

**Questions & Answers**  
**The Integrity of the Texas Workforce System**  
**40 TAC**  
**Chapter 801**  
**Subchapter C**

Texas Workforce Commission  
Workforce Development Division  
Contract Management Department

## *Preface*

The Texas Workforce Commission's Board Contract Management Department of the Workforce Development Division has developed a *Questions & Answers* Guide to provide clarification and documentation for Local Workforce Development Boards (Boards) regarding Chapter 801 40 T.A.C. of the Rules.

Please submit any questions, comments or suggestions to:

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# Questions & Answers - 40 TAC Chapter 801

## **801.51 Purpose and General Provisions**

**1. Q:** What is the effective date of these rules? Some Boards believe they are currently effective while others believe they become effective September 1, 2004. (See also question 12)

**A:** The rules became effective May 16, 2004. Boards are to develop required policies no later than September 1, 2004 (801.51(d)). Board members with contracts for workforce services in effect on May 16, 2004 have until the contract expires is renewed or September 1, 2005, whichever comes first, to comply with the rules. (Answered 8/26/04)

## **801.52 Definitions**

**1. Q:** Does the lifetime ban from working on a particular matter mean that former employees who worked on a particular matter are not ever allowed to work for a workforce service contractor?

**A:** No. A workforce service contractor is not prohibited from hiring a former Board employee who worked on a particular matter—as long as the former Board employee does not work on that particular matter when working for the same Board's workforce service contractor.

The term "particular matter" is defined narrowly to mean something quite specific, such as an investigation, application, contract, rule making, or other administrative proceeding.

This means a person subject to the particular matter restriction may work on matters similar to matters the individual worked on as a Board employee, but not work on exactly the same matter. For example, a former Board employee who worked on contract X at the Board could not leave the Board and work on the same contract X for the workforce service contractor. The former Board employee could, however, work on contract Z, even if contract Z involved similar issues as those raised in connection with contract X. (Preamble)

**2. Q:** Is an individual's brother, sister, brother-in-law, or sister-in-law included as a relative in determining if the individual has a "substantial financial interest" in the business entity?

**A:** No. The rules define substantial financial interest to include the "first degree of consanguinity or affinity," which means only the individual's parents and children, adopted children, or spouse. (Preamble)

**3. Q:** The Board enters into a contract with a hospital to provide training courses to hospital employees. The hospital identifies potential participants and information is verified by Board staff to ensure eligibility. Total amount of training costs is approximately \$150,000. The Board

has a board member who is a senior management employee at the hospital. Is this a conflict of Interest?

**A:** Conflict of interest if:

- Board contracts with the hospital to provide training courses and the Board member has a substantial financial interest with the hospital. (reference 801.28 (c)& 801.52 (5)(D)); or
- Board staff is providing a workforce service by assisting in the verification/determination of eligibility reference (see 801.28 (a)(4)).

No conflict of interest if:

- The Board member has a substantial financial interest with the hospital, but the Board contracts the training through a separate training provider and the Board's workforce services contractor assists in the verification/determination of eligibility. (Answered 9/17/04)

**4. Q:** A Board member is also on the board of a non-profit organization dedicated to improving literacy. The Board enters into an agreement with the literacy organization using WIA Statewide Activity funds in support of various efforts of the non-profit organization. The amount of the agreement is for approximately \$20,000. The terms of the agreement may be renewed and exceed the one-year exception. Is this a conflict of interest?

**A:** Conflict of interest if:

- The Board member "is a compensated member of the board of directors or other governing board of the business entity" (801.52(5)(E)). If the Board member is a compensated member of the non-profit's board of directors, then the Board member has a substantial financial interest in the non-profit and a conflict exists.

No conflict of interest if:

- The Board member is not a compensated board member of the non-profit. (Answered 9/17/04)

**5. Q:** Would it be a conflict of interest if we had a Board member and their spouse worked for the Board contractor?

**A:** A conflict does exist.

The adopted language in section 801.53(a) states that a Board shall not "contract with the following entities to deliver or determine eligibility for workforce services:

- (1) a Board member
- (2) a business, organization, or institution that a Board member represents on the Board;
- (3) a business, organization, or institution in which a Board member has a substantial financial interest; or
- (4) a Board employee.

