

## **CHAPTER 807. CAREER SCHOOLS AND COLLEGES**

**ADOPTED RULES WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*. THIS DOCUMENT WILL HAVE NO SUBSTANTIVE CHANGES BUT IS SUBJECT TO FORMATTING CHANGES AS REQUIRED BY THE *TEXAS REGISTER*.**

**ON NOVEMBER 6, 2007, THE TEXAS WORKFORCE COMMISSION ADOPTED THE BELOW RULES WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*.**

Estimated date of publication in the *Texas Register*: **November 23, 2007**  
The rules will take effect: **November 26, 2007**

The Texas Workforce Commission (Commission) adopts new Subchapter T, *without* changes to the following sections, relating to Career Schools and Colleges, as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4346):

Subchapter T, Career Schools Hearings, §807.381, §§807.383–807.386, §807.388, and §§807.391–807.395

The Commission adopts new Subchapter T, *with* changes to the following sections, relating to Career Schools and Colleges, as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4346):

Subchapter T, Career Schools Hearings, §807.382, §807.387, §807.389, and §807.390

PART I. PURPOSE, BACKGROUND, AND AUTHORITY  
PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

### **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**

The purpose of the adopted rule change is to set forth procedures for the appeal and hearing process for those entities and individuals subject to regulation by the Commission under Chapter 132 of the Texas Education Code. Under a separate, but concurrent rulemaking, the Commission has adopted the repeal of Chapter 823, General Hearings rules, containing the hearings and appeals process for career schools and colleges, which has been modified and incorporated into Chapter 807.

### **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES**

**The Commission adopts new Subchapter T, Career Schools Hearings, as follows:**

#### **§807.381. Purpose**

Section 807.381 states that the purpose of Subchapter T is to set out the hearings process as authorized by Agency rules and Chapter 132 of the Texas Education Code.

### **§807.382. Definitions**

Section 807.382 adds definitions, retained with minor modifications from the concurrent repeal of Chapter 823, which are referenced throughout Subchapter T.

**Comment:** One commenter suggested that the term "Agency" be defined because the term "Commission" is used to refer to the Texas Workforce Commission in Chapter 132, Texas Education Code and Chapter 807, but the term "Agency" is used in the new proposed Subchapter T.

**Response:** The Commission appreciates the comment and agrees with the suggestion. Therefore, to ensure consistency between Texas Education Code, Chapter 132, and Chapter 807, the definitions of both terms—Agency and Commission, as set forth in §800.2 of this title—are added as §807.382(1) and §807.382(3), respectively.

Section 807.382(1) defines "Agency," as set forth in §800.2 of this title, as the unit of state government established under Texas Labor Code Chapter 301 that is presided over by the Commission and administered by the Executive Director to operate the integrated workforce development system and administer the unemployment compensation insurance program in this state as established under the Texas Unemployment Compensation Act, Texas Labor Code Annotated, Title 4, Subtitle A, as amended.

Section 807.382(2) defines "appellant" as a party or the party's authorized hearing representative who files an appeal from an appealable determination or decision.

Section 807.382(3) defines "Commission," as set forth in §800.2 of this title, as the body of governance of the Texas Workforce Commission composed of three members appointed by the Governor as established under Texas Labor Code §301.002 that includes one representative of labor, one representative of employers, and one representative of the public.

Section 807.382(4) defines "date of notice" as the date the notice is received—unless good cause exists for the hearing officer to determine otherwise.

Section 807.382(5) defines "date of request of hearing" as the date on which the appellant or the hearing representative filed a written notice of appeal with the Agency by hand delivery, facsimile, or mail. If an appeal is mailed to the Agency, it is completed 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 hand delivered or faxed after 5 p.m., the date of request must be the following day.

Section 807.382(6) defines "hearing" as an informal, orderly, and readily available proceeding held before an impartial hearing officer. A party or hearing representative may present evidence to show that the Agency's determination should be reversed, affirmed, or modified.

Section 807.382(7) defines "hearing officer" as an Agency employee designated to conduct impartial hearings and issue final administrative decisions.

Section 807.382(8) defines "hearing representative" as any individual authorized by a party to assist in presenting the party's appeal, including legal counsel or another individual. Each party may have a hearing representative to assist in presenting the party's appeal.

Section 807.382(9) defines "party" as the person or entity with the right to participate in a hearing authorized in applicable statute or rule.

