

Chapter 801. Local Workforce Development Board.
§ 801.2 Waiver Requirements.

Part XX. Texas Workforce Commission
Chapter 801. Local Workforce Development Boards

40 TAC §801.2

The Texas Workforce Commission adopts new §801.2, concerning waivers which may be granted regarding service delivery, board staffing and developmental services, with changes to the proposed text as published in the January 26, 1996, issue of the Texas Register (21 TexReg 654).

The Workforce and Economic Competitiveness Act, as amended by Chapter 655, Acts of the 74th Legislature, 1995, requires the Commission to establish rules for the formation of local workforce development boards to plan and oversee the delivery of all workforce training programs in local workforce development areas. The Act restricts the delivery of workforce training and services developmental services and requires that local workforce development boards have an independent staff. The rule will permit boards to request waivers on one or more of the three statutory prohibitions if the board can show that a waiver is necessary for the delivery of workforce training programs in the local workforce development area. The Commission held a public hearing on the proposed rule on February 14, 1996. Oral comments received at that hearing were replicated in substance within the 48 written comments received.

The Legislature, in providing for a new integrated workforce development system, has imposed certain prohibitions on local workforce development boards, but required a system for obtaining waivers. These rules establish the system for obtaining these waivers from the Texas Workforce Commission. Only under exceptional circumstances will such waivers be allowed.

The Commission acknowledges that private industry councils (PICs) under the federal Job Training Partnership Act (JTPA) have fewer restrictions on their activities with regard to intake and eligibility determination, and also with regard to the provision of workforce training and services, than do workforce development boards under state law. However, workforce development boards, which serve as private industry councils, must abide by the state imposed restrictions. Private industry councils that wish to retain their flexibility under federal regulations and that choose not to become local development boards may not exercise any of the additional power and authority granted to a local workforce development board under state law.

The following parties submitted written and/or oral comments prior to or following publication of the proposed rule: John D. Baker, Texas Workforce Development Network; Don A. Balcer, Regional Administrator, U.S. Department of Labor; Jimmie Bender, People for Progress, Inc.; Bruce P. Bower, Houston Welfare Rights Organization; Rodney Bradshaw, Houston-Galveston Area Council; Michael Carr, Executive Vice President, Deaf Smith County Chamber of Commerce; Preston Combest, County Judge, Camp County; Vernon Cook, County Judge, Roberts County, and Chairman, Board of Directors, Panhandle Regional Planning Commission; Walter G. Diggles, Texas Association of Regional Councils; Susan Duecy; Paul Edwards, Middle Rio Grande Development Council; Ricky Fritz, County Judge, Scurry County; Rey Garcia, Texas Association of Community Colleges; John Garth, Central Texas CEO Consortium Board; Gladys Gerst, City Council Member, City of Sweetwater; Edward Hamilton, President Amarillo Mastercraft Industries, and Chair, Panhandle Private Industry Council; Dane Harris, President, Texas Association of Business & Chambers of Commerce; Ron Harris, County Judge, Collin County; Gilberto Hinojosa, Cameron County Judge; Tommy Honeycutt, County Judge, Lampasas County; Lee F. Jackson, County Judge, Dallas County; Kim Kerchoff, Texas Association of

Regional Councils; Glynn Knight, East Texas Council of Governments; Laurie Boullion Larrea, Private Industry Council of Dallas, Inc.; Joe McComb, County Commissioner, Nueces County; Bob McPherson, Center for the Study of Human Resources, The University of Texas at Austin; Alan Miller, Austin/Travis County Private Industry Council; Frances Monk, President-elect, South East Texas Regional Planning Commission and Mayor-Pro Tem, City of Port Neches; David P. Mooney, Chairman, East Texas Private Industry Council; Cynthia Mugerauer, Acting Executive Director of the Texas Council on Workforce and Economic Competitiveness; Representative Reno Oliveira, Chairman, House Economic Development Committee; Tom Patterson, Amarillo Chamber of Commerce; David N. Perdue, County Judge, Knox County and President, Texas Association of Counties; Larry Phillips, President, Angelina College; Sandra Pickett, City of Liberty; Burton Raiford, Texas Department of Human Services; Willis Smith, County Judge, Lipscomb County and Chair, Board of Directors Panhandle Job Training Consortium; Jack Steele, Houston-Galveston Area Council; Marcia Strieber, Workforce Development Board of Central Texas; Mike Temple, President, Texas Workforce Association; Texas Legal Services Center; Carl K. Thibodeaux, County Judge, Orange County; Carol Thomas, Permian Basin Private Industry Council; Tom Vandergriff, County Judge, Tarrant County; Joe Frank Wheeler, Executive Vice President, Borger Chamber of Commerce; George Wilkins, Secretary-Treasurer, East Texas Council of Governments; Lee E. Williams, County Judge, Wood County; and Linda Williamson, Texas Department of Commerce.

