

## Chapter 157. Hearings and Appeals

### Subchapter BB. Specific Appeals to the Commissioner

*Statutory Authority: The provisions of this Subchapter BB issued under the Texas Education Code, §§7.057, 12.116, and 21.301; and Texas Government Code, §2001.004, unless otherwise noted.*

#### §157.1071. Hearings in Which the Texas Education Agency is a Party.

- (a) All requests for hearing in which the Texas Education Agency (the agency) is a petitioner or respondent shall be heard by the State Office of Administrative Hearings (SOAH).
- (b) In hearings in which the agency is not the petitioner, petitions for review or requests for hearing shall be filed with the commissioner within 30 calendar days after the decision, order, or ruling complained of is first communicated to the petitioner, except as otherwise provided by law or agency rule.
- (c) The agency's division responsible for hearings and appeals shall transmit the petition for review or request for hearing and a request to docket the hearing to SOAH.
- (d) The agency administrative law judge may issue subpoenas if the requirements of Texas Government Code, §2001.089, are met. To obtain a subpoena, the moving party shall meet the following requirements.
  - (1) The motion shall set forth good cause for the issuance of the subpoena. The statement of good cause must be more than a conclusory statement that the witness' testimony is reasonably calculated to lead to the discovery of admissible evidence. The statement should specify how the requested testimony is likely to lead to admissible evidence concerning a particular issue in the case, including a statement of the operative facts.
  - (2) The motion shall contain a statement that counsel or the party, if not represented by counsel, has dedicated funds sufficient to pay a witness or deponent who is not a party to the case, the amount required under Texas Government Code, §2001.103, and will tender that amount to the witness or deponent no later than immediately following testimony or when the witness or deponent is released.
  - (3) If a party requests a witness to bring documents or objects, the motion should specifically identify the documents or objects and specify the good cause for each document or object.
  - (4) Motions to quash subpoenas must be filed with the SOAH.
- (e) In cases where discovery is appropriate, the agency administrative law judge may issue a commission for deposition in accordance with Texas Government Code, §2001.094.
  - (1) The commission for deposition allows the court reporter to issue subpoenas necessary to require that witnesses appear and produce books, records, papers, or other objects necessary and proper for the purposes of the proceeding.
  - (2) To obtain a commission for deposition, the party shall file a motion that sets forth good cause for obtaining a commission for deposition. The statement of good cause must be more than a conclusory statement that such discovery is reasonably calculated to lead to the discovery of admissible evidence. The statement should set forth a statement of the operative facts.
  - (3) The motion shall contain a statement that counsel or the party, if not represented by counsel, has dedicated funds sufficient to pay a deponent, who is not a party to the case, the amount required under Texas Government Code, §2001.103, and will tender that amount to the witness or deponent no later than immediately following testimony or when the witness or deponent is released.
  - (4) If a party requests a witness to bring documents or objects, the motion should specifically identify the documents or objects and specify the good cause for each document or object. The motion should also identify the time and place for the deposition.

- (5) Motions to quash depositions must be filed with the SOAH.

*Source: The provisions of this §157.1071 adopted to be effective July 20, 2004, 29 TexReg 6894; amended to be effective May 28, 2012, 37 TexReg 3830.*

**§157.1072. Hearings Brought Under Texas Education Code, Chapter 21, Subchapter G.**

- (a) **Applicability.** This section shall apply to all hearings under the Texas Education Code (TEC), Chapter 21, Subchapter G. To the extent that this section conflicts with any other sections governing hearings before the commissioner, this section shall prevail.
- (b) **Standard of review.** All hearings under this section shall be decided upon a substantial evidence review of the record created before an independent hearing examiner or the board of trustees except that the administrative law judge may take evidence of procedural irregularities that are not reflected in the local record that occurred at a hearing before an independent hearing examiner. In a request for an evidentiary hearing, a party shall identify the specific defect and its claimed effect on the decision of the board of trustees or board subcommittee. After such evidentiary hearing, the commissioner may:
  - (1) remand the case to the board of trustees with instructions;
  - (2) reverse the decision of the board of trustees; or
  - (3) decide the case on the merits if the commissioner finds that a procedural irregularity occurred but finds that the procedural irregularity was harmless.
- (c) **Petition for review.** A teacher wishing to appeal the decision of a board of trustees or board subcommittee must file with the commissioner or the agency's division responsible for hearings and appeals a petition for review not later than the 20th day after the date the board of trustees or the board subcommittee announces its decision under TEC, §21.259, or the board notifies the teacher in writing of its decision not to renew the teacher's contract under TEC, §21.208. Failure to timely file a petition for review will result in the dismissal of the hearing. A petition for review may not be amended or supplemented after the deadline for filing a petition for review. A petition for review shall contain the following in numbered paragraphs:
  - (1) a description of the challenged ruling;
  - (2) the date of the challenged ruling;
  - (3) a precise description of the action the teacher wants the commissioner to take on the teacher's behalf;
  - (4) a statement of the jurisdiction and the legal basis of the claim;
  - (5) the name, mailing address, telephone number of the teacher's party representative during business hours, and facsimile number, if any; and
  - (6) the name, mailing address, and business telephone number of the school district's representative and facsimile number, if any.
- (d) **Filing of local record.** A school district must file the record of the proceedings before an independent hearing examiner or the board of trustees not later than the 20th day after the date the petition for review is filed. All allegations which require the record for resolution will be deemed against the school district, if the school district fails to timely file the record of the proceedings. If a school district chooses to file an answer, the answer must be filed not later than the 20th day after the date the petition for review is filed or it will be struck as being untimely filed.
  - (1) The record of the proceedings before an independent hearing examiner or the board of trustees that is filed by the school district shall be considered complete and accurate and shall be admitted into evidence for all purposes unless the teacher files objections to the record within seven days after the date of filing. The administrative law judge may conduct a hearing for receiving evidence relevant to such a challenge to the record if it appears that the matter in dispute is material to the outcome of the hearing.

