

RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL HEARING BOARD

[25 PA. CODE CH. 1021]

Practice and Procedure

The Environmental Hearing Board (Board) amends Chapter 1021 (relating to practice and procedure) to read as set forth at Annex A. This final-form rulemaking amends the rules of practice and procedure before the Board by implementing improvements in practice and procedure.

The Board approved this final-form rulemaking at its meeting on June 2, 2016.

Effective Date

This final-form rulemaking will go into effect upon publication in the *Pennsylvania Bulletin*.

Contact Person

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Statutory Authority

This final-form rulemaking is adopted under the authority of section 5 of the Environmental Hearing Board Act (act) (35 P.S. § 7515) which empowers the Board to adopt regulations pertaining to practice and procedure before the Board.

Comments and Revisions to Proposed Rulemaking

The proposed rulemaking was adopted by the Board at its meeting of July 8, 2015, and published at 45 Pa.B. 7166 (December 19, 2015), with a 30-day public comment period. Comments were submitted by the Independent Regulatory Review Commission (IRRC) and Attorney William Cluck. The comments and the Board's responses were discussed at a public meeting/conference call of the Board's Rules Committee on March 10, 2016. In response to comments received during the official public comment period on the proposed rulemaking, a draft final rulemaking was prepared. A summary of the comments and Board's responses follows.

§ 1021.21. *Representation*

This rule is amended to delete former subsection (c), which required individuals acting in concert to be represented by counsel. The remaining subsections are renumbered accordingly.

IRRC questioned the Board's decision to place a notification about the Interest on Lawyers' Trust Account (IOLTA) fee in the comment. Specifically, IRRC questioned how the Board would enforce the provision which advises attorneys that payment of the IOLTA fee (set forth in 204 Pa. Code § 81.505(a) (relating to fees)) is not applicable in Board proceedings. The Board notified IRRC that the comment is simply explanatory.

§ 1021.32. *Filing*

The amendment to subsection (c)(3) contains a reference to the Board's electronic filing site. IRRC suggested adding the web site address. However, the Rules Committee and the Board expressed concern that if the web site address were to change in the future, the web site address would need to be amended through a rulemaking, a process that takes several months. The Rules Committee and the Board considered adding the electronic filing site address as a comment to the rule. The Legislative Reference Bureau advised the Board that updating a page in the *Pennsylvania Code* takes approximately 2 to 3 months and there was concern that an incorrect address could be misleading for that amount of time.

Therefore, the Rules Committee and Board publish the electronic filing address in this preamble: <http://ehb.courtapps.com/content/efiling.php>.

§ 1021.51. *Commencement, form and content*

IRRC asked for clarification on the amendment to subsection (c). This subsection is amended to clarify that if an appellant is not represented by an attorney, the notice of appeal shall be signed by the appellant. If the appellant is represented by an attorney, the attorney may sign the appeal form.

Subsection (d) is amended to require an appellant to attach a copy of the "notification and any documents received with the notification" to his notice of appeal. One commentator suggested also permitting an appellant to provide a link to the *Pennsylvania Bulletin* notice since the document is not always available to a third-party appellant, or in some cases may be quite lengthy. The Rules Committee and the Board agreed with the commentator's suggestion and this revision has been incorporated into subsection (d).

IRRC asked for clarification on the amendments to subsection (f)(3)(iii) and (vi) dealing with facsimile filing. Because subsection (f)(3)(iii) deals with the filing of a notice of appeal, this subparagraph is clarified by amending "each document" to "notice of appeal." A sentence is added to subsection (f)(3)(vi) to state that if a party's fax number is not available or operational for purposes of serving a copy of a faxed notice of appeal on other parties to the appeal, the appellant has the option of serving it by overnight delivery. This amendment was added based on IRRC's comments on the final-form rulemaking published at 44 Pa.B. 7365 (November 22, 2014).

§ 1021.101. *Prehearing procedure*

IRRC asked for clarification on why the amendments to this section had been proposed. The amendments were proposed for the following reasons:

Subsection (c) is amended to ensure that hearings may be scheduled far enough in advance to accommodate the schedules of the parties, counsel, witnesses and the Board.

Subsection (d) codifies the Board's long-standing practice of setting forth deadlines for the filing of prehearing memoranda and motions in limine and also recognizes that the Board may schedule a prehearing conference prior to a hearing on the merits.