**§807.383. Information on Right of Appeal**

Section 807.383 sets forth that an issuer of a determination shall inform the career school applicant or any party directly aggrieved by the determination of the right to a hearing. The notice shall explain the procedure for an appeal, the applicant's or party's right of appeal, and the right to be represented by others, including legal counsel.

**§807.384. Request for Hearing**

Section 807.384 sets forth procedures for requesting a hearing.

Section 807.384(a) provides that the party seeking review of a determination under this subchapter relating to career school hearings shall request a hearing in writing within 15 days after receipt of notice of the determination.

Section 807.384(b) states that the request shall be addressed as provided in the determination, state the nature of the determination, the name and identifying information of the requesting party, and a request that the determination be reviewed.

Section 807.384(c) specifies that the request may include an explanation of why the determination should be changed, although this is not a jurisdictional requirement.

**§807.385. Setting of Hearing**

Section 807.385 sets forth the Agency requirements for setting a hearing.

Section 807.385(a) states that upon receipt of the request for a hearing, the Agency shall promptly mail a notice of hearing that sets the hearing for a reasonable time and place within 30 days from the receipt of the request.

Section 807.385(b) requires that the notice of hearing be in writing and include:

- (1) a statement of the date, time, place, and nature of the hearing;
- (2) a statement of the legal authority under which the hearing will be held; and
- (3) a short and plain statement of the issues that will be considered during the hearing.

Section 807.385(c) requires that the notice of hearing be issued at least 10 days before the date of the hearing unless a shorter period is permitted by statute.

Section 807.385(d) provides that the hearing notice shall state whether the hearing will be conducted by telephone or in-person. The notice also shall identify the location of an in-person hearing.

Section 807.385(e) specifies that parties needing special accommodations, including a bilingual or sign language interpreter, may request such before the setting of the hearing, if possible, or as soon as practical.

**§807.386. Hearing Officer Independence and Impartiality**

Section 807.386 sets out the powers and independence of hearing officers and the grounds and process for the disqualification and withdrawal of hearing officers.

Section 807.386(a) provides that a hearing officer has all necessary powers to conduct a full, fair, and impartial hearing. Hearing officers are to remain independent and impartial in all matters relating to active cases and in issuing their decisions.

Section 807.386(b) specifies that a hearing officer shall be disqualified if he or she has a personal interest in the outcome of the appeal or directly or indirectly participated in the determination on appeal. Any party may present facts to the Agency in support of a request to disqualify a hearing officer.

Section 807.386(c) allows the hearing officer to withdraw from a hearing to avoid the appearance of impropriety or partiality.

Section 807.386(d) provides that upon disqualification or withdrawal, the Agency shall assign an alternate hearing officer. This alternate hearing officer is not bound by any findings or conclusions made by the disqualified or withdrawn hearing officer.

**§807.387. Hearing Procedures**

Section 807.387 sets out the general procedures for a hearing.

Section 807.387(a) specifies that hearings shall be conducted in person in Austin, Texas, unless the parties agree to a telephonic hearing or request a different location.

Section 807.387(b)(1)–(4) specifies that all hearings shall be conducted informally and in such a manner as to ascertain the substantive rights of the parties. All issues relevant to the appeal shall be considered and addressed, and may include:

- (1) presentation of evidence;
- (2) examination of parties and witnesses;
- (3) additional evidence; and
- (4) appropriate hearing behavior.

**Comment:** One commenter stated that schools as parties should retain the right to object to evidence.

**Response:** The Commission appreciates the comment and agrees that the right to object to evidence should be explicit in the rule. Therefore, the Commission adds language stating that a party has the right to object to evidence offered at a hearing by the hearing officer or other parties.

**Comment:** One commenter stated that schools as parties should have an unqualified right to examine and cross-examine parties and witnesses without that right being subject to the discretion of the hearing officer. The commenter also stated that the hearing officer should not be given an absolute right to permit cross-examination of witnesses. The commenter further noted that the regulation should not mandate that the hearing officer "shall" examine parties and any witnesses.

**Response:** The Commission believes that the primary duty of the presiding hearing officer is to ascertain the substantive rights of the parties. At the same time, the hearing officer has an affirmative duty to develop the record. Therefore, the Commission contends that the hearing officer has the obligation by rule to examine parties and witnesses and that control of the examination and cross-examination should be within the hearing officer's discretion.

