Item 18:
Review of 19 TAC Chapter 250, Agency Administration

DISCUSSION ONLY

SUMMARY: Texas Government Code, §2001.039, establishes a four-year rule review cycle for all state agency rules, including State Board for Educator Certification (SBEC) rules. This item presents the review of 19 TAC Chapter 250, Agency Administration. The rules being reviewed establish procedures for SBEC purchasing, rulemaking, training and education of employees, and negotiation and mediation relating to certain contract disputes.

STATUTORY AUTHORITY: Statutory authority for the rule review is Texas Government Code, §2001.039. The statutory authority for 19 TAC Chapter 250 is the Texas Education Code (TEC), §§21.040(5) and (6), and 21.041(a) and (b)(1), and Texas Government Code, §§572.051, 2155.076, and 2161.003, for Subchapter A; the TEC, §21.041(b)(1), and Texas Government Code, §2001.021, for Subchapter B; the TEC, §21.040(5), and Texas Government Code, §656.048 and §656.102, for Subchapter C; and the TEC, §21.041(b)(1), and Texas Government Code, §2260.052(c), for Subchapter D.

BOARD RESPONSE: This item is presented for review and comment.

PREVIOUS BOARD ACTION: The SBEC adopted the review of 19 TAC Chapter 250 in January 2001, finding that the reasons for initially adopting the rules continue to exist. A majority of the rules in 19 TAC Chapter 250 were adopted to be effective February 3, 2000, with the exception of §§250.40-250.49, which were adopted to be effective June 10, 2001. Sections 250.1-250.3 were amended to be effective March 30, 2005.

FUTURE ACTION EXPECTED: The review of 19 TAC Chapter 250, Agency Administration, is scheduled to be presented to the SBEC for adoption at the April 2010 SBEC meeting. Any rule changes resulting from the rule review process will also be presented to the SBEC for consideration.

BACKGROUND INFORMATION AND SIGNIFICANT ISSUES: The SBEC rules in 19 TAC Chapter 250 establish procedures for SBEC purchasing, rulemaking, training and education of employees, and negotiation and mediation relating to certain contract disputes. Section 250.20, Petition for Adoption of Rules, provides procedures for interested persons to file a petition seeking to propose or amend an SBEC rule, as authorized by the Texas Government Code, §2001.021.

The rules currently in effect in 19 TAC Chapter 250 are shown in Attachment II.

ANTICIPATED REVISIONS TO RULES: The Texas Education Agency (TEA) staff anticipates presenting proposed changes to 19 TAC Chapter 250 at the April 2010 SBEC meeting to reflect statute. Since, pursuant to House Bill 1116, 79th Texas Legislature, 2005, the SBEC no longer functions as a separate agency and no longer has an executive director, revisions to this chapter will be necessary. The statutory transfer of all administrative functions of the SBEC to

the TEA affects the reasons for adopting some or all of the reviewed rules. The TEA staff may conduct a stakeholder meeting in early 2010 on 19 TAC Chapter 250.

RULE REVIEW: The SBEC plans to file the notice of proposed review of 19 TAC Chapter 250, Agency Administration, with the *Texas Register* following the February 2010 SBEC meeting. The SBEC will accept comments as to whether reasons for adopting 19 TAC Chapter 250 continue to exist. The official comment period will begin with the publication of the proposed review of 19 TAC Chapter 250 in the *Texas Register*.

The filing of the notice of proposed review soliciting comments as to whether the reasons for adoption continue to exist would not preclude any amendments that may be proposed at different dates through a separate rulemaking process.

FISCAL IMPACT: None.

PUBLIC AND STUDENT BENEFIT: The review of 19 TAC Chapter 250 will result in the adoption of rules reflecting current law and the transfer of all SBEC administrative functions to the TEA.

PROCEDURAL AND REPORTING IMPLICATIONS: None.

LOCALLY MAINTAINED PAPERWORK REQUIREMENTS: None.

PUBLIC COMMENTS: None.

ALTERNATIVES: None.

OTHER COMMENTS AND RELATED ISSUES: None.

Respectfully submitted,

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Attachments: I. Statutory Citations
II. Text of 19 TAC Chapter 250, Agency Administration

ATTACHMENT I

Statutory Citations Relating to Review of 19 TAC Chapter 250, Agency Administration

Rule Review

Texas Government Code, §2001.039, Agency Review of Existing Rules:

(a) A state agency shall review and consider for readoption each of its rules in accordance with this section.

(b) A state agency shall review a rule not later than the fourth anniversary of the date on which the rule takes effect and every four years after that date. The adoption of an amendment to an existing rule does not affect the dates on which the rule must be reviewed except that the effective date of an amendment is considered to be the effective date of the rule if the agency formally conducts a review of the rule in accordance with this section as part of the process of adopting the amendment.

(c) The state agency shall readopt, readopt with amendments, or repeal a rule as the result of reviewing the rule under this section.

(d) The procedures of this subchapter relating to the original adoption of a rule apply to the review of a rule and to the resulting repeal, readoption, or readoption with amendments of the rule, except as provided by this subsection. Publishing the Texas Administrative Code citation to a rule under review satisfies the requirements of this subchapter relating to publishing the text of the rule unless the agency readopts the rule with amendments as a result of the review.

(e) A state agency's review of a rule must include an assessment of whether the reasons for initially adopting the rule continue to exist.

19 TAC Chapter 250, Agency Administration

Texas Education Code, §21.040, General Powers and Duties of Board (excerpt):

The board shall:

(5) provide to its members and employees, as often as necessary, information regarding their qualifications for office or employment under this chapter and their responsibilities under applicable laws relating to standards of conduct for state officers or employees;

(6) develop and implement policies that clearly define the respective responsibilities of the board and the board's staff;

Texas Education Code, §21.041, Rules; Fees (excerpt):

(a) The board may adopt rules as necessary for its own procedures.

