

Chapter 800. General Administration.

Subchapter D & E. §§800.101, 800.102, 800.112-800.115, 800.118-800.119, 800.151-800.152, 800.161, 800.171-800.177, 800.181-800.182, 800.191

Workforce Development Incentives and Sanctions Rule.

TITLE social-services-and-assistance

Part XX. Texas Workforce Commission

Chapter 800. General Administration

Subchapter D. Incentive Award Rules

The Texas Workforce Commission (Commission) adopts new §§ 800.101, 800.102, 800.112-800.115, 800.118, 800.119, 800.151, 800.152, 800.161, 800.171-800.177, 800.181, 800.182, and 800.191, concerning the Incentive Award and Sanctions Rules with changes to proposed text as published in the January 9, 1998, issue of the *Texas Register* (23 TexReg 340). The changed sections, §§800.101(b), 800.102, 800.112, 800.113, 800.114, 800.119, 800.152, 800.161, 800.172, 800.174, 800.175, 800.177, 800.181, 800.182, 800.191, will be republished here.

One of the primary goals of the Commission is to administer twenty-eight workforce programs in Texas. In order to meet that goal, the Commission proposed Incentive Award and Sanctions Rules to assist local programs in meeting performance requirements and encouraging a high level of performance.

The rules provide for an adjustment model to be used to adjust the incentive measures for local conditions. The methodology proposed is based on the experience and logic of a model used by the federal government in a workforce training program. The methodology is based on a statistical technique called multiple regression analysis which addresses the relationship between the outcome and several explanatory factors. The relationship with each explanatory factor is determined while taking into account its relationship with all the other factors. Each adjustment weight represents how much the outcome can be expected to change with a one-unit change in an explanatory factor, while holding the other explanatory factors constant. The influence of a set of explanatory factors can be determined by summing the influence of each explanatory factor.

Economic factors in the local areas which may be considered in the adjustment model include unemployment rate, three-year growth of earnings in retail and wholesale trade, annual earnings in retail and wholesale trade, employment in manufacturing, agriculture and wholesale trade, population density, percentage of families below the federally established poverty level, and employer/resident worker ratio. The data sources for the local economic factors are calculated from Bureau of Labor Statistics and Bureau of Census reports. Client characteristics which may be considered include the percentage of two-parent Temporary Assistance to Needy Families (TANF) families, education level, length of time on the welfare roll, gender, age, and ethnic groups.

The adopted rules describe procedures used by the Commission to provide incentive awards. Section 800.101 states that the purpose of the incentive award rules is to recognize Local Workforce Development Boards (boards) which have achieved high levels of performance. Section 800.102 defines terms used in the incentive award rules. Section 800.112 lists the criteria used by the Commission in making incentive awards. Section 800.113 describes the non-monetary awards which may be made by the Commission. Section 800.114 describes the possible monetary awards. Section 800.115 lists the factors considered by the Commission and a method of calculation used by the Commission to adjust incentive measures to ensure that the local conditions of each board are taken into consideration in the granting of incentive awards. Section 800.118 describes the distribution of incentive awards. Section 800.119 describes the requirements in the use of incentive award funds.

The adopted rules also describe the sanctions which may be imposed by the Commission in the case of violations. Section 800.151 states that the purpose of the rules is to increase the accountability of the boards and to ensure that performance requirements are met. Section 800.152 defines terms used in the sanctions rules. Section 800.161 describes the preventive maintenance provided by the Commission in the form of technical assistance, program and fiscal monitoring, as well as quality assurance reviews. Section 800.171 lists some possible Level One sanctions that may be imposed by the Commission. Section 800.172 lists some possible level two sanctions. Section 800.173 lists some possible level three sanctions. Section 800.174 lists some violations that might subject a board to Level One sanctions. Section 800.175 lists some violations that might subject a board to level two sanctions. Section 800.176 lists some violations that might subject a board to level three sanctions. Section 800.177 describes program specific sanctions. Section 800.181 describes the procedures used by the Commission to enforce the sanctions. Section 800.191 describes appeal procedures.

Some commenters were for the rules while others were against the rules. Comments were received from the following organizations: the Workforce Development Board of Central Texas, the West Central Texas Workforce Development Board, the North Central Texas Workforce Development Board, Inc., Dallas County Local Workforce

Development Board, Tarrant County Workforce Development Board, Capital Area Workforce Development Board, Texas Legal Services Center, and Lockheed Martin IMS. Following each comment is the Commission's response. Comment: One commenter stated that she had only positive comments to make regarding the proposed rules. The commenter stated that the intent was well defined and that the proposed rules made good business sense. The commenter asserted that the rules utilize standardized performance measures parallel to those used previously in other programs. These previously used measures have proven very effective in planning and utilizing resources in the commenter's region. The commenter stated that the number of measures was reasonable and attainment clearly described.

Comment: One commenter pointed out that §800.101(b) which states that the rule incorporates the existing rule for performance standards for the Job Training Partnership Act (JTPA) program seems unclear and could be interpreted to mean that JTPA standards are "subsumed" by this rule and will cease to exist following its adoption. The commenter suggests a clear statement that JTPA standards will remain in force and that these rules complement those JTPA standards would solve this problem.

