

Chapter 823. Hearing Procedure for Welfare-to-Work programs (FS E&T and JOBS), Child Care, Proprietary Schools, CIS, and other programs (HB 564). §§823.1-823.3, 823.11-823.15, 823.31-823.34, 823.41-823.44

## **Part XX. Texas Workforce Commission**

### **Chapter 823. General Hearings**

The Texas Workforce Commission (Commission) adopts new §§823.1-823.3, 823.11-823.15, 823.31-823.34, and 823.41-823.44 concerning a general hearing process for the Commission. Sections 823.1, 823.2, 823.12-823.15, 823.31-823.33, and 823.42-823.44 with non-substantive changes to the proposed text as published in the January 16, 1998, issue of the *Texas Register* (23 TexReg 415). Sections 823.3, 823.11, 823.34 and 823.41 are adopted without changes and will not be republished.

New Chapter 823 concerning General Hearings is adopted as the location of the new rules.

The new rules will govern administrative programs of the Commission including but not limited to Child Care, Proprietary Schools and Welfare-to-Work program hearings. This hearing process specifically does not apply to programs that are governed by hearing procedures provided for by statutes or rules promulgated under Texas Administrative Code, Title 40, Part XX, Chapters 805 (JTPA) and 815 (Unemployment and Labor Law). The new rules set forth the hearing procedures to meet federal and state fair hearing requirements within the purview of the Commission as required by provisions such as 40 U.S.C. §602(a)(4) and 7 U.S.C. §2020(e)(10) as currently worded and as may be amended.

New Subchapter A relating to General Provisions, Subchapter B relating to Pre-hearing, Subchapter C relating to Conduct of Hearing, and Subchapter D relating to Decision, Non-appearance, and Rehearing are adopted as the location for the rules.

New §823.1, sets forth the short title and purpose of Chapter 823.

New §823.2, sets forth the definitions that apply to Chapter 823.

New §823.3, sets forth the information on rights of appeal regarding Chapter 823.

New §823.11, provides for the procedure for requesting a hearing

New §823.12, provides for the procedure for setting of a hearing.

New §823.13, sets out the procedure and grounds for a postponement.

New §823.14, sets out the procedure regarding evidence to be used at the hearings.

New §823.15, sets out the grounds and procedures for hearing officer disqualification and withdrawal.

New §823.31, provides for the general hearing procedure.

New §823.32, sets out the procedures for continuance of a hearing.

New §823.33, sets out the procedures for withdrawal of an appeal.

New §823.34, provides for a change in the determination.

New §§823.41 - 823.43, detail the procedure regarding hearing decisions, reopened decisions for non-appearance and rehearing decisions respectively.

New §823.44 sets out the provisions regarding finality of decisions.

The Commission received no external public comments on the proposed procedures, but agency staff provided additional comments, which are reflected in the non-substantive changes.

The text of the new rules includes the following non-substantive changes to the text of the proposed rules.

In §823.1, the following language is added for clarity: ". . . matters involving denial of benefits administered through the Texas Department of Human Services."

In §823.2, the definition of "Date of notice" was deleted and replaced with: "The date mailed, except for proprietary schools which is from the date received, unless good cause exists for the hearing officer to determine otherwise."

This will provide consistency to the process and standardize its administration. The definition of "Date of request of hearing" is clarified to reflect that this pertained to delivery by hand and facsimile. The definitions are numbered pursuant to the new requirements of the *Texas Register*.

In §823.12, "hearing officer" is replaced with "Commission," "issue" is replaced with "mail," and "appellant requests a hearing in person" is replaced by "Commission determines an in-person hearing is necessary" for clarity and more flexibility with respect to the occasional need for in-person hearings.

In §823.13, "either" is replaced with "a" for clarity since there may be proceedings involving more than two parties.

In §823.14, the word "a" replaces "the" to show general applicability, "the opposing side" is replaced with "all parties," to clarify that there may be more than two parties in a hearing, "stipulate" is replaced with "agree," and the language "on its own motion or" is added for purposes of clarity. Subsection (f) was changed to provide that the hearing officer will distribute the oral or written information to all parties.

