by the hearing officer.

Section 823.22(c) states that the hearing officer shall advise the parties of the reason for the continuance and of any additional information required. At the continuance, the parties shall have an opportunity to rebut any additional evidence.

### **§823.23. Evidence**

Section 823.23 relates to the Agency's evidence procedures for hearings. The provisions in this section are retained from repealed Chapter 823 rules with minor modifications.

Section 823.23(a), Evidence Generally, states 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 823.23(b), Exchange of Exhibits, states that to be considered as evidence in a decision, any document or physical evidence must be entered as an exhibit at the hearing. Any documentary evidence to be presented during a telephonic hearing must be exchanged with all parties and a copy must be provided to the hearing officer in advance of the hearing. Any documentary evidence to be presented at an in-person hearing must be exchanged at the hearing.

Section 823.23(c), Stipulations, states that the 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 823.23(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 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 823.23(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.

#### **§823.24. Hearing Procedures**

Section 823.24 describes the Agency's hearing procedures, which include the presentation of evidence, examination of witnesses and parties, additional evidence, and appropriate hearing behavior. The provisions in this section are retained from the repealed rules and have not substantially changed.

Section 823.24(a)(1)–(4), General Procedure, states that all hearings shall be conducted informally and in such manner as to ascertain the substantial rights of the parties. The hearing shall be conducted de novo, that is, a new hearing without regard to any previous determinations or decisions issued by a Board. The hearing officer shall develop the evidence. All issues relevant to the appeal shall be considered and addressed, including:

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

Section 823.24(b)(1)–(3), Records, identifies the records procedures required for an Agency hearing, including:

- (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 other physical evidence entered as exhibits.
- (2) The hearing record must be maintained in accordance with federal or state law.
- (3) Confidentiality of information contained in the hearing record must be maintained in accordance with federal and state law.

#### **§823.25. Withdrawal of Complaint or Appeal**

Section 823.25 states a party may request a withdrawal of its own complaint or appeal at any time before a final Agency decision is issued. The hearing officer may grant the request for withdrawal in writing and issue an order of dismissal. Provisions in this section are retained from the repealed rules and have not substantially changed.

#### **§823.26. Hearing Officer Independence and Impartiality**

Section 823.26 relates to the Agency hearing officers' powers and impartiality. The provisions in this section are in part retained from the repealed rules.

Section 823.26(a) provides that 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 decisions.

Section 823.26(b) provides 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 or Board decision on appeal. Any party may present facts to the Agency in support of a request to disqualify a hearing officer.

Section 823.26(c) states that a hearing officer may withdraw from a hearing to avoid the appearance of impropriety or partiality.

Section 823.26(d) states that 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.

#### **§823.27. Ex Parte Communications**

Section 823.27 is intended to prevent improper communication with hearing officers, 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.

#### **SUBCHAPTER D. AGENCY-LEVEL DECISIONS, REOPENINGS, AND REHEARINGS**

**The Commission proposes new Subchapter D, Agency-Level Decisions, Reopenings, and Rehearings, as follows:**

Subchapter D identifies and contains rule provisions related to the Agency's specific responsibilities for Agency decisions, motions to request the reopening of hearings, and motions for rehearings. Subchapter D is similar to the repealed Subchapter D and retains many of the provisions related to General Hearings found throughout repealed Chapter 823.

### **§823.30. Hearing Decision**

Section 823.30 describes the Agency's procedures related to its hearing decisions. The provisions in this section are retained from repealed Chapter 823 rules with minor modifications.

Section 823.30(a) states that following the conclusion of the hearing, the hearing officer shall promptly issue a written decision on behalf of the Agency.

Section 823.30(b)(1)–(3) states that the hearing decision shall be based exclusively on the evidence of record in the hearing and on matters officially noticed in the hearing and 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 a determination or Board decision.

Section 823.30(c) states that the Agency may assume continuing jurisdiction to modify or correct a hearing decision until the expiration of 14 calendar days from the mailing date of the hearing decision unless a party files a timely motion for rehearing.

### **§823.31. Motion for Reopening**

Section 823.31 describes the Agency's procedures to request a reopening of a hearing. The provisions in this section are retained from repealed rules with minor modifications.