The Board member's spouse has a substantial financial interest in the business entity. It does not

matter if the spouse is in a decision-making position. If the spouse has a substantial financial interest in the business, then the Board cannot contract with that business. (Preamble 801.52) (Answered 10/13/04)

**6. Q:** A Board member is President/Chairman of a private, eligible training provider school. Eligible training providers meet standards set by the Board. The Board does not have contracts with training providers. Reimbursement to the Board member's school is based on customer selection. The Board member abstains on all votes related to targeted jobs and training providers. Is this a conflict of interest?

**A:** No conflict of interest:

- Since the Board does not have a contract with a Board member's school, there is no conflict. Board must ensure the Board member has provided written disclosure of all business interest referenced in 801.13(c). (Answered 9/17/04)

**7. Q:** Our Workforce Center Director has received an application from one of my board members applying for a job in the center. We don't want a perceived conflict of interest. We thought it couldn't be done. However, after reading the new rules again, we don't see where our situation is addressed.

The board member represents one of our counties and fully understands that he/she would resign from the board if hired. This individual has been an advocate for the center in his/her county and has been instrumental in getting employers to use our center. The Workforce Center Director would like to hire the board member because the board member would be an asset to the center. Do you see this as a conflict?

**A:** No conflict of interest if - the Board member resigns - 801.55 would apply to the situation.

- Was the person in a decision making position? NO  
801.52 - Board decision-making position -- A position with a Local Workforce Development Board that has final decision-making authority or final recommendation authority on matters that directly affect workforce service contractors. A Board decision-making position is one that performs the function of a Board's executive director, deputy executive director, chief financial officer, lead contract manager, or lead contract monitor)
- Was the person employed or compensated by the Board anytime during the previous 12 months? NO, (serving/volunteering on the Board but not employed) so we see no conflict per the rules. (Answered 9/28/04)

**8. Q:** My question is regarding state agencies who are required to serve on the board. Are they exempt in the same manner that education agencies and community colleges are?

**A:** Yes. State agencies are not considered workforce service contractors and are exempt from all the provisions in Subchapter C that govern workforce contractors. The definition of a "workforce service contractor" in 801.52(6) specifically excludes state agencies and higher

education institutions.

**9. Q:** However, our rehabilitation representative is now from the Commission for the Blind (DARS). Since their consolidation, I want to know if we would be prohibited from partnering with this state agency?

**A:** No, the Board is not prohibited from partnering, having an MOU, or contracting with the state agency. State agencies are not considered workforce service contractors and are exempt from all the provisions in Subchapter C that govern workforce contractors. The definition of a "workforce service contractor" in 801.52(6) specifically excludes state agencies and higher education institutions.

### **801.53 Prohibition against Directly Delivering Services**

**1. Q:** Does the §801.53 prohibition against directly delivering services prohibit a child care provider, or someone affiliated with a child care provider that is part of the child care management system, from sitting on a Board?

**A:** Not necessarily. If the child care representative does not contract directly with the Board as its child care contractor or for other workforce services, then the person may be a Board member. If the Board member is a child care provider that accepts Agency-subsidized children, then the child care provider may sit on the Board. The important distinction is in the contractual relationship. If the Board member is a direct contractor of the Board, then the individual shall not sit on the Board. If the Board member is a contractor of the Board's workforce service contractor, then the individual may sit on the Board. (Preamble)

**2. Q:** In rural communities, a Board member may own the only retail store in town that processes gas and work-related expense vouchers for Choices clients. Are these activities affected by the prohibition against a Board contracting with Board members' businesses for workforce services?

**A:** No. Processing a voucher is not a contractual relationship between a Board member and a contractor. This example would not fall under the prohibition to deliver services, because in this case the Board member is not determining eligibility or delivering services. The contractor issuing the voucher is determining eligibility and providing the service. If the client takes the voucher and processes it at a Board member's business, that would not be prohibited under the rules because processing the voucher is not a contractual activity with the Board. If, however, the Board contracts with the Board member's business to process vouchers, that activity would be prohibited by the rules. In most workforce areas, a Board's workforce service contractor contracts with an entity to provide services. Because the service provider is not directly contracting with the Board, the service provider could serve as a Board member, which would be allowed under the rules. (Preamble)

**3. Q:** Would a private sector Board member whose business is part of a consortium that receives customized or other training—whether from WIA Statewide Activity Funds, Skills Development or Self-Sufficiency Funds, or H1B Skills grants—need to resign from the Board?

**A:** If the contract is with the state and not the Board, the Board member would not have to resign as it would not violate the prohibition against a Board contracting with a Board member or a Board member's business.