**Comment:** One commenter suggested that parties should be given notice any time additional evidence is presented and afforded sufficient time to review and rebut any such additional evidence.

**Response:** The Commission understands that due process must be afforded to parties under such circumstances. However, the Commission believes that the requirement that a party shall be given the opportunity to rebut such evidence if it is to be used against the party's interest provides sufficient protection for the party's due process rights. As stated previously, the presiding hearing officer's primary duty is to ascertain the substantive rights of the parties.

Section 807.387(c)(1)–(4), Records, states that:

- (1) the hearing record shall include the audio recording of the proceedings and any other relevant evidence relied on by the hearing officer, including documents and other physical evidence entered as exhibits;
- (2) the hearing record shall be maintained in accordance with federal and state law;
- (3) confidentiality of information contained in the hearing record shall be maintained in accordance with federal and state law; and
- (4) upon request, a party has the right to obtain a copy of the hearing record at no charge. However, a party requesting a transcript of the hearing record shall pay the costs of the transcription.

**Comment:** One commenter stated that the rule should provide that parties have the right to request a copy of the record and the rule should specify the costs and procedures for obtaining the record.

**Response:** The Commission agrees with the comment and adds §807.387(c)(4).

### **§807.388. Postponements, Continuances, and Withdrawals**

Section 807.388 authorizes the hearing officer to grant a postponement, continuance, or withdrawal.

Section 807.388(a) allows the hearing officer to grant a postponement of a hearing for good cause at a party's request.

Section 807.388(b) states that a continuance may be ordered at the discretion of the hearing officer in order to consider additional, necessary evidence or for any other reason deemed appropriate by the hearing officer.

**Comment:** One commenter stated that continuances to consider additional, necessary evidence should be mandatory and not at the discretion of the hearing officer.

**Response:** The Commission disagrees. The hearing officer must determine whether additional evidence is relevant and necessary; therefore, the setting of a continuance must necessarily be within the discretion of the hearing officer.

Section 807.388(c) provides that a party may withdraw its appeal at any time before the final decision is issued.

**Comment:** One commenter recommended a new provision requiring that witnesses and parties be placed under oath by the hearing officer.

**Response:** The Commission agrees and has modified §807.387(b)(2) to indicate that witnesses must be placed under oath prior to their examination.

### **§807.389. Evidence**

Section 807.389 sets forth the evidence procedures for hearings.

Section 807.389(a), Evidence Generally, provides the standard for the admissibility of evidence, specifying that hearsay evidence may be admitted. However, the hearing officer has the authority to exclude relevant evidence to ensure fairness or to prevent undue delay, waste of time, or needless presentation of cumulative evidence.

Section 807.389(b), Exchange of Exhibits, states that any documentary evidence to be presented during a telephonic hearing shall be exchanged with all parties with a copy given to the hearing officer in advance of the hearing. Documentary evidence to be presented at an in-person hearing shall be exchanged at the hearing.

Section 807.389(c), Stipulations, states that parties to an appeal, with the consent of the hearing officer, may agree in writing to the relevant facts involved. The hearing officer may decide the appeal based on such stipulation or, at the hearing officer's discretion, may set the appeal for hearing and take such further evidence deemed necessary.

**Comment:** One commenter stated that hearing officers should only be allowed to decide the appeal based solely on stipulations if all parties are in agreement.

**Response:** Subsection 807.389(c) merely allows the hearing officer to issue a decision based on stipulations if the parties agree to waive their hearing rights. However, the Commission

believes that the right to a hearing is sufficiently set forth in §807.387. Therefore, the Commission agrees that parties should have the opportunity for a hearing, even if all facts are stipulated.

Section 807.389(d), Experts and Evaluations, allows the hearing officer to order—or a party may request, if relevant and useful—an independent expert or a professional evaluation from a source satisfactory to the parties and the Agency. Such expert or evaluation shall be at the expense of the party(ies).

**Comment:** One commenter stated that the costs of experts ordered by the hearing officer on his own motion should be borne equally by the parties.

**Response:** The Commission agrees and adds a provision stating that if a hearing officer orders testimony from an independent expert or a professional evaluation on his own motion, the cost will be borne equally by the parties.

