

TITLE 34. PUBLIC FINANCE
PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS
CHAPTER 43. CONTESTED CASES

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SUBCHAPTER D. FINAL DECISIONS OF TRS.

34 TAC §§43.301, 43.302, 43.303, 43.304, 43.305, 43.306, and 43.307

The Teacher Retirement System of Texas (TRS) proposes new §§43.1, 43.2, 43.3, 43.4, 43.5, 43.6, and 43.7 under new Subchapter A (relating to General Administration) of Chapter 43 in Part 3 of Title 34 of the Texas Administrative Code; new §§43.101, 43.102, 43.103, 43.104, 43.105, 43.106, and 43.107 under new Subchapter B (relating to Requests for Adjudicative Hearing) of Chapter 43 in Part 3 of Title 34 of the Texas Administrative Code; new §§43.201, 43.202, 43.203, 43.204, 43.205, 43.206, 43.207, 43.208, 43.209, 43.210, 43.211, 43.212, 43.213, 43.214, 43.215, 43.216, 43.217, 43.218, 43.219, 43.220, 43.221, 43.222, 43.223, 43.224, 43.225, 43.226, 43.227, and 43.228 under new Subchapter C (relating to Hearings Not Docketed at SOAH) of Chapter 43 in Part 3 of Title 34 of the Texas Administrative Code; and new §§43.301, 43.302, 43.303, 43.304, 43.305, 43.306, and 43.307 under new Subchapter D (relating to Final Decisions of TRS) of Chapter . These new rules are proposed in conjunction with the proposed repeals of all current rules under Chapter 43 (relating to Contested Cases) in Part 3 of Title 34 of the Texas Administrative Code as published elsewhere in this issue of the *Texas Register*.

BACKGROUND AND PURPOSE

In 2022, the TRS board of trustees approved the adoption of TRS's four-year rule review. As part of that adopted rule review, TRS staff recommended amending or repealing and readopting all of Chapter 43 of TRS rules, which govern the pension appeals process, in order to improve the readability of the chapter for TRS members and staff. To implement this recommendation, TRS proposes 49 new rules in Chapter 43. In addition, TRS is also proposing the repeal of all 44 current rules in Chapter 43.

As recommended in rule review, the proposed new rules primarily restructure the existing Chapter

43 rules to increase readability and usability for both TRS members and TRS staff. For instance, the proposed new rules are divided into four new subchapters to clarify which rules apply at which point in the TRS appeal process. In addition, 42 of the 44 current Chapter 43 rules are being readopted wholly or in part with, primarily, nonsubstantive style and structural changes.

The proposed new rules also provide for several minor administrative improvements to the pension appeals process. These improvements include clarifying the exceptions process after the administrative law judge issues a proposal for decision and the deadline for members to resubmit petitions for adjudicative hearing that were rejected for formal deficiencies.

Lastly, the proposed new rules make substantive changes to the hearing process for appeals to the board of trustees. These changes include: delegating the board's authority to determine whether to have oral argument to the executive director in consultation with the board chair; providing an expanded opportunity for parties to submit written briefs to the board; and clarifying the hearing process for disability appeals that come before the board.

These changes will improve the hearing process by expediting the process to determine whether oral argument will be granted while simultaneously ensuring that all parties have equal opportunity to provide written argument to the board. Further, the changes to the disability appeal process clarify how confidentiality, oral argument, and the board's review of the ALJ's proposal for decision shall proceed.

A full rule-by-rule description of the proposed new rules is provided below.

SECTION-BY-SECTION SUMMARY

Proposed new §43.1 of this title (relating to the Applicability) readopts portions of current §43.1 of this title (relating to Administrative Review of Individual Requests) and §43.9 of this title (relating to Docketing of Appeal for Adjudicative Hearing and Dismissal for Failure to Obtain Setting) in proposed new subsections (a) and (c), respectively. In addition, proposed new §43.1(b) clarifies that appeals relating to qualified domestic relations orders are governed by Chapter 47 of this title (relating to Qualified Domestic Relations Order) and not governed by Chapter 43.

Proposed new §43.2 of this title (relating to Definitions) largely readopts the existing provisions of current §43.3 of this title (relating to Definitions) with minor, nonsubstantive changes for style and clarity purposes.

Proposed new §43.3 of this title (relating to Filing of Documents) largely readopts the existing provisions of current §43.6 of this title (relating to Filing of Documents) with minor, nonsubstantive changes for style and clarity purposes. In addition, proposed new §43.3 also provides the procedures for filing of documents if TRS has referred an appeal for hearing before an administrative law judge (ALJ) not affiliated with the State Office of Administrative Hearings (SOAH).

Proposed new §43.4 of this title (relating to Computation of Time) primarily readopts current §43.7 of this title (relating to Computation of Time) with minor, clarifying changes.

Proposed new §43.5 of this title (relating to Extensions) readopts current §43.8 of this title (relating to Extensions) with minor, nonsubstantive changes for style and clarity purposes.

Proposed new §43.6 (relating to Ex Parte Consultations) readopts the provisions of current §43.36 of this title (relating to Ex Parte Consultations) and also clarifies that its provisions apply to all contested cases under Chapter 43, not just those heard before a hearing officer not affiliated with SOAH.

Proposed new §43.7 of this title (relating to Procedures Not Otherwise Provided) readopts current §43.47 of this title (relating to Procedures Not Otherwise Provided) with a clarifying change that the board of trustees and TRS deputy director may also, in addition to the ALJ and executive director, resolve procedural issues as necessary in accordance with this provision when there are no other applicable TRS rules or statutes.

Proposed new §43.1 through proposed new §43.7 are proposed to be included in proposed new Subchapter A (relating to General Administration) in Chapter 43 of TRS rules.

Proposed new §43.101 of this title (relating to Administrative Review of Individual Requests) readopts portions of current §43.1 of this title (relating to Administrative Review of Individual Requests) that pertain to the administrative review of pension appeals that do not relate to eligibility for disability retirement. Proposed new §43.101 also makes minor, conforming changes to the text of current §43.1.

Proposed new §43.102 of this title (relating to Administrative Review of Disability Determinations) readopts subsection (f) of current §43.1 of this title, which relates to the administrative review of disability determinations made by the TRS Medical Board. Proposed new §43.102 also provides procedural steps for the review that are analogous to the steps for administrative reviews under proposed new §43.101. Lastly, proposed new §43.102 provides that a TRS member who pursues an adjudicative hearing on the member's eligibility for disability retirement consents to public hearing of that appeal once it reaches the TRS Board of Trustees.

Proposed new §43.103 of this title (relating to Administrative Review of Option Beneficiary or Optional Retirement Annuity Plan Changes) readopts subsection (b) of current §43.4 of this title (relating to Decisions Subject to Review by an Adjudicative Hearing).

Proposed new §43.104 of this title (relating to Request for Adjudicative Hearing) largely readopts provisions from current §43.5 of this title (relating to Request for Adjudicative Hearing) and subsections (d) and (e) of current §43.12 of this title (relating to Form of Petitions and Other Pleadings). In addition, proposed new §43.104 provides that a petition for adjudicative hearing must include "a concise statement of the facts supporting the petition and a statement of the specific relief requested from TRS" to correspond with analogous provisions in paragraphs (f)(2)-(3) of current §43.12.

Proposed new §43.105 of this title (relating to Docketing of Petition for Adjudicative Hearing and Dismissal for Failure to Obtain Setting) readopts provisions from current §43.4 of this title and

§43.9 of this title that relate to the determination to docket or decline to docket a petition for adjudicative hearing. In addition, proposed new §43.105 clarifies the deadline for how long a party has to resubmit a petition that the deputy director rejects for formatting purposes.

Proposed new §43.106 of this title (relating to Authority to Grant Relief) primarily readopts current § 43.10 of this title (relating to Authority to Grant Relief) with minor, nonsubstantive changes for style and clarity. Proposed new §43.106 also clarifies that the chief benefit officer has the authority to grant an appeal while it remains in the docketing process.

Proposed new §43.107 of this title (relating to Subpoenas and Commissions) primarily readopts current § 43.43 (relating to Subpoenas and Commissions). In addition, proposed new § 43.107 simplifies the subpoena and commission process by placing all authority to issue subpoenas and commissions with the deputy director and providing that only the parties and the ALJ may request a subpoena or commission.

Proposed new §43.101 through proposed new §43.107 are proposed to be included in proposed new Subchapter B (relating to Requests for Adjudicative Hearing) in Chapter 43 of TRS rules.

Proposed new §43.201 of this title (relating to Applicability) is a new rule that provides that the provisions of new Subchapter C of Chapter 43 (relating to Hearings Not Docketed at SOAH) only apply to hearings docketed to be heard by a hearing official not affiliated with SOAH.

Proposed new §43.202 of this title (relating to Form of Pleadings) primarily readopts the provisions relating to pleadings of current §43.12 of this title with only minor conforming changes except the provisions related to petitions (specifically subsections (d)-(e) of current §43.12). Those subsections are readopted in proposed new §43.104 of this title (relating to Request for Adjudicative Hearing).