In cases in which the Board contracts directly with the consortium to provide services, the Board member's company that is participating in the consortium must not have signature authority for the consortium. Section §801.53(e) emphasizes that the rules do not restrict a Board member or a Board member's business from receiving workforce services and being a customer of a Board's workforce service contractors' services. Even though Boards are not allowed to contract directly with a Board member or a Board member's business, in most cases, members of a consortium receive workforce services from a provider under contract with the Board's workforce service contractor. Typically, Boards do not contract directly with the businesses in the consortium. (Preamble)

**4. Q:** Can a Board member's company receive on-the-job (OJT) training funds from the Board?

**A:** A Board cannot contract with a Board member or a Board member's company to provide workforce services. The Commission strongly encourages private sector Board members to use workforce services. OJT is a special case in which the company is both the provider and user of workforce services. Again, the answer depends on the Board's contractual relationship with the Board member's company. If the Board awards OJT funds directly to a company, then a Board member's company is not allowed to receive the OJT funds unless the Board member resigns. If the workforce service contractor contracts with the company for OJT funds, then the Board member's company is allowed to receive OJT funds. (Preamble)

**5. Q:** Is a Board allowed to provide apprenticeship training funds to a labor union if a Board member represents that union on the Board?

**A:** The union is allowed to receive the funds if the apprenticeship funds are provided to the labor union under contract with the workforce service contractor. (Preamble)

**6. Q:** Does a Board labor representative who also sits on an apprenticeship advisory committee have to resign from the Board in order for the committee to receive apprenticeship training funds from the Board?

**A:** No. The apprenticeship advisory committee can receive the funds and the Board member does not have to resign as long as the Board member does not represent the advisory committee on the Board. (Preamble)

**7. Q:** If a Board receives other workforce funding from its local community, is the prohibition

against directly delivering services still in place?

**A:** Yes. Boards have always been prohibited by law from delivering workforce services, regardless of the funding source. (Preamble)

**8. Q:** Why do the rules reference the 20-point test as a tool the Agency may use to determine if a Board directly controls the daily activities of its workforce service contractors?

**A:** The use of the 20-point test is a standard, common-law test that has been used for more than 30 years by the Internal Revenue Service, courts of law, and the Agency to determine if an employer-employee relationship exists. Even if the rules did not specifically reference the 20-point test, the test would still be used by courts to determine whether an employer-employee relationship exists. This test is applied to all Texas businesses and may be applied to Boards as well. The 20-point test is referenced in the rules as a permissible—not mandatory—model that the Commission could use to determine an employer-employee relationship between a Board and its contractor. (Preamble)

**9. Q:** How can the 20-point test be used as a tool to ensure that Boards do not directly deliver services?

**A:** The 20-point test is a standard tool that may be used to determine if the Board-contractor relationship is an employer-employee relationship or an independent contractor relationship. Boards should review each point in the test and determine how they can maintain an arm's-length relationship with the contractor. Boards need to examine the totality of the test and develop operational procedures that will not directly control the day-to-day activities and operations of the contractor. (Preamble)

**10. Q:** Will the 20-point test effectively prohibit the use of a PEO model?

**A:** No. The proposed rules are meant to fulfill the intent of SB 280, which states that Boards may not direct or control the staffing of any entity that provides one-stop workforce services. Furthermore, Texas Government Code §2308.267(b) stipulates that a Board's staff shall be separate and independent of any organization providing workforce services. The rules do not prohibit Boards from using a particular management model—unless that management model allows Board staff to direct or control the staffing of the workforce service provider or infringe upon the separation and independence of the workforce service contractor. (Preamble)

**11. Q:** One element of the 20-point test states that independent contractors normally pay all of their own business and travel expenses without reimbursement. If a Board reimburses a contractor for travel expenses, can this be construed as an employer-employee relationship?

**A:** Boards are encouraged to examine all of their contracting policies, procedures, and guidelines in light of the 20-point test. In this situation, because it is not a federal or state requirement that Boards directly reimburse a contractor for travel expenses, Boards should

refrain from doing so. Boards shall require that travel expenses meet the state guidelines in accordance with the TWC Financial Manual for Grants and Contracts, but they should refrain from directly reimbursing a contractor for travel expenses. (Preamble)

**12. Q:** The board is moving toward providing comprehensive services to several employers who agree to hire more than 100 people per year through the publicly funded workforce system. This is part of the board's effort in the area of economic development. The Board enters into an agreement with a board member's company to provide specialized services, including applicant assessments, space for job fairs and interviews, develop and post Work in Texas job orders to profile most appropriate employment candidates. [Note: Similar type services will be offered to a total of six "super-employers" until resources allow otherwise.] The Board member is a senior management employee of one of these companies and is party to the agreement between the company and the Board. Is this a conflict?