Response: The Commission agrees to clarify the proposed rule by revising it to read *"This rule incorporates by reference the existing rule for performance standards for the Job Training Partnership Act Program . . ."* The proposed rules do not supersede the JTPA rule nor do they replace it or declare it null and void.

Comment: Regarding §800.112(a)(4), one commenter asserted that this section should be revised for syntax. The second sentence in this item should be a separate paragraph of its own since it appears to apply to all parts of this section. The commenter suggested renumbering it as §800.112(a)(5).

Response: The Commission agrees that the sentence should be a separate paragraph. This sentence is a new subsection (b) and the subsequent section is renumbered appropriately.

Comment: Two commenters stated that §800.112(a)(4), which is the Caseload Reduction outcome measure, should be revised for reasons of content. The commenters suggested revising the paragraph to permit caseload reduction as an outcome measure to the extent that it reflects true economic improvement, resulting in people advancing out of poverty. Another commenter recommended that the Caseload Reduction outcome measure be deleted.

Response: The Commission disagrees that the Caseload Reduction outcome measure should be revised or deleted. The measure as defined is compatible with the definition of caseload reduction factors contained in the Personal Responsibility and Work Opportunities Act of 1996. The measure enhances the state's ability to meet federal work participation rates. The Commission therefore declines to revise the rule.

Comment: Regarding §800.112(a)(4), one commenter suggested that this section would more easily reward boards serving smaller populations since it is easier for them to achieve a given percentage reduction. This commenter suggested that tying caseload reduction to economic improvement, before granting an award based on caseload reduction, will level the field of competition. The commenter asserted that this will also serve as an incentive to boards to foster real economic progress as a part of caseload reduction.

Response: The Commission disagrees that this section would reward boards serving smaller populations. The adjustment model provides for a level playing field by calculating adjustments to the standards set out in §800.112. The adjustments are based on economic factors and client characteristics. The Commission believes that utilizing this adjustment model will put all boards on the same playing field.

Comment: Regarding § 800.113(d), one commenter asked if entities other than boards are eligible for monetary or non-monetary incentives.

Response: The Commission agrees to clarify this section. The reference to *"...or center..."* has been removed. The rules apply to boards only.

Comment: Regarding § 800.114, one commenter asked if it was the Commission's intent to award monetary incentives based on only one goal, rather than the outcome measures included in the rule and referenced in § 800.113, "Non-Monetary Incentive Awards."

Response: As stated in §800.114, the Commission will give priority to boards that achieve high performance in serving targeted populations when awarding monetary incentives for high performance. The Commission will award monetary incentives to as many as five boards who demonstrate high performance in serving that targeted population. The Commission will also award non-monetary incentive awards to the five top performers in any one of the four specified outcome measures listed in §800.112. The Commission has revised this rule to clarify the intent.

Comment: Regarding §800.114, a commenter believes it would be more beneficial to the State as a whole if all twenty-eight boards were eligible for financial recognition based on surpassing their own predictive standards.

Response: The Commission agrees that it could be more beneficial if all twenty-eight boards were eligible for incentives based on exceeding their own predicted standards. However, given the limited amount of funds available

to award monetary incentives, this is not feasible. The method of distribution in the rules will provide for a more effective use of these funds.

Comment: Regarding §800.114, a commenter asserted that there needs to be assurance that sanctions in one program do not lead to penalties in another.

Response: It appears that the commenter was making a general comment. Section 800.114 addresses Monetary Incentive Awards rather than Sanctions. While this policy does apply to all Commission-administered workforce development programs, the Commission recognizes the unique performance requirements within each program. The Commission can assure that meritorious performance within individual programs will not be adversely affected by poor performance in another program.

Comment: For §800.115, one commenter questioned what adjustments of local factors would be made that could reliably level the playing field for all workforce development areas wanting to receive an incentive, and recommended that the Commission perform such an analysis using current conditions.

Response: An adjustment model, based upon the methodology utilized by the JTPA economic adjustment model, has been developed. It will be applied using client characteristics and local economic conditions that exist during the performance period. The Commission believes that this adjustment model levels the playing field among areas that exhibit a wide range of economic conditions and client characteristics. This preamble is not the appropriate place for the details of the adjustment model. The Commission will distribute a guidance letter that will describe the adjustment model in detail.

Comment: Another commenter incorrectly referenced §800.115 in asking when and how an "SDA" accesses preventive maintenance services.

Response: The comment regarding accessing preventive maintenance services is addressed in the comments to §800.161.

Comment: Regarding §800.119, three commenters stated the need for a definition or examples of innovative workforce investment activities and requested that boards be allowed more control over the expenditure of incentive funds. A fourth commenter asked the Commission to provide examples of appropriate use of the incentive funds.

Response: The Commission agrees that this rule should be revised to give the boards more control over the expenditure of incentive funds. House Bill 1863 envisioned the boards designing creative programs that fit the unique characteristics and needs of their individual workforce development areas. In line with the Commission's commitment to local control, the phrase "as approved by the Commission" has been deleted and the phrase "as allowed by state and federal laws" has been substituted.