§ 1021.153. *Amendment of interlocutory orders*

IRRC suggested a style change to subsection (d) and recommended revising "Unless the Board acts" to "If the

Board does not act. . .” This revision was adopted by the Rules Committee and the Board.

One commentator suggested that the Board consider extending the 10-day deadline for requesting an amendment of an interlocutory order to certify an issue for appeal. The Rules Committee and Board considered the request but determined that an extension would not allow the Board sufficient time to act before expiration of the 30-day appeal deadline under subsection (d).

§ 1021.201. Composition of the certified record on appeal to Commonwealth Court

The specific reference to Pennsylvania Rules of Appellate Procedure 1951 (relating to record below in proceedings on petition for review) is deleted as revisions to the Pennsylvania Rules of Appellate Procedure would necessitate an amendment to the Board’s rule. IRRC requested that the Board provide a specific reference to the rules in this preamble. The Rules Committee and Board agreed. The applicable Pennsylvania Rules of Appellate Procedure for purposes of complying with this section are Pennsylvania Rules of Appellate Procedure 1911—1935 (relating to record on appeal from lower court).

Sunset Date

A sunset date has not been established for these regulations. The effectiveness of the regulations will be evaluated on an ongoing basis by the Board and the Rules Committee.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on December 9, 2015, the Board submitted a copy of the notice of proposed rulemaking, published at 45 Pa.B. 7166, to IRRC and the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, the Board shall submit to IRRC and the House and Senate Committees copies of comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments from IRRC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on June 14, 2017, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on June 15, 2017, and approved the final-form rulemaking.

Findings

The Board finds that:

(1) Public notice of the proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968, P.L. 769, No. 240 (45 P.S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) These regulations are necessary and appropriate for administration of the act.

Order

(1) The regulations of the Board, 25 Pa. Code Chapter 1021, are amended by adding §§ 1021.13 and 1021.153 and by amending §§ 1021.21, 1021.32, 1021.33, 1021.34, 1021.39, 1021.51, 1021.52, 1021.101, 1021.103, 1021.141, 1021.151, 1021.152 and 1021.201 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(2) The Chairperson of the Board shall submit this order and Annex A to the Office of Attorney General and the Office of General Counsel as to legality and form as required by law.

(3) The Chairperson of the Board shall submit this order and Annex A to the House Environmental Resources and Energy Committee, the Senate Environmental Resources and Energy Committee and IRRC as required by law.

(4) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(5) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

THOMAS W. RENWAND,
Chairperson and Chief Judge

(Editor’s Note: See 47 Pa.B. 3672 (July 1, 2017) for IRRC’s approval order.)

Fiscal Note: Fiscal Note 106-12 remains valid for the final adoption of the subject regulations.

Annex A

**TITLE 25. ENVIRONMENTAL PROTECTION
PART IX. ENVIRONMENTAL HEARING BOARD
CHAPTER 1021. PRACTICE AND PROCEDURE
TIME**

§ 1021.13. Computation of time.

(a) Except as otherwise provided by law, in computing a period of time prescribed or allowed by the rules of the Board or another provision of law, time shall be computed to exclude the first day of the action, event or filing. Time shall be computed to include the last day unless it falls on a Saturday, Sunday or legal holiday in which event the day will be omitted from the computation and the period shall run until the end of the next business day. Intervening Saturdays, Sundays and legal holidays shall be included in the computation.

(b) Subsection (a) supersedes 1 Pa. Code § 31.12 (relating to computation of time).

REPRESENTATION BEFORE BOARD

§ 1021.21. Representation.

(a) Parties, except individuals appearing on their own behalf, shall be represented by an attorney in good standing at all stages of the proceedings subsequent to the filing of the notice of appeal or complaint.

(b) Corporations shall be represented by an attorney of record admitted to practice before the Supreme Court of Pennsylvania. Corporations may also be represented by an attorney in good standing and admitted to practice before the highest court of another state on a motion pro hac vice filed by the Pennsylvania attorney of record.

(c) Individuals may appear in person on their own behalf; however, they are encouraged to appear through counsel and may be required to appear through counsel if the Board determines that they are not merely appearing on their own behalf.

(d) Subsections (a)—(c) supersede 1 Pa. Code §§ 31.21—31.23 (relating to appearance in person; appearance by attorney; and other representation prohibited at hearings).