In §823.15, the second sentence in subsection (b) is replaced with "Upon withdrawal, the Commission will select an alternate hearing officer." This clarifies the process and deletes unnecessary language.

In §823.31(a), "may impartially assist the parties in effective presentation of" is removed and replaced with "shall develop the evidence. In §823.31(a)(1), the plural "parties" is changed to singular "party" for consistency within the paragraph. In §823.31(a)(2), "party" is replaced with "parties" for clarity.

In §823.32, "a collateral source" is changed to "additional sources" to simplify the terminology.

In §823.33, the words "received by the Commission," "request for a " and "the" are added for purposes of clarity.

The language "unless otherwise provided in the determination" is added as some determinations may require the withdrawal be sent to Special Hearings or other appeals departments.

In §823.42, "of" is deleted and "is mailed" is added as the request to reopen has been tied to the date the decision is mailed as opposed to the date of the decision.

In §823.43, "hearing" is added for clarity.

In §823.44, "forty days" was changed to "thirty days" for consistency with the timeline for the motion for rehearing.

Subchapter A. General Provisions

#### **40 TAC §§823.1-823.3**

The new rules are adopted under Texas Labor Code, §301.061 and §302.002, which provides the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs; Texas Human Resources Code, §§31.012, 31.0125, 44.002(a) and 44.035(d) which provides the Texas Workforce Commission with authority to adopt rules to carry out the respective chapters; and Texas Education Code, §132.023 , which provides the Commission with the authority to adopt such rules as necessary for carrying out Chapter 132.

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

(a)

This chapter provides a hearing process to the extent authorized by federal and state law and rules administered by the Commission.

(b)

This chapter shall not pertain to review of determinations regarding:

(1)

across-the-board reductions of services, benefits or assistance to a class of recipients;

(2)

matters governed by Texas Labor Code, Title 2, Subtitle B, Restrictions on Labor and Subtitle C, Wages;

(3)

matters governed by Texas Labor Code, Title 4, Subtitle A, Texas Unemployment Compensation Act;

(4)

all programs funded in all or in part with monies allocated under the Job Training Partnership Act, 29 U.S.C. 1501 et seq.; and

(5)

matters governed by hearing procedures otherwise provided for within 40 TAC Part XX, Texas Workforce Commission.

(6)

matters involving denial of benefits administered through the Texas Department of Human Services.

##### *§823.2.Definitions.*

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

(1)

Appellant - The party or the party's authorized hearing representative who files an appeal from an appealable determination or decision.

(2)

Commission - The Texas Workforce Commission.

(3)

Date of notice - The date mailed, except for proprietary schools which is from the date received, unless good cause exists for the hearing officer to determine otherwise.

(4)

Date of request of hearing -- The date on which the appellant or the hearing representative filed a written notice of appeal with the contractor or Commission by hand delivery, facsimile or mail. If an appeal is mailed to the contractor or Commission, then the appeal is perfected as of the postmark date on the envelope containing the appeal request unless good cause exists for the hearing officer to determine otherwise. If an appeal is delivered by hand or facsimile after 5 p.m., the date of request shall be the next day.

(5)

Hearing -- A hearing is an informal, orderly, and readily available proceeding held before an impartial hearing officer. At the hearing, a party or hearing representative may present evidence to show that the determination should be reversed, affirmed or modified.

(6)

Hearing officer -- A hearing officer is a Commission employee designated to conduct fair hearings and issue final administrative decisions.

(7)

Party -- The person or entity, with the right to participate in a hearing authorized in applicable statute or rule.

(8)

Proprietary school appeal -- An appeal pursuant to Texas Education Code, Chapter 132, Subchapter D relating to Proprietary Schools.

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.