Comment: Regarding §800.152, one commenter asked whether the performance standards are those included in federal legislation and whether they would be established by the Texas Council for Workforce and Economic Competitiveness (TCWEC) or the Commissioners. The commenter also asked if the standards will include the requirements in Commission contracts with the boards. A second commenter stated that it is unclear why TCWEC has a role in imposing sanctions.

Response: The Commission agrees to clarify this section. The definition for Performance Standard, at §800.152, is revised to read: *"The contracted numerical value setting the minimum acceptable result to be achieved for a performance measure."* In addition, §800.102 defines the outcome measures as the Workforce Development performance measures adopted by the Governor and developed and recommended through TCWEC. TCWEC's role in imposing sanctions is pursuant to state law, specifically the Texas Government Code.

Comment: Regarding § 800.161, one commenter stated that it seems appropriate for the Commission to be more explicit about how it will perform preventive maintenance activities.

Response: All preventive maintenance measures developed and implemented by the Commission will be designed to assist boards in their efforts to meet performance requirements and to ensure fiscal accountability. Technical assistance will focus on sharing information and best practices to assist the boards with program and fiscal issues. Ongoing program and fiscal monitoring will provide analyses of strengths and weaknesses for continued progress or immediate solutions to operational problems. Quality Initiative staff will identify quality indicators to combine with training initiatives to develop and maintain high performance. All these measures are ongoing and available to meet the specific needs of each individual board.

Comment: Regarding §800.161, another commenter asked when and how does an "SDA" access preventive maintenance (this commenter incorrectly referenced §800.115).

Response: This rule applies to boards. The Commission will provide technical assistance to the boards as the Commission determines necessary. Additionally, the Commission will conduct the preventive maintenance measures described throughout the year. The boards may request that the Commission provide preventive maintenance services.

Comment: Regarding § 800.171, one commenter requested that the requirement for a board to participate in technical training and quality assurance workshops designated by the Commission should be extended to also apply to board contractors.

Response: The Commission is committed to the idea of local control embodied in House Bill 1863. The purpose of sanctions, as stated in the Scope and Purpose section, is to ensure accountability of boards. The boards are accountable for the actions and performance of their subcontractors. The board may require the subcontractor to participate in technical training and quality assurance workshops. However, as the Commission has no direct relationship with the board's subcontractor, the Commission may not require such participation. The Commission therefore declines to revise this rule.

Comment: Regarding §800.171, one commenter stated any final determination of disallowed costs should be predicated upon the due process afforded under the contract with the Commission and references §31 of the contract. The commenter suggested that this section be clarified to state that costs will be examined and audited under the normal process, and final determination of disallowance will provide for the negotiation of appeal, off-set or final repayment.

Response: The proposed rules provide for ample opportunity to provide information to the Commission prior to any decision to disallow costs. In addition, the rules provide for an appeals process in §800.191. The procedure described within the comment is reflective of procedures used within the JTPA program. These rules do not amend the JTPA rule and do not impact the JTPA process for resolving questioned costs. Regarding the reference to the contract, §31 of the contract simply provides a priority for recovery of funds after a determination that disallows funds has been made. For these reasons, the Commission declines to revise the rule.

Comment: Regarding §800.172(5), one comment was received stating that the wording appears to indicate that advance approval would be needed to implement required Commission actions. The commenter believes that this section indicates that Commission approval would be required in advance, before certain actions were taken by a board.

Response: The Commission agrees that this section needs clarification. To that end, this item is revised to read: *"implement actions required by the Commission to address the deficiencies;"*

Comment: Regarding §800.173, one commenter recommended inclusion of assurances that TWC will not deobligate money which has already been spent by a board trying to achieve expected performance levels, and a formula developed to determine how much money will be deobligated.

Response: Existing expenditures are subject to final approval during contract close-out. Deobligations will be based upon current contract funds and will not be dependent upon a formula. The Commission therefore cannot provide the assurance requested.

Comment: Regarding §800.173, a commenter recommended that boards be afforded more than five days' notice of intent to deobligate.

Response: The Commission agrees to afford the boards more than five days notice. To achieve consistency with the notice standards outlined in the board's contract with the Commission, the rule is revised to allow ten working days' notice.

Comment: Concerning §800.174, one commenter stated that it is unclear what "attain and/or maintain" means. The commenter questioned whether it is possible to "maintain" a participation rate determined only once a year.

Response: Performance standards and TANF participation rates will be reviewed by the state monthly. Each board is expected to attain and maintain contracted standards throughout the term of the contract. Section 800.174(1) and (2) is revised to read: (1) *failure to attain and maintain performance within 90% of established contracted standards;* (2) *failure to attain and maintain participation rates within 90% of established contracted standards;*

Additionally, §800.175(4) and (5) is revised to read: (4) *failure to attain and maintain performance within 75% of established contracted standards;* (5) *failure to attain and maintain participation rates within 75% of established contracted standards;*

Comment: Regarding §800.175(3), one commenter said that it is too restrictive to require that reported threats be rectified within 30 days. The commenter suggested that areas should be required to take appropriate action to ensure that threats are being addressed and that participants are not continuing to be exposed to such threats.