(b) The board shall propose rules that:

(1) provide for the regulation of educators and the general administration of this subchapter in a manner consistent with this subchapter;

Texas Government Code, §572.051, Standards of Conduct; State Agency Ethics Policy:

(a) A state officer or employee should not:

(1) accept or solicit any gift, favor, or service that might reasonably tend to influence the officer or employee in the discharge of official duties or that the officer or employee knows or should know is being offered with the intent to influence the officer's or employee's official conduct;

(2) accept other employment or engage in a business or professional activity that the officer or employee might reasonably expect would require or induce the officer or employee to disclose confidential information acquired by reason of the official position;

(3) accept other employment or compensation that could reasonably be expected to impair the officer's or employee's independence of judgment in the performance of the officer's or employee's official duties;

(4) make personal investments that could reasonably be expected to create a substantial conflict between the officer's or employee's private interest and the public interest; or

(5) intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the officer's or employee's official powers or performed the officer's or employee's official duties in favor of another.

(b) A state employee who violates Subsection (a) or an ethics policy adopted under Subsection (c) is subject to termination of the employee's state employment or another employment-related sanction. Notwithstanding this subsection, a state officer or employee who violates Subsection (a) is subject to any applicable civil or criminal penalty if the violation also constitutes a violation of another statute or rule.

(c) Each state agency shall:

(1) adopt a written ethics policy for the agency's employees consistent with the standards prescribed by Subsection (a) and other provisions of this subchapter; and

(2) distribute a copy of the ethics policy and this subchapter to:

(A) each new employee not later than the third business day after the date the person begins employment with the agency; and

(B) each new officer not later than the third business day after the date the person qualifies for office.

(d) The office of the attorney general shall develop, in coordination with the commission, and distribute a model policy that state agencies may use in adopting an agency ethics policy under Subsection (c). A state agency is not required to adopt the model policy developed under this subsection.

(e) Subchapters E and F, Chapter 571, do not apply to a violation of this section.

(f) Notwithstanding Subsection (e), if a person with knowledge of a violation of an agency ethics policy adopted under Subsection (c) that also constitutes a criminal offense under another law of this state reports the violation to an appropriate prosecuting attorney, then, not later than the 60th day after the date a person notifies the prosecuting attorney under this subsection, the prosecuting attorney shall notify the commission of the status of the prosecuting attorney's investigation of the alleged violation. The commission

shall, on the request of the prosecuting attorney, assist the prosecuting attorney in investigating the alleged violation. This subsection does not apply to an alleged violation by a member or employee of the commission.

(g) Not later than November 1, 2007, the office of the attorney general shall:

(1) develop a model ethics policy as required by Subsection (d); and

(2) distribute the policy to each state agency required to adopt an ethics policy under Subsection (c).

(h) Not later than January 1, 2008, each state agency shall:

(1) adopt an ethics policy as required by Subsection (c); and

(2) distribute a copy of the ethics policy and this subchapter to each employee of the agency.

(i) Subsections (g) and (h) and this subsection expire January 15, 2008.

Texas Government Code, §656.048, Rules Relating to Training and Education:

(a) A state agency shall adopt rules relating to:

(1) the eligibility of the agency's administrators and employees for training and education supported by the agency; and

(2) the obligations assumed by the administrators and employees on receiving the training and education.

(b) Repealed by Acts 2003, 78th Leg., ch. 200, Sec. 16(g).

Texas Government Code, §656.102, Agency Policy:

Before a state agency spends any money on training for a state employee, the state agency must adopt a policy governing the training of employees, in addition to the rules required by Section 656.048, that requires training to relate to an employee's duties following the training.

Texas Government Code, §2001.021, Petition for Adoption of Rules:

(a) An interested person by petition to a state agency may request the adoption of a rule.

(b) A state agency by rule shall prescribe the form for a petition under this section and the procedure for its submission, consideration, and disposition.

(c) Not later than the 60th day after the date of submission of a petition under this section, a state agency shall:

(1) deny the petition in writing, stating its reasons for the denial; or

(2) initiate a rulemaking proceeding under this subchapter.

Texas Government Code, §2155.076, Protest Procedures:

(a) The commission and each state agency by rule shall develop and adopt protest procedures for resolving vendor protests relating to purchasing issues. An agency's rules must be consistent with the commission's rules. The rules must include standards for maintaining documentation about the purchasing process to be used in the event of a protest.

(b) A state agency that is not subject to Chapter 2001 shall provide public notice of its proposed and adopted protest rules and provide a procedure for public comment on the proposed rules.

Texas Government Code, §2161.003, Agency Rules:

A state agency, including an institution of higher education, shall adopt the commission's rules under Section 2161.002 as the agency's or institution's own rules. Those rules apply to the agency's construction projects and purchases of goods and services paid for with appropriated money without regard to whether a project or purchase is otherwise subject to this subtitle.

Texas Government Code, §2260.052, Negotiation (excerpt):

(c) Each unit of state government with rulemaking authority shall develop rules to govern the negotiation and mediation of a claim under this section. If a unit of state government does not have rulemaking authority, that unit shall follow the rules adopted by the attorney general. A model rule for negotiation and mediation under this chapter shall be provided for voluntary adoption by units of state government through the coordinated efforts of the State Office of Administrative Hearings and the office of the attorney general.

ATTACHMENT II
Text of 19 TAC

Chapter 250. Agency Administration

Subchapter A. Purchasing

§250.1. Historically Underutilized Business (HUB) Program.

The State Board for Educator Certification hereby adopts the rules of the Texas Building and Procurement Commission relating to the Historically Underutilized Business (HUB) Program and codified at 1 Texas Administrative Code Chapter 111, Executive Administration Division, Subchapter B, Historically Underutilized Business Program, §§111.11-111.28.

Source: The provisions of this §250.1 adopted to be effective March 14, 1999, 24 TexReg 1617; amended to be effective March 30, 2005, 30 TexReg 1771.

§250.2. Ethical Standards.

(a) Definitions. The following words and terms when used in this section shall have the following meanings unless the context clearly indicates otherwise:

(1) Board--the State Board for Educator Certification and its employees and agents;

(2) Employee--an individual, other than an independent contractor, employed by the State Board for Educator Certification.

(3) Executive director--the board's executive director;

(4) Participate--to have taken action through decision, approval, disapproval, recommendation, giving of advice or opinion, investigation, evaluation, preparing bid specifications or request for proposals, or similar action.

(5) Particular matter--a specific application; investigation; hearing; rulemaking proceeding; request for information, offer, or proposal; bid review; contract; claim; charge; or other proceeding related to purchasing.

