

PROPOSED RULEMAKING

DEPARTMENT OF TRANSPORTATION

[67 PA. CODE CHS. 445 AND 491]

Administrative Practice and Procedure; Outdoor Advertising

The Department of Transportation (Department), Office of Chief Counsel, under the authority contained in 2 Pa.C.S. §§ 501—508 and 701—704 (relating to the Administrative Law) proposes to amend Chapters 445 and 491 (relating to outdoor advertising devices; and administrative practice and procedure), to read as set forth in Annex A.

Purpose of Chapter 491

The purpose of Chapter 491 is to supplement 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure) (General Rules). In accordance with 1 Pa. Code § 31.1(c) (relating to scope), Chapter 491 supersedes any inconsistent provisions in the General Rules in proceedings before the Department.

Purpose of the Proposed Amendments

The purpose of the proposed amendments is to provide a more comprehensive version of the rules regarding administrative proceedings before the Department's hearing officers. These rules spell out the particular requirements for a request for an administrative hearing and address the concerns of those seeking redress under the Department's authority. These proposed amendments will establish standards which will facilitate administrative review of the decisions of Department subordinates on matters involving, but not limited to, suspension or revocation of permit privileges; computation of credit for time served under suspension or revocation of the driving privileges; and denial of applications for permits related to driveways, placement of billboards on the right of way and heavy hauling. These proposed amendments also establish, as a consequence of a burgeoning docket, an additional Department hearing officer. The docket will now be divided between two hearing officers with separate docket clerks. One hearing officer will be situated at the Riverfront Office Center and will be responsible for appeals from the Department's denial or recall of an occupational license; appeals from the Department's denial, cancellation or recall of a probationary license; requests for record reviews under 75 Pa.C.S. § 1516 (relating to department records); and requests for credit toward serving driving privilege or vehicle suspension. The other hearing officer will be located at Forum Place and will review all other matters, including but not limited to driveway permits, school bus/hazardous walking routes, overweight or oversize truck hauling permits, outdoor advertising devices, prequalification of bidder suspension or debarment, public or private airport permits and petition to intervene.

From time to time, questions have arisen concerning the sufficiency of the general rules in matters before the Department's administrative hearing officer. The broad focus of the General Rules represents an effort to promulgate regulations that would address the general practice and procedural regulations of various administrative tribunals. What they do not and cannot do is address the particularized requirements attendant with an individual

agency's attempt to implement and interpret the statutory and regulatory authority imposed upon it, and to do so in an efficient, effective and just manner. The potential inability of the General Rules to provide sufficient practice and procedural guidance throughout the entire range of issues addressed by the numerous administrative tribunals within this Commonwealth is evidenced by the promulgation of 1 Pa. Code § 31.1(c) (relating to scope of part), which enables agency-promulgated regulations to supersede inconsistent regulations contained in the General Rules.

Among the issues where the Department has found the General Rules and the Department's existing regulations to be lacking in substantive and procedural guidance, are concerns regarding the specific role of the Department hearing officer at various stages of the review; the specific procedures for requesting and instituting a Departmental hearing; procedures governing intervening parties, continuances, depositions and requests for a stay or supersedeas.

These proposed amendments represent an attempt to remedy those deficiencies and to equip properly the Department's administrative hearing officers with the necessary tools to exercise their increasing role as a means of initial Department review. This proposal is the culmination of a substantial effort to draft clear, precise and effective provisions that will facilitate the expeditious and just resolution of matters brought before the administrative docket.

The following represents a summary of the significant amendments contained in this proposed rulemaking:

Section 491.2 (relating to definitions), has been amended by inclusion of a definition for the term "office of the agency." The General Rules provide, at 1 Pa. Code § 31.11 (relating to timely filing required), that the date of receipt at the office of the agency, rather than the date of deposit in the mail, is the determinative date for filing purposes. For this reason, and because the Department will have two separate dockets, the Administrative Docket Clerk and the Driver Licensing Docket Clerk have been designated as the office of the agency upon which all commencements of action is served upon the Secretary of Transportation. Determination of filing with the appropriate docket clerk is predicated upon the nature of the action filed, delineated in § 491.4(d) (relating to institution of proceedings).