Response: The Commission believes that reported threats to health and safety must be investigated and if found valid, resolved quickly. When the health and safety of our citizens are at risk, quick resolution of the threat is essential. Therefore, the Commission declines to revise the rule.

Comment: Regarding §800.177, one commenter said that a reduction of up to 25% of an area's TANF allocation is too severe, that there is no clear indication of the nature of the technical assistance to be provided, and questions what TWC will do with recovered funds not used to provide technical assistance. The commenter also stated that imposition of this sanction could result in reduction of staff or disruption of service. The commenter also stated that

sanctions should be increasingly strenuous for continued failed performance and suggested that this area needs more development and discussion.

Response: The Commission is bound by the 1996 federal welfare law to meet certain participation rates. A consequence of failing to meet federal requirements is a severe statewide reduction of federal dollars. The Commission will consider any information provided by the board demonstrating that the reasons for not meeting federal requirements were not within the board's control. The amount of reduction for failure of a board to meet its targeted TANF participation rate for two consecutive quarters will not exceed 25% of the allocated TANF funding. The funds withheld will be used to provide assistance to the sanctioned board. The Commission has no other intended use for these funds. The specific technical assistance provided and the level of sanction imposed by the Commission will be based on the nature and severity of the failure(s). The Commission believes that the disruption in services due to the imposition of federal sanctions would be exceedingly severe and wants to ensure that the federal penalty is not imposed. The three levels of sanctions provide for progressively more severe sanctions that may be imposed for continued failure. The Commission therefore declines to revise the rule.

Comment: Regarding §800.177, a commenter stated that this section is problematic, due to the structural reasons that cause some areas of the State difficulty in meeting participation rates. The commenter stated that harm should not be visited on individuals who have no control over the structure of the economy. The commenter recommended the addition of language regarding allowing the boards to obtain reduction or remission of the sanction to the extent that the board shows that economic factors beyond its control in the Local Workforce Development Area are the reason for the nonattainment of the targeted participation rates. The commenter asserts that the board must cooperate with the Commission's reasonable efforts and proposals for improving the economic factors that impede attainment of the targeted TANF participation rate.

Response: The Commission reiterates that the state must meet certain participation rates imposed by the 1996 federal welfare law. If the state does not meet these federal requirements, the state will lose federal funds. The Commission will consider any information provided by the boards which demonstrates that the reasons for not meeting federal requirements were not within the board's control. Due to the requirements under federal law, the Commission declines to revise the rule.

Comment: One commenter asked that, regarding the 75% and 90% of established contracted standards, the contracts with the local boards be reviewed. The commenter stated that the goals listed in the contract differ from the goals in the rules. The commenter asked which goal will be the contracted standards with regard to the policy.

Response: Levels One, Two, and Three sanctions are based on the contracted measures. The rules specify that each board's performance must reach 75% and 90% of the established target range in the contract to avoid sanctions. To meet contract requirements, the board must satisfy the terms of the contract. Therefore, the Commission believes that there is no inconsistency between the proposed rules and the contracts.

Comment: Regarding §800.177, another commenter asked for clarification of the relevance of this section in relationship to the explanation of 90% or 75% for two consecutive quarters in level one, two and three sanctions. It also stated that deobligation should be based upon the same criteria as the proportionate failure within the two significant groups (all-families and two-parent families).

Response: Performance and participation rates will be reviewed by the state monthly. Section 800.177 takes effect only if TANF participation rates have not been met for two consecutive quarters, a period of six months. The Commission agrees that any reduction in the board's contracted TANF funds should be based on proportionate failure within the two significant groups. Funds subject to reduction will be the target-specific funds.

Comment: A commenter asserted that the sanctions policy does not provide for any process for negotiation, fair hearing prior to staff action, or an opportunity to cure, prior to the imposition of sanctions.

Response: Regarding a process for negotiation, fair hearing, or an opportunity to cure, prior to the imposition of sanctions, the rules provide for this process. Any reduction in funding imposed as a sanction will occur only if the board fails to meet targeted participation rates for two consecutive quarters. This allows six months for the boards to provide information to the Commission. The boards have two quarters to cure any deficiency. An appeals process is set out in the rules at §800.191.

Comment: Regarding §800.177, one commenter asked who would decide the deobligation amount and upon what factors this is determined.

Response: The Welfare Reform Division will recommend to the Executive Director the appropriate sanction to be imposed. The amount will be based on the extent of the failure. The boards will have an opportunity to provide information relevant to the recommendation.

Comment: Regarding §800.177, one commenter stated that a reduction of TANF funds by 25% is punitive and questions why the amount was 25%. The commenter asked why affect services to customers who have no role in performance. He asked what effect this would have on fixed costs.