Section 807.389(e), Subpoenas, provides that:

- (1) The hearing officer may issue subpoenas to compel the attendance of witnesses and the production of records. A subpoena may be issued either at the request of a party or on the hearing officer's own motion.
- (2) A party requesting a subpoena shall state the nature of the information desired, including names of any witnesses and the records that the requestor feels are necessary for the proper presentation of the case.
- (3) The request shall be granted only to the extent the records or the testimony of the requested witnesses appears to be relevant to the issues on appeal.
- (4) A denial of a subpoena request shall be made in writing or on the record, stating the reasons for such denial.

### **§807.390. Ex Parte Communications**

Section 807.390(a) provides that the hearing officer shall not participate in ex parte communications, directly or indirectly, in any matter in connection with any substantive issue, with any interested person or party. Likewise, no person shall attempt to engage in ex parte communications with the hearing officer on behalf of any interested person or party.

Section 807.390(b) provides that if any such ex parte communication is received, the other parties should be given the opportunity to review the ex parte communication.

Section 807.390(c) specifies that hearing officers may communicate with parties or representatives about procedural matters.

Section 807.390(d) provides that a hearing officer may communicate with Agency personnel who are not otherwise involved in a case for the limited purpose of using the special skills or knowledge of the Agency and its staff in evaluating the evidence.

**Comment:** One commenter stated that the hearing officer should only contact an "impartial" Agency employee to evaluate the evidence if the hearing officer has notified the parties of the name and title of the Agency employee before contact.

**Response:** While the Commission agrees that the hearing officer should contact only an "impartial" Agency employee, the Commission disagrees with the requirement for notification of the name and address of the employee contacted. As set out in §807.387(b)(1), it is the responsibility of the hearing officer to actively develop the record on the relevant circumstances and facts to resolve all issues. To do so, the hearing officer may communicate only with an Agency employee who has not participated in a hearing or any determination in the case. Language has been added to §807.390(d) specifying that a hearing officer may initiate communications with an impartial Agency employee. A hearing officer may need to use the special skills or knowledge of Agency staff, including individuals in the hearing officer's own management chain. To require notification of the name and title of the employee before contact would be unnecessarily burdensome and would negatively impact a hearing officer's ability to resolve all issues. Further, allowing a hearing officer to have such communications is consistent with general administrative practices.

#### **§807.391. Change in Determination**

Section 807.391 sets out that the original issuer of the determination, which a party has appealed, may change the determination that is the basis of the appeal at any time up to the issuance of a decision by the hearing officer.

#### **§807.392. Hearing Decision**

Section 807.392 sets forth the time frame for and the content of a decision issued by a hearing officer under this subchapter.

Section 807.392(a) requires the hearing officer to prepare a written decision promptly after the hearing ends on behalf of the Agency.

Section 807.392(b)(1)–(3) provides that the decision shall be based exclusively on the evidence of record in the hearing and matters officially noticed in the hearing, and shall include:

- (1) a list of the individuals who appeared at the hearing;
- (2) the findings of fact and conclusions of law reached on the issues; and
- (3) the affirmation, reversal, or modification of the determination.

Section 807.392(c) states that unless a party files a timely motion for a rehearing, the Agency may assume continuing jurisdiction to modify or correct a hearing decision until the expiration of 30 calendar days from the mailing date of the hearing decision.

#### **§807.393. Motion for Reopening**

Section 807.393 sets forth the time frame and requirements for a motion for the reopening of a hearing.

Section 807.393(a) provides that if a party does not appear for a hearing, the party may request the reopening of the hearing within 30 calendar days from the date the decision is mailed.

Section 807.393(b) states that the motion shall be in writing and detail the reason for failing to appear at the hearing.

Section 807.393(c) provides that the Agency may schedule a hearing on whether to grant the reopening.

Section 807.393(d) allows that a motion may be granted if the hearing officer determines that the party has shown good cause for failing to appear at the hearing.

### **§807.394. Motion for Rehearing**

Section 807.394 sets forth the time frame and requirements for a motion for rehearing.

Section 807.394(a) states that a party has 30 calendar days from the date the decision is mailed to file a motion for rehearing. A rehearing may be granted only for the presentation of new evidence.

Section 807.394(b) requires that a motion for rehearing be in writing and allege the new evidence to be considered. The party must show a compelling reason why the evidence was not presented at the hearing.

Section 807.394(c) states that if the hearing officer determines that the alleged, new evidence warrants a rehearing, a hearing shall be scheduled at a reasonable time and place.

Section 807.394(d) requires that the hearing officer issue a written decision in response to a timely filed motion for rehearing.