Section 823.31(a) states that if a party does not appear for an Agency hearing, the party has the right to request a reopening of the hearing within 14 calendar days from the date the Agency decision is mailed.

Section 823.31(b) states that the motion shall be in writing and detail the reason for failing to appear at the hearing.

Section 823.31(c) states that the hearing officer may schedule a hearing on whether to grant the reopening.

Section 823.31(d) states the motion may be granted if it appears to the hearing officer that the party has shown good cause for failing to appear at the hearing.

### **§823.32. Motion for Rehearing and Decision**

Section 823.32 describes the Agency's procedures regarding motions for rehearings and decisions related to rehearings. The provisions in this section are retained from repealed rules and have not substantially changed.

Section 823.32(a) states that a party has 14 calendar days from the date the Agency decision is mailed to file a motion for rehearing. A rehearing may be granted only for the presentation of new evidence.

Section 823.32(b) states that motions for rehearing must be in writing and allege the new evidence to be considered. The appellant must show a compelling reason why the evidence was not presented at the hearing.

Section 823.32(c) states that if the hearing officer determines that the alleged, new evidence warrants a rehearing, a rehearing must be scheduled at a reasonable time and place.

Section 823.32(d) states that the hearing officer shall issue a written decision following the hearing.

Section 823.32(e) states that the hearing officer may also issue a decision denying a motion for rehearing.

### **§823.33. Finality of Decision**

Section 823.33 describes when the Agency hearing officer's decision becomes final. Certain provisions in this section are retained, substantially unchanged, from the repealed rules.

Section 823.33(a)(1)–(3) states the decision of the hearing officer is the final decision of the Agency after the expiration of 14 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 a decision.

Section 823.33(b) states any decision issued in response to a request for reopening or rehearing or a modification or correction issued by the Agency must be final on the expiration of 14 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 estimated additional costs to state government as a result of enforcing or administering the rules. Because the proposed sections give Boards the responsibility to conduct hearings on appeals from all Board determinations, Boards (local governments) in the aggregate may experience a total estimated \$100,000 per year increase in costs as they comply with the new rules requiring such appeals to be heard at the Board level. The total for such a cost increase for any given Board cannot be stated with certainty, and may also be influenced by numerous factors, including the number of determinations issued, the complexity of individual hearings, and the effectiveness of the Board's informal resolution process, as outlined in proposed §823.12.

There are estimated corresponding reductions in cost to the state (i.e, the Agency) of \$100,000 (including indirect administration and personnel fringe benefits) per year, as the anticipated number of appeals conducted at the state level will be minimal over the ensuing five-year

period. No reduction in cost to local governments is anticipated as a result of enforcing or administering the rules.

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

Enforcing or administering these rules does not have foreseeable implications relating to the cost or revenues of the state or local governments, aside from those possible increases of Board costs noted above.

There will be no probable economic costs to persons required to comply with these rules, aside from those possible increases of Board costs noted above, and there will be no adverse economic effect on small businesses or microbusinesses.

The reasoning for these conclusions includes the following:

1. Recent experience indicates that the vast majority of hearings resulting from Board actions were related to child care determinations, and an estimated 1,600 child care hearings statewide were conducted by the Agency during Fiscal Year 2006 (FY'06), at an estimated aggregate annual cost of approximately \$100,000. (Actual costs totaled \$105,205 during FY'06 and \$86,965 during FY'05, averaging \$96,085 per year over the two-year period, including all direct and indirect costs, and including employee fringe benefits.) As a result of the proposed rule's new hearings provisions, it is estimated that the same number of child care hearings may be held by the Boards each year during the ensuing five-year period. Proposed new §823.12 provisions require that Boards provide an opportunity for informal resolution of a complaint or appeal, and identify their responsibilities to attempt informal resolution in advance of a formal Board hearing. In TWC's experience, use of informal resolution in the areas of UI and wage claims routinely results in settlement of the vast majority of disputes, without the need for a formal hearing. An estimated 1,600 child care appeal hearings were conducted by TWC during FY'06—most of them from a small proportion of Boards—indicating that these particular Boards may benefit from the institution of informal resolution procedures, which could cause the number of hearings to decline from previous years. While there is no reasonable alternative basis to estimate future potential costs than to estimate the same number of child care hearings, at the average estimated annual aggregated cost of such Agency hearings (for example, the cost of Board hearings could increase during the initial period of time following the proposed rules going into effect—particularly regarding child care appeals for those few Boards that have been relying disproportionately on the Agency to conduct such appeals—then subsequently decline during the ensuing period as experience is gained), TWC believes that the quicker and more effectively the informal complaint and resolution provisions are instituted by Boards, the greater the likelihood that fewer hearings will be needed. Also, as noted in Part I. Purpose, Background, and Authority for these proposed rules, the Commission intends to provide training and technical assistance in order to assist Boards with implementation of these rules, including training on informal resolution procedures, hearing officer training, sample forms for complaints or resolution procedures, or other assistance in order to minimize costs as much as possible.