Proposed new §43.203 of this title (relating to Filing of Pleadings and Amendments) primarily readopts the provisions of current §43.13 of this title (relating to Filing of Pleadings and Amendments) with only minor conforming changes.

Proposed new §43.204 of this title (relating to Briefs) primarily readopts the provisions of current §43.14 of this title (relating to Briefs) with only minor conforming changes.

Proposed new §43.205 of this title (relating to Motions) primarily readopts the provisions of current §43.15 of this title (relating to Motions) with only minor conforming changes.

Proposed new §43.206 of this title (relating to Discovery) primarily readopts the provisions of current §43.44 of this title (relating to Discovery) with only minor conforming changes and to update the reference to SOAH's procedural rules regarding discovery.

Proposed new §43.207 of this title (relating to Notice of Hearing and Other Action) primarily readopts the provisions of current §43.16 of this title (relating to Notice of Hearing and Other Action) with only minor changes for style and clarity.

Proposed new §43.208 of this title (relating to Agreements To Be in Writing) primarily readopts the provisions of current §43.17 of this title (relating to Agreements To Be in Writing) with only minor conforming changes.

Proposed new §43.209 of this title (relating to Motion for Consolidation) primarily readopts the provisions of current §43.18 of this title (relating to Motion for Consolidation) with only minor conforming changes.

Proposed new §43.210 of this title (relating to Additional Parties) primarily readopts the provisions of current §43.19 of this title (relating to Additional Parties) with only minor changes for style and clarity.

Proposed new §43.211 of this title (relating to Appearance and Representation) primarily readopts the provisions of current §43.20 of this title (relating to Appearance and Representation) with only minor conforming changes.

Proposed new §43.212 of this title (relating to Lead Counsel) readopts the provisions of current §43.21 of this title (relating to Lead Counsel).

Proposed new §43.213 of this title (relating to Powers of the Administrative Law Judge) primarily readopts the provisions of current §43.23 of this title (relating to Powers of the Administrative Law Judge) with only minor conforming changes.

Proposed new §43.214 of this title (relating to Prehearing Conference and Orders) readopts the provisions of current §43.24 of this title (relating to Prehearing Conference and Orders).

Proposed new §43.215 of this title (relating to Conduct of Hearing) primarily readopts the provisions of current §43.25 of this title (relating to Conduct of Hearing) with minor conforming changes and a clarification that all TRS contested case hearings before a hearing officer not affiliated with SOAH are confidential. This is the same standard as contested case hearings heard before SOAH.

Proposed new §43.216 of this title (relating to General Admissibility) readopts the provisions of current §43.26 of this title (relating to General Admissibility).

Proposed new §43.217 (relating to Exhibits) primarily readopts the provisions of current §43.27 of this title (relating to Exhibits) with only minor conforming changes and changes for style and clarity.

Proposed new §43.218 of this title (relating to Pre-filed Direct Testimony in Disability Appeal Proceedings) readopts the provisions of current § 43.28 (relating to Pre-filed Direct Testimony in Disability Appeal Proceedings).

Proposed new §43.219 of this title (relating to Limit on Number of Witnesses) readopts the provisions of current §43.29 of this title (relating to Limit on Number of Witnesses).

Proposed new §43.220 of this title (relating to Failure to Appear) readopts the provisions of current §43.33 of this title (relating to Failure to Appear).

Proposed new §43.221 of this title (relating to Conduct and Decorum at Hearing) primarily readopts the provisions of §43.34 of this title (relating to Conduct and Decorum at Hearing) with only minor conforming changes.

Proposed new §43.222 of this title (relating to Official Notice) readopts the provisions of §43.35 of this title (relating to Official Notice).

Proposed new §43.223 of this title (relating to Recording of the Hearing; Certified Language Interpreter) primarily readopts the provisions of current §43.37 of this title (relating to Recording of the Hearing; Certified Language Interpreter) with only minor conforming changes.

Proposed new §43.224 of this title (relating to Dismissal without Hearing) primarily readopts the provisions of current §43.38 of this title (relating to Dismissal without Hearing) with only minor conforming changes.

Proposed new §43.225 of this title (relating to Summary Disposition) primarily readopts the provisions of current §43.39 of this title (relating to Summary Disposition) but changes the deadline for filing a motion for summary disposition from 25 days before the hearing on the merits to 30 days before the hearing. This change is necessary to ensure non-SOAH hearings conform with SOAH hearings on key procedural deadlines and provide sufficient time for the administrative law judge to consider the motion prior to the hearing on the merits.

Proposed new §43.226 (relating to The Record) readopts the provisions of current §43.40 of this title (relating to The Record).

Proposed new §43.227 (relating to Findings of Fact) readopts the provisions of current §43.41 of this title (relating to Findings of Fact).

Proposed new §43.228 of this title (relating to Reopening of Hearing) readopts some provisions of current §43.42 of this title (relating to the Reopening of Hearing) but removes provisions relating to reopening the hearing after the administrative law judge issues a PFD and the executive director or board of trustees have begun to consider the appeal. Because proposed new §43.228 only applies at the contested case level, these elements of current §43.42 have been readopted in provisions related to those later stages of the appeal process.

Proposed new §43.201 through proposed new §43.228 are proposed to be included in proposed new Subchapter C (relating to Hearings Not Docketed at SOAH) of Chapter 43 of TRS rules.

Proposed new §43.301 of this title (relating to Proposals for Decision and Exceptions) readopts subsection (b) of current §43.45 of this title (relating to Proposals for Decision, Exceptions, and Appeals to the Board of Trustees). In addition, proposed new §43.301 further clarifies the exceptions process after an ALJ issues a proposal for decision after a contested case. Specifically, proposed new §43.301 provides that exceptions shall be filed with and reviewed by the ALJ, not

the executive director, and the ALJ shall inform TRS whether any action was taken pursuant to the parties' exceptions.

Proposed new §43.302 of this title (relating to Decision of Executive Director) readopts, in part, subsections (c), (e), (h), and (i) of current §43.45 of this title to the extent the provisions involve the duties of the executive director after an ALJ issues a proposal for decision to TRS. Proposed new §43.302 also adds provisions to clarify the executive director's authority to remand a case to the administrative law judge and to modify a proposal for decision if a finding of fact is against the weight of the evidence.

Proposed new §43.303 of this title (relating to Proposals for Decision and Exceptions regarding Eligibility for Disability Retirement) readopts, in part, subsections (c), (h), and (i) of current §43.45 of this title as they relate to the duties of the board of trustees to review an ALJ's proposal for decision in a case relating to a member's eligibility for disability retirement. Proposed new §43.303 primarily expands upon these provisions to provide for the procedure for a proposal for decision to be reviewed by the board of trustees in such a case. The proposed new procedures are similar to those followed by the executive director in a pension appeal not related to eligibility for disability retirement.

Proposed new §43.304 of this title (relating to Appeals to the Board of Trustees) readopts, in part, subsections (c) through (i) and (k) of current §43.45 of this title as they relate to the duties of the board of trustees when reviewing a decision of the executive director. In addition, proposed new §43.304 makes several member-friendly changes to the board of trustees' portion of the appeals process. These changes include providing all parties with the opportunity to submit written briefs or exceptions to the board of trustees in every appeal to the board, not only those appeals when the executive director made a change to the ALJ's proposal for decision. The changes also include offering the parties the opportunity to express their preference on whether oral argument is needed in a case and delegates the determination on whether to have oral argument from the board to the executive director in consultation with the chairman of the board of trustees in order to expedite the decision-making process on that issue. Lastly, similar to the changes made in proposed new §43.302 of this title, proposed new §43.304 also adds provisions to clarify the board of trustees' authority to remand a case to the administrative law judge and to modify a proposal for decision if a finding of fact is against the weight of the evidence.

Proposed new §43.305 of this title (relating to Final Decision of TRS) readopts subsection (j) of current §43.45 of this title.

Proposed new §43.306 of this title (relating to Rehearings) primarily readopts current §43.46 of this title (relating to Rehearings) but also clarifies that the deputy director may also act upon a motion for rehearing or other related motions when the deputy director makes a decision not to docket an appeal in accordance with proposed new §43.105 of this title.

Proposed new §43.307 of this title (relating to Cost of Preparing Administrative Record) readopts current §43.48 of this title (relating to Cost of Preparing Administrative Record).

FISCAL NOTE

Don Green, TRS Chief Financial Officer, has determined that for each year of the first five years the proposed new rules will be in effect, there will be no foreseeable fiscal implications for state or local governments as a result of administering the proposed new rules.

PUBLIC COST/BENEFIT

For each year of the first five years the proposed new rules will be in effect, Mr. Green also has determined that the public benefit anticipated as a result of adopting the proposed new rules will be to improve the readability and clarity of TRS's existing pension appeal rules. In addition, Mr. Green has determined that the administrative changes to docketing process and board hearing process will increase the clarity of those processes and increase their efficiency.