Comment: Payment of the Interest on Lawyers Trust Account fee under 204 Pa. Code § 81.505(a) (relating to fees) is not required as a condition to pro hac vice admission in a proceeding before the Board.

DOCUMENTARY FILINGS

FILING AND SERVICE OF DOCUMENTS

§ 1021.32. Filing.

(a) *General filing requirements.* The following documents shall be conventionally filed or facsimile filed:

(1) A complaint that is original process naming a defendant or defendants.

(2) A motion to be excused from the Board’s mandatory electronic filing requirement.

(3) An entry of appearance filed under § 1021.51(j) (relating to commencement, form and content).

(4) A document filed on behalf of a person who is not a party to the proceeding at the time of the filing.

(b) *Filing of notice of appeal.* An original notice of appeal may be filed electronically, conventionally or by facsimile.

(c) *Electronic filing.*

(1) Documents except those listed in subsections (a) and (b) shall be electronically filed unless the Board orders otherwise in a particular proceeding. Persons wishing to be excused from the mandatory filing requirements shall file a motion under § 1021.92 (relating to procedural motions). The Board will excuse persons from the mandatory electronic filing requirement, with respect to all filings or with respect to specific filings, if the Board determines that the requirement would impose an unreasonable burden on the potential filer.

(2) Documents filed electronically may not also be filed by other means unless the Board orders otherwise or the document to be filed includes an original bond or check. When electronically filing documents including an original bond or check, a copy of the document, including a copy of the original bond or check, shall be electronically filed. The original, including the original bond or check, shall be deposited in the mail, addressed to the Board’s headquarters at the address provided in subsection (e)(1).

(3) Electronic filing can be performed only by registered users. Individuals who are not registered users can become registered users by submitting a registration statement to the Board and receiving authorization for electronic filing and service from the electronic filing provider. The registration statement consists of an electronic form prepared by the Board and accessed on its electronic filing web site. The prospective registered user shall provide a name, mailing address, e-mail address, telephone number and attorney identification number (if the registered user is an attorney).

(4) When registration is complete, a registered user may not withdraw from the electronic filing and electronic service system except with leave from the Board.

(5) Filers are responsible for providing an objective description of documents electronically filed. The description must include:

(i) The party filing or serving the document.

(ii) The title of the document (for example, Appellant ABC Corporation’s Motion for Summary Judgment, Appellant Smith’s Motion to Compel Permittee XYZ, Inc. to Produce Documents).

(6) When a document has been filed electronically, the official record is the electronic document filed with the Board and the filer is bound by the document as filed.

(7) The registered user’s log-in and password required to file documents using the electronic filing provider serve as the registered user’s signature on electronic documents filed with the Board. The log-in and password serve as a signature for purposes of § 1021.31 (relating to signing) and other purposes for which a signature is required in connection with proceedings before the Board.

(8) If an electronically filed document does not bear the actual signature of the registered user, the name of the registered user under whose log-in and password the document is submitted must be preceded by “s/” and typed in the space in the document’s signature block where the signature would otherwise appear (for example, “s/ Jane Doe”).

(9) No registered user or other person may knowingly permit or cause a registered user’s password to be used by anyone other than an authorized agent of the registered user.

(10) A document that is electronically filed and requires an original signature other than that of the registered user shall be maintained by counsel or, if the party is not represented, by the party itself, for 1 year after periods for appeals expire. Documents shall be maintained by the filer and produced at the request of the Board or other party within 14 days of the request.

(11) Documents may be electronically filed in WordPerfect format, Microsoft Word format, PDF format or other formats as the Board may permit. The electronic filing provider automatically converts uploaded documents not already in PDF format to PDF format. A document may exceed page limitation rules if the additional pages result solely from the electronic conversion by the electronic filing provider.

(12) To the extent practicable, electronically filed documents must be formatted in accordance with subsection (e)(4).

(13) An electronic filing completed before midnight Eastern Time will be considered to be filed on that date. Upon completion of the filing, the electronic filing provider will issue a transaction receipt that includes the date and time the document was received. The transaction receipt serves as proof of filing.

(14) Except in the case of notices of appeal, which are governed by § 1021.53a (relating to nunc pro tunc appeals), if electronic filing or service does not occur or is made untimely because of a technical issue, the party affected may seek appropriate relief from the Board.