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#### Subchapter B. Pre-Hearing Procedure

#### **40 TAC §§823.11-823.15**

The new rules are adopted under Texas Labor Code, §301.061 and §302.002, which provides the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Texas Workforce Commission programs; Texas Human Resources Code, §§31.012, 31.0125, 44.002(a) and 44.035(d) which provides the Texas Workforce Commission with authority to adopt rules to carry out the respective chapters; and Texas Education Code, §132.023, which provides the Commission with the authority to adopt such rules as necessary for carrying out Chapter 132.

#### *§823.12.Setting of Hearing.*

(a)

After the Commission receives the request for hearing, the Commission will mail within thirty days a notice of hearing, which sets the hearing for a reasonable time and place. In proprietary school appeals the hearing shall be held within thirty days from the receipt of the request for an appeal.

(b)

The notice of hearing must be in writing and include a statement of the time, place, and nature of the hearing; a statement of the legal authority under which the hearing is to be held; and a short and plain statement of the matters asserted and to be proved.

(c)

The notice of hearing must be sent to the requesting party at least ten days before the date of the hearing unless a shorter period is permitted by statute.

(d)

The hearing notice will also contain a statement of whether the hearing will be conducted by telephone or the location of the in-person hearing.

(e)

Hearings will be conducted by telephonic means, unless the Commission determines an in-person hearing is necessary, except in proprietary school appeals where hearings are conducted in person in Austin unless the parties agree to a telephonic hearing and/or a different location.

#### *§823.13.Postponement.*

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 may be granted within two days of the scheduled hearing.

#### *§823.14.Evidence.*

(a)

Evidence Generally. The parties are not bound by technical rules of evidence. Evidence will be admitted and given probative effect if it possesses probative value and is relevant as determined by the hearing officer.

(b)

Exchange of Documentary Evidence. Any documentary evidence to be presented during a telephonic hearing shall be exchanged with all parties with a copy to the Commission in advance of the hearing. Any documentary evidence to be presented at an in-person hearing shall be exchanged at the hearing. A party has the right to review, upon request, any documentary materials submitted to or by the hearing officer.

(c)

Stipulations. The parties to an appeal, with the consent of the hearing officer, may agree in writing to the facts involved. The hearing officer may decide the appeal based on such stipulation or, in the hearing officer's discretion, may set the appeal for hearing and take such further evidence as is deemed necessary for determining the appeal.

(d)

Discovery. The hearing officer may order other forms of discovery deemed appropriate.

(e)

Experts and Evaluations. The hearing officer may order, its own motion or at a party's request and expense, if relevant and useful, an independent expert or a professional evaluation from a source satisfactory to the parties and the Commission.

(f)

Ex parte communications. Private (ex parte) communications of information, whether oral or written, about the substantive issues of the appeal are allowed only if the substance is shared with all parties to the appeal. The hearing officer will provide all parties with the oral or written information.

(g)

Confidential information. Statutorily confidential information shall be protected in accordance with state and federal law.

*§823.15.Hearing Officer Disqualification and Withdrawal.*

(a)

Disqualification. A hearing officer is disqualified if the hearing officer directly participated in the determination under review. The hearing officer participated if the hearing officer:

(1)

reviewed either the file or a summary of it to assist in making the determination; or

(2)

has a personal interest in the outcome of the appeal decision.

(b)

Withdrawal. The hearing officer may withdraw from a hearing to avoid the appearance of impropriety or partiality. Upon withdrawal, the Commission will select an alternate hearing officer.

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.

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Subchapter C. Conduct of Hearing

**40 TAC §§823.31-823.34**

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*§823.31.Hearing Procedure.*

(a)

General Procedure. All hearings 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. When a party appears, the hearing officer shall place the party and any witnesses under oath, examine such party and the party's witnesses, if any, and allow presentation of witnesses and other evidence by each party as may be pertinent. If during the proceeding, the hearing officer determines that an in-person hearing is necessary to present the evidence, a continuance shall be issued until such time as needed to set the in-person hearing.

(2)

Cross-Examination. The parties, witnesses and evidence are subject to cross-examination by the other parties or the hearing officer. A party has the right to object to and confront evidence offered at hearing by the hearing officer or the other parties.