Mr. Green has also determined that the public will incur no new costs as a result of complying with the proposed new rules.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

TRS has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed new rules. Therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under Government Code §2006.002.

LOCAL EMPLOYMENT IMPACT STATEMENT

TRS has determined that there will be no effect on local employment because of the proposed new rules. Therefore, no local employment impact statement is required under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

TRS has determined that for the first five years the proposed new rules are in effect, the proposed new rules will not create or eliminate any TRS programs; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to TRS; will not eliminate any fees currently paid to TRS; will not expand, limit or repeal an existing regulation; will not increase or decrease the number of individuals subject to the rule's applicability; and will not affect the state's economy.

The proposed new rules will create 49 new rules but almost all these provisions substantively reincorporate provisions from existing Chapter 43 rules that are proposed for repeal elsewhere in this issue of the *Texas Register*. In addition, as described above, many of the proposed new rules add administrative improvements to the TRS pension appeal process.

TAKINGS IMPACT ASSESSMENT

TRS has determined that there are no private real property interests affected by the proposed new rules, therefore, a takings impact assessment is not required under Government Code §2007.043.

COSTS TO REGULATED PERSONS

TRS has determined that Government Code §2001.0045 does not apply to the proposed new rules because the proposed new rules do not impose a cost on regulated persons.

COMMENTS

Comments may be submitted in writing to Brian Guthrie, TRS Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice in the *Texas Register*.

SUBCHAPTER A. GENERAL ADMINISTRATION

34 TAC §§43.1, 43.2, 43.3, 43.4, 43.5, 43.6, and 43.7.

STATUTORY AUTHORITY

The proposed new rules are proposed under the authority of Government Code §825.102, which authorizes the Board to adopt rules for eligibility for membership, the administration of the funds of the retirement system, and the transaction of business of the Board; Government Code §825.115(b), which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority.

CROSS-REFERENCE TO STATUTE

The proposed new rules affect the following statutes: Government Code §825.115, which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority.

§43.1. Applicability.

(a) The procedures of this chapter apply only to administrative decisions, appeals, and adjudicative hearings relating to the TRS pension plan, unless rules relating to other programs specifically adopt by reference the provisions of this chapter.

(b) The procedures of this chapter do not apply to determinations of whether a domestic relations order is a qualified domestic relations order (QDRO) under Chapter 47 of this title (relating to Qualified Domestic Relations Orders). Appeals relating to QDROs are subject to the requirements

of Chapter 47.

(c) If a contested case under this chapter is referred to the State Office of Administrative Hearings (SOAH) for adjudicative hearing, then during the period of time the case is before SOAH, the procedural rules for SOAH (1 TAC Chapter 155) shall apply unless inconsistent with applicable statutes or constitutional provisions. If a matter is referred for an adjudicative hearing to a hearing official not affiliated with SOAH, then the rules of Subchapter C of this chapter (relating to Hearings Not Docketed at SOAH) shall apply to the conduct of the hearing while pending before the hearing official.

§43.2. Definitions.

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

(1) Administrative law judge--An individual appointed to conduct the adjudicative hearing in a contested case. The deputy director may refer an appeal to be heard by an administrative law judge employed by the State Office of Administrative Hearings or may employ, select, or contract for the services of another administrative law judge or hearing examiner to conduct a hearing.

(2) Appeal--A formal request to the executive director or board, as applicable under this chapter, to reverse or modify a final administrative decision by the chief benefit officer or the Medical Board on a matter over which TRS has jurisdiction and authority to grant relief.

(3) Board--The Board of Trustees of TRS.

(4) Chief Benefit Officer--The Chief Benefit Officer of TRS or person acting in that position.

(5) Contested case--A proceeding in which the legal rights, duties, or privileges of a party are to be determined by TRS after an opportunity for adjudicative hearing on a matter over which TRS has jurisdiction and authority to grant relief and the relief sought does not conflict with the terms of the pension plan.

(6) Deputy Director--The Deputy Director of TRS or person acting in that position.

(7) Executive director--The executive director of TRS or person acting in that position; when the executive director determines that a need exists, the executive director at his or her discretion may designate a person to accomplish the duties assigned in this chapter to the executive director.

(8) Final administrative decision--An action, determination, or decision by the chief benefit officer or the Medical Board, as applicable, based on review of a person's request on an administrative basis (i.e., without an adjudicative hearing).

(9) Final decision of TRS--A decision that may not be appealed further within TRS, either because of exhaustion of all opportunities for appeal within TRS or because of a failure to appeal the decision further within TRS in the manner provided for in this chapter.

(10) Medical board--The medical board appointed by the TRS board of trustees under Government Code §825.204.

(11) Member--A person who is a member, retiree, or beneficiary of TRS.

(12) Order--The whole or a part of the final disposition of an appeal, whether affirmative, negative, injunctive, or declaratory in form, of the executive director, deputy director, or the board in a contested case.

(13) Party--Each person named or admitted in a contested case.

(14) Person--Any natural person or other legal entity.

(15) Pleading--A written document that is submitted by a party, by TRS staff, or by a person seeking to participate in a case as a party and that requests procedural or substantive relief, makes claims or allegations, presents legal arguments, or otherwise addresses matters involved in a contested case.

(16) SOAH--The State Office of Administrative Hearings.

(17) State Office of Administrative Hearings--The state agency established by Chapter 2003, Government Code, which may serve as the forum for the conduct of an adjudicative hearing upon referral of an appeal by TRS.

(18) Third party respondent or petitioner--A person joined as an additional party to a proceeding; a party shall be designated as either a third party respondent or third party petitioner based on whether the person opposes the action requested in the petition or supports it or whether the person's interests are aligned with petitioner or respondent.

(19) TRS--The Teacher Retirement System of Texas.

(20) Trustee--One of the members of the board.

(21) With prejudice--Barring a subsequent contested case on the same claim, allegation, or cause of action.

§43.3. Filing of Documents.

(a) All documents relating to any appeal of a final administrative decision shall be filed with the deputy director at TRS, 1000 Red River Street, Austin, Texas 78701-2698. A document may be filed with TRS by hand-delivery, courier-receipted delivery, facsimile transmission, or regular, certified, or registered mail. A document is deemed filed when mailed if it is received by TRS within a timely manner under Rule 5 of the Texas Rules of Civil Procedure and the sender provides adequate proof of the mailing date.

(b) If the deputy director has docketed an appeal and referred it for adjudicative hearing at SOAH,

documents shall be filed in accordance with the procedural rules of SOAH and served upon TRS in accordance with those rules.

(c) If the deputy director has docketed an appeal and referred it to an administrative law judge or other hearing official not affiliated with SOAH, documents shall be filed with the administrative law judge and a copy provided to the TRS docket clerk during the time the matter is pending before the administrative law judge.

§43.4. Computation of Time.

In computing any period of time prescribed or allowed by this chapter, by order of the deputy director, executive director, or board, or by any applicable statute, the period shall begin on the day after the act, event, or default in question, and it shall conclude on the last day of that designated period, unless the last day is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or a legal holiday.

§43.5. Extensions.

(a) Unless otherwise provided by statute, the time for filing pleadings or other documents may be extended, upon the filing of a motion, prior to the expiration of the applicable period of time, showing that there is good cause for such extension of time and that the need for the extension is not caused by the neglect, indifference, or lack of diligence of the party making the motion.

(b) A copy of any such motion shall be served upon all other parties of record to the proceeding contemporaneously with its filing.

(c) In the case of filings that initiate a proceeding or that are made before an appeal has been referred for an adjudicative hearing, the deputy director will determine whether good cause exists and whether an extension should be granted.

(d) In the case of filings made in a proceeding after TRS has referred the appeal for an adjudicative hearing, rules governing hearings before SOAH will control so long as the matter is before SOAH.

(e) If a matter is referred for an adjudicative hearing to a hearing official not affiliated with SOAH, then the rules of this chapter shall apply to the conduct of the hearing while pending before the hearing official.

(f) For matters returned by an administrative law judge or hearing examiner to TRS, either through dismissal from the adjudicative hearing docket or through issuance of a proposal for decision, the executive director may determine whether good cause exists and whether an extension should be granted.

(g) The executive director is authorized to rule on motions for extensions on matters directed to the Board if no Board meeting is scheduled before the expiration of the applicable period of time.

§43.6 Ex Parte Consultations.

Unless required for the disposition of ex parte matters authorized by law, the executive director, the administrative law judge, and any member of the board who may render a decision that may become final under this chapter or make findings of fact and conclusions of law in a contested case may not communicate, directly or indirectly, in connection with any issue of fact or law with any agency, person, party, or their representatives, except on notice and opportunity for all parties to participate. To the extent permitted by law, the executive director, the administrative law judge, and any member of the board who may render a decision that may become final under this chapter or make findings of fact and conclusions of law in a contested case, may communicate ex parte with employees of TRS who have not participated in any hearing in the case for the purpose of utilizing the special skills or knowledge of TRS and its staff in evaluating the evidence.