(15) A registered user shall submit as exhibits or attachments only excerpts of the referenced documents that are directly germane to the matter under consideration by the Board. Excerpted information must be clearly and prominently identified as such. A registered user who files excerpts of documents as exhibits or attachments under this paragraph does so without prejudice to his right to timely file additional excerpts or the complete document and shall, upon request, provide responding parties with the complete document. A responding party may timely file the complete document or additional excerpts that it believes are directly germane.

(d) *Facsimile filing.*

(1) Documents permitted under subsections (a), (b) and (c)(1) and (2) to be filed by facsimile shall be transmitted to the Board’s facsimile line at (717) 783-4738.

(2) The date of facsimile filing is the date the document is received by the Board.

(3) For documents more than ten pages long, the facsimile filed must consist of the certificate of service and the first five pages and last five pages of each document except exhibits. Exhibits shall be omitted from the filing transmitted to the Board's facsimile line.

(4) On the same day a document is transmitted to the Board's facsimile line, the original (including exhibits) shall be deposited in the mail, addressed to the Board's headquarters at the address provided in subsection (e)(1). When facsimile filing a document including an original bond or check, a copy of the bond or check must be included with the document transmitted by facsimile. The original bond or check must be included with the original of the document deposited in the mail.

(5) Documents must be formatted in accordance with subsection (e)(4).

(6) Except in the case of filing a notice of appeal, which is governed by § 1021.53a, if facsimile filing or service does not occur or is made untimely because of a technical issue, the party affected may seek appropriate relief from the Board.

(e) *Conventional filing.*

(1) Documents permitted to be conventionally filed with the Board under subsections (a), (b) and (c)(1) and (2) shall be filed at the Board's headquarters—2nd Floor, Rachel Carson State Office Building, 400 Market Street, Post Office Box 8457, Harrisburg, Pennsylvania 17105-8457.

(2) The date of conventional filing is the date the document is received by the Board.

(3) Only hard copies may be conventionally filed unless the filer has secured prior approval from the Board to conventionally file documents in other formats, such as CDs, DVDs or other digital storage media.

(4) With the exception of exhibits, documents filed with the Board must be typewritten on letter-size paper (approximately 8 to 8 1/2 inches by 10 1/2 to 11 inches) and pages after the first must be numbered. With the exception of exhibits, notices of appeal and complaints, documents filed must be double spaced, except that footnotes must be single spaced and quotations in excess of a few lines must be single spaced and indented. Photocopied documents will be accepted as typewritten, provided that all copies are legible.

(f) *Format of filing.* Failure to comply with subsection (c)(5), (d)(5) or (e)(4) will not result in dismissal of a filing, but the Board may request that the party resubmit the document in proper form.

§ 1021.33. Service by the Board.

(a) The Board will serve the orders, notices and other documents it issues upon counsel designated on the docket. For any parties not represented by counsel, the Board will serve the person who filed the complaint or notice of appeal, or the person upon whom the notice of appeal or complaint was served.

(b) The Board will serve documents it enters or issues upon registered users participating in the proceeding through the electronic filing provider, subject to the provisions in this chapter. The Board will serve persons who have been excused from electronic filing under § 1021.32(c)(1) (relating to filing) by mail or in person.

(c) An order filed electronically without the original signature of an administrative law judge has the same force and effect as if the administrative law judge had affixed a signature to a paper copy of the order.

(d) Subsections (a)—(c) supersede 1 Pa. Code § 33.31 (relating to service by the agency).

§ 1021.34. Service by a party.

(a) Notices of appeal shall be served as provided in § 1021.51(h) (relating to commencement, form and content). Complaints filed by the Department will be served as provided in § 1021.71(b) (relating to complaints filed by the Department).

(b) Copies of each document filed with the Board shall be served upon every party to the proceeding on or before the day that the document is filed with the Board. Service upon a party represented by an attorney in the matter before the Board shall be made by serving the attorney.

(c) Electronic service of documents to other registered users through the electronic filing provider shall be considered valid and effective service and have the same legal effect as serving an original paper document. Registered users who receive documents by electronic service shall access the documents using the electronic filing provider.

(d) Documents filed electronically shall be served by hand, mail, other personal delivery or facsimile upon parties who have been excused from electronic filing under § 1021.32(c)(1) (relating to filing).