(6) Purchase--a procurement delegated to the State Board for Educator Certification under Government Code, Chapter 2155, Chapter 2156, Chapter 2157, or Chapter 2158 or the rules adopted by the Texas Building and Procurement Commission under those statutes;

(7) Relative of the employee—

(A) the employee's parent or child;

(B) the employee's brother, sister, grandparent, or grandchild;

(C) the employee's great-grandparent, great-grandchild, aunt who is a sister of a parent of the employee, uncle who is a brother of a parent of the employee, nephew who is a child of a brother or sister of the employee, or niece who is a child of a brother or sister of the employee;

(D) the employee's spouse; or

(E) the spouse of any of the relatives listed in subparagraph (A) or (B) of this paragraph.

(8) Procurement coordinator--the board employee primarily responsible for administering the purchase of goods and services for the agency.

(9) Vendor--an actual or prospective supplier of goods or services to the state.

(b) Purpose and scope. This section states the ethical standards of conduct required of current and former employees of the board and vendors. The section applies to purchases made by the board or on behalf of

the board. The executive director will notify employees of these ethical standards and, to the greatest feasible extent, disseminate them to vendors.

(c) Former employees. A former employee of the board who ceases service or employment with the board may not represent any person or receive compensation for services rendered on behalf of any person regarding a particular matter in which the former employee participated during the period of employment, either through personal involvement or because the purchase was a matter within the employee's official responsibility.

(d) Current employees. An employee shall not:

(1) participate in a purchase knowing that the employee has an actual or potential financial interest in the purchase, including prospective employment;

(2) participate in a purchase knowing that a relative of the employee described by subsection (a) of this section has an actual or potential financial interest in the purchase, including prospective employment;

(3) solicit or accept anything of value from a vendor;

(4) be employed by, or agree to work for, a vendor; or

(5) knowingly and without authorization disclose confidential information for personal gain or to benefit another.

(e) Vendors. A vendor shall not:

(1) offer, give, or agree to give an employee anything of value;

(2) participate in a proposed bid or award a contract if the vendor participated in preparing the specifications or request for proposals on which the bid or contract is based.

(f) Notice of violation. An employee or vendor who has information about a suspected violation under this section shall promptly notify the board's procurement coordinator. If the procurement coordinator is the person alleged to have violated this section, then the employee or vendor shall notify the executive director. A vendor may protest a purchase made in violation of this section pursuant to the board's protest procedures.

(g) Determination of violation and corrective action. As appropriate in accordance with subsection (f) of this section, the procurement coordinator or the executive director shall investigate an alleged violation of this section and determine whether a violation has occurred. The procurement coordinator or the executive director, as appropriate, may designate one or more employees to help investigate an alleged violation under this section and to report in writing the results of the investigation. To participate in an investigation under this subsection, an employee must not have been implicated by the allegation or identified as a witness with knowledge of the alleged violation.

(h) Corrective action. A current employee who violates a provision of this section is subject to corrective action, including the following: reprimand; exclusion from participating in purchases; suspension; or termination. A former employee or vendor who violates a provision of this section is subject to corrective action, including the following: rejection of a pending bid, proposal, or offer; cancellation of an existing contract; or debarment.

Source: The provisions of this §250.2 adopted to be effective February 3, 2000, 25 TexReg 574; amended to be effective March 30, 2005, 30 TexReg 1771.

§250.3. Vendor Protest Procedures.

(a) Definitions. The following words and terms when used in this section shall have the following meanings unless the context clearly indicates otherwise:

(1) Board--the State Board for Educator Certification and its employees and agents;

(2) Executive director--the board's executive director;

(3) Executive staff council--the board's management staff other than the executive director, including the program directors and the general counsel;

(4) Interested party--a vendor who has submitted a bid, offer, or proposal for the purchase at issue in a protest;

(5) Purchase or purchasing process--a procurement delegated to the State Board for Educator Certification under Government Code, Chapter 2155, Chapter 2156, Chapter 2157, or Chapter 2158 or the rules adopted by the Texas Building and Procurement Commission under those statutes;

(6) Receive or receipt--actual receipt;

(7) Procurement coordinator--the board employee primarily responsible for administering the purchase of goods and services for the agency; and

(8) Vendor--an actual or prospective supplier of goods or services to the state.

(b) Purpose. The purpose of this section is to provide an internal procedure to be used by an interested party for protesting an alleged violation of applicable rules or statutes during the purchasing process. This section is consistent with the General Services Commission's rules governing resolution of vendor protests. If the staff services officer or the executive director is the subject of a protest, the board's general counsel shall assume the powers and duties of the person under this section.

(c) Protests. An interested party may file a formal protest with the procurement coordinator about a violation of applicable rules or statutes in the purchasing process that aggrieves the party. A protest shall be in writing and must be received by the procurement coordinator not later than the 14th calendar day after the purchase order or contract at issue has been executed.

(1) The procurement coordinator will notify other interested parties that a protest has been filed over the purchase.

(2) An interested party is entitled to receive copies of the protest and additional filings and to participate in the matter as provided by this section. Upon request, the procurement coordinator will provide the names and mailing addresses of the protesting party and other interested parties, as available.

(d) Status of purchase during protest and appeal. If the purchase being protested has not been awarded, upon the timely filing of a protest or appeal under these procedures, the executive director shall not proceed further with the purchase unless the executive director, in consultation with the procurement coordinator, makes a written determination that the purchase without delay is necessary to protect substantial interests of the State of Texas.

(e) Filing of protest. A formal protest shall be sworn to and contain the following items:

(1) a specific identification of the statutory or regulatory provision(s) that the action complained of is alleged to have violated;

(2) a specific description of each act alleged to have violated the statutory or regulatory provision(s) identified in paragraph (1) of this subsection;

(3) a precise statement of the relevant facts;

(4) an identification of the issue or issues to be resolved; and

(5) argument and authorities in support of the protest.

(f) Failure to file timely or in proper form. The procurement coordinator shall dismiss a protest that does not comply with the requirements of this section, unless the executive director determines that good cause exists for the untimely or improper filing and the protest raises significant issues about the board's purchasing process.

(g) Informal resolution. The procurement coordinator shall have the authority, prior to any appeal to the executive director, to informally resolve a protest.