§43.7 Procedures Not Otherwise Provided.

If, in connection with any hearing, the board of trustees, the executive director, the deputy director, or the administrative law judge, as applicable, determines that there are no statutes or other applicable rules resolving particular procedural questions in the proceedings, the parties shall follow procedures consistent with the purpose of this chapter.

SUBCHAPTER B. REQUESTS FOR ADJUDICATIVE HEARING

34 TAC §§43.101, 43.102, 43.103, 43.104, 43.105, 43.106, and 43.107

STATUTORY AUTHORITY

The proposed new rules are proposed under the authority of Government Code §825.102, which authorizes the Board to adopt rules for eligibility for membership, the administration of the funds of the retirement system, and the transaction of business of the Board; Government Code §825.115(b), which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority; Government Code §825.521, which provides that in adopting rules relating to appeals of a determination or decision of the retirement system by the system's staff, the board of trustees shall ensure that rules establishing deadlines for the filing of an appeal afford a member or retiree at least the same amount of time to file an appeal as the retirement system has to issue the retirement system's decision; and Section 12 of House Bill 1585, as enrolled by the 87th Texas Legislature, Regular Session, on May 13, 2021 and effective on May 26, 2021.

CROSS-REFERENCE TO STATUTE

The proposed new rules affect the following statutes: Government Code §825.115, which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority and Government Code §825.521, which provides that in adopting rules relating to appeals of a determination or decision of the retirement system by the system's staff, the board of trustees shall ensure that rules establishing deadlines for the filing of an appeal afford a member or retiree at least the same amount of time to file an appeal as the

retirement system has to issue the retirement system's decision

§43.101. Administrative Review of Individual Requests.

(a) TRS is divided into administrative divisions, which are further divided into departments, for the efficient implementation of its duties. Any person who desires any action from TRS must consult with the proper department within TRS and comply with all proper requirements for completing forms and providing information to that department.

(b) In the event that a person is adversely affected by a determination, decision, or action of department personnel, the person may appeal the determination, decision, or action to the appropriate manager within the department, and then to the chief benefit officer of TRS. The chief benefit officer shall mail a final written administrative decision, which shall include:

(1) the chief benefit officer's determination regarding the person's appeal and reasons for denying the appeal, if applicable; and

(2) a statement that if the person is adversely affected by the decision, the person may request an adjudicative hearing to appeal the decision and the deadline for doing so.

(c) An appeal to the chief benefit officer as described by subsection (b) of this section must be submitted by the later of:

(1) 45 days after the date the decision of the department manager is mailed; or

(2) the number of days after the date the decision of the department manager is mailed equal to the number of days it took TRS to issue the decision of the department manager.

(d) The number of days it took TRS to issue the decision of the department manager is calculated from the date TRS received the person's appeal of the determination, decision, or action of department personnel to the date TRS mailed the decision of the department manager.

(e) A person adversely affected by a decision of the chief benefit officer may request an adjudicative hearing to appeal the decision of the chief benefit officer as provided in §43.104 of this chapter (relating to Request for Adjudicative Hearing). The deputy director shall determine whether the appeal should be docketed and set for a contested case hearing pursuant to §43.105 of this chapter (relating to Docketing of Petition for Adjudicative Hearing and Dismissal for Failure to Obtain Setting).

§43.102. Administrative Review of Disability Determinations.

(a) In the event that the Medical Board does not certify disability of a member under Government Code §824.303(b), or the Medical Board certifies that a disability retiree is no longer mentally or physically incapacitated for the performance of duty under Government Code §824.307(a), the member or retiree may request reconsideration and submit additional information to the Medical

Board.

(b) The Medical Board shall consider a request for reconsideration and additional information and make a determination on the disability of the member or retiree. If a request for reconsideration has been denied, a member or retiree may appeal the decision by requesting an adjudicative hearing as provided in §43.104 of this chapter (relating to Request for Adjudicative Hearing).

(c) The deputy director shall determine whether the petition should be docketed and set for a contested case hearing pursuant to §43.105 of this chapter (relating to Docketing of Petition for Adjudicative Hearing and Dismissal for Failure to Obtain Setting).

(d) A party who requests to adjudicative hearing pursuant to this section consents to the public discussion by the board of trustees of all relevant facts, including information in the member's file that may otherwise be confidential by law, when the board considers the proposal of decision of an administrative law judge in the party's appeal.

§43.103. Administrative Review of Option Beneficiary or Optional Retirement Annuity Plan Changes.

A determination by the executive director or the executive director's designee regarding whether a court with jurisdiction over the marriage of a retiree and the beneficiary of an optional annuity selected by the retiree under Government Code §824.204(c)(1), (c)(2), or (c)(5) or an optional disability annuity selected by the retiree under Government Code §824.308(c)(1), (c)(2), or (c)(5) has approved or ordered a change in retirement plan under Government Code §824.1012, or a change in beneficiary under Government Code §824.1013, is a final decision by TRS. No appeal to the board of trustees of TRS is authorized. A party adversely affected by a determination of the executive director or the designee must file a motion for reconsideration with the executive director no later than 25 days after the date such a determination is rendered if the party wishes to contest the determination.

§43.104. Request for Adjudicative Hearing.

(a) On a matter over which TRS has jurisdiction and authority to grant relief that does not conflict with the terms of the pension plan, a person may appeal a final administrative decision by filing a petition for adjudicative hearing with the deputy director.

(b) A petition for adjudicative hearing must be filed by the later of:

(1) 45 days after the date the final administrative decision is mailed; or

(2) a number of days after the final administrative decision is mailed equal to the number of days it took TRS to issue the final administrative decision.

(c) The number of days it took TRS to issue the final administrative decision is calculated from the date TRS received the person's appeal of the department manager's decision to the date TRS mailed the final administrative decision.

(d) The original petition for an adjudicative hearing should be styled: "Petition of (Name of Petitioner)" and must be filed with TRS, directed to the attention of the deputy director. The petition must include:

(1) the name, address, telephone number, and email address of petitioner;

(2) the name, address, telephone number, email address, and, if known, the tax number of any member whose interest or whose beneficiary's interest may be involved in the case. In lieu of the tax number, the petition may include other information sufficient to identify the member or beneficiary whose interest may be involved in the case;

(3) the identity of other all persons who may have a material interest in the outcome of the case, the basis for that interest, and such person's last known address, telephone number, and email address; and

(4) a concise statement of the facts supporting the petition and a statement of the specific relief requested from TRS.

§43.105. Docketing of Petition for Adjudicative Hearing and Dismissal for Failure to Obtain Setting.

(a) Subject to subsection (b) of this section, the deputy director shall assign a petition for adjudicative hearing a TRS docket number, provide all parties notice of the docket number, and refer the matter for an adjudicative hearing before SOAH or otherwise as authorized by law if the petition regards the following:

(1) any matter related to a member's service or disability retirement, death or survivor benefits, or request for refund of accumulated contributions;

(2) the eligibility of a person for membership in TRS;

(3) the amount of annual compensation credited by TRS;

(4) the amount of deposits or fees required of a member;

(5) any matter involving the granting, purchase, transfer, or establishment of service credit;

(6) any application for correction of error in the file of a member, beneficiary, or alternate payee, other than a determination of whether an order is a QDRO;

(7) the cancellation or suspension of retirement, survivor, or death benefits; or

(8) any other matter affecting eligibility for retirement and related disability and death benefits or the amount of such benefits payable under the laws governing TRS.

(b) Notwithstanding subsection (a) of this section, the deputy director may decline to docket an

appeal for the following reasons:

- (1) TRS has no jurisdiction over the subject matter of the petition;
- (2) TRS does not have the authority to grant the relief requested by the petition;
- (3) the petition is not timely filed; or
- (4) the petition otherwise fails to comply with this chapter.

(c) The deputy director's decision declining to docket an appeal is the final decision of TRS when the circumstances described in Government Code §2001.144, are met. A person may not appeal such decision to the executive director or the board. A person may file a motion for rehearing with the deputy director in accordance with §43.306 of this chapter (relating to Rehearings).

(d) Prior to docketing a petition, the deputy director may review the request filed with TRS to determine whether it meets the requirements of §43.104 of this chapter (relating to Request for Adjudicative Hearing). If the petition does not materially comply with §43.104 of this chapter, the deputy director shall return the petition to the person who filed it, along with reasons for the return. The person shall be given 60 days from the date the deputy director sends the notice to file a corrected petition. If the petition is not corrected to substantially comply with §43.104 of this chapter within the time given, the deputy director may decline to docket the appeal.

(e) A party that files an appeal and causes a matter to be docketed and referred to for adjudicative hearing shall have the responsibility of prosecuting the appeal within a reasonable time period. TRS may seek dismissal with prejudice of an appeal if a responsible party fails to obtain a setting for a hearing on the merits within two years of referral of the matter for an adjudicative hearing.