(e) Subpoenas and documents that must be conventionally filed with the Board under § 1021.32(b) shall be served by hand, mail or other personal delivery. Documents that are conventionally or facsimile filed with the Board under § 1021.32(a) shall be served by hand, mail, other personal delivery or facsimile.

(f) If a party does not receive electronic service in a matter involving a request for expedited disposition, service shall be made upon that party within 24 hours of filing the document with the Board. For purposes of this subsection, service means actual receipt by the party served.

(g) If a person filing electronically becomes aware that the notice of electronic filing was not successfully transmitted to a registered user, or that the notice transmitted to the registered user is defective, the filer shall serve the electronically filed document upon the registered user by hand, mail, other personal delivery or facsimile by 4:30 p.m. on the business day following notification of the deficiency. The filer may also effect service by e-mail, provided the registered user consents to service in that manner.

(h) The filing of a registration statement constitutes a certification that the registered user will accept electronic service of documents permitted to be electronically filed.

(i) Subsections (a)—(h) supersede 1 Pa. Code § 33.32 (relating to service by a participant).

§ 1021.39. Docket.

(a) The Board will maintain a docket of proceedings and a proceeding as initiated will be assigned an appropriate designation. The Board will maintain the docket on its web site available to all members of the public and will accept electronic filing of documents from registered users subject to the provisions in this chapter.

(b) The docket will register the date of all filings. When a document is filed electronically, the electronic filing

provider will transmit a notice of the electronic filing to all registered users in the proceeding, which includes the date and time of the filing.

(c) The Board will maintain a complete official file on all proceedings consisting of electronic and hard copy filings. The official copy of an electronically filed document or Board order shall be that appearing on the Board's web site.

(d) The electronic docket will be available on the Board's web site and the hard copy portion of the official file shall be available for inspection and copying by the public during the office hours of the Board insofar as consistent with the proper discharge of the duties of the Board.

(e) Subsections (a)—(d) supersede 1 Pa. Code § 33.51 (relating to docket).

FORMAL PROCEEDINGS

APPEALS

§ 1021.51. Commencement, form and content.

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(c) The notice of appeal must set forth the name, mailing address, e-mail address and telephone number of the appellant. The notice of appeal shall be signed by at least one attorney of record in the attorney's individual name or, if a party is not represented by an attorney, shall be signed by the party.

(d) If the appellant has received written notification of an action of the Department, the appellant shall attach a copy of that notification and any documents received with the notification to the notice of appeal. If the documents include a permit, the appellant only needs to attach the first page of the permit. Instead of attaching a copy of the notification of the action or related documents, the appellant may provide a link to the publication of the action in the *Pennsylvania Bulletin*.

(e) The notice of appeal must set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal.

(f) An original notice of appeal shall be filed electronically, conventionally or by facsimile.

* * * * *

(3) Facsimile filing.

(i) Original notices of appeal filed by facsimile shall be transmitted to the Board's facsimile line at (717) 783-4738. If a bond or check is required to secure payment of a penalty, a copy of the bond or check must be included with the facsimile filing. The notice of appeal and attachments, including the original bond or check, shall be deposited in the mail, addressed to the Board's headquarters at the address provided in paragraph (2)(i).

(ii) The date of facsimile filing is the date the original notice of appeal is received by the Board.

(iii) For original notices of appeal more than ten pages long, the facsimile filed must consist of the certificate of service and the first five pages and last five pages of the notice of appeal except exhibits. Except for copies of checks and bonds required to secure payment of a penalty, exhibits shall be omitted from the filing transmitted to the Board's facsimile line.

(iv) On the same day an original notice of appeal is transmitted to the Board's facsimile line, the original,

including exhibits, shall be deposited in the mail, addressed to the Board's headquarters at the address provided in paragraph (2)(i).

(v) The notice of appeal must be formatted in accordance with paragraph (2)(v). Failure to comply with this requirement will not result in rejection or dismissal of the notice of appeal. The Board may request that the appellant file an amended version of the notice of appeal in proper form.

(vi) The appellant shall, concurrent with or prior to the facsimile filing of a notice of appeal, serve a copy by facsimile on the individuals and entities listed in paragraph (2)(vi). If a party's fax number is not available or operational, the notice of appeal shall be served to that party by overnight delivery.

* * * * *

§ 1021.52. Timeliness of appeal.

(a) Except as specifically provided in § 1021.53 (relating to amendments to appeal or complaint), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows, unless a different time is provided by statute:

(1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.