**A:** No conflict of interest if:

- Board is contracting with an entity and the Board's Workforce Services Contractor is providing the services to the entity. No restriction for a Board member's organization being a customer of a Board's workforce services contractor's services. (801.53 (e)). (Answered 9/17/04)

**13. Q:** A Board member is President/Chairman of a private, eligible training provider school. Eligible training providers meet standards set by the Board. The Board does not have contracts with training providers. Reimbursement to the Board member's school is based on customer selection. The Board member abstains on all votes related to targeted jobs and training providers. The Board member's spouse is an employee in a senior management position for the career center contractor. The spouse is jointly employed by the career center contractor and a PEO. All WIA training is customer choice; case managers authorize the training selected by the participant; senior manager reviews and approves the case managers' decision; fiscal officer ensures funds are available; and final approval for training rests with the career center managing director. The Board member's spouse is not involved in any part of the approval process. Is this a conflict of interest?

**A:** Conflict of interest:

- A Board shall not contract with a Board member's entity in which the Board member has a substantial financial interest (801.53(a)(3)). A Board member has a substantial interest in an entity if the member "is related to a person in the first degree by consanguinity or affinity,... who has a substantial financial interest in the business entity..." (801.52(5)(G)). (Answered 9/28/04)

**14. Q:** The Board issues a request for interest in the I Can Learn program. All interested parties that respond are accepted. The Board enters into MOUs to install workstations, provide computer tech support, other hardware/software and award scholarships by site. The installation and support will be provided by JRL, TWC's contractor. No money is exchanging hands but the

availability of the service at these sites may be seen as delivering workforce services. A Board member who represents an economic development entity is executive director of a community-based organization receiving the I Can Learn stations and party to the executed MOU. TWC recently extended these contracts with boards through 2007, which exceeds the one-year exception.

**A. No conflict of interest**

- Since Board has no contract with the community-based organization and services provided by another contractor; the services just happen to be in the community-based organization's facilities. No services prohibited by the Rules.

**15. Q:** Although it is not a problem for us now, it may come up again and I want to be sure that our policy addresses the issue correctly. At the time our rehabilitation representative was the MHMR Contractor for Golden Crescent. Gulf Bend MHMR was the only entity in the WDB who provided "job coaching." We wrote the WIG grant and partnered with Texas Rehabilitation, Commission for the Blind and Gulf Bend. Since Gulf Bend provided the job coaches, they had a contract with the Board for the duration of that WIG Contract. I realize that Gulf Bend is a CBO, we could not contract with them under the new guidelines.

**A:** The Board can contract with Gulf Bend (CBO) as described in 801.53(c) that states in part: *A Board may grant a one-year exception to the prohibitions described in subsection (a) of this section for a community-based organization that fulfills the requirements set forth in Texas Government Code 2308.256(a)(2). The exception can only be granted by a two-thirds vote of the members present in an open meeting and may not be granted for contracts for the operation of Texas Workforce Centers.*

**801.54 Board Contracting Guidelines**

**1. Q:** How far up the corporate chain is a Board required to review for the three-year financial history of adverse judgments and findings of a contractor?

**A:** It depends on what entity signed the contract. If the contract is in the name of the larger corporate entity only and the Board typically deals with one division instead of the entire corporation, then the review must be of the entire corporation's history of adverse judgments or findings. The thoroughness of the review may be more in depth for the division that is more closely related to the type of services that are contracted and less in depth for the unrelated divisions of the corporation. While adverse judgments or findings of a specific division may have a higher relevance to the ability of the contractor to perform under the Board's contract, the stability of the larger corporation is important. The key language is "review and consider." The amount of time spent reviewing and considering is up to the Board and may vary depending on the Board's assessment of the relevance of the adverse judgments or findings. (Preamble)

**2. Q:** May a Board withhold a portion of a payment to a workforce service contractor and place this amount in escrow until a future period? The amount will be reported as contractor payments

on IRS Form 1099 when initially paid to the contractor—not when released from escrow. Will this be viewed as establishing a contingency fund, which is not allowed under OMB Circular A-122?