Response: The rule states that the reduction will not exceed 25%; this amount is not a set amount. The state has no desire to reduce services to customers. Rather, it is the intent of this rule to utilize the sanctioned funds to assist the board in delivering services in a manner that meets federal requirements. The Commission envisions that customers will be positively affected by this rule. The Commission does not believe that there will be an effect on fixed costs. Comment: Regarding §800.177, one commenter asserted that boards may have to access non-federal funds and asked what happens if non-federal funds are insufficient. The commenter asked if local governmental partners would be affected. The commenter also asked why the state would add state staff that would have to monitor and process these reductions.

Response: The Commission has no interest in decreasing the amount of taxpayer dollars available to provide services to Texas residents. If successful, the boards will not have to access non-federal funds and local partners will not be affected. The Commission has no intention of adding staff to implement sanctions. The Commission intends to assist the boards in meeting their requirements. The consequence of the state failure to meet federal requirements is a severe reduction in federal dollars to the state. In order to ensure that federal dollars are not reduced, the Commission must do all it can to assist the boards in meeting those federal requirements. If a board is failing to meet the federal requirements, the Commission will work with the sanctioned board to overcome the failure.

Comment: Regarding §800.181, four commenters stated that sanctions should be imposed by the Commission rather than Commission staff, and that TWC should inform the Administrative Entity as well as the CEO and Board Chair.

Response: The Commission believes that contract issues should be administered by Commission staff. Therefore, the Commission Executive Director will impose sanctions for violations of the contract. As to notification, the Commission agrees that the board's executive director, chair, and the chief elected official should be notified. The Commission will notify the elected official designated to represent the chief elected officials. Determining whether notice should be sent to the Administrative Entity is a local decision for the board to make. The Commission will revise the rule to reflect that notice will also be sent to the board's Executive Director.

Comment: Regarding §800.181, a commenter stated that this section references the notice to include violation, the corrective action, and the impending sanction, and questions whether any agency, including TWC, would be able to address important issues, corrective action and have sanctions imposed without the benefit of response, guaranteed administrative process, and due process provided under the contract. This commenter also referred to the written notice sent at least five days in advance of the effective date of the sanction. The commenter also asserted that any notification of five days issued by staff could cause irreparable damage to a local program, clients and contractors.

Response: The rules provide an opportunity for the Board to respond to reported violations prior to the imposition of sanctions. Administrative process and due process are provided for throughout the period before the sanction is imposed. The master contract §11 pertains only to contract amendments made as a result of Commission policy decisions and does not apply to sanctions. An opportunity to respond, administrative process and due process are built in to the system. At each level in the process, the boards have an opportunity to provide information to the Commission. Additionally, the boards have an appeals process under these rules, as specified in §800.161.

Regarding the notice provisions, the Commission agrees to revise the proposed rules to allow ten working days.

Comment: Regarding §800.181, one commenter suggested that a ten working day notice be utilized for any significant issues requiring immediate action to preserve the integrity of the fund.

Response: The Commission agrees that ten working days should be provided and revises the rule to reflect the change.

Comment: Regarding §800.182(b), which refers to enforcement fees, two comments were received asking whether there will be enforcement fees.

Response: As the Commission has no enforcement fees, the Commission agrees to revise the rule. The reference to "enforcement fee" in § 800.182(b) is removed.

Comment: Regarding §800.182, one commenter suggested that adequate notification should not be faxed and recommended that only certified mail be used for any sanctions which affect funds.

Response: The Commission agrees. Any notice of sanctions will be sent certified mail, return receipt requested. Notification by facsimile transmission will be used for early notification. The rule is revised to reflect the change.

Comment: One comment received recommended that the policy be taken "back to the drawing board" and measured against current management practices used by highly successful private sector organizations.

Response: These rules have been under active development for over six months. Throughout the process, the comments and opinions of staff at local and state levels have been solicited and, where possible, incorporated. The rule development has included research on both national perspectives on performance measurements as well as state considerations for advancing the integrated local delivery system model outlined in House Bill 1863. The Commission believes that the implementation of these rules will support the goals of putting Texans to work and promoting local control.

Comment: A commenter stated that prohibition on the use of boards' contractors, currently a Level Two sanction, should be reclassified as a Level Three sanction. Due to the adverse impact on clients and employees and the severe disruption of service delivery, this sanction should be used only as a last resort. The commenter asserted that this reclassification would be in keeping with the intent of House Bill 1863 and its giving local control to the boards.

Response: As delineated in the proposed rule at §800.151, the sanctions rule serves to ensure the accountability of boards in meeting the needs of employers and job seekers, ensure performance in reaching outcome measures, ensure adequate returns on state investments and support the state in achieving its goals. The boards are in control of how services in their area are provided. If the boards' subcontractors are not performing, action must be taken. Considering the severe federal penalty, action must be taken quickly. Given the consequences, the Commission believes it is justified in maintaining its position on the stated sanctions.

Comment: One commenter asked if there is a provision for "SDAs" that are in the process of contracting out services, and whether there is a "grace period" to allow contractors to transition effectively.

Response: These issues are related to contract negotiations between the Commission and the boards and therefore not appropriate to these rules. Also, as stated earlier, the rules will apply to boards only.