(h) Determination by procurement coordinator. The procurement coordinator may solicit written responses to the protest from other interested parties. If the protest is not resolved by mutual agreement, the procurement coordinator will issue a written determination on the protest and take appropriate remedial action, which may include voiding a purchase order or contract related to the protest.

(1) If the procurement coordinator determines that no violation of rules or statutes has occurred, he or she shall so inform the protesting party and interested parties in writing, setting forth the reasons for the determination.

(2) If the procurement coordinator determines that a violation of the rules or statutes has occurred in a case in which a purchase order has not been issued or a contract has not been awarded, he or she shall so inform the protesting party and interested parties in writing, setting forth the reasons for the determination and the appropriate remedial action.

(3) If the procurement coordinator determines that a violation of the rules or statutes has occurred in a case in which a purchase order has been issued or a contract has been awarded, he or she shall so inform the protesting party and interested parties in writing, setting forth the reasons for the determination and the appropriate remedial action, which may include voiding the purchase order or contract.

(i) Appeal to executive director. The procurement coordinator's determination issued under subsection (h) of this section may be appealed by the protesting party or by an interested party to the executive director.

(1) An appeal of the procurement coordinator's determination shall be in writing and must be received by the executive director not later than the 14th calendar day after the issuance of the procurement coordinator's written determination under subsection (h) of this section. The executive director shall dismiss an appeal that does not comply with requirements of this subsection. The procurement coordinator shall notify non-appealing interested parties of the appeal.

(2) The appeal shall be limited to a review of the procurement coordinator's determination.

(3) The executive director shall request one or more members of the executive staff council to review the staff services officer's determination and to provide the executive director with a written recommendation for disposition. Other interested parties may file responses to the appeal, and the executive director may consider them in making a decision or referring the matter to the board.

(4) The executive director may issue a written decision on the appeal. A decision by the executive director shall be final and shall completely dispose of all the issues related to a protest, determination, or appeal under this section.

(5) The executive director reserves the sole discretion to refer the matter to the board for the members' consideration at a regularly scheduled open meeting.

(j) Referral to board. When the executive director refers an appeal to the board, the following requirements shall apply.

(1) Copies of the appeal, any responses to it by other interested parties, the procurement coordinator's written determination, and any recommendations or findings by the executive director or executive staff council members shall be provided to the board members. Copies of the appeal and any responses to it by other interested parties shall be made available to all interested parties.

(2) All interested parties who wish to make an oral presentation at the open meeting during which the particular matter is to be considered should notify the executive director or a designee at least 48 hours before the meeting.

(3) The board may consider oral presentations and written documents presented by staff and interested parties. The board's presiding officer shall set the order and amount of time allowed for presentations. The board may take the matter under advisement and decide the appeal at a subsequent open meeting.

(4) The board's decision on the appeal shall be by duly adopted resolution reflected in the minutes of the open meeting and shall be final.

(k) Standards for maintaining documentation. The executive director or a designee will maintain all documentation about the purchasing process in accordance with the board's records retention schedule.

Source: The provisions of this §250.3 adopted to be effective February 3, 2000, 25 TexReg 574; amended to be effective March 30, 2005, 30 TexReg 1771.

Subchapter B. Rulemaking Procedures

§250.20. Petition for Adoption of Rules.

(a) Definitions. The following words and terms when used in this section shall have the following meanings unless the context clearly indicates otherwise:

(1) Administrative Procedure Act--Chapter 2001 of the Government Code.

(2) Amend or amendment--a change to an existing rule, including modification, addition, substitution, deletion, or repeal.

(3) Board--the State Board for Educator Certification and its employees and agents;

(4) Executive director--the board's executive director;

(5) Interested person--an individual whose interests are or will be affected by the rule or amendment.

(6) Rule--a section containing a board statement of general applicability and has the meaning assigned to "rule" under the Administrative Procedure Act.

(7) Rulemaking proceeding--deliberation about a petitioned-for rule at a regularly scheduled board meeting.

(b) Filing. Any interested person may request the board to propose or amend a rule by filing a petition with the executive director. To be considered by the board, a petition shall be filed with the executive director not later than the 30th calendar day and not earlier than the 45th calendar day before a regularly scheduled board meeting. The executive director shall deny a petition that does not comply with the requirements of this subsection.

(c) Scope. The filing of a petition does not obligate the executive director or the board to grant it, to hold a hearing, or to engage in any other public rulemaking proceedings. In denying a petition under this section, the board is not obligated to make findings of fact or conclusions of law or to decide questions or issues raised in the petition. A petition filed under this section is not a contested case under the Administrative Procedure Act or 19 Texas Administrative Code Chapter 249 of this title (relating to Disciplinary Proceedings, Sanctions, and Contested Cases, Including Enforcement of the Educator's Code of Ethics). The approval of a petition and the initiation of a rulemaking proceeding under this section does not obligate the board to propose or to adopt the rule or amendment petitioned for.

(d) Denial by executive director. The executive director shall deny a petition that does not comply with the requirements of subsection (e) of this section.

(1) A petitioner whose petition has been denied by the executive director shall have one more opportunity to refile a corrected petition in accordance with the requirements of this section. Each refiling of a petition begins anew the 60-day deadline for the board to act on the petition under subsection (f) of this section.

(2) After two opportunities to file a petition that complies with this section, the executive director shall deny without further review all subsequent petitions filed by the same petitioner regarding the same or similar rule.

(e) Petition. A petition for rulemaking filed under this section shall include the following items:

(1) Identifying information. The petition shall contain the full name, complete United States mail address, and daytime telephone and fax numbers, if any, of the petitioner and each signatory to the petition.

(2) Text of proposed rule. The petition shall contain the full text of the proposed rule or amendment in the exact form in which it is to be published for legal notice and public comment.

(A) If the petition seeks the adoption of a new rule, the text of the proposed rule shall be underlined.

(B) If the petition seeks to amend an existing rule, the text of the proposed amendment shall show:

(i) the full text of the rule being amended;

(ii) deleted text inside brackets and stricken through; and

(iii) added text underlined.

(3) Statutory authority. The specific statutory authority for the promulgation of the proposed rule shall be cited with sufficient particularity to enable the board and the public to readily access the referenced statute.

(4) Suggested effective date. Subject to applicable statute and rule, the desired effective date should be stated.

