

PART XX. Texas Workforce Commission

CHAPTER 823. General Hearings

The Texas Workforce Commission (Commission) proposes 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.

New Chapter 823, concerning General Hearings is proposed 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 is proposed.

New Subchapter B relating to Pre-hearing Procedure is proposed.

New Subchapter C relating to Conduct of Hearing is proposed.

New Subchapter D relating to Decision, Non-appearance, and Rehearing is proposed.

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.

Randy Townsend, Director of Finance, has determined that for the first five-year period the sections are in effect, there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the new rules. Mr. Townsend estimates that there will be no foreseeable cost reductions to the state and to local governments, no foreseeable net effect in revenues as a result of enforcing and administering the rules, and no foreseeable implications relating to costs or revenues to the state or to governments. There is no anticipated economic costs to persons who are required to comply with the section as proposed and there will be no foreseeable effect on small businesses.

Ferris Duhon, Acting Deputy Director of Legal Services, also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be that the public will have a more uniform, clear and concise hearing procedure.

Official comments must be received by the Commission no later than February 16, 1997. Comments on the proposal may be submitted to Ferris Duhon, Acting Deputy

Director of Legal Services, at the Texas Workforce Commission Building, 101 East 15th Street, Room 264, Austin, Texas 78778 (512) 463-2293. Comments may also be submitted via fax to (512) 463-1426 or e-mail to: ferris.duhon@twc.tx.state.us.

SUBCHAPTER A. General Provisions

40 TAC §§823.1-823.3

The new rules are proposed under Texas Labor Code, §301.061 and §302.002, 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; Texas Human Resources Code §§31.012, 31.0125, 44.002(a) and 44.035(d) which provide 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 necessary for carrying out Chapter 132. The proposed rules affect Texas Labor Code, Title 4, Subtitle B, Chapter 301, 302 and 305; Texas Education Code, Chapter 132; and Texas Human Resources Code, Chapter 44.

§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.

§823.2. Definitions.

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

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

Commission - The Texas Workforce Commission.

Date of notice - The date of receipt of a determination or notice. Absent a signed, certified-mail, return receipt card, which shall be prima facie evidence of the date of receipt, there shall be a presumption that the determination or notice is received 5 (five) days after mailing of the determination or notice unless good cause exists for the hearing officer to determine otherwise.

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. 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.

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.

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

Party - The person or entity with the right to participate in a hearing

authorized in applicable statute or rule.

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

§ 823.3. Information on Right of Appeal.

An issuer of a determination must inform the applicant or any person directly aggrieved by the determination of the right to a hearing. The notice must explain the procedure for an appeal, the person's right of appeal, and the right to be represented by others, including legal counsel.

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

Issued in Austin, Texas, on January 5, 1998.

TRD-9800060

J. Randel (Jerry) Hill

General Counsel

Texas Workforce Commission

Earliest possible date of adoption: February 16, 1998

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

SUBCHAPTER B. Pre-Hearing Procedure

40 TAC §§823.11-823.15

The new rules are proposed under Texas Labor Code, §301.061 and §302.002, 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; Texas Human Resources Code §§31.012, 31.0125, 44.002(a) and 44.035(d) which provide 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 necessary for carrying out Chapter 132. The proposed rules affect Texas Labor Code, Title 4, Subtitle B, Chapter 301, 302 and 305; Texas Education Code, Chapter 132; and Texas Human Resources Code, Chapter 44.

§823.11. Request for Hearing.

(a) The party seeking review of a determination under this Chapter relating to General Hearings must request a hearing in writing within sixty days of the date of notice of the determination unless:

(1) the appeal is a proprietary school appeal wherein a party seeking review must request a hearing in writing within fifteen days after receipt of notice of the determination,

(2) or as otherwise provided in 40 TAC Part XX relating to the Texas Workforce Commission.

(b) The request must be addressed as provided in the determination and state the nature of the determination, the name and identifying information of the requesting party, and a request that the determination be reviewed. The request should include an explanation of why the determination should be changed; however, this is not a jurisdictional requirement.

(c) Parties needing special accommodations including the need for a bilingual or sign language interpreter or other accommodations should request such before the setting of the hearing, if possible, or as soon as practical.

§823.12. Setting of Hearing.

(a) After the Commission receives the request for hearing, the hearing officer will issue 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 appellant requests a hearing in person 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 either 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 the telephonic hearing shall be exchanged with the opposing side 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 stipulate 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, 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 by the party initiating the communication within a reasonable amount of time.

(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 hearing officer refers the case to an alternate hearing officer who will be chosen by the hearing officer's supervisor.

This agency hereby certifies that the proposal has been reviewed by legal

counsel and found to be within the agency's legal authority to adopt.
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Texas Workforce Commission

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

SUBCHAPTER C. Conduct of Hearing

40 TAC §§823.31-823.34

The new rules are proposed under Texas Labor Code, §301.061 and §302.002, 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; Texas Human Resources Code §§31.012, 31.0125, 44.002(a) and 44.035(d) which provide 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 necessary for carrying out Chapter 132. The proposed rules affect Texas Labor Code, Title 4, Subtitle B, Chapter 301, 302 and 305; Texas Education Code, Chapter 132; and Texas Human Resources Code, Chapter 44.

§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 may impartially assist the parties in effective presentation of evidence and arguments. 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 parties 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 party 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 party.

(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 audiotaped 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 a collateral source 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 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 withdrawal shall be sent to Appeals Department, Texas Workforce Commission, 101 East 15th Street, Austin, Texas 78778-0001.

(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.

§823.34. Change in Determination.

The issuer of the determination may change the determination anytime before the hearing officer issues the decision. Despite the issuer changing the determination, the parties may proceed with the hearing.

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

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J. Randel (Jerry) Hill

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Texas Workforce Commission

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SUBCHAPTER D. Decisions, Non-appearances, and Rehearings

40 TAC §§823.41-823.44

The new rules are proposed under Texas Labor Code, §301.061 and §302.002, 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; Texas Human Resources Code §§31.012, 31.0125, 44.002(a) and 44.035(d) which provide 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 necessary for carrying out Chapter 132.

The proposed rules affect Texas Labor Code, Title 4, Subtitle B, Chapter 301, 302 and 305; Texas Education Code, Chapter 132; and Texas Human Resources Code, Chapter 44.

§823.41. Decision.

(a) Generally. Within ten days from the date of the hearing's conclusion, the hearing officer will issue a written decision unless an order of continuance or dismissal is granted.

(b) Content. The decision of the hearing officer must include a statement of appearances at the hearing by the parties and their hearing representatives; the hearing officer's findings of facts and conclusions of law reached on the issues; and whether the determination is affirmed, reversed or modified.

§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 of the decision 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 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 forty 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 forty days from the date of mailing of the decision in response to the request for reopening or rehearing or on the expiration of forty days from the date of mailing of a subsequent decision issued by the Commission.

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

Issued in Austin, Texas, on January 5, 1998.

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J. Randel (Jerry) Hill

General Counsel

Texas Workforce Commission

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