§43.106. Authority to Grant Relief.

(a) At any time before an appeal is referred for adjudicative hearing, the chief benefit officer or, in the matter of certification for disability retirement, the Medical Board may grant the relief sought by the petitioner and dismiss the appeal, provided that the interests of other individual parties are not adversely affected and the relief does not conflict with the terms of the pension plan.

(b) If the granted appeal has been referred to SOAH, the parties shall request that the SOAH administrative law judge dismiss the case from the SOAH docket in accordance with SOAH rules. If the granted appeal was referred for an adjudicative hearing to a hearing official not affiliated with SOAH, then the rules of Subchapter C of this chapter (relating to Hearings Not Docketed at SOAH) shall apply to the dismissal of the case.

§43.107. Subpoenas and Commissions.

(a) Except as provided in subsection (d) of this section, the issuance of a subpoena in any proceeding under this chapter shall be governed by the Administrative Procedure Act, Government Code §2001.089. Upon a written request by a party showing good cause and payment of required

fees, or upon the request of the administrative law judge, the deputy director may issue a subpoena addressed to the sheriff or a constable to require the attendance of witnesses or the production of books, records, papers, or other objects as may be necessary and proper for the purposes of a hearing.

(b) The issuance of a commission in any proceeding under this subchapter shall be governed by the Administrative Procedure Act, Government Code §2001.094. Upon a written motion of a party and payment of required fees, or on the request of the administrative law judge, the deputy director may issue a commission addressed to the officers authorized by statute to take a deposition, requiring that the deposition of a witness be taken.

(c) Subpoenas and commissions shall be issued by the deputy director only after a deposit of sums sufficient to ensure payment of expenses incident to the subpoenas. Payment of witness fees shall be made in the manner prescribed in the Administrative Procedure Act, Government Code §2001.103.

(d) Members of the Medical Board may not be the subject of a subpoena regarding findings or determinations made in assisting the deputy director or the board of trustees in all matters referred to it.

SUBCHAPTER C. HEARINGS NOT DOCKETED AT SOAH

34 TAC §§43.201, 43.202, 43.203, 43.204, 43.205, 43.206, 43.207, 43.208, 43.209, 43.210, 43.211, 43.212, 43.213, 43.214, 43.215, 43.216, 43.217, 43.218, 43.219, 43.220, 43.221, 43.222, 43.223, 43.224, 43.225, 43.226, 43.227, and 43.228

STATUTORY AUTHORITY

The proposed new rules are proposed under the authority of Government Code §825.102, which authorizes the Board to adopt rules for eligibility for membership, the administration of the funds of the retirement system, and the transaction of business of the Board; and Government Code §825.115, which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority and to refer a contested case to a hearing officer not affiliated with the State Office of Administrative Hearings.

CROSS-REFERENCE TO STATUTE

The proposed new rules affect the following statutes: Government Code §825.115, which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority and to refer a contested case to a hearing officer not affiliated with the State Office of Administrative Hearings.

§43.201. Applicability.

The provisions of this subchapter only apply to an adjudicative hearing referred to a hearing official not affiliated with SOAH.

§43.202. Form of Pleadings.

(a) Briefs and other pleadings shall be typed or printed on paper not to exceed 8 1/2 inches by 11 inches with an inside margin of at least one inch width. Annexed exhibits shall be folded to the same size. Only one side of the paper shall be used. Copies may be used, provided they are clear and permanently legible.

(b) The pleadings shall state their object and shall contain a concise statement of the supporting facts.

(c) The original of any pleading filed with TRS shall be signed by the party filing it or by his or her authorized representative. Pleadings shall contain the address, telephone number, and email address of the party filing the documents or the name, business address, telephone number, email address, and fax number of counsel.

(d) If a TRS or other adjudicative hearing docket number has been assigned, pleadings shall contain the docket number.

(e) All pleadings shall contain the following:

(1) the name of the party filing the pleading;

(2) a concise statement of the facts relied upon by the party;

(3) a request stating the type of relief, action, or order desired by the party;

(4) a certificate of service conforming to subsection (f) of this section; and

(5) any other matter required by statute.

(f) Written pleadings may be served by hand-delivery, courier-receipted delivery, fax, or regular, certified, or registered mail upon all other known parties of record, and a certification of such service should be submitted with the original copy of the pleading filed with TRS. If a party is represented by an attorney, service may be made upon a party by serving the attorney of record. The following form of certification will be sufficient: "I hereby certify that I have this _____ day of _____, 20____, served copies of the foregoing pleading upon all other parties to this proceeding, by (state the manner of service). Signature."

(g) A party may object to the form or sufficiency of a pleading by filing the objections in writing at least 15 days before the hearing date. If the objections are sustained, the administrative law judge shall allow a reasonable time for amendment.

§43.203. Filing of Pleadings and Amendments.

(a) Any party to a case may file answers, amendments to pleadings (as permitted by this subchapter), and motions that conform to the requirements of this subchapter. Any amendment that operates as a surprise to any other party may be allowed only upon a written motion showing no harm will result. Failure to file an answer shall in no case result in a default judgment.

(b) The filing of motions, answers, amended pleadings, and corrected pleadings shall not be permitted to delay any hearing unless the executive director, board of trustees, or administrative law judge determines that such delay is necessary in order to prevent injustice or to protect the public interest and welfare.

§43.204. Briefs.

Briefs shall conform, where practicable, to the form requirements of pleadings set out in this subchapter. The points involved shall be concisely stated, the allegations in support of each point shall be summarized, and the argument and authorities shall be organized and directed to each point in a concise and logical manner.

§43.205. Motions.

A motion, unless made during a hearing, shall be made in writing, set forth the relief or order sought, state the grounds for such relief, and be timely filed with TRS, and the administrative law judge. A copy shall be served by the movant on each party of record. Any reply to the motion shall be timely filed with TRS or the administrative law judge, as applicable, with a copy served on the movant and other parties of record. Failure to serve copies may be grounds for withholding consideration of the motions or replies. Unless otherwise directed by the administrative law judge, executive director, or board, motions based on matters which do not appear of record must be supported by affidavit. When necessary, a hearing will be held to consider any motion.

§43.206. Discovery.

If a matter was referred for an adjudicative hearing to a hearing official not affiliated with SOAH, parties may obtain discovery under this subchapter or under SOAH's relevant procedural rules (1 TAC §§155.251-155.259 (relating to Discovery)) to the extent those rules do not conflict with this subchapter.

§43.207. Notice of Hearing and Other Action.

(a) Notices of hearing, proposals for decision, and all other rulings, orders, and actions by TRS, or an administrative law judge, as applicable, shall be served upon all parties or their attorneys of record in person or at their last known address by mail. Service by mail is complete upon deposit in the mail, properly addressed, with postage prepaid if it is received by TRS within a timely manner under Rule 5 of the Texas Rules of Civil Procedure and the sender provides adequate proof of the mailing date. Service may also be accomplished by electronic mail or facsimile transmission if all parties agree. In that case, the sender shall retain the original of the document and file it upon

request with the administrative law judge or the executive director, as applicable. Upon request, the sender has the burden of proving the date and time of receipt of the document served by facsimile transmission or electronic mail. Electronic mail may not be used with documents produced pursuant to a discovery request. On motion by any party or on its own motion, TRS may serve notice of a hearing on any person whose interest in the subject matter will be directly affected by the final decision in the case.

(b) All initial hearing notices shall include the following:

(1) a statement of time, place, and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular sections of the statutes and rules involved;

(4) a short, plain statement of the factual matters asserted. If TRS or a party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon written application filed not less than ten days before the date set for hearing, a more definite and detailed statement must be furnished not less than seven days prior to the date set for the hearing; and

(5) a statement that failure to appear at the prehearing conference or any scheduled hearing may result in the following: the facts alleged by TRS may be admitted as true; the relief requested by TRS may be granted; petitioner's appeal may be denied; or petitioner's appeal may be dismissed with prejudice for failure to prosecute the claim; or any or all of the foregoing actions.

(c) After service of the initial notice, any party wishing to raise issues or matters not set forth in the initial notice must do so by filing a motion which sets forth such issues or matters not less than 30 days before the date set for hearing. If the motion is granted, the administrative law judge shall give notice, not less than 20 days before the date of hearing, of the additional issues and matters to be decided in the contested case.

(d) All other notices in a contested case shall set forth only the additional issues and matters to be decided.

§43.208 Agreements to be in Writing.

No stipulation or agreement between the parties, their attorneys, or representatives, with regard to any matter involved in any proceeding governed by this subchapter, shall be enforced unless it shall have been reduced to writing and signed by the parties or the representatives authorized by this subchapter to appear for them, or unless it shall have been dictated into the record by them during the course of a hearing or incorporated into an order bearing their written approval. This section does not limit a party's ability to waive, modify, or stipulate any right or privilege afforded by this subchapter, unless precluded by law.