Section 807.394(e) states that the Agency may assume continuing jurisdiction to modify, correct, or reform a decision until the expiration of 30 calendar days from the mailing date of the hearing decision.

### **§807.395. Finality of Decision**

Section 807.395 sets forth the conditions under which the decision of the hearing officer is the final decision of the Agency, and gives the Agency the discretion to assume continuing jurisdiction.

Section 807.395(a) states that the decision of the hearing officer becomes the final decision of the Agency after the expiration of 30 calendar days from the mailing date of the decision unless within that time:

- (1) a request for reopening is filed with the Agency;
- (2) a request for rehearing is filed with the Agency; or
- (3) the Agency assumes continuing jurisdiction to modify or correct the decision.

Section 807.395(b) provides that any decision issued in response to a request for a reopening or rehearing or a modification or correction issued by the Agency shall be final on the expiration of 30 calendar days from the mailing date of the decision, modification, or correction.

**Comment:** One commenter suggested that a school's right to appeal the Agency's final decision should be recognized in a rule.

**Response:** The Commission does not believe it is necessary to establish such a rule because it is stipulated in state statute. A decision, when issued, includes a notification to the parties of their appeal rights. Schools that disagree with the Agency's final decision have the right to appeal to a district court in Travis County, pursuant to the provisions of Chapter 132 of the Texas Education Code. This right to appeal is derived from the Texas Legislature and is not granted by the Commission.

#### **COMMENTS WERE RECEIVED FROM:**

Sadie Harrison-Fincher, Whitaker, Chalk, Swindle & Sawyer, L.L.P., attorneys for Career Education Corporation

The Agency hereby certifies that the adoption has been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

The new rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The new rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

## Chapter 807. CAREER SCHOOLS AND COLLEGES

### SUBCHAPTER T. CAREER SCHOOLS HEARINGS

#### §807.381. Purpose

This subchapter provides a hearing process to the extent authorized by Chapter 132 of the Texas Education Code and the rules administered by the Agency.

#### §807.382. Definitions

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

**(1) Agency -- The unit of state government established under Texas Labor Code Chapter 301 that is presided over by the Commission and administered by the Executive Director to operate the integrated workforce development system and administer the unemployment compensation insurance program in this state as established under the Texas Unemployment Compensation Act, Texas Labor Code Annotated, Title 4, Subtitle A, as amended. The definition of "Agency" shall apply to all uses of the term in rules contained in this subchapter.**

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

**(3) Commission** -- **The body of governance of the Texas Workforce Commission composed of three members appointed by the Governor as established under Texas Labor Code §301.002 that includes one representative of labor, one representative of employers, and one representative of the public. The definition of "Commission" shall apply to all uses of the term in rules contained in this subchapter.**

**(4)(2) Date of notice** -- The date the notice is received, unless good cause exists for the hearing officer to determine otherwise.

**(5)(3) Date of request of hearing** -- The date on which the appellant or the hearing representative filed a written notice of appeal with the Agency by hand delivery, facsimile, or mail. If an appeal is mailed to the Agency, 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.

**(6)(4) Hearing** -- An informal, orderly, and readily available proceeding held before an impartial hearing officer. A party or hearing representative may present evidence to show that the Agency's determination should be reversed, affirmed, or modified.

**(7)(5) Hearing officer** -- An Agency employee designated to conduct impartial hearings and issue final administrative decisions.

**(8)(6) Hearing representative** -- Any individual authorized by a party to assist the party in presenting the party's appeal. A hearing representative may be legal counsel or another individual. Each party may have a hearing representative to assist in presenting the party's appeal.

**(9)(7) Party** -- The person or entity with the right to participate in a hearing authorized in applicable statute or rule.

### **§807.383. Information on Right of Appeal**

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

### **§807.384. Request for Hearing**

- (a) The party seeking review of a determination under this subchapter relating to career schools hearings shall request a hearing in writing within 15 days after receipt of the notice of determination.
- (b) The request shall 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.
- (c) The request may include an explanation of why the determination should be changed; however, this is not a jurisdictional requirement.