Comment: One commenter stated that boards and their contractors need a method for monitoring (client) sanctions requested to ensure they are actually imposed by the Texas Department of Human Services (DHS). The commenter also stated that a standardized level of service and duties needs to be developed and enforced for DHS. The same commenter said that "SDAs" cannot be held accountable for the actions or inactions of DHS.

Response: The Commission agrees that DHS plays an essential role in correctly certifying individuals for TANF benefits and promptly initiating adverse actions when recipients fail to comply with work requirements. However, those requirements are contained in DHS policy. The board has the responsibility to work out local arrangements with DHS.

Comment: One commenter stated that TWC should separate administrative and performance violations and ensure that client services are not affected for administrative infractions.

Response: The tiered approach for levying sanctions provides the Commission with the flexibility necessary to preserve delivery of services to clients while the board is in the process of correcting a contract violation. The Commission is committed to giving control to the boards. While the Commission will work with the local boards, it is a board's responsibility to ensure that its subcontractor is complying with the contract between the board and the subcontractor.

Comment: One commenter stated that the determinations that there will be no fiscal implications or economic costs to persons who are required to comply with the proposed rules "is simply not true." The commenter asserted that deobligating an area's funds has fiscal implications.

Response: If a workforce area meets all requirements, there will be no negative impact. However, if it is necessary to impose sanctions due to failure to meet all requirements, there could be the possibility of a negative impact. The amount and nature of the impact would depend upon the nature and amount of the sanction and the conditions in the area. The Commission cannot predict the extent of any negative impact. Additionally, the award of incentives will have a positive impact on the area.

Comment: One commenter asked what would be done for Commission programs in non-board areas that fail participation rates for two consecutive quarters. The commenter recommended that if no sanctions are imposed, the incoming administrative board should have a full year to improve performance. Improvement should be relative to the condition of the program or programs upon receipt for all boards assuming failed programs. The commenter stated that this is equally true of boards receiving performing programs. Failure to perform after the board assumes responsibility for a previously performing program should not be allowed to continue for two consecutive quarters.

Response: Boards that receive control of failing programs will not be accountable for performance prior to assuming control of that program. It is the practice of the Commission to negotiate contract performance goals with the board, taking program status into account. Sanctions are not imposed until after two consecutive quarters of failed participation rates in order to provide the boards with an opportunity to cure the issue. Preventive maintenance, however, is done on a continuous basis throughout the contract year.

A comment was received concerning the absence of a statewide system for local performance management of the welfare programs and data.

Response: The Commission acknowledges this issue. The development of a comprehensive management information system is a priority project of the Commission; however, this preamble and these rules cannot provide the format for resolving the matter.

Comment: A commenter stated that a standardized level of service and duties needs to be developed and enforced for DHS. This should outline DHS' duties and obligations to the board and its contractors, along with specific deliverable time frames.

Response: The nature of this comment relates to a stipulated service level offered by a separate agency and not of the Commission. Therefore, this comment does not apply to the language of the Incentive and Sanction Rules. Thus, the Commission declines to respond.

Comment: A commenter stated that these rules should not be adopted at all. The commenter resented the suggestion that representatives volunteering to serve their community would work harder for a financial reward. The commenter stated that a "carrot and stick" approach is not what would improve participation rates in the TANF program across the state.

Response: The Commission has tremendous respect for every member of every board and recognizes that the motivation for service to the community does not hinge on an incentive award. The Commission seeks to recognize boards for outstanding service to their communities by employing practices which result in self-sufficient lifestyles for residents previously dependent on public assistance. The state's true reward is the successful transition of Texans off of public assistance. The severe federal consequences, however, require that the Commission do all it can to ensure that federal participation rates are met.

Comment: One commenter stated that performance must be based and measured on the activities that are within the complete control of the SDAs and/or contractors.

Response: The proposed rule has been crafted to do exactly this. Boards are in control of designing a unique system of delivery suited to their area. To that end, boards select contractors who can best deliver performance within that design.

As the Incentive Award and Sanctions Rules only apply to boards, the Commission has amended §800.191(a) by deleting "or subrecipients." This section will now read "*Boards may appeal the decision of the Commission.*"

40 TAC 800.101, 800.102, 800.112-800.115, 800.118, 800.119

The new rules are adopted under Texas Labor Code §301.061, which provides the Texas Workforce Commission with the authority to adopt, amend, or rescind such rules as it deems necessary for the effective administration of Texas Workforce Commission programs.

§800.101.Scope and Purpose.

(a)

The purpose of the incentive is to reward Local Workforce Development Boards (boards) that meet the stated goals of the Commission to increase the local control of workforce development programs and to put Texans to work. The board is responsible for providing strategic planning for the local area for all workforce development programs consolidated into the Texas Workforce Commission (Commission). The development of an integrated and coherent workforce development system at the local level is the primary focus of boards. Thus, this policy seeks to recognize boards for achieving high performance as a system, as well as high performance on behalf of the populations annually targeted by the Commission during the budget process. Incentives will emphasize accountability, high performance, continuous improvement and support the state in achieving workforce development goals.