Several commenters urged that the proposed language with regard to independent staffing, "the board's staff may not be employed by, or provide services to, any other person in conflict with the board's duties and function under the Act," was in contravention of the legislative intent of House Bill 1863 to give control of workforce programs to locals. The Commission did not intend to tie the hands of local workforce development boards as to the employment of staff by the phraseology used in the proposed rule. The language was intended to ensure that the board's staff was accountable only to the board. Therefore, the proposed language was struck and replaced by language closely resembling language suggested by one commenter that more clearly states the agency's position.

Several commenters argued that the proposed language, "the board's staff may not be employed by, or provide services to, any other person in conflict with the board's duties and functions under the Act," is vague and ambiguous. The Commission replaced the objectionable language with a sentence that more clearly states the agency's position.

Several commenters argued that the same language regarding independent staffing would lead to the creation of new administrative entities and would thereby lead to administrative inefficiency. The Commission replaced the offending language with other language that better states the agency's position.

One commenter noted that the legislation limits its explanation of the independent staffing requirement even though it is clear that if the statutory independent staffing requirement was only intended to ensure separate service provision, then the separate service provision waiver would be sufficient. Therefore, the commenter suggests that the independent staffing provision should clarify that staff would not be independent if the staff reports to an entity other than the board, regardless of whether that other entity provided services. The Commission agrees that the statutory intent of the independent staffing provision is to have the board's staff be accountable to the board, and not another entity.

Another commenter urged that the Legislature's intent with the independent staffing provision was to ensure that the board's staff would be protected from undue influence by another entity. The Commission agrees and has attempted to ensure that a board's staff will remain accountable to the board.

One commenter suggested that when the staff of a private industry council is

provided by a separate administrative entity it prohibits the staff from acting autonomously. The commenter suggested that the rules should ensure that a board have an autonomous staff. The Commission agrees and has addressed this concern by requiring that boards ensure the accountability of their staff through employment policies or contractual provisions.

One commenter noted that the issue of independent staffing could be addressed in the CEO-Partnership agreements to assure independent staffing and not the establishment of a separate local entity in a constrained funding environment. The Commission agrees in principle that the accountability of a board's staff may be addressed in an appropriate document; thus, the Commission modified the language with regard to the independent staffing provision so that boards may ensure accountability through contractual provisions or employment policies.

One commenter maintained that, in the real world, staff must serve both the board and the chief elected officials, and some provision in the rules for "equal" staff support to both significant partners should be included. The Commission believes that it has addressed the concerns of the Legislature that boards' staff be independent of any other entity by requiring that boards ensure accountability of their staff through employment policies and contractual provisions.

One commenter argued that independent staffing was an important safeguard of the new system which would ensure independence and avoid split loyalties. The Commission agrees and has tried to address this concern in the waiver rules with regard to independent staffing.

Several commenters noted that state rules restrict the staff of a local board from providing intake eligibility and assessment, but that the federal Job Training Partnership Act (JTPA) does not restrict private industry councils from providing those services. The Commission acknowledges that private industry councils have fewer restrictions on their activities with regard to intake and eligibility determination, and also with the provision of workforce training and services. However, workforce development boards, which serve as private industry councils under the JTPA, must abide by the state imposed restrictions. Private industry councils that wish to retain their flexibility under federal regulations and that do not become local workforce development boards may not exercise any of the powers granted to a local workforce development board under the Act. The Commission believes the legislature provided for local areas to have the option to form a board and comply with the state requirements or continue as a private industry council under JTPA.