### **§807.385. Setting of Hearing**

- (a) Upon receipt of request for a hearing, the Agency shall promptly mail a notice of hearing that sets the hearing for a reasonable time and place within 30 days from receipt of the request for a hearing.
- (b) The notice of hearing shall be in writing and include a:
  - (1) statement of the date, time, place, and nature of the hearing;
  - (2) statement of the legal authority under which the hearing is to be held; and
  - (3) short and plain statement of the issues to be considered during the hearing.
- (c) The notice of hearing shall be issued at least 10 days before the date of the hearing unless a shorter period is permitted by statute.

- (d) The hearing notice shall state whether the hearing shall be conducted by telephone or in-person. The hearing notice shall also include the location of an in-person hearing.
- (e) Parties needing special accommodations, including a bilingual or sign language interpreter, may request such before the setting of the hearing, if possible, or as soon as practical.

#### **§807.386. Hearing Officer Independence and Impartiality**

- (a) A hearing officer presiding over a hearing shall have all powers necessary and appropriate to conduct a full, fair, and impartial hearing. Hearing officers shall remain independent and impartial in all matters regarding the handling of any issues during the pendency of a case and in issuing their written decisions.
- (b) A hearing officer shall be disqualified if the hearing officer has a personal interest in the outcome of the appeal or if the hearing officer directly or indirectly participated in the determination on appeal. Any party may present facts to the Agency in support of a request to disqualify a hearing officer.
- (c) The hearing officer may withdraw from a hearing to avoid the appearance of impropriety or partiality.
- (d) Following any disqualification or withdrawal of a hearing officer, the Agency shall assign an alternate hearing officer to the case. The alternate hearing officer shall not be bound by any findings or conclusions made by the disqualified or withdrawn hearing officer.

#### **§807.387. Hearing Procedures**

- (a) The hearing shall be conducted in person in Austin, Texas, unless the parties agree to a telephonic hearing or request a different location.
- (b) The hearing shall be conducted informally and in such a manner as to ascertain the substantive rights of the parties. All issues relevant to the appeal shall be considered and addressed, and may include:
  - (1) Presentation of Evidence. The parties to an appeal may present evidence that is material and relevant, as determined by the hearing officer. In conducting a hearing, the hearing officer shall actively develop the record on the relevant circumstances and facts to resolve all issues. To be considered as evidence in a decision, any document or physical evidence must be entered as an exhibit at the hearing. **A party has the right to object to evidence offered at the hearing by the hearing officer or other parties.**
  - (2) Examination of Parties and Witnesses. **After placing the witnesses under oath, the** ~~The~~ hearing officer shall examine parties and any witnesses and shall

allow cross-examination to the extent the hearing officer deems necessary to afford the parties due process.

- (3) Additional Evidence. The hearing officer, with or without notice to any of the parties, may take additional evidence as deemed necessary, provided that a party shall be given an opportunity to rebut the evidence if it is to be used against the party's interest.
- (4) Appropriate Hearing Behavior. All parties shall conduct themselves in an appropriate manner. The hearing officer may expel any individual or party who fails to correct behavior the hearing officer identifies as disruptive. After expulsion, the hearing officer may proceed with the hearing and render a decision.

(c) Records

- (1) The hearing record shall include the audio recording of the proceeding and any other relevant evidence relied on by the hearing officer, including documents and other physical evidence entered as exhibits.
- (2) The hearing record shall be maintained in accordance with federal and state law.
- (3) Confidentiality of information contained in the hearing record shall be maintained in accordance with federal and state law.

**(4) Upon request, a party has the right to obtain a copy of the hearing record at no charge. However, a party requesting a transcript of the hearing record shall pay the costs of the transcription.**

**§807.388. Postponements, Continuances, and Withdrawals**

- (a) The hearing officer may grant a postponement of a hearing for good cause at a party's request.
- (b) A continuance of a hearing may be ordered at the discretion of the hearing officer in order to consider additional, necessary evidence or for any other reason the hearing officer deems appropriate.
- (c) A party may withdraw an appeal at any time prior to the issuance of the final decision.

**§807.389. Evidence**

- (a) Evidence Generally. Evidence, including hearsay evidence, shall be admitted if it is relevant and if in the judgment of the hearing officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. However, the hearing officer may exclude evidence if its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues, or by reasonable concern for undue delay, waste of time, or needless presentation of cumulative evidence.