2. The reasoning for concluding that there will be no adverse economic effect on small businesses or microbusinesses is that small or microbusinesses are not regulated by these rules, except for those career schools or colleges that may be small businesses or microbusinesses. The proposed repeal of Chapter 823 hearings and appeals rules for career schools and colleges and the addition of new Chapter 807 Career Schools and Colleges hearings and appeals rules do not apparently represent a significant change and is not additionally substantively burdensome for small or microbusinesses.

Mark Hughes, Director, 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 provide a unified and streamlined process regarding the resolution of complaints, hearings, and appeals related to Board-administered workforce services. In addition, due process principles and other legal rights will be protected, program outcomes will be achieved more effectively, and workforce services will be further integrated.

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](mailto: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 repeals 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 Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed repeals affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as the Texas Government Code, Chapter 2308.

#### **SUBCHAPTER A. GENERAL PROVISIONS**

§823.1. Short Title and Purpose

§823.2. Definitions

§823.3. Information on Right of Appeal

## SUBCHAPTER B. PRE-HEARING PROCEDURE

- §823.11. Request for Hearing
- §823.12. Setting of Hearing
- §823.13. Postponement
- §823.14. Evidence
- §823.15. Hearing Officer Disqualification and Withdrawal

## SUBCHAPTER C. CONDUCT OF HEARING

- §823.31. Hearing Procedure
- §823.32. Continuance of Hearing
- §823.33. Withdrawal of Appeal
- §823.34. Change in Determination

## SUBCHAPTER D. DECISIONS, NON-APPEARANCES, AND REHEARINGS

- §823.41. Decision
- §823.42. Reopened Decision for Non-appearance
- §823.43. Rehearing Decision
- §823.44. Finality of Decision

The new 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.

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

## **Chapter 823. INTEGRATED COMPLAINTS, HEARINGS, AND APPEALS**

### **SUBCHAPTER A. GENERAL PROVISIONS**

#### **§823.1. Short Title and Purpose**

- (a) This chapter provides an appeals process to the extent authorized by federal and state law and by rules administered by the Texas Workforce Commission (Agency).
- (b) This section applies only to complaints or determinations regarding federal- or state-funded workforce services administered by the Agency or Local Workforce Development Boards (Boards), as follows:
  - (1) Child care;
  - (2) Temporary Assistance for Needy Families (TANF) Choices;
  - (3) Food Stamp Employment and Training (FSE&T);
  - (4) Project Reintegration of Offenders (Project RIO);
  - (5) Workforce Investment Act (WIA) Adult, Dislocated Worker, and Youth; and
  - (6) Eligible Training Providers (ETP) receiving WIA funds or other funds for training services.
- (c) Determinations or complaints relating to the following matters are not governed by this chapter:
  - (1) Across-the-board reductions of services, benefits, or assistance to a class of recipients;
  - (2) Matters governed by hearing procedures otherwise provided for in this title;
  - (3) Alleged violations of nondiscrimination and equal opportunity requirements;
  - (4) Denial of benefits as it relates to mandatory work requirements for individuals receiving TANF and FSE&T services and is administered through the Texas Health and Human Services Commission (HHSC);
  - (5) Matters governing job service–related complaints as referenced in 20 C.F.R. Part 658, Subpart E, §§400-418 and the federal Employment Service law;
  - (6) Services provided by the Commission pursuant to Texas Labor Code §301.023 - Complaints Against the Commission; or

- (7) Alleged criminal violations of any services referenced in §823.1(b).