§43.209 Motion for Consolidation.

A motion for consolidation of two or more appeals, applications, petitions, or other proceedings shall be in writing, signed by the movant or the movant's attorney, and filed with SOAH, TRS, or the administrative law judge, as applicable, prior to the date set for hearing. The motion shall state the number and style of all proceedings sought to be consolidated, and the movant shall file a copy of the motion in each proceeding. No two or more appeals, applications, petitions, or other proceedings shall be consolidated or heard jointly without the consent of all parties to all such proceedings unless the administrative law judge or executive director shall find that the two or more appeals, applications, petitions, or other proceedings involve common questions of law or fact, or both, and shall further find that separate hearings would result in unwarranted expense, delay, or substantial injustice. Special hearings on separate issues may also be allowed.

§43.210 Additional Parties.

(a) A person who may be affected by a decision of TRS in the proceeding may file a written motion to intervene at least 15 days in advance of the hearing date. The person may request an opportunity to present any relevant, material, and proper testimony and evidence bearing upon the request to intervene.

(b) A party may move to join other persons as parties to the proceeding if they may be affected by a final decision of TRS. A motion to join other parties shall identify the person by name, address, and telephone number; shall state the nature of the other person's relationship to the proceeding or potential interest in the proceeding; and shall state why the person is needed for the just adjudication of the appeal or other grounds for the motion. The motion shall also state whether joinder of the person is feasible. If the motion is granted, the person shall be a party to the proceeding.

§43.211. Appearance and Representation.

(a) A party or person seeking to be admitted as a party may appear at a hearing or prehearing conference in person or by an attorney. A natural person may not be represented by another person who is not an attorney. An entity other than a natural person that is a party or that seeks to be admitted as a party may appear through a person with legal authority to act on behalf of the entity, such as an officer, director, or trustee, or may be represented by an attorney.

(b) An attorney representing a person or party in a proceeding must be authorized to practice law in the court of highest jurisdiction of any state of the United States or the District of Columbia. The attorney of record of any party shall be the attorney who signs the first pleading filed on behalf of the party or who files with TRS or the administrative law judge, as applicable, a written notice signed by the party designating the attorney as attorney of record in the case. An attorney appearing on behalf of a party may be required to show authority to act for the party. Nothing in this subchapter shall be interpreted to require a party to the hearing to be represented by counsel.

§43.212. Lead Counsel.

A party represented by more than one attorney in a proceeding may be required to designate a lead counsel who shall have control in the management of the matter. The administrative law judge, executive director, or board may limit the number of counsel heard on any matter.

§43.213. Powers of the Administrative Law Judge.

The presiding administrative law judge shall have the authority established by applicable statutes and the rules of this subchapter. Additionally, the administrative law judge may:

- (1) determine the jurisdiction of TRS concerning the matter under consideration;
- (2) determine the scope of the matter referred to the administrative law judge; and
- (3) limit testimony to matters under TRS's jurisdiction and to matters referred to the administrative law judge by TRS.

§43.214. Prehearing Conference and Orders.

(a) The administrative law judge may hold a prehearing conference prior to any adjudicative hearing.

(b) At the prehearing conference or by prehearing conference order, the administrative law judge may require parties to file and serve the following in order to expedite the hearing:

(1) a list of witnesses the party intends to have testify, with a brief narrative summary of their expected testimony;

(2) a written statement of the disputed issues; or

(3) a copy of any documentary evidence the party intends to use at the hearing.

(c) Witnesses and proposed documentary evidence may be added and narrative summaries of expected testimony amended at the hearing only upon a finding of the administrative law judge that good cause existed for failure to serve the additional or amended material by the established date.

(d) At any prehearing conference, or in a prehearing conference order, the administrative law judge:

(1) may obtain stipulations and admissions, and otherwise identify matters on which there is agreement;

(2) shall identify disputed issues for consideration at the hearing;

(3) may consider and rule prospectively upon objections to the introduction into evidence at the hearing on the merits of any written testimony, documents, papers, exhibits, or other

materials;

(4) may identify matters of which official notice may be taken;

(5) may strike issues not material or not relevant, including issues not within the scope of the matter referred by TRS; and

(6) may consider any other matter that may expedite the hearing or aid in the disposition of the matter.

(e) A prehearing conference may be held by means of a conference telephone call.

(f) Rulings or decisions made at a prehearing conference shall be summarized in a written order by the administrative law judge and made part of the record.

§43.215. Conduct of Hearing.

(a) A hearing shall be confidential to ensure the information of a member's file is not disclosed. The member may expressly waive the member's right to maintain confidentiality of the information before the proceedings will be opened to the public.

(b) All hearings will be held in Austin, Texas unless all parties agree to another site.

(c) The petitioner has the burden of proving by a preponderance of the evidence that the relief sought in the petition should be granted. The petitioner shall present his or her direct case first at hearing.

(d) Where the proceeding is initiated at the executive director's or the board's own call, or where several proceedings are heard on a consolidated record, the administrative law judge shall designate who shall open and close and at what stage intervenors or other parties shall be permitted to offer evidence.

(e) The administrative law judge may call upon any party or staff of TRS for further material or relevant evidence upon any issue before the issuance of a proposal for decision; however, no such evidence shall be allowed into the record without an opportunity for inspection, cross-examination, and rebuttal by the other interested parties.

(f) At the request of a party, the administrative law judge shall order the witnesses excluded so that they cannot hear the testimony of other witnesses. This section does not authorize exclusion of a party.

(g) During the hearing, formal exceptions to rulings of the administrative law judge are not required. It shall be sufficient that a party, at the time of any ruling is made or sought, shall make known to the administrative law judge the action sought.

§43.216. General Admissibility.

(a) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in nonjury civil cases in the district courts of Texas shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by a reasonably prudent person in the conduct of the person's affairs. The administrative law judge shall give effect to the rules of privilege recognized by law.

(b) When testimony is excluded by ruling of the administrative law judge, the party offering such evidence shall be permitted to make an offer of proof by dictating or submitting in writing the substance of the proposed testimony prior to the conclusion of the hearing. Such offer of proof shall be sufficient to preserve the point for review. The administrative law judge may ask questions of the witness as he or she deems necessary to satisfy himself or herself that the witness would testify as presented in the offer of proof.

§43.217. Exhibits.

(a) Exhibits of documentary character shall be of a size which will not unduly encumber the files and records of TRS and whenever practicable, shall conform to the requirements set forth in §43.202 of this chapter (relating to Form of Pleadings).

(b) The original of each exhibit offered shall be tendered to the court reporter or administrative law judge for identification; one copy shall be furnished to the administrative law judge and one copy to each other party of record or his or her attorney of record.

(c) In the event an exhibit has been identified, objected to, and excluded, the administrative law judge shall determine whether the party offering the exhibit withdraws the offer, and if so, permit the return of the exhibit to that party. If the excluded exhibit is not withdrawn, it shall be given an exhibit number for identification, shall be endorsed by the administrative law judge with the ruling, and shall be included in the record for the purpose only of preserving the exception.

(d) Unless specifically permitted by the administrative law judge, no exhibit will be permitted to be filed in any proceeding under this subchapter after the conclusion of the hearing. In the event the administrative law judge allows an exhibit to be filed after the conclusion of a hearing, copies of the late-filed exhibit shall be served on all parties of record.

§43.218. Pre-filed Direct Testimony in Disability Appeal Proceedings.

(a) In a contested case concerning Medical Board denial of certification of disability or a finding that a disability retiree is no longer mentally or physically incapacitated from the performance of duty, all testimony and other evidence, including medical or employment records, that the petitioner intends to offer in petitioner's direct case shall be pre-filed at least 90 days before the date of the hearing on the merits. Testimony shall include all expert and fact witnesses, including that of a petitioner who intends to testify. In order to avoid any unnecessary expense and time associated with adjudicative hearings and in accordance with Government Code §824.303, which requires Medical Board certification in order for a person to be retired, TRS staff shall be given adequate opportunity to present such information to the Medical Board for consideration before

the hearing on the merits. If, upon consideration of the information petitioner intends to offer at hearing, the Medical Board certifies the person as disabled, TRS staff or petitioner may move for dismissal of the appeal. If, however, the Medical Board does not certify the person as disabled, the petitioner may continue to prosecute the appeal as previously docketed and referred for an adjudicative hearing. The petitioner shall not be permitted to introduce direct testimony and evidence that has not been pre-filed and made available to the Medical Board for consideration.