**A:** OMB Circular A-122, Attachment B, Item 8, does not prohibit a reserve of funds as described above. The term "contingency reserve," as used in OMB Circular A-122, refers to a reserve of funds that is drawn down, set aside, and not expended unless the contingency for which the reserve was established occurs. In contrast, this scenario is more akin to the concept of retainage, in that the funds the Board would be withholding from its contractor would be a portion of the contractor's reimbursement for allowable expenditures that it incurred. The contractor would only receive the withheld funds, if at the end of the contract the contractor met specific provisions outlined in the contract—i.e., no losses occurred. (Preamble)

**3. Q:** Many rural Board members in the private sector are also that community's banker who makes loans to our contractor, contractor's staff, and the community at large. Will these rules prohibit a Board member from providing loans to a contractor or contractor's staff?

**A:** Nothing in the rules prevents Board members or workforce service contractors from conducting normal business activities within the community. In fact, §801.54(d)(1)(E) specifically states that the disclosure provision does not apply to a transaction or benefit provided to a Board member or a Board employee under the same terms and conditions provided to members of the general public. (Preamble)

**4. Q:** If a workforce service contractor employee in a decision-making position sells his car to a Board member, is the workforce service contractor required to report this transaction?

**A:** If the transaction is offered to a Board member or a Board employee under the same terms and conditions provided to members of the general public, then the contractor does not have to disclose the transaction. Normal business transactions should include a good faith offer to the general public and not be offered exclusively to Board employees or Board members, and the sale should be genuinely open to the public. The sale of the car should not appear to be a preferential arrangement provided to a Board member or employee on the basis of the Board member's or Board employee's position. These normal business transactions do not have to be reported by the workforce service contractor. The Commission recognizes that there are situations in which individuals sell personal items exclusively to friends and acquaintances and do not make the sale open to the public. If a workforce contractor conducts such a business transaction with a Board member, then that transaction must be reported. The intent of the rule is not to prohibit such transactions, but to make the transactions transparent to the public in order to show that contracts are awarded on the basis of cost and quality, not on personal relationships and favors provided to Board members. (Preamble)

**5. Q:** Would a workforce service contractor or its employee in a decision-making position have to report a contract with a Board member to paint the Board member's house?

**A:** Again, nothing in the rules prevents Board members or workforce service contractors from conducting normal business activities within the community. The workforce service employee would not be required to report this transaction as long as the business (painting the house) is available to the general public. The Commission recognizes that there are personal relationships and long-standing friendships between Board employees and workforce service contractor staff. In many of these friendships, services of value may be performed exclusively for friends and at a much-reduced price. If a workforce service contractor conducts such a business transaction with a Board member, then that transaction must be reported. The intent of the rule is not to prohibit such transactions, but to make the transactions transparent to the public in order to show that contracts are awarded on the basis of cost and quality, not on personal relationships and favors provided to Board members. (Preamble)

**6. Q:** Would a gift of a briefcase or portfolio from a workforce service contractor to a Board member or Board employee need to be reported by a contractor or contractor's employee under the disclosure rules?

**A:** No—if the value of the portfolio is \$50 or less. Yes—if the value is over \$50. (Preamble)

**7. Q:** How do the fiscal integrity evaluation indicators differ from the standard financial monitoring evaluation attributes?

**A:** It is unclear to us what the Board means by "standard financial monitoring evaluation attributes." The purpose of the fiscal evaluation required by section 801.54 is to ensure that federal and state funds are protected from waste, fraud, and abuse. At a minimum, the fiscal integrity evaluation indicators would have to assess the contractor's internal control systems and accounting and reporting mechanisms to ensure the existence of key controls. For example, a contractor's fiscal system should include budgeting, cash management, procurement standards, asset tracking, disbursement controls, record retention, etc. In other words, the Board should ensure that a contractor's system includes all the necessary elements of a sound financial management system. (Answered 8/26/04)

**8. Q:** What is the basis for the 10% funds (bonding, insurance, and cash) *set aside* requirements; i.e., are they to protect the Boards from a financial demise of a contractor or are they to offer protection against disallowed costs.

