

PROPOSED RULEMAKING

LIQUOR CONTROL BOARD

[40 PA. CODE CHS. 15 AND 17]

Hearings by Video Teleconference

The Liquor Control Board (Board), under the authority of section 207(i) of the Liquor Code (47 P.S. § 2-207(i)), proposes to add subsection (c) and rename § 15.46 (relating to hearings), add § 17.16 (relating to hearings on license applications) and amend and rename § 17.32 (relating to hearings), to read as set forth in Annex A.

Purpose of the Proposed Rulemaking

This proposed rulemaking specifies the manner in which hearings before the Office of Administrative Law Judge (OALJ), as well as hearings on license applications before the Board, will be conducted. Like other agencies and businesses, the Board and the OALJ, which is an autonomous office within the Board, faced an unprecedented challenge with the arrival of the novel coronavirus (COVID-19) public health emergency in March 2020. The executive orders and mandates of the Governor necessitated that many agencies transition to a telework environment to continue day-to-day operations and ensure continued service to citizens of this Commonwealth.

In September 2020, the Board began operating under temporary procedures for hearings conducted by electronic means, the procedures for which have been available on the Board's web site. The OALJ began conducting virtual hearings in November 2020. After extensive testing and revision, virtual hearings have proved extremely successful, offering a variety of benefits as discussed in further detail as follows. The Board believes making these hearing procedures permanent is in the public interest and therefore proposes to supplement and amend its regulations to provide clear guidance to the regulated community.

Since September 2020, hundreds of licensing hearings have been conducted by virtual means. Minimal in-person licensing hearings have been held since the COVID-19 emergency began in March 2020, although an in-person licensing hearing may be necessary under special circumstances. For example, the Board's Office of Chief Counsel held an in-person licensing hearing in October 2022, to accommodate the needs of participants. The OALJ has conducted dozens of virtual hearings since November 2020 and has yet to require an in-person hearing.

Since the implementation of virtual hearings, the Board, the OALJ and hearing participants have realized the following benefits:

1) *Cost savings.* Conducting hearings by virtual means has resulted in the complete elimination of several costs associated with traditional, in-person hearings. As a result of the transition to virtual hearings, Board personnel, hearing examiners, OALJ personnel and Pennsylvania State Police, Bureau of Liquor Control Enforcement (BLCE) personnel no longer generate transportation, lodging or meal expenses for the Commonwealth in connection with their participation in hearings at the administrative level, thus eliminating all travel costs.

By way of example, one Board attorney traveled 7,370 miles for administrative hearings in 2018 and 7,453 miles for administrative hearings in 2019, including numerous overnight trips. In contrast, that same attorney traveled 0

miles for administrative hearings in 2020 and 2021, generating no travel costs for administrative-level hearings.

Further, hearing examiners are compensated at \$250 per hour, including driving time, in addition to being reimbursed at the Internal Revenue Service's annual rate for mileage on any personal vehicle used when a hearing location is more than 50 miles from their principal place of business. Considering that there are only a few hearing examiners to cover the entire Commonwealth, the expense of that time and mileage is considerable when conducting in-person hearings but is completely eliminated through the use of virtual hearings.

Additionally, in-person hearings in certain locations of the Commonwealth routinely necessitated that the Board or the OALJ reserve the use of conference rooms to be used as a hearing space. However, as with travel expenses, virtual licensing hearings have eliminated this expense entirely.

Virtual hearings have also resulted in substantial cost savings for licensees. Licensees are able to participate in hearings from the location of their choosing, thereby reducing their own travel expenses, including any costs associated with an absence from their place of work. In addition, virtual hearings have afforded licensees the opportunity for reduced legal fees. Time spent by counsel traveling to participate in a hearing on the behalf of the licensee, and the associated fees for this time, may be greatly reduced thereby providing licensees with tangible savings in legal costs.

Finally, the exclusive use of electronic documents in virtual hearings has dramatically reduced the consumption of paper and other office supplies. It has also reduced the cost of postage for all parties.

2) *Increased productivity.* Travel for Board personnel, hearing examiners, OALJ personnel, BLCE personnel and any witnesses to and from in-person hearings throughout this Commonwealth primarily occurred during normal business hours. Virtual hearings eliminate travel time altogether, thereby enabling Board and BLCE attorneys to spend more time preparing cases, completing assignments and participating in hearings. Likewise, judges and hearing examiners can more efficiently use their time to get through their caseloads.

By way of illustration, the same attorney previously referenced, spent approximately 147 hours traveling in 2018 and 149 hours traveling in 2019. At a standard rate of 37.5 hours per week, that is roughly the equivalent of 4 full weeks of work per year spent traveling.

3) *Convenience for Hearing Participants.* Virtual hearings enable law enforcement witnesses, many of whom work overnight shifts or otherwise have demanding work schedules, to testify from a variety of locations including their home or police headquarters. Similarly, other participants such as witnesses and court reporters no longer bear the burden of traveling to in-person hearings.

The inherent flexibility of virtual hearings also simplifies scheduling and results in fewer continuances. Both the Board and the OALJ have received a significant amount of positive feedback from licensees or applicants, or both, and their counsel on the convenience of virtual hearings for all participants.