(3)

Additional Evidence. The hearing officer, with or without notice to any of the parties, may request, receive and enter into the record such additional evidence as necessary for a full and fair hearing on the matter, provided that a party shall be given an opportunity to rebut such evidence if it is to be used against the party's interest.

(b)

Hearing Representative. Each party may authorize a hearing representative to assist in presenting the appeal of the party under this chapter relating to General Hearings. A hearing representative is any individual authorized by a party who assists the party in presenting their appeal. A legal counsel, relative, friend, or other spokesperson may serve as a hearing representative to the extent permitted by law.

(c)

Records.

(1)

The hearing shall be tape-recorded and the hearing record will include the audiotape of the proceeding and any relevant evidence relied on by the hearing officer in reaching the decision, including any electronic printouts.

(A)

A party may request a copy of the audio-taped hearing at no cost.

(B)

A party requesting a transcript of a proceeding must pay the cost of transcription.

(2)

The hearing record must be maintained as long as required by the federal or state law affecting the matter appealed.

*§823.32. Continuance of Hearing.*

(a)

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 consult additional sources for information or testimony;

(4)

an in-person hearing needs to be scheduled for proper presentation of the evidence; or

(5)

any other reason deemed appropriate by the hearing officer.

(b)

The hearing officer must advise the parties of the reason for the continuance and any additional information required. Any testimony taken by the hearing officer at the continuance of the hearing must be taken under oath and recorded. The parties will have an opportunity to rebut any additional evidence.

*§823.33. Withdrawal of Appeal.*

(a)

If a party requests a withdrawal of an appeal either during a hearing or in writing received by the Commission at any time before a final decision is issued, the hearing officer shall grant the request for withdrawal and issue an order of dismissal. The request for a withdrawal shall be sent to the Appeals Department, Texas Workforce Commission, 101 East 15th Street, Austin, Texas 78778-0001 unless otherwise provided in the determination.

(b)

If the hearing officer believes the appellant was improperly induced or influenced to withdraw the appeal, prior to granting the withdrawal and dismissing the appeal, the hearing officer must advise the appellant to reconsider withdrawing the appeal.

(c)

If a party dies during the appeal process, the legal representative of the decedent's estate must pursue the appeal or the hearing officer may consider the appeal withdrawn.

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Subchapter D. Decisions, Non-appearances, and Rehearings

**40 TAC §§823.41-823.44**

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*§823.42.Reopened Decision for Non-appearance.*

A party has the right to request the reopening of the hearing until the expiration of thirty days from the date the decision is mailed if good cause exists for non-appearance at the hearing. The request must be in writing and detail the grounds for reopening. The Commission will determine whether the allegations establish that good cause exists to warrant reopening and will schedule a hearing, if deemed necessary, and render a decision.

*§823.43.Rehearing Decision.*

(a)

A party has thirty days from the date the decision was mailed to file a motion for rehearing for the presentation of new evidence.

(b)

Motions for rehearing must be in writing and allege the new evidence to be considered.

(c)

If the hearing officer determines that the allegations justify a rehearing, a hearing will be scheduled at a reasonable time and place.

(d)

The Commission shall issue a decision in response to a timely filed motion for rehearing.

(e)

The Commission may assume continuing jurisdiction to modify, correct, or reform a decision until the expiration of thirty days from the date of mailing of the hearing decision.

*§823.44.Finality of Decision.*

(a)

The decision of the hearing officer shall become the final administrative decision of the Commission after the expiration of thirty days from the date of mailing of the decision unless a timely request for reopening or rehearing is filed with the Commission or the Commission assumes continuing jurisdiction to modify, correct, or reform a decision as provided by §823.43 of this title (relating to Rehearing Decision).

(b)

If a request for reopening or rehearing is timely filed or the Commission assumes continuing jurisdiction pursuant to §823.43 of this title (relating to Rehearing Decision), the resulting decision shall be final on the expiration of thirty days from the date of mailing of the decision in response to the request for reopening or rehearing or on the expiration of thirty days from the date of mailing of a subsequent decision issued by the Commission.

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