## **§ 823.2. Definitions**

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

- (1) Adverse action -- Any denial or reduction in benefits or services to a party, including displacement from current employment by a Texas Workforce Center customer.
- (2) Agency decision -- The written finding issued by an Agency hearing officer following a hearing before that hearing officer.
- (3) Appeal -- A written request for a review filed with the Board or Agency by a person in response to a determination or decision.
- (4) Board decision -- The written finding issued by a Board hearing officer following a hearing before that hearing officer in response to an appeal or complaint.
- (5) Complaint -- A written statement alleging a violation of any law, regulation, or rule relating to any federal- or state-funded workforce service.
- (6) Determination -- A written statement issued to a Texas Workforce Center customer by a Board, its designee, or the Agency relating to an adverse action, or to a provider or contractor relating to denial or termination of eligibility under programs administered by the Agency or a Board listed in §823.1(b).
- (7) Hearing officer -- An impartial individual designated by either the Board or the Agency to conduct hearings and issue administrative decisions.
- (8) Informal resolution -- Any procedure that results in an agreed final settlement between all parties to a complaint or an appeal.
- (9) Party -- A person who files a complaint or who appeals a determination or the entity against which the complaint is filed or that issued the determination.

## **§823.3. Agency and Board Timeliness**

- (a) A properly addressed determination or decision is final for all purposes unless the party to whom it is mailed files an appeal no later than the fourteenth calendar day after the mailing date.
- (b) Each party to a complaint or an appeal shall promptly notify, in writing, the Board, Board's designee, or the Agency with which the complaint or appeal was filed of any

change of mailing address. Determinations and decisions shall be mailed to this address.

- (1) A copy of the determination or decision must be mailed to a properly designated party representative in order for it to become final.
  - (2) The Board or Agency is responsible for making an address change only if the Board or Agency is specifically directed by the party to mail subsequent correspondence to the new address.
  - (3) If the Board, Board's designee, or Agency addresses a document incorrectly, but the party receives the document, the time frame for filing an appeal shall begin as of the actual date of receipt by the party, whether or not the party receives the document within the appeal time frame set forth in subsection (a) of this section. However, this does not apply if the party fails to provide a current address or provides an incorrect address.
- (c) A determination or decision mailed to a party shall be presumed to have been delivered if the document was mailed as specified in subsection (b) of this section.
- (1) A determination or decision shall not be presumed to have been delivered:
    - (A) if there is tangible evidence of nondelivery, such as being returned to sender by the U.S. Postal Service; or
    - (B) if credible and persuasive evidence is submitted to establish nondelivery or delayed delivery to the proper address.
  - (2) If a party provides the Board or Agency with an incorrect mailing address, a mailing to that address shall be considered a proper mailing, even if there is proof that the party never received the document.
- (d) A complaint or an appeal shall be in writing. Complaints or appeals may be filed electronically only if filed in a form approved by the Agency in writing. The filing date for a complaint or an appeal shall be:
- (1) the postmarked date or the postal meter date (where there is only one or the other);
  - (2) the postmarked date, if there is both a postmark date and a postal meter date;
  - (3) the date the document was delivered to a common carrier, which is equivalent to the postmarked date;

- (4) three business days before receipt by the Board or Agency, if the document was received in an envelope bearing no legible postmark, postal meter date, or date of delivery by a common carrier;
  - (5) the date of the document itself, if the document date is fewer than three days earlier than the date of receipt and if the document was received in an envelope bearing no legible postmark, postal meter date, or date of delivery by a common carrier;
  - (6) the date of the document itself, if the mailing envelope containing the complaint or appeal is lost after delivery to the Board or Agency. If the document is undated, the filing date shall be deemed to be three business days before receipt by the Board or Agency; or
  - (7) the date of receipt by the Board or Agency, if the document was filed by fax.
- (e) Credible and persuasive testimony under oath, subject to cross-examination, may establish a filing date that is earlier than the dates established under subsection (d) of this section. A party shall be allowed to establish a filing date earlier than a postal meter date or the date of the document itself only upon a showing of extremely credible and persuasive evidence. Likewise, when a party alleges that a complaint or appeal has been filed that the Board or Agency has never received, the party must present extremely credible and persuasive evidence to support the allegation.
- (f) A decision or determination shall not be deemed final if a party shows that a representative of the Board, Board's designee, or Agency has given misleading information on appeal rights to the party. The party shall specifically establish:
- (1) how the party was misled; or
  - (2) what misleading information the party was given, and, if possible, by whom the party was misled.
- (g) There is no good cause exception to the timeliness rules.