(5) Reasoned justification. The petition shall provide a reasoned justification for the proposed rule in narrative form with sufficient particularity to fully inform the board and the public of the following items:

(A) a summary of the rule;

(B) the factual basis for the rule;

(C) the purpose of the rule, including a statement explaining the desired effect to be achieved by the proposed rule;

(D) how the rule would work in practice;

(E) the premises for the rule;

(F) data or information considered in formulating the rule; and

(G) analyses of relevant factors and reasons why the rule was found to be appropriate, including an explanation as to why the means set out in the rule to achieve the desired effect is the best method for achieving that effect.

(6) Fiscal impact statement. A description of the estimated fiscal impact of the rule that includes the following information:

(A) the additional estimated cost to the state and to local governments expected as a result of enforcing or administering the rule;

(B) the estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule;

(C) the estimated loss or increase in revenue to the state or to local governments as a result of enforcing or administering the rule; and

(D) if applicable, that enforcing or administering the rule does not have foreseeable implications relating to cost or revenues of the state or local governments.

(7) Public benefit statement. An explanation about public benefits and costs for each year of the first five years that the rule would be in effect:

(A) the public benefits expected as a result of adoption of the proposed rule;

(B) the probable economic cost to persons required to comply with the rule; and

(C) a determination of whether the proposed rule may affect a local economy; if so, the petition must describe in detail the probable effect of the rule on employment in each geographic area affected by the rule for each year of the first five years that the rule will be in effect.

(8) Signatures. The petitioner and the attorney or other representative of the petitioner must sign the petition.

(f) Not later than the 60th day after the date the executive director receives a petition under this section, the board shall:

(1) deny the petition in writing, stating the reasons for denial; or

(2) initiate a rulemaking proceeding.

(g) Without limitation to the reasons for denial set out below, the board may deny a petition on the following grounds:

(1) the board does not have jurisdiction or authority to propose or to adopt the rule petitioned for;

(2) the rule petitioned for conflicts with a statute, court decision, another rule proposed or adopted by the board, or other law;

(3) the board determines that a different proceeding, procedure, or act more appropriately addresses the subject matter of the petition than initiating a rulemaking proceeding; or

(4) the petitioner is inappropriately using the opportunity to file a rulemaking petition under this section, as evidenced by filing a petition:

(A) after having participated in rulemaking activities on the same subject matter but without having objected to or appealed from an ensuing rule proposed or adopted by the board;

(B) before the fourth anniversary of the board's having previously considered and rejected a similar rule on the same subject matter;

(C) to amend a rule proposed or adopted by the board that has not yet become effective;

(D) to amend an existing rule undergoing review under the plan submitted by the board to the Texas Secretary of State; or

(E) to amend an existing rule before the first anniversary of a completed review of the rule under the plan submitted by the board to the Texas Secretary of State.

(h) The board's presiding officer may appoint a committee of board members to review petitions under this section and to recommend disposition to the board. The executive shall notify the petitioner of the board's disposition of the petition.

Source: The provisions of this §250.20 adopted to be effective February 3, 2000, 25 TexReg 574.

Subchapter C. Training and Education for Employees

§250.30. Definitions.

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

(1) Agency--the State Board for Educator Certification acting through its executive director and other employees.

(2) Board--the members of the State Board for Educator Certification appointed under §21.033, Education Code.

(3) Designee--an agency employee in a management role assigned by the executive director to carry out responsibilities under this subchapter.

(4) Executive director--the person employed by the board under §21.039, Education Code.

(5) Training--instruction, teaching, or education received by an employee that is not normally received by other state employees and that is designed to enhance the ability of the employee to perform the employee's job. The term includes a course of study at an institution of higher education or a private or independent institution of education as defined by section 61.003, Education Code, if the agency spends money to assist the employee to meet the expense of the course of study or pays salary to the employee to undertake the course of study as an assigned duty. The term does not include training required either by state or federal law or that is determined necessary by the agency and offered to all employees of the agency performing similar jobs.

Source: The provisions of this §250.30 adopted to be effective February 3, 2000, 25 TexReg 575.

§250.31. Findings, Policy, and Applicability.

(a) Programs for the training of agency employees materially aid the effective administration of the board's mission, and the spending of public funds on those programs serves an important public purpose.

(b) In accordance with state law and this subchapter, the agency may use public funds to provide training and education for its employees. The training must be related to the duties or prospective duties of the employee following training.

(c) This subchapter applies to full- and part-time employees who receive training that is paid for by the agency. This subchapter does not apply to contracted or temporary workers.

Source: The provisions of this §250.31 adopted to be effective February 3, 2000, 25 TexReg 575.

§250.32. Eligibility.

(a) Subject to approval by the executive director or a designee, the agency may pay for all or part of the training an employee receives under this subchapter. To be eligible, an employee must:

(1) have completed at least six months of continuous employment from the date of beginning or restarting service with the agency;

(2) meet or exceed performance standards on the most current written employee evaluation, if any; and

(3) not be on leave or suspension without pay.

(b) Notwithstanding subsection (a)(2) of this section, the executive director or a designee may approve training that is reasonably expected to help the employee meet or exceed performance standards in the employee's written evaluation.

(c) Board members and the executive director may receive training under this subchapter.

Source: The provisions of this §250.32 adopted to be effective February 3, 2000, 25 TexReg 575.

§250.33. Employee Obligations.

(a) During a training period when an employee does not perform the employee's regular duties for three or more months as a result of the training, the employee assumes the following enforceable obligations:

(1) to work for the agency following the training for at least one month for each month of the training period; or

(2) to pay the agency for all the costs associated with the training that were paid during the training period, including any amounts of the employee's salary that were paid and that were not accounted for as paid vacation or compensatory leave.

(b) The executive director may require an employee of the agency to attend, as all or part of the employee's duties, a training or education program if the training is related to the employee's current or prospective duties.

(c) Before an employee receives training that will be paid for by the agency and during which the employee will not be performing the employee's regular duties for three months or more, the executive director shall require the employee to agree in writing, before the training begins, to comply with the requirements of subsection (a) of this section.

(d) By an order adopted in a public meeting, the board may waive the requirements prescribed under subsection (a) of this section and release an employee from the obligation to meet those requirements if the board finds that such action is in the best interest of the agency or is warranted because of an extreme personal hardship suffered by the employee.