Section 491.2a (relating to separation of adjudicatory function from representation of the Department) has been added. The new section reflects the Department's respect for the constitutional right to due process which requires that the function of representing the Department in an administrative hearing be separated from the role of the adjudicator. Pennsylvania law requires that any commingling of adjudicatory and prosecutorial functions, which creates the appearance of bias and when there are no procedural safeguards implemented to ensure a fair and impartial hearing process, is a violation of procedural due process, without a showing of actual prejudice. See *Marchionni v. Southeastern Pennsylvania Transportation Authority*, 1998 Pa. Cmwlth. LEXIS 638, Decided August 3, 1998 and *Lyness v. State Board of Medical Examiners*, 529 Pa. 535, 605 A.2d 1204 (1992).

For this reason, it has been the Department's consistent practice to erect a wall between those Department employees and attorneys who are involved in administra-

tive proceedings on the one hand, and the Secretary and the Chief Counsel on the other hand. The addition of § 491.2a is to reemphasize the Department's position and the law.

Section 491.3 (relating to request for a hearing) has been amended by more fully delineating what an appellant or petitioner shall provide in the request. Additionally, in subsection (b), the Department has clearly stated its rules for timely filing of a request for a hearing. For requests for credit toward serving a driving privilege or vehicle registration suspension, every request shall be filed consistent with whichever occurs first: either 30 days after the mailing date of the Department letter denying credit or 30 days after the person requesting credit knew or should have known that the person was not receiving credit. The Department believes that by clearly and concisely stating its rules on these matters, the rules are friendly and more readily make it easier for affected persons to make determinations regarding appeals from Department action.

Section 491.4 (relating to institution of proceedings) has been amended to establish two separate docket clerks and consequently two filing addresses. For appeals from denial or recall of an occupational limited license or denial, recall or cancellation of a probationary license, requests for record review under 75 Pa.C.S. § 1516, and hearing to request credit towards a suspension, the pleadings, brief and other papers shall be filed with the Driver Licensing Docket Clerk, 1101 South Front Street—3rd Floor, Harrisburg, PA 17104-2516. For all other matters, including driveway permits, school bus/hazardous walking permits, oversize and overweight truck hauling permits, outdoor advertising sign permits, prequalification suspensions or debarment, public or private airport permits and personnel salary claims, the pleadings, briefs and other papers shall be filed with the Administrative Docket Clerk, c/o Office of Chief Counsel, 555 Walnut Street—9th Floor Forum Place, Harrisburg, PA 17101-1900.

For any given month, the Department entertains roughly over 260 cases. Of these cases, approximately 175 concern requests for credit towards serving a driving privilege or vehicle registration suspension. By dividing the administrative docket, the Department provides the forum for its driver licensing docket hearing officer to more readily dispose of the relatively simple but greater volume credit cases as well as other related traffic safety matters. More complex issues will be handled by the hearing officer situated at the Forum Place.

Section 491.6 (relating to notice and conduct of hearing), has been amended by providing substantive and procedural guidance lacking in the General Rules as they relate to an administrative practice before the Department in matters of intervention, continuances, depositions, requests for a stay or supersedeas and dispositive motions.

Under the amended rules, a request for a continuance will be considered if the same is received in writing 10 days prior to the date of the hearing. The Department's rules now make it clear that continuances will only be granted for compelling reasons, at the discretion of the hearing officer.

The amended rules also provide for the taking of testimony of a witness by deposition upon application. The granting of an application for deposition shall be entirely discretionary with the hearing officer and will only be granted for substantial and compelling reason.

The proposed amendments also spell out the conditions for grant of a stay or supersedeas. The request shall be in

writing and demonstrate to the satisfaction of the hearing officer: (1) the likelihood of success in the matter before the hearing officer; (2) immediate and irreparable from failure to grant the stay or supersedeas; (3) issuance will not substantially harm other parties to the proceedings; (4) no other remedy is available; and (5) reasonable notice has been given to all parties.

These proposed amendments are designed to eliminate dilatory action on the part of some attorneys and to facilitate swift resolution of the matter before the hearing officer without sacrificing fairness or fair play.