(b)

This rule incorporates by reference the existing rule for performance standards for the Job Training Partnership Act Program cited in 40 TAC 805.160 through 40 TAC 805.165. State variation of performance standards established by the U. S. Department of Labor and/or state standards shall be published in the Texas Register on an annual basis in a numbered TWC Letter.

§800.102.Definitions.

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

(1)

Core Outcome Measures --Workforce Development Program performance measures adopted by the Governor and developed and recommended through the Texas Council on Workforce and Economic Competitiveness (TCWEC). TCWEC Core Outcome Measures have been adjusted to allow for a follow-up period of six months in lieu of the one year period established by TCWEC.

(2)

Earnings Gains Measure --The average earnings of persons employed during the post-placement follow-up periods (six months) compared to the average earnings of the same persons six months prior to program entry.

(3)

Employment Measure --The annual percentage of individuals who entered unsubsidized employment subsequent to participation in job preparation services, who remained employed (by the same or another employer) six months after entering employment.

(4)

Skill Attainment Measure --The annual measure specified by the Commission based upon the percentage of individuals who completed skill attainment activities and acquired a skill as recognized by the state or an industry in the form of an achievement as specified below:

(A)

board certification of youth/adult competency levels as specified by Job Training Partnership Act §106a(5);

(B)

a high school diploma;

(C)

GED certificate;

(D)

post secondary education degree;

(E)

occupational license;

(F)

occupational certification; or

(G)

other certifications recognized by the state.

(5)

Workforce Development Programs --job-training, employment and employment-related educational programs and functions as listed in Texas Labor Code §302.021.

(6)

High Performance Achievement --The top five boards as ranked by performance outcomes, adjusted for regional economic conditions according to the model cited in §800.115 of this title.

(7)

Caseload Reduction --The number of percentage points by which the annual average monthly number of families receiving TANF cash assistance has declined in a Local Workforce Development Area (LWDA) during the performance period as specified in TWC Letter ID/NO WD 88-97, "Incentive Policy Adjustment Model."

(8)

Local Workforce Development Boards --A board that is certified by the Governor of the State of Texas, has a plan approved by the Governor of the State of Texas, and is operating multiple workforce development programs through an executed contract with the Commission.

(9)

Incentive Award Pool --Funding that the Commission shall reserve during the annual budget process in sufficient amount to use to reward boards for high performance achievement.

§800.112.Criteria for Award.

(a)

To encourage system building and accountability in meeting the needs of employers and jobseekers, the state will apply four outcome measures to establish a high performance recognition. The four outcome measures are:

(1)

Employment Measures -- retention in employment for six months following placement;

(2)

Earnings Gains Measures -- earnings over the same period;

(3)

Skill Attainment Measures -- work-related skills attained and documented by credentials accepted by states or industries; and

(4)

Caseload Reduction -- percentage decrease in TANF households.

(b)

Each board will be evaluated on these core outcome measures for high performance recognition.

(c)

In order to be eligible to receive an incentive, a board must be within 90% of the variance range established for each contract performance measure.

§800.113.Non-Monetary Incentive Awards.

(a)

Non-monetary awards for high performance achievement and continuous improvement in meeting performance measures may include, but are not limited to, plaques, certificates of achievement, or other formalized recognition accolades.

(b)

To be eligible for a non-monetary incentive award, a certified board must be one of the five outstanding performers for any one of the four specified core outcome measures.

(c)

Non-monetary incentive awards will be awarded annually based on performance beginning in Fiscal Year 1998, which commenced September 1, 1997.

(d)

A board may be recognized as an outstanding performer under more than one measure.

§800.114.Monetary Incentive Awards.

(a)

Amounts from the Incentive Award Pool may be distributed to boards based on high performance achievement to a targeted population, and may be used to carry out innovative workforce investment activities consistent with state and federal requirements as determined by the Commission.

(b)

A targeted population will be annually identified by the Commission in the budget process. The first three measures set out in §800.112 above will be applied to this targeted population, while the fourth measure will be applied as written. Monetary incentives will reward up to five top performing boards based on high performance in meeting these four measures.

(c)

Amounts from the Incentive Award Pool may be awarded annually based on performance beginning in Fiscal Year 1999, commencing September 1, 1998.

§800.119.Use of Funds.

Boards that receive an incentive award shall use the incentive award to carry out innovative workforce investment activities as allowed by state and federal laws.

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

Filed with the Office of the Secretary of State on March 12, 1998.

TRD-9803595

J. Randel (Jerry) Hill

General Counsel

Texas Workforce Commission

Effective date: April 1, 1998

Proposal publication date: January 9, 1998

For further information, please call: (512) 463-8812

Subchapter E. Sanction Rules

40 TAC §§800.151, 800.152, 800.161, 800.171-800.177, 800.181, 800.182, 800.191

The new rules are adopted under Texas Labor Code §301.061, which provides the Texas Workforce Commission with the authority to adopt, amend, or rescind such rules as it deems necessary for the effective administration of Texas Workforce Commission programs.

§800.152.Definitions.

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

(1)

Performance Standard --The contracted numerical value setting the minimum acceptable result to be achieved for a performance measure.