One commenter suggested that the definition of "one-stop" services would put current one-stop centers, operating under a pilot program by the Department of Labor, out of compliance with the rule. The Commission believes that the definition of "one-stop" services, which substantively includes the services required of a Career Development Center under House Bill 1863 and Senate Bill 642, will have no effect on the DOL "one-stop" pilot centers. Although some areas may form boards and subsequently modify the services at a pilot center to comply with the statutory requirements of a Career Development Center, the waiver rules do not apply to centers that are not operated as Career Development Centers by a workforce development board.

One commenter suggested that the definition of "one-stop" services could be interpreted as an exclusive list, as opposed to an inclusive list. The Commission has clarified that the definition of "one-stop" services available at a Career Development Center is an open-ended list by using the phrase "including, but not limited to".

One commenter remarked that the definition of "one-stop" services as proposed suggested that the Career Development Center must provide support services, loans and the like, under subsection (b) (3) (D). The commenter suggested that the definition should include "access to, or information about support services" The Commission believes that the definition of "one-stop" services in the

proposed rule substantively tracks the language used in the statute to determine those services which must be provided at a Career Development Center.

One commenter urged that the Commission not define the term "one-stop" services but rather use the term Career Development Center. The Commission agrees that the term "one-stop" has come to mean many things to many people; however, the statute prohibits a person who provides "one-stop" services at a Career Development Center from also providing developmental services. Further, there is no statutory definition of "one-stop" services. Accordingly, the Commission believes that it is necessary to define the term "one-stop" services in order to more clearly define the services that must be kept separate.

One commenter noted that a definition of developmental services was needed. The Commission agrees and added such a definition.

Several commenters suggested that time limits on the submission and consideration of a waiver request should be included in the rule. The Commission believes that each set of circumstances with regard to a waiver request will be unique and must be given due consideration, without the constraints of a rigid timetable.

One commenter asserted that the term "proposals" should be used instead of the term "bid" in the list of information to be submitted with a waiver request. The Commission agrees that use of the word proposal is better, so the word "bid" has been replaced with "proposal."

One commenter noted that the law does not prohibit a state agency from submitting a response to a request for proposal, and that the re-wording of subsection (f)(2)(A) to read "documentation of the process used to notify the public, state agencies, and other interested parties of the solicitation..." would make clear that state agencies may submit proposal without suggesting that the TWC could override a waiver request by becoming a service provider. The Commission agrees that the statute does not expressly prohibit a state agency from responding to a request for proposal; however, the Commission has determined that the issue of the agency's provision of services is best dealt with elsewhere. Accordingly, the request for information regarding the TWC's ability to provide services was struck from the rule.

Several commenters objected to requiring a request for waiver to address whether the Texas Workforce Commission (TWC) is able to provide the needed services in the area. It is argued that this sets up a conflict of interest, that it would preclude the granting of any waivers, that TWC should have to compete in the proposal process, that TWC has no demonstrated performance in the new style system, and that ambiguous lines of authority would be created. The proposed request was for information regarding the ability of the TWC to provide needed services in areas in which no satisfactory service providers responded to the board's request for proposal. However, the Commission has determined that the issue is more properly addressed elsewhere rather than by including it in the list of information to be submitted with a waiver request. Accordingly, the item was deleted from the proposed rule.

One commenter opined that whether TWC is able or willing to provide particular services in a given area should be an agency-based decision and recommended that the information regarding TWC's ability to provide services be struck from the requested information submitted with a waiver request. The Commission has determined that information regarding the TWC's ability to provide services for a board is better addressed elsewhere. Accordingly, the request for information was struck from the list.

One commenter remarked that the rules need to provide general guidance concerning which items would be of primary interest in the review of a waiver request. The Commission anticipates that all factors will be considered equally and that each area's unique set of circumstances will be viewed in totality to determine the need for a waiver. Therefore, no one factor, nor any prioritized list of factors, will be determinative of a waiver request.

One commenter was concerned as to what constitutes a "material change in circumstances" that the Commission might reconsider a waiver. A material change in circumstances is generally held to be the acquisition of new or different information that a reasonable person would have considered material in the outcome of his decision-making process. The Commission believes that it should retain jurisdiction over the grant of a waiver, in the event that a material change of circumstances would make the waiver unnecessary. However, the Commission recognizes that new information would not necessarily warrant the withdrawal of a waiver in the middle of a program year.