**A:** Both. The rule was written to comply with §2308.264(e)(1) of the Texas Government Code which states that the rules "ensure that each independent contractor that contracts to provide one-stop workforce services...has sufficient insurance, bonding, and liability coverage for the overall financial security of one-stop workforce services funds and operations." (Answered 8/26/04)

**9. Q:** Are the *set aside* funds necessary in pure cost reimbursement contracts?

**A:** The provision for escrow of funds in §801.54(b)(3) is not mandatory. It is an alternate method for a Board to comply with the overall requirements of §801.54. (Answer 9/17/04)

**10. Q:** Explain the relationship, if any between *set aside* amounts and stand-in costs?

**A:** The requirements to secure 10% of funds subject to the control of the workforce center contracts exist to ensure the “overall financial security of one-stop workforce services funds and operations.” Stand-in costs only have an application in audit resolution as an alternative to repaying disallowed costs. (Answered 8/26/04)

**11. Q:** What is the relationship between set aside funds and contractor donated (non-statutory) match?

**A:** As stated above the requirement to secure 10% of funds subject to the control of the workforce center contracts exists to ensure the “overall financial security of one-stop workforce services funds and operations.” Contractor donated match does not secure workforce services funds and operations, but instead represent donations by the Contractor that are above and beyond what is otherwise required for the performance of the award, and for which it does not receive reimbursement under the award. (Answered 8/26/04)

**12. Q:** Can a for-profit contractor’s profit of 10% be held in lieu of obtaining additional insurance, bonding and/or cash?

**A:** The 10% profit amount, if earned, will be paid to the contractor from Board funds. Therefore the answer is no, such amount may not be held in lieu of additional insurance or cash.

The purpose of 40 TAC §801.54 is to ensure that a Board is protected for any financial losses of one-stop workforce services funds. The rule sets a minimum bonding amount, and lists other methods a Board may use to secure funds to cover such losses. (Rule preamble, 29 *TexReg* 4903, May 14, 2004)

The rule requires that at least 10% of the funds controlled by a Board's workforce service contractor must be protected by either bonds, insurance, escrow accounts, cash on deposit or other methods. So, if a workforce service contractor controls \$100,000 then the Board must be protected by either:

- a \$10,000 bond,
- an insurance policy in the amount of \$10,000,
- \$10,000 placed in an escrow account, or
- \$10,000 cash on deposit with the Board.

Bonds and insurance policies will cover an eligible loss by payment from third party funds (the surety or insurance company). Similarly, the escrow account funds or cash on deposit funds must be third party funds (contractor funds). Otherwise, the Board is covering a contractor's loss with government funds.

The amount held in escrow or as a cash deposit to cover a contractor's loss should not be

confused with a "retainage amount" which is a percentage of contracted funds held until contract completion in order to ensure full performance of the contract terms. (Answered 9/17/04)

**13. Q:** How does the set aside requirement apply to Community Colleges and School Districts?

**A:** The provisions of §801.54(b) apply to a community college or school district only if it meets the definition of a "workforce service contractor" as defined by §800.52(6). A workforce service contractor is "a business entity or person, except a state agency or an institution of higher education as defined in §61.003 of the Texas Education Code, that contracts with a Board to provide one or more of the workforce services listed in §801.28 of this chapter, which include core, intensive, training, and other support services such as child care and transportation." Community colleges and school districts are not included in the definition of an "institution of higher education." (Answered 8/26/04)

**14. Q:** What is the relationship between the 10% *set aside* requirement and the allowable 20% advance per section 13.07c of the TWC FMGC.

**A:** Under the provisions of §801.54(b), 10% of funds subject to the control of the workforce center contracts must be secured through bonds, insurance, escrow accounts, cash on deposit or other methods. "Funds subject to the control of the workforce center contracts" include the total amount of funds that are obligated for those contractors, including advanced funds discussed in §13.07c of the FMGC. (Answered 8/26/04)

**15. Q:** Do we have to set aside the amounts paid to a workforce service contractor, which they retain as their own fee (as opposed to money we pay them, which they pay on to third parties).

**A:** Yes. Amounts paid for fee are "funds that are subject to the control of the workforce center contractors." As such they are subject to the provisions of §801.54(b). (Answered 8/26/04)

**16. Q:** We lease property from a workforce board member. The member is merely a passive landlord. All services in the building (a local one-stop center) are provided by an unrelated third party. Is the lease permissible?

**A:** The lease is permissible to the extent that the procurement was conducted in accordance with applicable federal and state requirements for the procurement of leased space. The prohibitions in 801.53(a) relate to contracts "to deliver or determine eligibility for workforce services." The prohibitions are intended to apply only to workforce service contractors. (Answered 8/26/04)

**17. Q:** When does the 10% bonding rule take effect?

**A:** May 16, 2004 (see #1 above). (Answered 8/26/04)

**18. Q:** The rule allows for the Board to cover the bonding requirement for the contractor. Does the board have to use its admin money to cover these cost or can program dollars be used?