Section 445.9 (relating to erection, maintenance and repair of signs) has been amended by indicating that a request for hearing, after a person has been notified by the Department of the revocation or denial of a permit, shall be made within 30 days of the date of the notice revoking or denying the permit. The existing rule provides that the request shall be made within 20 days of the revocation or denial of the permit. This proposed change was made because the request for a hearing will not be submitted to the Chief, Right of Way Division, as the existing rule provides, but rather directly to the office of the hearing officer. Accordingly, the request for a hearing shall be consistent with § 491.4(b).

Persons and Entities Affected

These proposed amendments affect all Department officials involved in the administrative hearing process and those persons who have occasion to request administrative review of Department determinations.

Fiscal Impact

These proposed amendments will not impose increased costs on private persons, State or local governments. These proposed amendments will not occasion the development of additional reports or other paperwork requirements.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on October 6, 1999, the Department submitted a copy of the proposed amendments to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Committees on Transportation. In addition to submitting these proposed amendments, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

If IRRC has objections to any portion of the proposed amendments, it will notify the Department within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the amendments, by the Department, the General Assembly and the Governor of objections raised.

Sunset Date

The Department is not establishing a sunset date for these proposed amendments since these amendments are needed to administer provisions required under 2 Pa.C.S. (relating to administrative law and procedure). The Department will, however, continue to monitor closely these regulations for their effectiveness.

Public Comments

Interested persons are invited to submit, within 30 days of publication of this notice in the *Pennsylvania Bulletin*, written comments, suggestions or objections regarding the proposed amendments to Robert H. Raymond, Jr., Deputy Chief Counsel, Office of Chief Counsel, 555 Walnut Street, 9th Floor Forum Place, Harrisburg, PA 17120.

Contact Person

The contact person is Jerry McCoy, Assistant Counsel-In-Charge, Regulations, Office of Chief Counsel, 555 Walnut Street, 9th Floor Forum Place, Harrisburg, PA 17120, (717) 787-5299.

BRADLEY L. MALLORY, Secretary

Fiscal Note: 18-349. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 67. TRANSPORTATION

PART I. DEPARTMENT OF TRANSPORTATION

Subpart B. NONVEHICLE CODE PROVISIONS

ARTICLE III. HIGHWAYS

CHAPTER 445. OUTDOOR ADVERTISING DEVICES

§ 445.9. Erection, maintenance and repair of signs.

* * * * *

(f) *Hearing.* A person notified of the revocation or denial of a permit under this section shall be granted a [Departmental] hearing by the [Chief, Division of Right-of-Way, or his representative,] Department hearing officer if a request is made within [20] 30 days of the date of the notice revoking or denying the permit. A request for a hearing shall operate to stay the revocation of a permit pending disposition of the hearing.

ARTICLE V. GENERAL PROCEDURES

CHAPTER 491. ADMINISTRATIVE PRACTICE AND PROCEDURE

§ 491.1. Applicability of [general rules] General Rules.

This chapter [is intended to supplement and supersede] supplements and supersedes inconsistent provisions in [1 Pa. Code Part II (relating to) the [general rules of administrative practice and procedure)] General Rules.

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§ 491.2. Definitions.

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

* * * * *

General [rules of administrative practice and procedure] Rules—The rules found [at] in 1 Pa. Code Part II (relating to general rules of administrative practice and procedure).

Office of the agency—The Office of the Administrative Docket Clerk, or the Driver Licensing

Docket Clerk, upon which commencement of process is made upon the Secretary.

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§ 491.2a. Separation of adjudicatory function from representation of the Department.

(a) *Separation of adjudicatory function.* The adjudicatory function performed in accordance with this chapter and the General Rules will be separated from the function of representing the Department in administrative hearing matters. This chapter prescribes that an administrative hearing officer will preside over any hearing and, if exceptions are filed by any party, the decision ultimately is made by the Secretary. The Department's Chief Counsel advises the Secretary in his adjudicatory capacity.

(b) *Ex parte discussions.* Under no circumstances may any Department attorney representing the Department in an administrative hearing matter, or any Department employe involved in such a matter, discuss the case ex parte with the administrative hearing officer, the Chief Counsel or the Secretary.