- (2) The school district shall notify the teacher in writing when the record of the proceedings before the independent hearing examiner or the board of trustees is prepared and make the record available for inspection. A copy of the record shall be provided to the teacher at a reasonable charge upon request.
- (e) Local record. The record of the proceedings before the independent hearing examiner or the board of trustees shall include:
- (1) the transcripts of proceedings at the local level;
  - (2) all admitted evidence;
  - (3) all offers of proof;
  - (4) all written pleadings, motions, and intermediate rulings;
  - (5) a description of all matters officially noticed;
  - (6) if applicable, the recommendation of the independent hearing examiner;
  - (7) the transcript of the oral argument before the board of trustees or the board subcommittee;
  - (8) the decision of the board of trustees or the board subcommittee; and
  - (9) if applicable, the board of trustees' or the board subcommittee's written reasons for changing the recommendation of the independent hearing examiner.
- (f) Authority of administrative law judge. The administrative law judge has the same authority as to the conduct of the hearing and discovery as does an independent hearing examiner under TEC, Chapter 21, Subchapter F. Due to the expedited nature of the hearing before the commissioner, in a hearing where discovery may be taken, the administrative law judge shall establish discovery timelines as justice requires.
- (g) Motions. All motions requiring a ruling must contain a certificate of conference asserting that the movant has conferred with the opposing party representative and has or has not obtained agreement with the motion. If no conference was conducted, the movant shall state the reasons, amounting to good cause, why the conference was not held. All motions requiring a certificate of conference will be denied without the requirement of a response if the moving party fails to confer with the opposing party as required.
- (h) Motions without a conference. Any motion for which a conference was not held, when the movant alleges there was good cause not to hold a conference, must be responded to within three days unless the administrative law judge specifies a shorter time to respond. Failure to timely respond will result in a presumption that the motion is unopposed.
- (i) Nonrenewal hearings without an independent hearing examiner. In a hearing involving the nonrenewal of a term contract that was not heard by an independent hearing examiner, if no fact findings were made, the commissioner will determine whether the decision is supported by substantial evidence by judging whether there is substantial evidence to support the reasons for proposed nonrenewal.
- (j) Request for rehearing. Not later than the 20th day after the date the party or the party representative receives notice of the commissioner's decision under TEC, §21.304, a party may file a request for rehearing. A request for rehearing is not required for a party to appeal the commissioner's decision under TEC, §21.307. A request for rehearing is denied by operation of law if the commissioner does not issue an order before the 45th day after the date the party or the party's representative receives notice of the commissioner's decision.
- (k) Motions for summary judgment. Motions for summary judgment are not permitted.
- (l) Mailbox rule for filings. The mailbox rule does not apply to filings under this section.

*Source: The provisions of this §157.1072 adopted to be effective July 20, 2004, 29 TexReg 6894; amended to be effective May 28, 2012, 37 TexReg 3830.*