(2) Any other person aggrieved by an action of the Department shall file its appeal with the Board within one of the following:

(i) Thirty days after the notice of the action has been published in the *Pennsylvania Bulletin*.

(ii) Thirty days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin*.

(b) The appellant shall, within 20 days of the mailing of a request from the Board, file missing information required under § 1021.51(c), (d) and (k) (relating to commencement, form and content) or suffer dismissal of the appeal.

(c) Subsections (a) and (b) supersede 1 Pa. Code §§ 35.5—35.7 and 35.9—35.11 (relating to informal complaints; and formal complaints).

Comment: The language "person to whom the action of the Department is issued or directed" is intended to include, but not be limited to, the recipient of: an order, a permit or license issuance or denial, a civil penalty assessment, or certification. See section 4(a) and (c) of the act (35 P.S. § 7514(a) and (c)).

PREHEARING PROCEDURES AND PREHEARING CONFERENCES

§ 1021.101. Prehearing procedure.

(a) Upon the filing of an appeal, the Board will issue a prehearing order providing that:

(1) All discovery shall be completed no later than 180 days from the date of the prehearing order.

(2) The service of a report of an expert together with a statement of qualifications may be substituted for an answer to expert interrogatories.

(3) Dispositive motions shall be filed within 210 days of the date of the prehearing order.

(4) The parties may, within 60 days of the date of the prehearing order, submit a Joint Proposed Case Management Order to the Board.

(b) A Joint Proposed Case Management Order shall propose alternate dates for the conclusion of discovery, the service of expert or supplemental reports, and the filing of dispositive motions. The Board may issue subsequent prehearing orders incorporating the alternate dates proposed by the parties or other dates the Board deems appropriate.

(c) The Board will establish a hearing date for the issues in the appeal. The Board may also direct that the parties meet prior to the hearing to stipulate to uncontested facts, the qualifications of experts and the admissibility of exhibits.

(d) The parties shall file their prehearing memoranda at least 20 days before the scheduled hearing date. The Board may issue an order scheduling specific dates on which each party is to file its prehearing memorandum, deadlines for filing motions in limine and a prehearing conference.

(e) Subsection (d) supersedes 1 Pa. Code § 35.121 (relating to initiation of hearings).

§ 1021.103. Subpoenas, notices to attend and notices to produce.

(a) Except as otherwise provided in this chapter or by order of the Board, requests for subpoenas, subpoenas, notices to attend and notices to produce shall be governed by Pa.R.C.P. 234.1—234.4, 234.6—234.9 and 4009.21—4009.27. When the term “court” is used in Pa.R.C.P. “Board” is to be understood; when the terms “Prothonotary” or “clerk of court” are used in Pa.R.C.P. “Secretary to the Board” is to be understood.

(b) Proof of service of the subpoena need not be filed with the Board.

(c) Subsections (a) and (b) supersede 1 Pa. Code §§ 35.139 and 35.142 (relating to fees of witnesses; and subpoenas).

TERMINATION OF PROCEEDINGS

§ 1021.141. Termination of proceedings.

* * * * *

(c) When a proceeding is sought to be terminated by the parties pursuant to a consent adjudication, all parties shall submit the proposed consent adjudication to the Board for approval. No proposed consent adjudication will be approved by the Board unless it contains the agreement of all parties to the action. The Board may refuse to approve a proposed consent adjudication if any of its provisions are contrary to law or constitute, in the discretion of the Board, overreaching or bad faith by any party. Prior to approval, the Board will publish the major substantive provisions of the consent adjudication in the manner indicated in subsection (b)(3). In addition, the notice shall provide a comment period of at least 30 days for comments to be provided by the public. When comments are received from the public the parties to the consent adjudication shall respond to the comments. The Board may schedule a hearing prior to taking action on the consent adjudication. Any appeal from a consent adjudication shall be with the Commonwealth Court, and shall, when taken by an aggrieved person not a party to the action, be taken within 30 days of the date of the Board's action.

Comment: The prior rule at § 1021.120(b) authorizing dismissal with and without prejudice was deleted because

the Board thought it more appropriate to determine this matter on a case-by-case basis rather than by rule.

RECONSIDERATION

§ 1021.151. Reconsideration of interlocutory orders.