(c) *Prohibited discussions with employes.* Likewise, the administrative hearing officer, the Chief Counsel and the Secretary will not discuss with, or exercise any supervisory responsibility over, any employe with respect to an administrative hearing matter with which that employe is involved.

(d) *Designation by Chief Counsel and Secretary.* If it becomes necessary for the Chief Counsel or the Secretary to become involved on behalf of the Department in any administrative hearing matter, they are prohibited from participating in the adjudication of the case and should designate appropriate individuals to exercise their functions.

§ 491.3. Request for hearing.

(a) *Content.* [A written request for a hearing shall contain a clear, concise statement of the facts, including the essential elements of the case and the relief requested.] A request for a hearing shall be made in writing and shall contain:

(1) A clear and concise statement of the facts of the case, including all essential elements of the claim.

(2) A clear and specific list of the legal issues upon which the appeal is based and the desired remedy.

(3) A copy of the denial or revocation letter, permit, statutory or regulatory provision or other document which gives rise for the occasion of the appeal.

(b) *Timeliness of petition for hearing.*

(1) *General rule.* Except as otherwise provided in paragraph (2) or by statute or regulation, every request for a hearing shall be filed within 30 days of the Department's determination which gives rise to the appeal.

(2) *Request for credit toward serving driving privilege or vehicle registration suspensions.* Every request for a hearing to request credit toward serving a driving privilege or vehicle registration

suspension shall be filed consistent with whichever of the following events occurs first:

(i) Thirty days after the mailing date of the Department's letter denying credit.

(ii) Thirty days after the date the person requesting the hearing knew or should have known that the person was not receiving credit.

[(b)] (c) *Determination of insufficiency.* The Department hearing officer may determine that a request for a hearing is insufficient or improper under [1 Pa. Code Part II (relating to) the [general rules of administrative practice and procedure)] General Rules or this chapter, and may direct the [administrative] docket clerk to mark the matter closed and to return the request, with notice of the deficiency, to the initiating party [with notice of the deficiency].

(d) *Department's request for clarification of the issues.* The Department may request that the Department hearing officer order that the opposing counsel or party more specifically articulate the issues giving rise to the cause for the appeal.

[(c)] (e) * * *

§ 491.4. Institution of proceedings.

(a) *Approval and docketing.* Upon approval, under § 491.3(b) (relating to request for a hearing), of a written request for a hearing, or upon receipt of a written request from the Department for an order to show cause under § 491.9 (relating to order to show cause), the [administrative] docket clerk will assign the matter a caption, including [an administrative] a docket number, and will enter the matter [onto] into the [administrative] docket.

* * * * *

(c) *Docket clerks designated office of the agency/timely filings.* For purposes of activities and proceedings before the Department in matters under 2 Pa.C.S. §§ 501—508 and 701—704 (relating to the administrative agency law) which are not vested in other bodies of law, the Administrative Docket Clerk and the Driver Licensing Docket Clerk are designated as the office of the agency. As the office of the agency, all correspondence, pleadings, briefs, orders and other papers relating to the case shall be filed with the Administrative Docket Clerk or the Driver Licensing Docket Clerk. The date of receipt at the office of the agency and not the date of deposit in the mails is determinative for timely filing purposes.

(d) *Address for filing.* Correspondence, pleadings, briefs, orders or other papers relating to the case shall be filed with the [administrative] appropriate docket clerk at the following address:

(1) Secretary of Transportation, Driver Licensing Docket Clerk, 1101 South Front Street, 3rd Floor, Harrisburg, Pennsylvania 17104-2516 for matters involving:

(i) Appeals from the Department's denial or recall of an occupational limited license.

(ii) Appeals from the Department's cancellation, denial or recall of a probationary license.

(iii) Requests for record review under 75 Pa.C.S. § 1516 (relating to department records).

(iv) Hearings to request credit toward serving driving privilege or vehicle registration suspensions.

(2) Secretary of Transportation, Administrative Docket Clerk, c/o Office of Chief Counsel, [Room 521, Transportation and Safety Building,] 555 Walnut Street—9th Floor, Harrisburg, Pennsylvania [17120] 17101-1900 for all matters not specified in paragraph (1), including the following:

(i) Minimum use driveway permits.