**A:** The classification of a cost as administrative or programmatic is generally determined by the nature of the affection and not by whether the Board or its workforce center contractor incur the cost. The provision of insurance and bonding is generally an administrative function. (Answered 8/26/04)

**19. Q:** We would like further clarification on a scenario. Our confusion stems from a Q&A response included with the adopted rules with preamble. It states that the rules do not prevent a board member's son or daughter from working for the contractor, yet we received a response to an earlier question that cites the first degree of consanguinity, which would include a son or daughter. There would appear to be a conflict in the responses.

**A:** Both would be a conflict of interest. If the son or daughter has a substantial financial interest in the business, then the Board cannot contract with the business.

Even if the son/daughter is not in a decision-making position in the business, the Board is still not allowed to contract with the business since the son/daughter has a substantial financial interest in the business. (This assumes the son/daughter meets the criteria of a substantial financial interest in 801.52(5) which includes that the person receives more than 10% of his/her annual income from the business).

The "workforce service contractor employee in a decision-making position " provisions of the rule only apply to workforce contractor disclosures (801.54). Workforce service contractors must disclose to the Board any substantial financial interest the contractor or its employees in a decision-making position have in a business entity or business transaction with a Board member or Board employee in a decision-making position.

Subchapter C is the section that should be used in reviewing conflicts of interest, not the earlier 801.13. Subchapter C replaces 801.13 of Subchapter A. The old section 801.13 should have been deleted when Subchapter C was created. This rule is under review and corrections will be made so the rule will be consistent and not have contradictions.

**20. Q:** In looking at "substantial financial interest," does this stand alone or does it need to be tied to (i.e., and) a decision-making position?

**A:** The substantial financial interest stands alone. If the Board member has a substantial financial interest in the business (via the son/daughter/spouse/parent); then the Board cannot contract with the business. On the other hand, if the son or daughter does not have a substantial financial interest in the business, even if the son/daughter is in a decision-making position with the business, then the Board may contract with that business. It may be unlikely that a decision-making employee would not have a substantial financial interest in the business, but in the rare instance, the Board will be allowed to contract with the business.

The "workforce service contractor employee in a decision-making position " provisions of the

rule only apply to workforce contractor disclosures (801.54). Workforce service contractors must disclose to the Board any substantial financial interest the contractor or its employees in a decision-making position have in a business entity or business transaction with a Board member or Board employee in a decision-making position.

**21. Q:** Also, we are not sure if our independent contractor model might result in a different interpretation of the term decision-making position. If we were to change contractors, this would result in the removal of only one person, the independent contractor. As such, would other career center employees be viewed as decision-makers if they are not part of the independent contractor's corporation?

**A:** Yes, those individuals could be viewed in a decision-making position. Decision-making position as defined in the preamble are workforce service contractor employee(s) in decision-making positions - positions that includes the ability to commit or bind the contractor to a particular course of action with respect to carrying out the contractor's duties and activities under the contract. {Preamble 801.52}

**22. Q:** The Board wants to know if the "Honesty Bonds" that they require of their contractors covers incidents of theft or is it for something like in the event contractor fails to perform per the contract?

**A:** Yes such bonds cover employee theft and are more commonly called "Fidelity Bonds". (See for example Section 15 of the TWC Agency-Board Agreement.) Generally, Fidelity Bonds are designed to guarantee honesty of employees (and may be referred to as "Honesty Bonds"). These bonds cover losses arising from employee dishonesty and indemnify the principal for losses caused by the dishonest actions of its employees.

A Fidelity Bond insures the employer for any type of stealing by theft, forgery, larceny, or embezzlement. It does not cover liability due to poor workmanship, job injuries, or work accidents.

**23. Q:** Could you provide us with clarification on how the Commission interpreted "overall financial security" and "loss" under 40 TAC 801.54(b) and the preamble of the final rules? Again, could you provide us with clarification on how the Commission interpreted types of "losses" under 40 TAC 801.54(b) and the preamble of the final rules?

**A:** The preamble to the adopted rules at 29 TexReg 4900 and 4903 (May 14, 2004) states that one of the purposes for the rules is to implement the directive in Government Code §2308.264 that Boards must ensure that each provider of one-stop workforce services has sufficient insurance, bonding, and liability coverage to protect the overall financial security of the workforce service contractor's one-stop services funds and operations.