#### **§823.4. Representation**

Each party may authorize a hearing representative to assist in presenting a complaint or an appeal on behalf of the party under this chapter. The Agency or Board may require authorization to be in writing. On behalf of the party, the hearing representative may exercise any of the party's rights under this chapter.

### **SUBCHAPTER B. BOARD COMPLAINT AND APPEAL PROCEDURES**

#### **§823.10. Board-Level Complaints**

- (a) Persons who may file a complaint include:
  - (1) Texas Workforce Center customers;
  - (2) other interested persons affected by the One-Stop Service Delivery Network, including subrecipients and eligible training providers; and
  - (3) previously employed individuals who believe they were displaced by a Texas Workforce Center customer participating in work-based services such as subsidized employment, work experience, or workfare.
- (b) Complaints shall be in writing and filed within 180 days of the alleged violation.
- (c) The complaint shall include:
  - (1) the party's name and current mailing address; and
  - (2) a brief statement of the alleged violation identifying the facts on which the complaint is based.
- (d) Each Board shall ensure that information about complaint procedures is provided to individuals, eligible training providers, and subrecipients. The information provided shall be presented in such a manner as to be understood by the affected individuals, including youth, individuals with disabilities, and individuals with limited English proficiency. This information shall be:
  - (1) posted in a conspicuous public location at each Texas Workforce Center;
  - (2) provided in writing to any customer;
  - (3) made available in writing to any individual upon request; and
  - (4) placed in each Texas Workforce Center customer's file.

#### **§823.11. Determinations**

- (a) A determination affecting the type and level of services to be provided by a Board or its designee shall be promptly provided to any person directly affected.
- (b) The determination shall include the following:
  - (1) A brief statement of the adverse action;
  - (2) The mailing date of the determination;
  - (3) An explanation of the individual's right to an appeal;

- (4) The procedures for filing an appeal to the Board, including applicable time frames as required in §823.3;
  - (5) The right to have a hearing representative, including legal counsel; and
  - (6) The address or fax number to send the appeal.
- (c) Boards shall allow providers of training services the opportunity to appeal a determination related to the:
- (1) denial of eligibility as a training provider under WIA §122(b), §122(c), or §122(e);
  - (2) termination of eligibility as a training provider or other action under WIA §122(f); or
  - (3) denial of eligibility as a training provider of on-the-job or customized training by the operator of a Texas Workforce Center under WIA §122(h).
- (d) A person that receives a determination from a Board or a Board's designee may file an appeal with the Board requesting a review of the determination. The appeal must be submitted in writing, filed within 14 calendar days of the mailing date of the determination, and include the party's proper mailing address.

#### **§823.12. Board Informal Resolution Procedure**

- (a) Boards shall provide an opportunity for informal resolution of a complaint or appeal.
- (b) Informal resolution may include but is not limited to:
  - (1) informal meetings with case managers or their supervisors;
  - (2) second reviews of the case file;
  - (3) telephone calls or conference calls to the affected parties;
  - (4) in-person interviews with all affected parties; or
  - (5) written explanations or summaries of the laws or regulations involved in the complaint.

#### **§823.13. Board Hearings**

- (a) If the informal resolution procedure results in a final agreement between the parties, no hearing shall be held.