(ii) Low, medium and high volume driveway permits.

(iii) School bus/hazardous walking routes.

(iv) Overweight or oversize truck hauling permits.

(v) Private airport permits.

(vi) Public airport permits.

(vii) Outdoor advertising sign permits.

(viii) Prequalification suspension or debarment.

(ix) Personnel salary claims.

(x) Municipal reimbursements.

(xi) Appeals from the Department's refusal to issue a certificate of title for reasons other than failure to pay a required fee or tax in connection with or resulting from the acquisition or use of a vehicle.

(xii) Miscellaneous matters, including petitions to intervene.

[(d)] (e) * * *

§ 491.5. Filing fee.

(a) *Fee required with request for a hearing.* A filing fee shall accompany a written request for a hearing in all matters except those involving the suspension or revocation of a permit, license, certificate or privilege by the Department, wherein a filing fee is not required.

(1) The schedule of filing fees will be reviewed [and revised annually by the Department as necessitated by the increasing costs of adjudication] and revised periodically by the Department and will be published in the *Pennsylvania Bulletin*.

* * * * *

(3) Information regarding filing fees may be obtained from the [administrative] appropriate docket clerk at the [address] addresses provided in § 491.4 [(c)] (d) (relating to institution of proceedings).

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(c) *Fee not received with filing.* If a written request for a hearing is received without the required filing fee, the [administrative] docket clerk will immediately provide the requesting party with written notice that the fee shall be forwarded and received by the [administrative] docket clerk within 20 days of the mailing date of the notice.

(d) *Request not docketed for failure to remit filing fee.* If the Department does not receive the required filing fee

within 20 days after the mailing date of the notice to the requesting party, [**and the filing fee is not waived,**] the [**administrative**] docket clerk may refuse to allow the matter to be docketed, may determine the matter to be closed and may return the written request to the requesting party.

* * * * *

§ 491.6. Notice and conduct of hearing.

(a) *Written notification to [**interested**] parties.* Upon docketing a written request for a hearing, the [**administrative**] docket clerk will provide written notification to all [**interested**] parties [**and other participants**] of the request for a hearing and of referral of the matter to the Department hearing officer for scheduling.

(b) *Scheduling.* The Department hearing officer will schedule a hearing for the docketed request and will direct the [**administrative**] docket clerk to issue written notice of the time and place of the scheduled hearing to all [**interested**] parties and other participants.

(c) *Authority of Department hearing officer.* [**After referral of the matter, the**] **The** Department hearing officer will have the authority to decide all motions, petitions, requests for supersedeas, discovery requests or other matters presented by the parties to [**the**] **this** action or other participants and to proceed in accordance with 1 Pa. Code Chapter 35 Subchapter E (relating to presiding officers).

(d) Intervention.

(1) *Petition to intervene.* A person who seeks to intervene as a party in a proceeding shall file a petition for leave to intervene with the Office of Administrative Docket Clerk. The petition shall contain a concise statement of the interest of the moving party and the grounds for intervention.

(2) Refusal.

(i) *Delay.* A petition for intervention may be refused if the moving party has unduly delayed in applying for intervention or the intervention will unduly delay or prejudice the hearing or the adjudication of the rights of the parties.

(ii) *Supersedeas.* This subsection supplements 1 Pa. Code §§ 35.27—35.36.

(e) Continuances.

(1) A request for a continuance will be considered if the docket clerk is notified in writing of the grounds at least 10 days prior to the date of the hearing. Continuances will be granted only for substantial or compelling reasons, at the discretion of the Department hearing officer.

(2) A request for continuance made less than 10 days prior to the date of the hearing will not be considered unless the Department hearing officer is satisfied that circumstances relating to the requested continuance occurred within 10 calendar days of the hearing date.

(3) The requesting party shall seek the agreement of the other parties to the proceeding prior to requesting the continuance. The position of the opposing parties shall specifically be noted in the continuance request. The hearing officer may

refuse a request for continuance in spite of the concurrence of all parties.

(f) *Depositions.* The testimony of a witness may be taken by deposition only upon application by a party in a proceeding before the Department. The granting of an application for depositions will be entirely discretionary with the Department hearing officer and will only be granted for substantial and compelling reasons.