(b) The pre-filed testimony of a witness upon direct examination shall be in question and answer form. The qualifications of an expert witness shall be described in question and answer testimony or by attachment of a resume as an exhibit to the testimony. Pre-filed testimony of a witness may be offered into the record by a party during its direct case. The testimony shall not be admitted into the hearing record in whole or in part unless the witness is available at the hearing on the merits and, upon being sworn, identifies the pre-filed testimony as a true and accurate record of what his or her testimony would be if the witness were testifying orally. A witness may be given an opportunity to correct errors. After calling the witness and authenticating the testimony in this manner, a party may offer the testimony into the record. Pre-filed testimony is subject to the rules of evidence, including objections or motions to strike when such testimony is offered, as if the testimony were presented orally at a hearing. Such testimony, if admitted, may be incorporated in the record as if read or received as an exhibit. The witness shall be subject to cross-examination by other parties after the admission of the pre-filed testimony in whole or in part, and the party offering the testimony may conduct re-direct examination of the witness at the conclusion of cross-examination.

(c) Pre-filed documentary evidence other than testimony of witnesses may be offered into the record by a party during its direct case. All pre-filed documentary evidence is subject to the rules of evidence.

§43.219. Limit on Number of Witnesses.

The administrative law judge shall have the right in any proceeding under this subchapter to limit the number of witnesses whose testimony is merely cumulative.

§43.220. Failure to Appear.

The petitioner or the petitioner's attorney shall appear at the hearing. Failure to so appear may be grounds for withholding consideration of a matter, denial of the appeal with or without prejudice, or dismissal of the appeal. However, no default judgment may be taken against a third party petitioner or respondent for failure to appear.

§43.221. Conduct and Decorum at Hearing.

Every participant in the proceedings shall conduct himself with proper dignity, courtesy, and respect for TRS, the administrative law judge, all other participants, and all other persons attending the proceedings. TRS or the administrative law judge may take such action as appropriate and necessary to enforce this rule.

§43.222. Official Notice.

Official notice may be taken of all facts judicially cognizable. In addition, official notice may be taken of generally recognizable facts within the specialized knowledge of TRS. All parties shall be notified either before or during the hearing, or by reference in preliminary reports, drafts of orders, or otherwise, of any material officially noticed, including any staff memoranda or data. All parties will be afforded an opportunity to contest the material so noticed.

§43.223. Recording of the Hearing; Certified Language Interpreter.

(a) A record of a hearing or prehearing conference shall be made in a manner consistent with the purpose of 1 TAC §155.423 (relating to Making a Record of Proceeding). Because of the nature of TRS proceedings and the expense of stenographic recordings and transcripts, it is the policy of TRS to rely on an audio or video recording as the official record of the proceeding, regardless of the anticipated length of the hearing.

(b) TRS may assess the cost of preparation of a stenographic recording or transcript against a party requesting such, or against other parties as appropriate. Cost of a transcript copy ordered by a party shall be paid by that party. TRS may require a deposit or full payment of the estimated costs by a party against whom costs have been assessed in advance of arranging for a court reporter to be present at the hearing or in advance of preparation of the transcript. If no party requests stenographic recording of a proceeding or preparation of a transcript by a court reporter but the administrative law judge so requires, TRS may assess the cost to one or more parties or may request that TRS not be required to bear the costs.

(c) In the alternative to a stenographic recording or transcript prepared by a court reporter, TRS may prepare a transcript from a video or audio tape of the proceeding. The transcript prepared by TRS may be considered the official record of the proceeding. TRS may obtain the official audio or video recording from the administrative law judge for purposes of preparing the transcript. A party who objects to a TRS-prepared transcript and requests that proceedings be stenographically recorded or transcribed by a court reporter may be required to pay the costs of such recording and transcription.

(d) A stenographic reporter shall recognize that TRS may print and distribute additional copies of the transcript as necessary to conduct its business and shall maintain the confidentiality of information presented at hearing.

(e) A party who desires the services of a certified language interpreter for any part of the contested case proceedings is responsible for arranging for the interpreter and paying for the services.

§43.224. Dismissal without Hearing.

(a) The administrative law judge may consider motions for dismissal from the adjudicative hearing docket without a hearing and recommend dismissal with or without prejudice for any of the following reasons:

(1) failure to prosecute a claim;

(2) unnecessary duplication of proceedings or res judicata;

(3) withdrawal or voluntary dismissal of appeal;

(4) moot questions, obsolete petitions, or laches;

(5) lack of jurisdiction; or

(6) failure to comply with §43.104 of this chapter (relating to Request for Adjudicative Hearing) or other applicable sections.

(b) The administrative law judge shall dismiss from the adjudicative hearing docket and recommend dismissal by TRS of the appeal of a petitioner who has defaulted by:

(1) failing to appear at the hearing; or

(2) failing to request a hearing or take some other action specified by the administrative law judge within 30 days after notice is mailed of intention to dismiss the claim.

(c) For good cause, the executive director may permit reinstatement of a dismissed appeal.

§43.225. Summary Disposition.

(a) A party may move with or without supporting affidavits for a summary disposition any time after an appeal has been referred for an adjudicative hearing. The motion for summary disposition shall specify the grounds for resolving the appeal without an evidentiary hearing. The motion and any supporting affidavits shall be filed and served at least 30 days before the time specified for the hearing. The motion may be granted if the pleadings, discovery, affidavits, stipulation of the parties, and authenticated or certified public records submitted in support of the motion show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on the issues expressly set out in the motion.

(b) A proposal for decision by the administrative law judge recommending summary disposition is subject to exceptions in the same manner as a proposal for decision issued after an evidentiary hearing.

§43.226. The Record.

The record in a contested case shall include the items identified in Government Code §2001.060.

§43.227. Findings of Fact.

Findings of fact shall be based exclusively on the evidence admitted in accordance with applicable rules and statutes and on matters officially noticed.

§43.228. Reopening of Hearing.

Upon motion of any party or upon the order of the administrative law judge the hearing may be reopened for good cause at any time before the proposal for decision is issued.

SUBCHAPTER D. FINAL DECISIONS OF TRS.

34 TAC §§43.301, 43.302, 43.303, 43.304, 43.305, 43.306, and 43.307

STATUTORY AUTHORITY

The proposed new rules are proposed under the authority of Government Code §825.102, which authorizes the Board to adopt rules for eligibility for membership, the administration of the funds of the retirement system, and the transaction of business of the Board; Government Code §825.115(b), which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority; Government Code §825.521, which provides that in adopting rules relating to appeals of a determination or decision of the retirement system by the system's staff, the board of trustees shall ensure that rules establishing deadlines for the filing of an appeal afford a member or retiree at least the same amount of time to file an appeal as the retirement system has to issue the retirement system's decision; and Section 12 of House Bill 1585, as enrolled by the 87th Texas Legislature, Regular Session, on May 13, 2021 and effective on May 26, 2021.

CROSS-REFERENCE TO STATUTE

The proposed new rules affect the following statutes: Government Code §825.115, which authorizes the Board to adopt rules relating to the authority of the Board to make a final decision in a contested case or delegate its authority and Government Code §825.521, which provides that in adopting rules relating to appeals of a determination or decision of the retirement system by the system's staff, the board of trustees shall ensure that rules establishing deadlines for the filing of an appeal afford a member or retiree at least the same amount of time to file an appeal as the retirement system has to issue the retirement system's decision

§43.301. Proposals for Decision and Exceptions.

(a) The administrative law judge shall issue a proposal for decision with proposed conclusions of law and findings of fact in accordance with Government Code, Chapter 2001 and other applicable law.

(b) Exceptions to the proposal for decision, if any, shall be filed with the SOAH administrative law judge or the administrative law judge in accordance with 1 TAC §155.507 (relating to Proposals for Decision; Exceptions and Replies). The exceptions shall also be filed with TRS, directed to the attention of the executive director.

(c) The administrative law judge shall notify TRS and the parties whether the administrative law judge made any changes to the proposal for decision based on the exceptions and replies of the parties.

§43.302. Decision of Executive Director.

(a) After TRS receives notice from the administrative law judge under §43.301(c) of this chapter (relating to Proposals for Decision and Exceptions), the executive director shall review the proposal for decision of the administrative law judge and render a decision in the proceeding, except as provided by §43.303 of this title (relating to Proposals for Decision and Exceptions regarding Eligibility for Disability Retirement). The executive director may accept or modify the proposed conclusions of law or proposed findings of fact or may vacate or modify an order issued by an administrative law judge in the manner set forth in subsection (c) of this section. If changes are made, the decision shall state in writing the specific reason and legal basis for each change. A copy of the decision shall be served on the parties.

(b) The executive director's decision shall be based upon the existing record in the case, including any exceptions and replies to exceptions filed with the administrative law judge.

(c) The executive director, in the executive director's sole discretion may take the following actions:

(1) modify, refuse to accept, or delete any proposed finding of fact or conclusion of law made by the administrative law judge;

(2) make alternative findings of fact and conclusions of law;

(3) vacate or modify an order issued by the administrative law judge and remand to the administrative law judge, if necessary; and

(4) make a final decision on a contested case.