(e) If an employee does not provide the services required in accordance with subsection (a) of this section, provides those services for less than the required term, or fails to make payments required by this section, and the board has not released the employee from the obligation to provide the services or to make the payments, the employee is liable to the agency for any costs described by subsection (a)(2) of this section and for the agency's reasonable expenses incurred in obtaining payment, including reasonable attorney's fees.

Source: The provisions of this §250.33 adopted to be effective February 3, 2000, 25 TexReg 575.

§250.34. Report.

The executive director or a designee shall prepare and submit an annual report to the Legislative Budget Board detailing the amount of money expended by the agency in the preceding fiscal year for training subject to this subchapter.

Source: The provisions of this §250.34 adopted to be effective February 3, 2000, 25 TexReg 575.

Subchapter D. Negotiation and Mediation Procedures Relating to Certain Contract Disputes

§250.40. General.

(a) Policy. It is the policy of the State Board for Educator Certification that contract disputes involving the agency be resolved as fairly and expeditiously as possible.

(b) Purpose. The purpose of this subchapter is to establish procedures to resolve certain contract disputes between contractors and the State Board for Educator Certification (SBEC).

(c) Scope and applicability. This subchapter applies to certain breach of contract claims and counterclaims involving the State Board for Educator Certification. This subchapter does not apply to:

(1) contracts between SBEC and another governmental body;

(2) contracts between a subcontractor and contractor;

(3) a grant agreement between SBEC as grantor and a public or private entity as grantee;

(4) a claim for personal injury or wrongful death arising from the breach of a contract; or

(5) a claim or dispute with respect to which the 77th Legislature or a previous legislature has enacted a concurrent resolution granting permission to the contractor to bring a suit against the state or SBEC.

(d) Legal authority. Government Code, §2260.052(c) requires the Board to adopt rules for negotiation and mediation of certain breach of contract claims and counterclaims involving contractors and the State of Texas. Education Code, §21.041(a) authorizes the Board to adopt rules as necessary for its own procedures and §21.041(b)(1) requires the Board to propose rules for the general administration of its organic statutes, Education Code, Chapter 21, Subchapter B.

(e) Exclusive procedures. In accordance with Civil Practice and Remedies Code, Chapter 107, relating to permission to sue the state, this subchapter contains the exclusive and required prerequisites to suit for breach of contract by a contractor against SBEC.

(1) By written agreement of the parties, this subchapter may be applied to a breach of contract claim brought by SBEC against a contractor.

(2) Nothing in this subchapter precludes SBEC from initiating a lawsuit for damages against the contractor in a court of competent jurisdiction.

(f) Sovereign immunity. This subchapter does not waive sovereign immunity to suit or liability.

(g) Delivery of papers. Delivery of notices and other papers required under this subchapter shall be made by hand delivery (courier receipt requested), certified mail (return receipt requested), or other verifiable delivery service.

(1) Delivery to SBEC shall be made to the agency's executive director.

(2) Delivery to the contractor shall be made to the contractor's representative designated in the contract for receipt of papers under this subchapter or to the contractor's chief executive officer or registered agent for delivery of service if a representative is not so designated in the contract.

Source: The provisions of this §250.40 adopted to be effective June 10, 2001, 26 TexReg 3930.

§250.41. Definitions.

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

(1) Agency--The State Board for Educator Certification.

(2) ALJ--An individual appointed by the chief administrative law judge of SOAH under Government Code, §2003.041.

(3) APA--The Administrative Procedure Act, codified as Government Code, Chapter 2001.

(4) Board--The State Board for Educator Certification.

(5) Contested case--A proceeding brought pursuant to this subchapter in which the legal rights, duties, or privileges of a party are to be determined by the Board or SOAH or both after an opportunity for an adjudicative hearing.

(6) Contract--A written agreement between SBEC and a contractor by the terms of which the contractor agrees either:

(A) to provide goods or services, by sale or by lease, to SBEC; or

(B) to perform a project as defined by Government Code, §2166.001, relating to building construction and acquisition.

(7) Contractor--Independent contractor who has entered into a contract directly with the agency. The term does not include:

(A) a contractor's subcontractor, officer, employee, agent, or other person furnishing goods or services to a contractor;

(B) an employee of SBEC or another unit of state government; or

(C) a student at an institution of higher education.

(8) Day--A calendar day, unless otherwise indicated.

(9) Dispute--A contested legal or factual issue involving a breach of contract claim or counterclaim.

(10) Institution of higher education--Any public technical institute, public junior college, public senior college or university, medial or dental unit, or other agency of higher education as defined by the Education Code, §61.003.

(11) Mediation--A non-adversarial approach to disputes that seeks a collaboratively reached consensual solution to conflicts through the assistance of a third-party neutral, who guides participants through a confidential process designed to facilitate understanding of parties' real interests and conscious exploration of alternative solutions.

(12) Negotiation--A process whereby SBEC and the contractor come together to discuss potential solutions to the dispute.

(13) Party to the contract or Party--A contractor or SBEC; a "neutral third party" refers to a mediator.

(14) Representative--A person authorized to represent SBEC or a contractor in matters arising under this subchapter.

(15) SBEC--The State Board for Educator Certification.

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

Source: The provisions of this §250.41 adopted to be effective June 10, 2001, 26 TexReg 3930.

§250.42. Dispute Resolution Process.

(a) If any disputes arise relating to contracts between SBEC and a contractor, the parties shall attempt to resolve those disputes first by negotiation, by mediation if the parties are unable to resolve the disputes through negotiation, and lastly by a contested hearing before SOAH if the parties are unable to resolve the disputes by mediation.

(b) A settlement agreement reached under this subchapter will be final and binding on the parties. The settlement agreement shall be in writing and signed by representatives of SBEC and the contractor with authority to bind the parties.

(1) The parties shall disclose their settlement approval procedures to each other prior to negotiation or mediation.

(2) If the settlement agreement does not resolve all issues raised by the claim and counterclaim, the agreement shall identify the issues that are not resolved. A partial settlement does not waive a contractor's rights under Government Code, Chapter 2260, as to the parts of the claim that are not resolved.

(3) Any settlement to be paid by SBEC is subject to the availability of funds appropriated to the agency.