(g) Request for a stay or supersedeas.

(1) *Conditions for grant.* The Department hearing officer, upon written motion of a party, may grant a request for a stay or supersedeas, if the requesting party can demonstrate the following to the satisfaction of the Department hearing officer:

(i) A likelihood of success on the merits of the matter before the Department hearing officer.

(ii) Immediate and irreparable harm will result from the failure to grant the stay or supersedeas.

(iii) Issuance of the stay or supersedeas will not substantially harm other parties to the proceedings.

(iv) No other remedy is available.

(v) The moving party has given reasonable notice of the request to all parties.

(2) *Requirement to provide security.* The hearing officer may require a non-Commonwealth party submitting a request for a stay or supersedeas to provide a bond or other appropriate security, as determined by the Department hearing officer, for the satisfaction of the order if it is affirmed or if for any reason the appeal is dismissed, or for the satisfaction of any modification of the order and in either case costs, interest and damages for delay that may finally be awarded.

(3) *Memorandum in opposition.* Any party to a proceeding may file with the Office of Administrative Docket Clerk a memorandum in opposition to a request for a stay or supersedeas within 10 days of the filing of the request.

(h) Dispositive motions.

(1) *Dismissal.* The Department hearing officer, on motion of a party, may dismiss the action in whole or in part:

(i) Whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense.

(ii) For failure to preserve the right to an appeal by a timely filing.

(iii) For mootness.

(iv) For any other reason appearing in the record.

(2) *Supersession.* This section supersedes 1 Pa. Code § 35.180 (relating to action on motions).

(i) *Appeal to the Secretary of a hearing officer order.* Unless otherwise provided by this chapter, an appeal from an order rendered by the hearing officer shall be filed with the appropriate docket clerk within 30 days of the date the order is entered.

[(d)] (j) * * *

§ 491.7. Filing requirements

(a) *Number of copies.* The original and two conformed copies of briefs, pleadings or other documents relating to the case, subsequent to the written request for a hearing, together with a certificate of service showing service to all other parties and participants, as required in § 491.8 (relating to service), shall be filed with the [administrative] docket clerk who will date stamp them upon receipt and provide copies to the Department hearing officer.

(b) *Telefacsimile and electronic transmission not accepted.* A request for a hearing, subsequent correspondence, briefs, pleadings or other documents relating to the case will not be accepted for filing if received **electronically** or by telefacsimile.

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§ 491.9. Order to show cause.

(a) *Initial request.* When the Department [initiates] files a written request for an order to show cause, that request shall be accompanied by a copy of the proposed order to show cause for the signature of the Department hearing officer.

(b) *Notification to respondent.* Upon the [signature by the Department hearing officer of an order to show cause] issuance of an order to show cause by the Department hearing officer, the [administrative] docket clerk will forward a copy of the order to the respondent [and all interested parties], directing the respondent to show cause why the subject action should not be taken by the Department.

* * * * *

(d) *Answer.* The order to show cause shall include a notice to the respondent to answer, in writing, within [20] 30 days of the date the notice was mailed. A respondent who fails to file an answer within [20] 30 days of the mailing date of the notice shall be deemed to have waived objection to the Department's proposed action.

(e) *Notification to [interested] parties [and other participants].* Upon timely filing of an answer to an order to show cause, the [administrative] docket clerk will notify all [interested] parties [and other participants] of referral of the matter to the Department hearing officer for the scheduling of a hearing.

(1) Timely filing of an answer to the order to show cause will not operate as an automatic **stay** or supersedeas of action taken by the Department prior or subsequent to the receipt of the order to show cause.

(2) Persons initiating a formal request for **stay** or supersedeas shall direct their application to the Department hearing officer.

(f) *Scheduling of hearing.* The Department hearing officer will schedule a hearing and will direct the [administrative] docket clerk to issue notice to all [interested] parties and other participants of the time and place of the hearing.

(g) [*Authority of Department hearing officer.* The Department hearing officer will preside at the hearing or scheduled prehearing conference and will

rule on questions regarding the admissibility of evidence or other matters relating to the conduct of the hearing.