- (b) If no final informal resolution is reached, Boards shall provide an opportunity for a hearing to resolve an appeal or complaint.
- (c) Either a final agreement resulting from informal resolution or a hearing and Board decision shall be completed within 60 calendar days of the original filing of the appeal or complaint.
- (d) Boards shall provide a process that allows an individual alleging a labor standards violation to submit a complaint to a binding arbitration procedure, if a collective bargaining agreement covering the parties to the complaint so provides.
- (e) Within 60 calendar days of the filing of the appeal or complaint, the Board shall send the parties a decision setting forth the results of the hearing. The decision shall be issued by a Board hearing officer, shall include findings of fact and conclusions of law, and shall provide information about appeal rights to the parties.
- (f) If no Board decision is mailed within the 60 calendar-day time frame described in subsection (e) of this section or if any party disagrees with a timely Board decision, a party may file an appeal with the Agency.
- (g) An appeal to the Agency shall be filed in writing with TWC Appeals, Texas Workforce Commission, 101 East 15th St., Room 410, Austin, Texas 78778-0001, within 14 calendar days after the mailing date of the Board's decision. If the Board does not issue a decision within 60 calendar days of the date of the filing of the original appeal or complaint, an appeal to the Agency must be filed no later than 90 calendar days after the filing date of the original appeal or complaint.

**§823.14. Board Policies for Resolving Complaints and Appeals of Determinations**

- (a) A Board shall establish written policies to handle complaints and appeals of determinations, provide the opportunity for informal resolution, and conduct hearings in compliance with this subchapter for individuals, eligible training providers, and other persons affected by the One-Stop Service Delivery Network, including subrecipients.
- (b) A Board shall maintain written copies of these policies, and make them available to the Agency, Texas Workforce Center customers, and other interested persons upon request. A Board shall require that its subrecipients provide these policies to Texas Workforce Center customers and other interested persons upon request.
- (c) At a minimum, a Board shall develop and approve policies to:
  - (1) ensure that determinations are provided as specified in §823.11;

- (2) ensure that information about complaint procedures is available as described in §823.10(d);
  - (3) notify persons that complaints must be submitted in writing and set forth the facts on which the complaint is based, and notify them of the time limit in which to file a complaint;
  - (4) maintain a complaint log and all complaint-related materials in a secure file for a period of three years;
  - (5) designate an individual to be responsible for investigation, documentation, monitoring, and following up on complaints;
  - (6) inform persons of the:
    - (A) right to file a complaint;
    - (B) right to appeal a determination;
    - (C) opportunity for informal resolution and a Board hearing;
    - (D) time frame in which to either reach informal resolution or to issue a Board decision; and
    - (E) right to file an appeal to the Agency, including providing information on where to file the appeal;
  - (7) designate hearing officers to conduct Board hearings, document actions taken, and render decisions; and
  - (8) ensure that complaints remanded from the Agency to the Board for resolution are handled in a timely fashion and follow established Board policies and time frames.
- (d) Complaints filed directly with the Agency may be remanded to the appropriate Board to be processed in accordance with the Board's policies for resolving complaints.

## **SUBCHAPTER C. AGENCY COMPLAINT AND APPEAL PROCEDURES**

### **§823.20. State-Level Complaints**

- (a) A Texas Workforce Center customer or other interested person affected by the statewide One-Stop Service Delivery Network, including service providers that allege a noncriminal violation of the requirements of any federal- or state-funded workforce services, may file a complaint with the Agency.

- (b) Complaints shall be in writing and filed within 180 calendar days of the alleged violation. The complaint shall include the party's name, current mailing address, and a brief statement of the alleged violation identifying the facts on which the complaint is based.
- (c) The complaint shall be filed with TWC Appeals, Texas Workforce Commission, 101 East 15th St., Room 410, Austin, Texas 78778-0001.
- (d) The Agency shall provide an opportunity for informal resolution.
- (e) If the informal resolution procedure results in a final agreement between the parties, no hearing shall be held.
- (f) If no final informal resolution is reached, the complaint shall be promptly set for a hearing and a decision shall be issued in accordance with the procedures for appeals under this subchapter.
- (g) Complaints filed directly with the Agency may be remanded to the appropriate Board to be processed in accordance with the Board's hearing policies.

#### **§823.21. Setting a Hearing**

- (a) A WIA-funded training provider or other provider certified by the Agency and later found to be ineligible to receive funding as a training provider may file an appeal directly with the Agency.
- (b) Upon receipt of an appeal from a Board decision, an appeal pursuant to subsection (a) of this section, or if no informal resolution of a complaint is successfully reached pursuant to §823.20, the Agency shall promptly assign a hearing officer and mail a notice of hearing to the parties and/or their designated representatives. The hearing shall be set and held promptly and in no case later than as provided by applicable statute or rule.
- (c) The notice of hearing shall be in writing and include a:
  - (1) statement of the date, time, place, and nature of the hearing;
  - (2) statement of the legal authority under which the hearing is to be held; and
  - (3) short and plain statement of the issues to be considered during the hearing.
- (d) The notice of hearing shall be issued at least 10 calendar days before the date of the hearing unless a shorter period is permitted by statute.