**§157.1073. Hearings Brought Under Texas Education Code, §7.057.**

- (a) **Applicability.** This section shall apply to all hearings brought under Texas Education Code (TEC), §7.057. To the extent that this section conflicts with any other section governing hearings before the commissioner, the requirements of this section shall prevail.
- (b) **Jurisdiction.** The commissioner has jurisdiction of allegations that a person is aggrieved by:
  - (1) the school laws of the state; or
  - (2) the actions or decisions of any school district board of trustees that violate:
    - (A) the school laws of the state; or
    - (B) a provision of a written employment contract between the school district and a school district employee, if a violation causes or would cause monetary harm to the employee.
- (c) **Petition for review.** In a hearing brought against a school district, a petition for review shall contain the following:
  - (1) a description of the challenged ruling, action, or failure to act;
  - (2) the date of the challenged ruling, action, or failure to act;
  - (3) a precise description of the action the petitioner wants the commissioner to take on the petitioner's behalf;
  - (4) a statement of jurisdiction and the legal basis for the claim;
  - (5) the name, mailing address, and business telephone number of the petitioner's party representative, and facsimile number, if any; and
  - (6) the name, mailing address, and business telephone number of respondent or respondent's representative, and facsimile number, if any.
- (d) **Local record.** It is the responsibility of the school district to make and preserve the records of the proceedings before the board of trustees. If the school district fails to create and preserve the record without good cause, all substantial evidence issues that require missing portions of the record for resolution shall be deemed against the school district. The record shall include:
  - (1) a tape recording or a transcript of the hearing at the local level. If a tape recording is used:
    - (A) the tape recording must be complete, audible, and clear; and
    - (B) each speaker must be clearly identified;
  - (2) all evidence admitted;
  - (3) all offers of proof;
  - (4) all written pleadings, motions, and intermediate rulings;
  - (5) a description of all matters officially noticed;
  - (6) if applicable, the decision of the hearing examiner;
  - (7) a tape recording or transcript of the oral argument before the board of trustees; and
  - (8) the decision of the board of trustees.
- (e) **Filing of the local record; objection to the record.** In all hearings filed against a school district, the school district must file the local record with its answer. The school district shall notify the petitioner in writing when the local record is prepared and make the record available to the petitioner for inspection. A copy of the local record shall be provided to the petitioner for a reasonable charge upon request. In all hearings filed against a school district, the record before the commissioner shall be considered complete and accurate and shall be admitted into evidence for all purposes, unless within 30 days of the date of filing the record, the petitioner files objections to the record that specifically set forth the items that are relevant and material and

have been erroneously omitted for the record or portions of the record that are relevant and material but have been inaccurately transcribed. The administrative law judge shall conduct a hearing to receive evidence relevant to the challenge to the record if it appears that the matter in dispute is material to the outcome of the hearing.

- (f) **Supplementation of the local record.** In all hearings filed against a school district, the commissioner's decision shall be based on a review of the local record. The administrative law judge may, on the motion of either party, order that the record be reopened and remanded to the district to supplement the transcript or tape recording if it appears that the party has evidence to offer that is material, relevant, or not unduly repetitious that the party, for good cause, was unable to adduce at the local hearing. Good cause for failure to secure the testimony of a witness may be demonstrated by:
- (1) a clear and unambiguous communication to the witness of the party's intention to call the witness at the hearing;
  - (2) reasonable notice to the witness of the date, time, and place of the board meeting at which the testimony will be required;
  - (3) such reasonable follow-up measures as an ordinary prudent person would exercise to secure the attendance of a material witness at a hearing before the board of trustees; and
  - (4) if the witness is an employee of the district, the district shall produce the witness if reasonable notice is given to the superintendent of the party's intention to call the witness.
- (g) **Oral argument.** Upon either party's request, the administrative law judge may afford both parties the opportunity to file briefs and present oral argument concerning the merits of the hearing.
- (h) **Standard of review in hearings against a school district.** If no findings of fact are made by the board of trustees, the commissioner shall determine whether the decision is supported by substantial evidence by judging whether any permissible findings of fact support the board's decision. In all hearings against a school district, the commissioner may not substitute his or her judgment for the judgment of the school district on the weight of the evidence questions committed to the discretion of the board of trustees but:
- (1) may affirm the decision of the board of trustees in whole or in part; and
  - (2) shall reverse or remand the case for further hearings if substantial rights of the petitioner have been prejudiced because the decision of the board of trustees is:
    - (A) in violation of a constitutional or statutory provision;
    - (B) in excess of the statutory authority of the board of trustees;
    - (C) made through unlawful procedure;
    - (D) affected by other error of law;
    - (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
    - (F) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.
- (i) **Standard of review in hearings not against a school district.** In all hearings not against a school district, the commissioner's decision shall be based upon a record developed before the commissioner, and the standard of review shall be preponderance of the evidence.
- (j) **Motion for summary judgment.** A motion for summary judgment may not be filed in a hearing that is reviewed under the substantial evidence standard without obtaining leave of the administrative law judge.
- (k) **Administrative Procedure Act adopted.** This section adopts for all purposes the provisions of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

*Source: The provisions of this §157.1073 adopted to be effective July 20, 2004, 29 TexReg 6894.*