(h) *Waiver.* Upon the failure of the respondent to file a timely answer to the order to show cause, the Department hearing officer may direct the [administrative] docket clerk to send to all parties [and other participants] a notice that objections to the order to show cause are deemed irrevocably waived and the proposed action of the Department deemed approved.

[(i)] (h) * * *

§ 491.10. Hearings.

(a) *Recording.* Upon the scheduling of a hearing, the [administrative] docket clerk will arrange for a stenographer to record the testimony presented at the hearing. [**The administrative docket clerk will notify the stenographer of continuances, withdrawals and rescheduling.**]

(b) *Presentation of evidence.* The party with the burden of proof in a proceeding will proceed first with the presentation of evidence at a hearing.

(1) In matters involving the suspension or revocation of an existing permit, license or privilege by the Department, **or the debarment of a contractor**, the Department will proceed first with the presentation of evidence at the hearing.

(2) In matters involving the denial of an application for a permit, license, certificate, **prequalification**, privilege, credit toward suspension or other requested action by the Department, the permit or license applicant shall proceed first with the presentation of evidence at the hearing.

* * * * *

(d) *Findings of fact and conclusions of law.* At the close of the hearing, the parties or other participants [will] **may, at the discretion of the Department hearing officer, be required or given an opportunity to file [Recommended Findings of Fact and Conclusions of Law] recommended findings of fact and conclusions of law**, together with a brief or memorandum discussing the applicable law and relevant facts of record. [**The Department hearing officer may also request the parties or other participants to file the same.**]

(e) *Filing of hearing transcript.* Upon the filing of the transcript of the hearing, the [administrative] docket clerk shall mail notice of the date the transcript was filed to the parties.

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§ 491.11. Proposed report.

(a) *General.* Following the hearing **and the timely submission of any posthearing filings**, the Department hearing officer will prepare and file a proposed report with the [administrative] docket clerk.

(b) *Contents.* The proposed report shall contain:

* * * * *

(4) An [administrative] order.

(c) *Notification.* The [administrative] docket clerk will forward copies of the proposed report to all parties [or participants] of record.

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§ 491.12. Exceptions.

(a) *Filing.* A party [or other participant] desiring to appeal to the Secretary may file exceptions to the proposed report within 30 days after the mailing date of the proposed report by the [administrative] docket clerk.

(b) *Reply.* A party [or other participant] may file a reply to the exceptions filed by another party [or other participant] within [10] 20 days of the filing date of exceptions filed by another party [or participant].

(c) *Record.* When timely exceptions are filed, the [Department hearing officer] docket clerk will forward the following to the Secretary:

* * * * *

(d) *Waiver.* If no party [or other participant] files exceptions to the proposed report within the time prescribed in subsection (a), those persons shall be deemed to have irrevocably waived objections to the proposed report, and the proposed report will be deemed approved by the Secretary.

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§ 491.13. Transmittal of certified record upon appeal.

If a final order of the Secretary is appealed to Commonwealth Court under 42 Pa.C.S. § 763 (relating to direct appeals from government agencies), the [Department hearing officer, together with the administrative] docket clerk[,] will prepare and forward the certified record to the clerk of Commonwealth Court.

[Pa.B. Doc. No. 99-1794. Filed for public inspection October 22, 1999, 9:00 a.m.]

FISH AND BOAT COMMISSION

[58 PA. CODE CH. 117]

Boat Rental Business; Extension of Public Comment Period

On May 22, 1999, the Fish and Boat Commission (Commission) published a notice of proposed rulemaking (Regulation No. 48A-90) at 29 Pa.B. 2678 (May 22, 1999), seeking public comments, objections or suggestions on a proposal relating to boat rental businesses or liveryes. The Commission is extending the public comment period for the proposed amendments until November 30, 1999.

Interested persons are invited to submit written comments, objections or suggestions about the proposal to the Executive Director, Fish and Boat Commission, P. O. Box 67000, Harrisburg, PA 17106-7000, on or before November 30, 1999. Comments submitted by facsimile will not be accepted. Comments also may be submitted electronically at "regulations@fish.state.pa.us." A subject heading of the proposal and a return name and address must be included in each electronic mail transmission. In addition, all electronic comments must be contained in the text of the transmission, not in an attachment. If an acknowledgment of electronic comments is not received by the sender

within 2 working days, the comments should be retransmitted to ensure receipt.