(d) In exercising the director's discretion, the executive director, may consider but is not limited to the following grounds for changing a finding of fact or conclusion of law or for making a final decision in a contested case that is contrary to the recommendation of the administrative law judge:

(1) the administrative law judge did not properly apply or interpret applicable law, retirement system rules, written policies provided to the administrative law judge, or prior administrative decisions;

(2) a prior administrative decision on which the administrative law judge relied is incorrect or should be changed;

(3) a technical error in a finding of fact should be changed;

(4) a finding of fact of the administrative law judge is against the weight of the evidence;

(5) a finding or conclusion or other action of the administrative law judge would alter the terms of the plan; or

(6) the change is pursuant to a fiduciary responsibility.

(e) The executive director may delegate any of the authority under this subchapter to the deputy director or another TRS employee for any appeal.

§43.303. Proposals for Decision and Exceptions regarding Eligibility for Disability Retirement.

(a) In a proceeding relating to a member's eligibility for disability retirement, an administrative law judge's proposal for decision shall be reviewed by the board of trustees.

(b) After TRS receives notice from the administrative law judge under §43.301(c) of this chapter (relating to Proposals for Decision and Exceptions), the board of trustees shall review the proposal for decision of the administrative law judge and render a decision in the proceeding. The board of trustees may accept or modify the proposed conclusions of law or proposed findings of fact or may vacate or modify an order issued by an administrative law judge in the manner set forth in subsection (d) of this section. If changes are made, the decision shall state in writing the specific reason and legal basis for each change. A copy of the decision shall be served on the parties.

(c) The decision of the board of trustees shall be based upon the existing record in the case, including any exceptions and replies to exceptions filed with the administrative law judge.

(d) The board of trustees, in the board's sole discretion may take the following actions:

(1) modify, refuse to accept, or delete any proposed finding of fact or conclusion of law made by the administrative law judge;

(2) make alternative findings of fact and conclusions of law;

(3) vacate or modify an order issued by the administrative law judge and remand to the administrative law judge, if necessary; and

(4) make a final decision on a contested case.

(e) In exercising the board's discretion, the board of trustees may consider but is not limited to the following grounds for changing a finding of fact or conclusion of law or for making a final decision in a contested case that is contrary to the recommendation of the administrative law judge:

(1) the administrative law judge did not properly apply or interpret applicable law, retirement system rules, written policies provided to the administrative law judge, or prior administrative decisions;

(2) a prior administrative decision on which the administrative law judge relied is incorrect or should be changed;

(3) a technical error in a finding of fact should be changed;

(4) a finding of fact of the administrative law judge is against the weight of the evidence;

(5) a finding or conclusion or other action of the administrative law judge would alter the terms of the plan; or

(6) the change is pursuant to a fiduciary responsibility.

(f) The board of trustees shall consider a proposal for decision under this section in open meeting to the extent required by law. The board in its sole discretion may determine whether to hear oral argument from the parties when considering a proposal for decision under this section.

§43.304. Appeals to the Board of Trustees.

(a) Any party adversely affected by a decision of the executive director in a docketed appeal may appeal the decision to the board of trustees, unless by statute or other rule the decision of the executive director is the final decision of TRS. Written notice of appeal and any associated exceptions or briefing under subsection (d) of this section must be filed with the executive director by the later of:

(1) 20 days after the decision of the executive director is mailed; or

(2) the number of days after the date the decision of the executive director is mailed equal to the number of days it took the executive director to render the decision in the proceeding.

(b) The number of days it took the executive director to render the decision in a proceeding is calculated from:

(1) if exceptions to a proposal for decision are not filed, the date of the deadline to file exceptions to a proposal for decision in the proceeding under §43.301(b) of this chapter (relating to Proposals for Decisions and Exceptions) to the date the decision of the executive director is mailed; or,

(2) if exceptions to a proposal for decision are filed, the date the administrative law judge takes action on the filed exceptions to the date the decision of the executive director is mailed.

(c) If notice of appeal is timely filed, the decision of the executive director shall serve as a proposal for decision to the board.

(d) If a decision of the executive director is appealed, the parties may file additional exceptions or briefs and replies. Additional exceptions or briefs must be filed and served at the same time as the notice of appeal. Replies shall be filed and served within 15 days of the filing of the notice of appeal and exceptions or briefs. The executive director may modify the filing deadlines. Briefs and replies filed under this section may not include additional evidence not previously admitted into the administrative record of the proceeding.

(e) A notice of appeal to the Board of Trustees must also include a statement whether the appealing party is requesting oral argument before the board of trustees and, if oral argument is set, whether the party prefers to appear in person or virtually. A notice of appeal that does not include a statement regarding oral argument shall be deemed as not requesting oral argument. A notice of appeal that does not include how the party requests to appear for oral argument shall be deemed as a request to appear in person.

(f) A nonappealing party may also request oral argument before the board of trustees or request that oral argument not be granted in the party's reply to the appealing party's notice of appeal. The nonappealing party may also state whether the party requests to appear in person or virtually for oral argument.

(g) The executive director, in the executive director's sole discretion, shall determine whether to grant oral argument in a given appeal and how the parties shall appear for oral argument, if granted. The executive director shall consult with the chairman of the board of trustees in making a determination under this subsection and shall make the determination by order no later than 30 days prior to the date of the hearing. The order shall be provided to all parties to the appeal.

(h) The final decision in an appeal shall be based upon the existing record in the case, including any exceptions, oral argument, or briefing filed with the board of trustees under this section. In its sole discretion, the board of trustees may take the following actions:

(1) modify, refuse to accept, or delete any proposed finding of fact or conclusion of law made by the administrative law judge;

(2) make alternative findings of fact and conclusions of law;

(3) vacate or modify an order issued by the administrative law judge and remand to the administrative law judge, if necessary; and

(4) make a final decision on a contested case.

(i) In exercising its discretion, the board of trustees may consider but is not limited to the following grounds for changing a finding of fact or conclusion of law or for making a final decision in a contested case that is contrary to the recommendation of the administrative law judge:

(1) the administrative law judge did not properly apply or interpret applicable law, retirement system rules, written policies provided to the administrative law judge, or prior administrative decisions;

(2) a prior administrative decision on which the administrative law judge relied is incorrect or should be changed;

(3) a technical error in a finding of fact should be changed;

(4) a finding of fact of the administrative law judge is against the weight of the evidence;

(5) a finding or conclusion or other action of the administrative law judge would alter the terms of the plan; or

(6) the change is pursuant to a fiduciary responsibility.

(j) An appeal to the board of trustees shall be considered in open meeting to the extent required by law.

§43.305. Final Decision of TRS.

An administrative decision of TRS staff, a decision by the Medical Board, or a decision by the executive director is the final decision of TRS unless a party exhausts any right to appeal a matter to the board of trustees, if applicable.

§43.306. Rehearings.

(a) A decision of the executive director or deputy director is the final decision of TRS when, under applicable law or rule, the decision is not subject to appeal to the board and when the circumstances described in Government Code §2001.144, are met.

(b) A decision by the board of trustees in a contested case is the final decision of TRS when the circumstances described in Government Code §2001.144, are met.

(c) A party adversely affected by a decision that may be the final decision of TRS may file a motion for rehearing with TRS, not later than the 25th day after the date on which the decision or order that is the subject of the motion is signed, unless the time for filing the motion has been extended under Government Code §2001.142, by an agreement under Government Code §2001.147, or by written order of the executive director or deputy director under subsection (g) of this section. A timely motion for rehearing is a prerequisite to an appeal in a contested case under Government Code §2001.145, if an appeal is otherwise permitted by law.

(d) A reply to the motion for rehearing must be filed with TRS not later than the 40th day after the date on which the decision or order that is the subject of the motion is signed, or not later than the 10th day after the date a motion for rehearing is filed if the time for filing the motion for rehearing has been extended by an agreement under Government Code §2001.147 or by a written order of the executive director or deputy director under subsection (g) of this section.

(e) The board of trustees, the executive director, or the deputy director, as applicable, shall act on a motion for rehearing not later than the 55th day after the date on which the decision or order that is the subject of the motion is signed. If the motion is not acted on within the time specified, the motion is overruled by operation of law.

(f) The board of trustees may rule on a motion for rehearing in the manner provided for in Government Code §2001.146. A subsequent motion for rehearing is not required after the board of trustees rules on a motion for rehearing unless a motion is required under Government Code §2001.146(h).

(g) The executive director or the deputy director if the motion for rehearing concerns a decision of the deputy director may by written order extend the time for filing a motion or reply or for TRS to act on a motion for rehearing, in accordance with Government Code §2001.146.

(h) A motion for rehearing under this section must identify with particularity findings of fact or conclusions of law that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous. The motion must also state the legal and factual basis for the claimed error.

§43.307. Cost of Preparing Administrative Record.

In the event an appeal of the Final Decision of the Board of Trustees is authorized by law, any cost associated with pursuing the appeal is the responsibility of the appealing party, including the cost of the record of the administrative proceedings and the transcription of any video or audio recordings of administrative proceedings.

CERTIFICATION

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.