One commenter raised several questions about potential conflicts between federal law and the proposed rules, or underlying state law. He urged that extra state law requirements not necessarily affect the status of a private industry council (PIC) that meets federal law requirements. He also urged that rules address training requirements to avoid conflicts. The Commission agrees that private industry councils have options which are not available to boards that assume the functions of private industry councils under the JTPA. However, areas that wish to retain the options available to a private industry council may choose not to form a local workforce development board. The issue of board training is being addressed through administrative channels within the TWC.

Two commenters expressed support for the proposed rule as written.

One commenter requested that the Commission assure that service deliverers make services available to all segments of the population including those most needy. The commenter urged the Commission to establish measures to ensure the delivery of effective education, training and job placement services and further urged the Commission to hold service providers strictly accountable to those measures. The Commission agrees that service deliverers must be held accountable for the appropriate delivery of services to all segments of the population. However, the waiver rules address a different aspect of the board's functions. Performance measures will be addressed elsewhere.

Several commenters noted that local areas need planning money to begin the process of developing local workforce boards and also that there needs to be a transition period available for the smooth transfer of programs from the current system to the new locally driven system. The Commission agrees and will address the planning money issue in another forum. In addition, the Commission recognizes that waivers may be necessary in some instances to allow areas to transition to other service providers.

One commenter suggested that waivers of separate service provision for workforce training and services and for developmental services be considered illegal unless the local community college in the service area cannot provide service delivery in the most cost-effective manner. The Commission believes that the statute provides for the grant of a waiver from any of the stated prohibitions in an appropriate circumstance, to be determined by the Commission.

One commenter recommended that no waivers be granted except in extreme circumstances and further that the Commission may recommend a "one-time waiver not to exceed one year." The Commission agrees that waivers should be the exception, not the rule; however, the statute clearly permits the granting of a waiver if circumstances warrant. Accordingly the Commission believes that the waiver rule addresses the concern that waivers require exceptional circumstances and that waiver must be limited in duration.

One commenter objected that the "workforce training and services" was defined too broadly, and does not track the statutory definition. The commenter argues that intake, eligibility and assessment functions are operational functions and should not be considered part of the "training and services programs" in the statutory definition of "workforce training and services." The Commission changed the proposed definition of "workforce training and services" so that it now reads like the statutory definition. However, the Commission created a definition for operational functions to clarify that some services that the

board cannot provide without a waiver are operational functions and not "workforce training and services."

One commenter requested that the Commission adopt a provision in the waiver rule requiring that a local board that receives a waiver be required to provide public notice of the waiver, including an expiration date. The commenter argued that notice would provide information to interested parties who may wish to develop additional capacity in a local area. The Commission believes that the rule as written requires that a local board submit information regarding the public process used to determine whether a qualified alternative provider exists in the local workforce area. The Commission feels that this process will provide notice in the region that the board is seeking a waiver of one of the statutory prohibitions. Further, the Commission has restricted waivers to no greater than the term of one plan which will require that a local board again conduct a public request for proposal for the next planning cycle.

One commenter suggested that the rule require that waiver requests be submitted in conjunction with submission of the local plan. The Commission believes that the rule as written better serves the planning process. The rule permits a board to seek a waiver request at any time in its planning process. Therefore, if a board would like to conduct public request for proposal prior to formulating its local plan, it may do so.

One commenter suggested that in some instances a board may need to submit a waiver request after a plan is in place; therefore, the Commission should delete the portion of that rule stating "in the board's planning process." The Commission believes that such a change from the approved plan will be dealt with as a modification or amendment to the plan.

One commenter suggested that the Commission use the definition of "workforce services" as previously used by the Texas Council on Workforce and Economic Competitiveness. The Commission has chosen to use the definition of "workforce training and services" as it is defined in the Act, because it works best within the framework of the proposed waiver rule.

One commenter noted there was no reference to an appeal process should a waiver be denied, and suggested that if there is no opportunity to appeal the Commission decision, that a statement be included in the rule that the Commission decision is final. The Commission agreed with this comment and added the provision that the Commission's decision on a waiver request shall be final.

The new section is adopted under Texas Civil Statutes, Labor Code, §302.063, as amended by Chapter 655, Acts of the 74th Legislature, 1995, which direct the Texas Workforce Commission to develop objective criteria for the granting of waivers under Texas Civil Statutes, Government Code, §§2308.264, 2308.267, and 2308.312.