PETER A. COLANGELO, Executive Director

[Pa.B. Doc. No. 99-1795. Filed for public inspection October 22, 1999, 9:00 a.m.]

STATE BOARD OF BARBER EXAMINERS

[49 PA. CODE CH. 3]

Fees

The State Board of Barber Examiners (Board) proposes to amend § 3.103 (relating to fees) by revising certain application fees to read as set forth in Annex A.

A. Effective Date

The proposed amendment will be effective upon publication of the final-form regulation in the Pennsylvania Bulletin.

B. Statutory Authority

The proposed amendment is authorized under section 14 of the Barbers' License Law (63 P. S. § 564).

C. Background and Purpose

The Barbers' License Law requires the Board to set fees by regulation so that revenues meet or exceed expenditures over a biennial period. General operating expenses of the Board are funded through biennial license renewal fees. Expenses related to applications or services which are provided directly to individual licensees or applicants are excluded from general operating revenues and are funded through fees in which the cost of providing the service forms the basis for the fee.

In a recent systems audit of the operations of the Board within the Bureau of Professional and Occupational Affairs, the fees for services to licensees and applicants were analyzed to determine if the fees reflected the actual cost of providing the services. Actual cost calculations are based upon the following formula:

number of minutes to perform the function
x
pay rate for the classification of personnel performing the function
+
a proportionate share of administrative overhead.

The analysis determined that certain fees were insufficient to capture the actual cost of providing the service whereas certain other fees were more than sufficient to capture the cost of providing the service. For example, the proposed fee for an application for licensure as a barber, barber manager or barber teacher would be reduced from \$20 to \$10 which is the actual cost of processing this application.

In this proposal, fees for the services identified would be adjusted to allocate costs to those who use the service or application. The Board would continue to apportion the enforcement and operating costs to the general licensing population when the Board makes its biennial reconciliation of revenue and expenditures.

D. *Compliance with Executive Order 1996-1*

In accordance with of Executive Order 1996-1 (February 6, 1996), in drafting and promulgating the proposed amendment the Board considered the least restrictive alternative to regulate costs for services requested by licensees and applicants.

E. *Fiscal Impact and Paperwork Requirements*

The proposed amendment will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The fees will have a modest fiscal impact on those members of the private sector who apply for services from the Board. The proposed amendment will impose no additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

F. *Sunset Date*

The Board continuously monitors the cost effectiveness of its regulations. Therefore, no sunset date has been assigned.

G. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on October 6, 1999, the Board submitted a copy of this proposed amendment to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Professional Licensure Committee and the Senate Consumer Protection and Professional Licensure Committee. In addition to submitting the proposed amendment, the Board has provided IRRC and the Committees with a copy of a detailed regulatory analysis form prepared by the Board in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

If IRRC has objections to any portion of the proposed amendment, it will notify the Board within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the amendment, by the Board, the General Assembly and the Governor, of objections raised.

H. *Public Comment*

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed amendment to Sara Sulpizio, Administrative Assistant, State Board of Barber Examiners, P. O. Box 2649, Harrisburg, PA 17105-2649, within 30 days of publication of this proposed rulemaking. Please reference No. 16A-422 (Application Fees), when submitting comments.

RICHARD SCIORILLO,
Chairperson

Fiscal Note: 16A-422. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 3. STATE BOARD OF BARBER EXAMINERS

SCHOOLS OF BARBERING

§ 3.103. Fees.

The schedule of fees charged by the Board is as follows:

	* * * * *
Licensure of barber, barber shop manager or barber teacher	\$ [20] 10
Licensure of barber by reciprocity	\$ [15] 20
Licensure of barber shop	\$ [35] 55
Licensure of barber school	\$ [100] 280
	* * * * *
Change in barber shop—inspection required	\$ [35] 55
	* * * * *
Reinspection after first fail-new or change (shop or school)	\$40
[Certification of licensure] Verify license/permit/registration	\$15
Certification of exam scores	\$25

[Pa.B. Doc. No. 99-1796. Filed for public inspection October 22, 1999, 9:00 a.m.]