(a) A petition for reconsideration of an interlocutory order or ruling shall be filed within 10 days of the order or ruling. The petition must demonstrate that extraordinary circumstances justify consideration of the matter by the Board. A party may file a memorandum of law at the time the petition or response is filed.

(b) A copy of the petition shall be served upon the parties. A party wishing to file an answer may do so within 10 days of service or as ordered by the Board.

(c) The failure of a party to file a petition under this section will not result in a waiver of any issue.

(d) Subsections (a)—(c) supersede 1 Pa. Code § 35.241 (relating to application for rehearing or reconsideration).

Comment: There is no need to file a petition for reconsideration of an interlocutory order in order to preserve an issue for later argument. Reconsideration is an extraordinary remedy and is inappropriate for the vast majority of the rulings issued by the Board.

§ 1021.152. Reconsideration of final orders.

(a) A petition for reconsideration of a final order shall be filed within 10 days of the date of the final order. A party may file a memorandum of law at the time the petition or response is filed. Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons. These reasons may include the following:

(1) The final order rests on a legal ground or a factual finding which has not been proposed by any party.

(2) The crucial facts set forth in the petition:

(i) Are inconsistent with the findings of the Board.

(ii) Are such as would justify a reversal of the Board's decision.

(iii) Could not have been presented earlier to the Board with the exercise of due diligence.

(b) A copy of the petition shall be served upon all parties simultaneously with and in the same manner as the filing of an appeal with the Board. A party wishing to file an answer may do so within 10 days of service or as ordered by the Board.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.241 (relating to application for rehearing or reconsideration).

Comment: This provides a shorter time than the standard motions practice, since reconsideration must be granted within 30 days under Pa.R.A.P. 1701. The Board's period for reconsideration of final orders will run contemporaneously with the 30-day right of appeal to Commonwealth Court.

§ 1021.153. Amendment of interlocutory orders.

(a) Requests to amend an interlocutory order to certify one or more issues for appeal in accordance with 42 Pa.C.S. § 702(b) (relating to interlocutory orders) shall be filed within 10 days of service of the order and shall take the form of a motion under § 1021.91 (relating to general).

(b) Motions filed under subsection (a) must be accompanied by a memorandum of law setting forth the reasons why the order involves a controlling question of law as to

which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.

(c) Responses to motions filed under this section shall be filed within 10 days of service of the motion and shall be consistent with § 1021.91.

(d) If the Board does not act on the motion within 30 days of it being filed, the motion shall be deemed denied.

(e) The filing of a motion under this section or the amendment of an interlocutory order containing the requested finding will not stay a proceeding unless otherwise ordered by the Board or by Commonwealth Court.

(f) Subsections (a)–(e) supersede 1 Pa. Code § 35.225 (relating to interlocutory orders).

APPELLATE MATTERS

§ 1021.201. Composition of the certified record on appeal to Commonwealth Court.

(a) Unless the parties file a stipulation with the Board or the Commonwealth Court requires otherwise, the Board shall certify the record in accordance with the applicable Rules of Appellate Procedure. The record must consist of:

- (1) A list of the docket entries.
- (2) The notice of appeal and the Department action appealed to the Board, or, if the proceedings before the Board were initiated with a complaint, the complaint.

(b) In addition to items listed in subsection (a), for appeals of Board adjudication, the record must also include:

- (1) The Board’s adjudication and order.
- (2) The notes of testimony from the hearing, all exhibits admitted into evidence.
- (3) The parties’ posthearing briefs, including requested findings of fact and conclusions of law.
- (4) Petitions for reconsideration or to reopen the record, answers and accompanying exhibits.
- (5) Other documents which formed the basis of the Board’s adjudication.

(c) In addition to items listed in subsection (a), for appeals of Board opinions and orders, the record must also include:

- (1) The Board’s opinion and order.
- (2) The motion or petition which was the subject of the Board’s opinion and order, together with responses, answers and replies, and accompanying exhibits.

(3) Petitions for reconsideration of the Board’s opinion and order, responses, answers and replies, and accompanying exhibits.

(4) Other documents which formed the basis of the Board’s opinion and order.

(d) For electronic filings, a paper copy of the electronic filing will be submitted to the Commonwealth Court as part of the certified record in accordance with this rule, notwithstanding the provisions of § 1021.39(c) (relating to docket) that the official copy of an electronically filed document shall be that appearing on the Board’s web site.

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