No other statute, article or code will be affected by this rule.

§801.2. Waiver Requirements.

(a) Purpose of Rule. The Workforce and Economic Competitiveness Act, §§2308.264, 2308.267, and 2308.312, Government Code, Vernon's Texas Civil Statutes, Annotated, sets forth prohibitions regarding service delivery, board staffing, and developmental services. Only under exceptional circumstances will waivers from such prohibitions be allowed. The Commission's decision on a waiver request shall be final.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings unless the context clearly requires otherwise:

(1) Board-A local workforce development board as created under the Workforce and Economic Competitiveness Act.

(2) Developmental services-Program services designed to increase a participant's basic education and skill level, including adult basic education courses, GED preparatory courses, adult literacy programs, and occupational skills training.

(3) One-Stop services-Services provided at a Career Development Center established by a board, including, but not limited to:

(A) access to labor market information in the workforce area;

(B) individual education, training, and employment referral services;

(C) independent assessment of individual needs and the development of an individual service strategy;

(D) centralized and continuous case management and counseling;

(E) support services, including, child care assistance, student loans, and other forms of financial assistance required to participate in and complete training;

(F) uniform eligibility determination of state and federal benefit programs, including Food Stamp Employment and Training and unemployment insurance benefits; and,

(G) other employment services, such as job readiness seminars, life skills programs, and job search seminars.

(4) Operational functions-Intake, eligibility determination, assessment, and referral.

(5) Person-Any individual, sole proprietorship, partnership, corporation or other legal entity.

(6) Workforce development-Includes workforce educational programs and workforce training and services.

(7) Workforce education-Articulated career-path programs and the constituent courses of those programs that lead to initial or continuing licensing or certification or associate degree-level accreditation and that are subject to:

(A) initial and ongoing state approval or regional or specialized accreditation;

(B) a formal state evaluation that provides the basis for program continuation or termination;

(C) state accountability and performance standards; and

(D) a regional or statewide documentation of the market demand for labor according to employers' needs.

(8) Workforce training and services-Training and services programs that are not "workforce education".

(c) Independent Service Delivery. A board is prohibited from directly

providing workforce training and services. A board is prohibited from directly providing operational functions.

(d) Separate Staffing. A board may employ professional, technical and support staff to carry out its strategic planning, oversight, and evaluation functions. The staff employed by the board must be employed separately and independently of any person that provides workforce training and services. The independent nature of the board's staff shall be ensured through employment policies or contractual provisions.

(e) Developmental Services. A person who provides "one-stop" services at a Career Development Center may not also provide developmental services. Persons seeking developmental services must be referred to the full range of services available in the region and must not be unduly influenced to participate in any training services made available by a particular provider.

(f) Requesting a Waiver of the Requirements.

(1) The board may submit its written request for a waiver under subsection (c), (d), or (e) to the Commission at any time in the board's planning process, including at the time of submission of the strategic plan.

(2) A request for a waiver of any of the requirements under subsection (c), (d), or (e) must contain the following:

(A) A detailed justification for the waiver, including, but not limited to:

(i) cost-effectiveness;

(ii) prior experience;

(iii) geographic and budgetary considerations;

(iv) availability of qualified applicants; and,

(v) a detailed proposal for the provision of such services should a waiver be granted.

(B) Documentation of the process used to solicit proposals for the provision of necessary services, including, but not limited to:

(i) the process used to notify the public and interested parties of the solicitation of proposals for the provision of necessary services;

(ii) details regarding any proposals or inquiries received as a result of public notice and solicitation for proposals, including responses given to any inquiries received;

(iii) criteria used to evaluate any proposals received; and,

(iv) methodology used to determine the lack of any existing qualified alternative.

(g) Duration of Waiver.

(1) A waiver may be granted for a period less than, but not to exceed, the effective term of an approved plan and budget.

(2) A waiver may be conditioned upon the board's completion of measures taken to eliminate the need for a waiver.

(h) Changed Circumstances. If the Commission becomes aware of a change in circumstances materially affecting its decision to grant a waiver, the Commission may review its decision and require the board to submit information regarding the continued need for the waiver.

This agency hereby certifies that the adoption have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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