The rules establish guidelines for Boards to use in routinely assessing the fiscal integrity of their workforce service contractors. The rules also set minimum bonding amounts "and other methods

Boards may use" to secure funds to cover losses.

The elements of the fiscal integrity evaluation listed in 40 TAC §801.54(a)(3)-(5) help determine the types of financial losses that must be insured or secured. Those rules require evaluation of a contractor's past experience relating to the proper use of funds. The rules require review of a contractor's financial history related to administrative audit findings; monitoring findings; sanctions imposed. The evaluation may consider compliance with federal regulations in accounting for program income; timely repayment of disallowed costs; and safeguarding fixed assets.

Some of the potential losses may be covered by bonds, i.e., proper use of funds, and some by insurance, i.e., safeguarding fixed assets, and some by other methods such as an escrow account, i.e., history of disallowed costs.

In summary, to be in compliance with the rules, a Board must secure any potential financial losses determined from the Board's fiscal integrity evaluation of each contractor. A Board may use any combination of methods to protect and secure against liability for those identified potential losses.

**24. Q:** Was the rule intended to cover failure to perform as well as theft or any other actual loss of funds under 40 TAC 801.54?

**A:** No, the rule was enacted to implement the requirements of Government Code §2308.264(e)(1) to ensure that each provider of one-stop workforce services had sufficient insurance for "the overall financial security of one-stop workforce services funds and operations." The focus of the statute and rule is on financial security and not assurance of performance.

**25. Q:** Can a contractor obtain the required 10% as an addendum to their Crime insurance?

**A:** Yes, if the Crime Insurance addendum is written to cover a sum equal to at least 10% of the funds subject to the control of the workforce service contractors, such coverage will comply with the requirement of 40 TAC §801.54.

The preamble to the adopted rules, at 29 TexReg 4904 (May 14, 2004) states that the Boards' existing crime and theft bonds may be amended to include errors and omissions. This would also apply to a Crime Insurance Policy.

**26. Q:** What type of losses require coverage under 40 TAC 801.54?

- (a) Theft of funds by an employee
- (b) Failure to perform per contract
- (c) Disallowed costs
- (d) Could you give some examples of other types of losses that require securing a bond or

insurance under 40 TAC 801.54?

**A:** The rules require coverage against loss due to thefts of funds by an employee and disallowed costs, but not from a contractor's failure to perform. Examples of losses that may be covered by a bond or insurance are cited in the foregoing answer.

**27. Q:** What type of bonding/insurance are required by 40 TAC 801.54?

- (a) Fidelity bond (or Honesty Bonds or similar) for theft of funds by an employee
- (b) Errors and Omission Insurance
- (c) Could you give some examples of other types of bonding or insurance that are required under 40 TAC 801.54?

**A:** Either Fidelity Bonds or Errors and Omissions Insurance may be used, neither method is required. Various types of security instruments are listed in 40 TAC §801.54(b)(1) as available methods of insuring against loss, and a Board may select from those methods, or "other methods".

### **801.55 Employment of Former Board Employees by Workforce Service Contractors**

**1. Q:** Do the rules regarding employment of former Board employees apply if a Board wants to hire a former workforce service contractor staff member?

**A:** No. The post-employment restriction only applies to movement from a Board to a workforce service contractor. The post-employment restriction follows the contract relationship. (Preamble)

**2. Q:** Our Workforce Center Director has received an application from one of my board members applying for a job in the center. We don't want a perceived conflict of interest. We thought it couldn't be done. However, after reading the new rules again, we don't see where our situation is addressed.

The board member represents one of our counties and fully understand that he/she would resign from the board if hired. This individual has been an advocate for the center in his/her county and have been instrumental at getting employers to use our center. The Workforce Center Director would like to hire him/her because he/she would be an asset to the center.

Do you see this as a conflict?

**A:** No conflict of interest if - the Board member resigns - 801.55 would apply to the situation.

- Was the person in a decision making position? NO  
801.52 - Board decision-making position -- A position with a Local Workforce Development Board that has final decision-making authority or final recommendation authority on matters that directly affect workforce service contractors. A Board decision-

making position is one that performs the function of a Board's executive director, deputy executive director, chief financial officer, lead contract manager, or lead contract monitor)

- Was the person employed or compensated by the Board anytime during the previous 12 months? NO, (serving/volunteering on the Board but not employed) so we see no conflict per the rules. (Answered 9/28/04)

### **801.56 Enforcement**