(2)

Level One Sanction --The sanction that the Texas Workforce Commission (Commission) may impose as a response to a contractual breach and/or failure to comply with specific state and federal requirements and Commission policies.

(3)

Level Two Sanction --The sanction that either the Commission or the Texas Council on Workforce and Economic Competitiveness may impose as a response to a severe problem and the potential negative impact such a problem may have on the local workforce development area or the state.

(4)

Level Three Sanction --The sanction that the Commission may impose where a severe and/or continued failure to comply with state and/or federal laws, regulations or Commission policies has gone uncorrected.

§800.161.Preventive Maintenance.

Preventive maintenance measures, developed to ensure program outcome and provide fiscal accountability, include technical assistance, timely and effective program and fiscal monitoring, and quality initiative reviews.

(1)

Technical assistance is performance-driven and outcome-based, stressing the sharing of information and best practice models. Assistance is provided for both fiscal and program issues.

(2)

Program and Fiscal Monitoring assistance may include site visits, desk reviews, and analysis of both financial and program outcomes to help identify potential weaknesses before such weaknesses result in sub-standard performance or questioned costs. Monitoring may result in recommendations that provide practical solutions that can be used to take immediate corrective action.

(3)

Quality Initiative assistance includes routine evaluation of essential quality indicators and certification systems and will be enhanced with timely and relevant professional training to help develop and maintain the knowledge, skills, and abilities required across program lines.

§800.172.Level Two Sanctions.

Level two sanctions may result in, but are not limited to, one or more of the following actions:

(1)

imposition of one or more level one sanctions;

(2)

restrictions on ability to draw down funds;

(3)

possible delay, suspension, or denial of contract payments;

(4)

prohibition on the use of contracted service providers;

(5)

implement actions required by the Commission to address the deficiencies;

(6)

formal Commission representation at all board meetings; and

(7)

reduction of grant or contract allocations in future periods.

§800.174.Violations Subject to Level One Sanctions.

Violations which may result in the imposition of level one sanctions include, but are not limited to, the following:

(1)

failure to attain and maintain performance within 90% of established contracted standards;

(2)

failure to attain and maintain participation rates within 90% of established contracted standards;

(3)

failure to submit required financial and/or performance reports;

(4)

failure to take corrective action to resolve findings identified during monitoring, investigative or program reviews;

(5)

failure to rectify and/or resolve all independent audit findings and/or questioned costs within required timeframes;

(6)

failure to submit the annual audit required by OMB Circular A-133, as may be amended;

(7)

breach of administrative and service contract requirements; and

(8)

failure to retain required service delivery and financial records.

§800.175.Violations Subject to Level Two Sanctions.

Violations which may result in the imposition of level two sanctions include, but are not limited to, the following:

- (1) failure to rectify a level one sanction within 180 days of notice;
- (2) committing a second violation within the same fiscal year;
- (3) failure to rectify reported threats to health and safety of program participants within 30 days of notice;
- (4) failure to attain and maintain performance within 75% of established contracted standards; and
- (5) failure to attain and maintain participation rates within 75% of established contracted standards.

§800.177. Program Specific Sanctions.

Failure of a board to meet its targeted Temporary Assistance to Needy Families (TANF) participation rate for two consecutive quarters may result in a reduction in the board's contracted TANF funds in an amount not to exceed 25% of the funding allocated to the Local Workforce Development Area. Funds retained by the Commission as a result of such a reduction in allocation shall be used to assist the sanctioned board in meeting the federal participation rates. This remedy is in addition to the other remedies available to the Commission.

§800.181. Enforcement.

- (a) The specific sanction(s) to be imposed by this policy shall be determined by the Commission Executive Director.
- (b) The Commission shall work in concert with the Texas Council on Workforce and Economic Competitiveness, whenever necessary, to impose sanctions as required by the Texas Government Code, 2308.268 and 2308.269.
- (c) The Commission shall send a written notice of pending sanctions indicating the violation, the corrective action, and the impending sanction.
- (d) The written notice shall be sent to the board executive director, chair and the chief elected official of the Local Workforce Development Area.
- (e) The Commission shall send the written notice at least ten working days in advance of the effective date of the sanction.

§800.182. Notice.

- (a) The date of notice shall be the date the notice is sent to the board by certified mail.
- (b) All notices of violations will be sent by the following methods:
 - (1) facsimile (fax) transmission for all notices; and
 - (2) letter by certified mail, return receipt requested.

§800.191. Appeal.

- (a) Boards may appeal the decision of the Commission.
 - (b) Requests for appeal must be submitted within ten working days of the date of notice to the General Counsel, Texas Workforce Commission, 101 East 15th Street, Room 614, Austin, Texas 78778.
 - (c) Requests for appeal will be referred to a hearing officer. The hearing officer will receive oral and written evidence from both parties and prepare a written proposal for decision.
- This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 12, 1998.

TRD-9803594

J. Randel (Jerry) Hill
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Texas Workforce Commission

Effective date: April 1, 1998

Proposal publication date: January 9, 1998

For further information, please call: (512) 463-8812