- (b) Exchange of Exhibits. Any documentary evidence to be presented during a telephonic hearing shall be exchanged with all parties and a copy shall be provided to the hearing officer in advance of the hearing. Any documentary evidence to be presented at an in-person hearing shall be exchanged at the hearing.
- (c) Stipulations. The parties, with the consent of the hearing officer, may agree in writing to relevant facts. The hearing officer may decide the appeal based on such stipulations or, at the hearing officer's discretion, may set the appeal for hearing and take such further evidence as the hearing officer deems necessary.
- (d) Experts and Evaluations. If relevant and useful, testimony from an independent expert or a professional evaluation from a source satisfactory to the parties and the Agency may be ordered by hearing officers, on their own motion or at a party's request. **The cost of any** ~~Any~~ such expert or evaluation **ordered by the hearing officer** shall be **borne equally by** ~~at the expense of one or more of~~ the parties.
- (e) Subpoenas.
  - (1) The hearing officer may issue subpoenas to compel the attendance of witnesses and the production of records. A subpoena may be issued either at the request of a party or on the hearing officer's own motion.
  - (2) A party requesting a subpoena shall state the nature of the information desired, including names of any witnesses and the records that the requestor feels are necessary for the proper presentation of the case.
  - (3) The request shall be granted only to the extent the records or the testimony of the requested witnesses appears to be relevant to the issues on appeal.
  - (4) A denial of a subpoena request shall be made in writing or on the record, stating the reasons for such denial.

#### **§807.390. Ex Parte Communications**

- (a) The hearing officer shall not participate in ex parte communications, directly or indirectly, in any matter in connection with any substantive issue, with any interested person or party. Likewise, no person shall attempt to engage in ex parte communications with the hearing officer on behalf of any interested person or party.
- (b) If the hearing officer receives any such ex parte communication, the other parties shall be given an opportunity to review any such ex parte communication.
- (c) Nothing shall prevent the hearing officer from communicating with parties or their representatives about routine matters such as requests for continuances or opportunities to inspect the file.

- (d) The hearing officer may initiate communications with an **impartial** Agency employee who has not participated in a hearing or any determination in the case for the limited purpose of using the special skills or knowledge of the Agency and its staff in evaluating the evidence.

**§807.391. Change in Determination**

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

**§807.392. Hearing Decision**

- (a) Following the conclusion of the hearing, the hearing officer shall promptly prepare a written decision on behalf of the Agency.
- (b) The decision shall be based exclusively on the evidence of record in the hearing and on matters officially noticed in the hearing. The decision shall include:
  - (1) a list of the individuals who appeared at the hearing;
  - (2) the findings of fact and conclusions of law reached on the issues; and
  - (3) the affirmation, reversal, or modification of the determination.
- (c) Unless a party files a timely motion for rehearing, the Agency may assume continuing jurisdiction to modify or correct a hearing decision until the expiration of 30 calendar days from the mailing date of the hearing decision.

**§807.393. Motion for Reopening**

- (a) If a party does not appear for a hearing, the party may request the reopening of the hearing within 30 calendar days from the date the decision is mailed.
- (b) The motion for reopening shall be in writing and detail the reason for failing to appear at the hearing.
- (c) The Agency may schedule a hearing on whether to grant the reopening.
- (d) The motion may be granted if the hearing officer determines that the party has shown good cause for failing to appear at the hearing.

**§807.394. Motion for Rehearing**

- (a) A party has 30 calendar days from the date the decision is mailed to file a motion for rehearing. A rehearing shall be granted only for the presentation of new evidence.

- (b) A motion for rehearing shall be in writing and allege the new evidence to be considered. The party shall show a compelling reason why this evidence was not presented at the hearing.
- (c) If the hearing officer determines that the alleged, new evidence warrants a rehearing, a hearing shall be scheduled at a reasonable time and place.
- (d) The hearing officer shall issue a written decision in response to a timely filed motion for rehearing.
- (e) The Agency may assume continuing jurisdiction to modify, correct, or reform a decision until the expiration of 30 calendar days from the date of mailing of the hearing decision.

**§807.395. Finality of Decision**

- (a) The decision of the hearing officer is the final decision of the Agency after the expiration of 30 calendar days from the mailing date of the decision unless within that time:
  - (1) a request for reopening is filed with the Agency;
  - (2) a request for rehearing is filed with the Agency; or
  - (3) the Agency assumes continuing jurisdiction to modify or correct the decision.
- (b) Any decision issued in response to a request for reopening or rehearing or a modification or correction issued by the Agency shall be final on the expiration of 30 calendar days from the mailing date of the decision, modification, or correction.