(4) The confidentiality of a final settlement agreement to which SBEC is a signatory is governed by Government Code, Chapter 552, the Texas Public Information Act.

(c) The parties may act through their representatives in pursuing resolution of a claim or counterclaim under this subchapter.

(1) The parties shall select representatives who have knowledge about the dispute and who are in a position to reach agreement or can credibly recommend approval of an agreement, with the understanding that the agreement may have to be approved by others with SBEC or the contractor or other state officials, others with a company, corporation, or within the contracting entity.

(2) Limitations on the settlement authority, if any, of a representative participating in a negotiation or mediation shall be disclosed as soon as possible by that individual to a representative of the other party.

(d) The parties shall refrain from litigation during the resolution process insofar as they can do so without prejudicing their legal rights.

Source: The provisions of this §250.42 adopted to be effective June 10, 2001, 26 TexReg 3930.

§250.43. Required Contract Provisions.

(a) Each contract that SBEC enters into to which these procedures apply shall include as a term of the contract the following provisions:

(1) Negotiation:

(A) "Both parties agree they will first attempt to resolve any disputes relating to this contract through negotiations pursuant to SBEC's negotiation procedures relating to certain contract disputes."

(B) "Both parties agree that SBEC shall file any agency counterclaim in accordance with SBEC's above-referenced negotiation procedures."

(2) Mediation: "Both parties agree that if they are unable to resolve completely the dispute during negotiation, the parties shall invoke SBEC's mediation procedures relating to certain contract disputes for the portions of the claim that remain unresolved."

(3) Contested case hearing: "Both parties agree that if any unresolved issues remain following negotiation and mediation efforts, the contractor shall request an administrative hearing in accordance with SBEC's contested hearing procedures relating to certain contract disputes. The contractor's failure to request such a hearing is a waiver of claim as to the unresolved issues."

(b) In each contract with SBEC, a contractor shall designate a representative to receive papers delivered under this subchapter.

(c) Even in the absence of a contractual provision to do so, SBEC and the contractor may apply the procedures in this subchapter to resolve a breach of contract claim if they agree in writing to do so, subject to the limitations imposed by §250.40(c) of this title (relating to General).

Source: The provisions of this §250.43 adopted to be effective June 10, 2001, 26 TexReg 3930.

§250.44. Damages.

(a) The total amount of money recoverable on a claim for breach of contract under these procedures may not, after deducting the amount specified in subsection (b) of this section, exceed the balance due and owing on the contract price, including orders for additional work, services, or goods.

(b) Any amount owed to SBEC for work not performed or goods not delivered under a contract or in substantial compliance with its terms shall be deducted from the amount in subsection (a) of this section.

(c) Any award of damages under these procedures may not include:

(1) consequential or similar damages;

(2) exemplary damages;

(3) any damages based on an unjust enrichment theory;

(4) attorney's fees; or

(5) home office overhead.

Source: The provisions of this §250.44 adopted to be effective June 10, 2001, 26 TexReg 3930.

§250.45. Notice of Claim or Counterclaim.

(a) Notice of claim of breach of contract. To assert a breach of contract claim against SBEC, a contractor must deliver notice of the claim to SBEC in accordance with the provisions of this subsection or the claim is waived. The notice of claim of breach of contract must:

(1) be in writing;

(2) state with particularity:

(A) the name and address of the contractor and the contractor's representative;

(B) the nature of the alleged breach, including a detailed description of each event that the contractor claims breached the contract, the identity of any witnesses to the event, the date of each such event, and the identity of each contract provision allegedly breached;

(C) a description of damages that includes the amount and method used to calculate those damages; and

(D) the legal theory of recovery, i.e., breach of contract, including the relationship between the alleged breach and the damages claimed; and

(3) be delivered to SBEC's executive director not later than 180 days after the date of the event that the contractor asserts as the basis of the claim.

(b) Notice of Counterclaim. SBEC may counterclaim in opposition to or deduction from a contractor's claim of breach of a contract between the contractor and SBEC. The notice of counterclaim under this subsection must:

(1) be in writing;

(2) state with particularity:

(A) the name and address of SBEC's representative;

(B) the nature of the counterclaim;

(C) a description of damages or offsets, including the amount and method used to calculate those damages or offsets; and

(D) the legal theory supporting the counterclaim; and

(3) be delivered to the contractor no later than 90 days after SBEC receives the contractor's notice of claim.

Source: The provisions of this §250.45 adopted to be effective June 10, 2001, 26 TexReg 3930.

§250.46. Duty to Negotiate.

The parties shall negotiate in accordance with the timetable set forth in §250.47 of this title (relating to Negotiation Timetable), to attempt to resolve all claims and counterclaims filed under this chapter. No party is obligated to settle with the other party as a result of the negotiation.

Source: The provisions of this §250.46 adopted to be effective June 10, 2001, 26 TexReg 3930.

§250.47. Negotiation Timetable.

(a) Following receipt of a contractor's notice of claim, SBEC shall review the contractor's claim and the agency's counterclaim, if any, and initiate negotiations with the contractor to attempt to resolve the claim and counterclaim.

(b) Subject to subsection (c) of this section, the parties shall begin negotiations within a reasonable period of time, not to exceed 60 days following the later of:

(1) the date of termination of the contract;

(2) the completion date, or substantial completion date in the case of construction projects, in the original contract; or

(3) the date SBEC receives the contractor's notice of claim.

(c) SBEC may delay negotiations until after the 180th day after the date of the event giving rise to the claim of breach of contract by:

(1) delivering written notice to the contractor that the commencement of negotiations will be delayed; and

(2) delivering written notice to the contractor when SBEC is ready to begin negotiations.

(d) The parties may conduct negotiations according to an agreed schedule as long as they begin negotiations no later than the applicable deadlines set forth in subsection (b) or (c) of this section, whichever is applicable.

(e) Subject to subsection (f) of this section, the parties shall complete the negotiations that are required by this chapter as a prerequisite to a contractor's request for contested case hearing no later than 270 days after SBEC receives the contractor's notice of claim.

(f) The parties may agree in writing to extend the time for negotiations on or before the 270th day after SBEC receives the contractor's notice of claim. The agreement shall be signed by representatives of the parties with authority to bind each respective party.