- (e) Hearings shall be conducted by telephonic means, unless an in-person hearing is required by applicable statute or the Agency determines that an in-person hearing is necessary.
- (f) Parties needing special accommodations, including the need for a bilingual or sign language interpreter, shall make this request before the hearing is set, if possible, or as soon as practical.

#### **§823.22. Postponement and Continuance**

- (a) The hearing officer may grant a postponement of a hearing for good cause at a party's request. Except in emergencies or unusual circumstances confirmed by a telephone call or other means, no postponements shall be granted within two days of the scheduled hearing.
- (b) A continuance of a hearing may be ordered at the discretion of the hearing officer if:
  - (1) there is insufficient evidence upon which to make a decision;
  - (2) a party needs additional time to examine evidence presented at the hearing;
  - (3) the hearing officer considers it necessary to enter into evidence additional information or testimony;
  - (4) an in-person hearing is necessary for proper presentation of the evidence; or
  - (5) any other reason deemed appropriate by the hearing officer.
- (c) The hearing officer shall advise the parties of the reason for the continuance and of any additional information required. At the continuance, the parties shall have an opportunity to rebut any additional evidence.

#### **§823.23. 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. To be considered as evidence in a decision, any document or physical evidence must be entered as an exhibit at the hearing. 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 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.
- (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 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.

#### **§823.24. Hearing Procedures**

- (a) General Procedure. All hearings shall be conducted de novo. The hearing shall be conducted informally and in such manner as to ascertain the substantial rights of the parties. The hearing officer shall develop the evidence. All issues relevant to the appeal shall be considered and addressed.
  - (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 Witnesses and Parties. 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 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 an expulsion, the hearing officer may proceed with the hearing and render a decision.

(b) 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 or state law.
- (3) Confidentiality of information contained in the hearing record shall be maintained in accordance with federal and state law.

**§823.25. Withdrawal of Complaint or Appeal**

A party may request a withdrawal of its own complaint or appeal at any time before a final Agency decision is issued. The hearing officer may grant the request for withdrawal in writing and issue an order of dismissal.

**§823.26. 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 decisions.
- (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 or Board decision on appeal. Any party may present facts to the Agency in support of a request to disqualify a hearing officer.
- (c) A 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.

#### **§823.27. 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 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.

### **SUBCHAPTER D. AGENCY-LEVEL DECISIONS, REOPENINGS, AND REHEARINGS**

#### **§823.30. Hearing Decision**

- (a) Following the conclusion of the hearing, the hearing officer shall promptly issue a written decision on behalf of the Agency.
- (b) The Agency decision shall be based exclusively on the evidence of record in the hearing and on matters officially noticed in the hearing. The Agency 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 a determination or Board decision.
- (c) Unless a party files a timely motion for rehearing, the Agency may assume continuing jurisdiction to modify or correct a hearing decision until the expiration of 14 calendar days from the mailing date of the hearing decision.

#### **§823.31. Motion for Reopening**

- (a) If a party does not appear for an Agency hearing, the party has the right to request a reopening of the hearing within 14 calendar days from the date the Agency decision is mailed.
- (b) The motion 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 it appears to the hearing officer that the party has shown good cause for failing to appear at the hearing.

**§823.32. Motion for Rehearing and Decision**

- (a) A party has 14 calendar days from the date the decision is mailed to file a motion for rehearing. A rehearing may be granted only for the presentation of new evidence.
- (b) Motions for rehearing shall be in writing and allege the new evidence to be considered. The appellant must show a compelling reason why this evidence was not presented at the hearing.
- (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 decision following the hearing.
- (e) The hearing officer may also issue a decision denying a motion for rehearing.

**§823.33. Finality of Decision**

- (a) The decision of the hearing officer is the final decision of the Agency after the expiration of 14 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 a 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 14 calendar days from the mailing date of the decision, modification, or correction.