Source: The provisions of this §250.47 adopted to be effective June 10, 2001, 26 TexReg 3930.

§250.48. Mediation.

(a) Mediation timetable. SBEC and the contractor may agree to mediate the dispute at any time before the 270th day after the date a claim is filed under this subchapter or before the expiration of any extension agreed to in writing by the parties to the contract.

(1) SBEC and the contractor may mediate the dispute even after the case has been referred to SOAH for a contested case hearing. SOAH may also refer a contested case for mediation pursuant to its own rules and guidelines, regardless of whether the parties have previously attempted mediation.

(2) In setting the time period for the duration of the mediation, SBEC and the contractor should allow enough time in which to make arrangements with mediator and the attending representatives to schedule the mediation, to attend and to participate in the mediation, and to complete any settlement approval procedures necessary to achieve final settlement.

(b) Conduct of mediation. Mediation is a consensual, confidential process in which an impartial third person, the mediator, facilitates communication between the parties to promote reconciliation, settlement, or

understanding among them. The mediation is nonbinding and subject to Government Code, Chapter 2009, the Governmental Dispute Resolution Act.

(c) Qualifications, standards, and immunity of mediator. The mediator must be acceptable to both parties, subject to the authority of SOAH to appoint a mediator in a contested case referred to mediation. To qualify as a mediator under this subchapter, a person must have completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by a county alternative dispute resolution system created under Civil Practice and Remedies Code, Chapter 152, or other dispute resolution organization approved by SOAH.

(1) The mediator shall be subject to the standards and duties prescribed by Civil Practice and Remedies Code, §154.053, including the following:

(A) A mediator shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.

(B) Unless expressly authorized by the disclosing party, the mediator may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.

(2) SBEC and the contractor should decide whether, and to what extent, knowledge and experience in mediation of the subject matter at issue would be required or preferred of the mediator.

(3) A volunteer mediator shall have, if applicable, the qualified immunity prescribed by Civil Practice and Remedies Code, §154.055, which provides that a person appointed to facilitate an alternative dispute resolution procedure under this subchapter, or appointed by the parties whether before or after the institution of formal judicial proceedings, who is a volunteer and who does not act with wanton and willful disregard of the rights, safety, or property of another, is immune from civil liability for any act or omission within the course and scope of his or her duties or functions as mediator. For purposes of this paragraph, a volunteer mediator is a person who does not receive compensation in excess of reimbursement for expenses incurred or a stipend intended as reimbursement for expenses incurred.

(d) Source of Mediator. Subject to the requirements of subsection (c) of this section, relating to qualifications, standards, and immunity of mediator, SBEC and the contractor may obtain the services of a mediator through an agreement with:

(1) a governmental officer or employee or private individual who is qualified as a mediator under this subsection;

(2) SOAH;

(3) the Center for Public Policy Dispute Resolution at the University of Texas School of Law;

(4) a county alternative dispute resolution system created under Civil Practice and Remedies Code, Chapter 152; or

(5) another state or federal agency or through a pooling agreement among several governmental bodies.

(e) Agreement to mediate. The mediation agreement shall be in writing and executed by both parties to the contract. At a minimum, the agreement must address the following factors:

(1) the identity of the mediator;

(2) the time period for the mediation;

(3) the location of the mediation;

(4) the allocation of costs of the mediator;

(5) the identity of representatives who will attend the mediation on behalf of the parties by name and position within SBEC or the contractor's organization; and

(6) the settlement approval process in the event the parties reach agreement at the mediation.

(f) Confidentiality of mediation. A mediation conducted under this subchapter is confidential in accordance with §2009.054, Government Code, relating to confidentiality of certain records and communications made during alternative dispute resolution procedures. Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including an appointing ALJ.

(g) Each participant in the mediation, including the mediator, is subject to the requirements of Family Code, Chapter 261, Subchapter B, relating to reports of child abuse or neglect, and of Human Resources Code, Chapter 48, Subchapter C, relating to reports of abuse, neglect, or exploitation of elderly or disabled persons.

(h) Any settlement agreement reached during a mediation shall be signed by representatives of the contractor and the unit of state government, and shall describe any procedures that the parties must follow to obtain final and binding approval of the agreement.

(i) Costs of mediation. Unless SBEC and the contractor agree otherwise, the costs of the mediation process itself shall be divided equally between the parties. Each party shall be responsible for its own costs incurred in connection with the mediation, including costs of document reproduction for documents requested by such party, attorney's fees, and consultant or expert fees.

Source: The provisions of this §250.48 adopted to be effective June 10, 2001, 26 TexReg 3930.

§250.49. Referral to the State Office of Administrative Hearings.

(a) If mediation does not resolve all disputed issues, the contractor may request SBEC to refer the dispute to SOAH. On its own initiative, with or without a request from the contractor, SBEC may refer the dispute to SOAH. Before the dispute may be referred to SOAH for contested case proceedings, SBEC or the contractor must determine that mediation has failed to resolve the dispute in whole or in part and deliver written notification of such determination to the other party.

(b) The contractor's request under this section must be in writing and received by SBEC within 30 days after SBEC or the contractor receives written notification from the other party that mediation has failed to resolve the dispute in whole or in part. The request must:

(1) state the factual and legal basis for the claim or counterclaim; and

(2) request that the claim be referred to the State Office of Administrative Hearings for a contested case hearing.

(c) SBEC's notice of intent to refer the dispute to SOAH must be in writing and received by the contractor within 30 days after SBEC or the contractor receives written notification from the other party that mediation has failed to resolve the dispute in whole or in part. The notice must:

(1) state the factual and legal basis for the claim or counterclaim; and

(2) state that the matter is being referred to the State Office of Administrative Hearings for a contested case hearing.

(d) Within 20 days of receiving the contractor's request for referral of the dispute to SOAH or of delivering to the contractor SBEC's intent to refer the dispute to SOAH, SBEC shall deliver to SOAH a request to docket the dispute for a contested case hearing. Proceedings before SOAH shall be governed by the APA and applicable SOAH rules and procedures.

(e) Subject to SOAH's rules, nothing in this subchapter prohibits SBEC and the contractor from negotiating or mediating a resolution of their dispute after the case has been referred for contested case hearing.

Source: The provisions of this §250.49 adopted to be effective June 10, 2001, 26 TexReg 3930.