4) *Health and Safety.* COVID-19, including its new variants which continue to emerge, remains a potential threat to licensees, witnesses, attorneys, hearing examiners, judges, court reporters and Board employees. Travel only increases the likelihood of spreading disease from one office/household/community to another. Virtual hearings help protect the health and safety of all hearing participants and their families.

Additionally, by eliminating travel, the risk of traffic accidents while traveling for in-person hearings is eliminated. Over the years, Board employees have been involved in traffic accidents while traveling for in-person hearings. Without question, the inherent risks of roadway travel, especially travel during inclement weather, are eliminated by virtual hearings.

5) *Training/Monitoring opportunities.* Virtual hearings provide a convenient, non-intrusive opportunity for supervisors or new hires, or both, to listen in on a proceeding for training or employee oversight purposes. Furthermore, virtual hearings offer a convenient opportunity for collaboration and mentorship, for example, between Board attorneys and between OALJ judges.

6) *Superior performance.* Virtual hearings enable participants to use a variety of computer-based resources in real time during virtual hearings. Instant access to licensing records, legal research platforms, maps and other databases is either impossible or impractical when conducting in-person hearings. During virtual hearings, documents or information can be retrieved and presented without delay as the situation dictates, allowing for more effective advocacy and decreasing delays.

7) *Flexible scheduling.* Previously, both the Board and the OALJ had to coordinate the scheduling of multiple hearings on the same day, at the same location, to maximize travel efficiency. Unlike proceedings that are to be held in person, virtual hearings can be scheduled based purely on the availability of the participants.

For example, instead of forcing a license applicant from Montgomery County and an applicant from Erie County to wait until a hearing date can be scheduled in each respective area, both hearings may be heard on the same day. Similarly, the OALJ has previously had to delay the scheduling of hearings until there were a sufficient number of pending cases to warrant the expenses associated with in-person hearings; however, with virtual hearings, this is no longer a problem.

Moreover, the elimination of travel results in counsel, witnesses, judges, hearing examiners and court reporters having greater availability for hearings. Virtual hearings are also far less likely to be canceled due to inclement weather or be delayed due to traffic issues, thereby increasing efficiency and judicial economy.

8) *Environmental impact.* Virtual licensing hearings alleviate the environmental impact of travel and its accompanying fossil fuel consumption and resulting emissions. Moreover, the exclusive use of electronic computer-based files in virtual hearings results in far less consumption of paper and printer ink, along with a reduction in the amount of wastepaper being generated.

9) *Employee morale/retention.* Work-related travel presents a hardship for employees and their families, especially those with dependent children. In addition to eliminating this hardship, virtual hearings reduce other work-related stresses thereby enhancing morale, reducing employee turnover, and helping to make the Board and OALJ more desirable workplaces when filling vacancies.

10) *Continuity of government.* Like all Commonwealth agencies, the Board and the OALJ maintain plans for the continuity of government in the event of circumstances which may disrupt the ability to operate. The recent COVID-19 public health emergency illustrated this contingency. Given the magnitude of that disruption, it is fair to say that while agency continuity of operations plans are comprehensive, they cannot anticipate every contingency. Virtual hearings will augment the Board and OALJ's continuity of operations plans and further protect against future disruptions including any future public health emergencies that may require social distancing.

Although the transition to virtual hearings on an interim basis has been largely successful, the Board has occasionally received some pushback from participants. These issues mostly dealt with participants allegedly not having access to the requisite technology and were promptly addressed by the Board. Likewise, the OALJ has received immensely positive feedback, with the only negative responses being from a handful of attorneys who indicated that they had no desire to learn or use a new technology. That said, prior to the implementation of virtual hearings, the Board and OALJ were accustomed to addressing accommodation requests from participants for hearings held in-person. Should a situation arise that necessitates that a particular hearing be held in-person, the Board and OALJ retain the ability to do so. However, over the course of the past 2 years, adjustments have been made to improve the efficiency and convenience of virtual hearings while preserving the integrity of the legal process, so that in-person hearings are rarely, if ever, necessary. Further improvements will continue to be made going forward to provide ever-increasing convenience and access to the Board and OALJ's administrative hearings.

Explanation of the Proposed Rulemaking

Under section 464 of the Liquor Code (47 P.S. § 4-464), the Board is authorized to "fix a time and place for hearing" on license applications, which include non-renewal matters and transfers. Section 464 places few requirements on the conduct of these hearings and leaves many of the specifics to the Board's discretion. Similarly, under § 15.46(a) of the Board's regulations, hearings before the OALJ are conducted in accordance with 1 Pa. Code §§ 35.121—35.128 and 35.131—35.133 (relating to hearing; and transcript), that is, the General Rules of Administrative Practice and Procedure. Of those provisions, the only general requirement pertaining to the time and place of hearings states that the agency will initiate hearings by issuance of an order or notice. 1 Pa. Code § 35.121 (relating to initiation of hearings).

Accordingly, § 15.46 of the Board's regulations is proposed to be amended to add subsection (c). Subsection (c) specifies that hearings before the OALJ will generally be conducted virtually, although the OALJ has the discretion to hold in-person hearings. Additionally, § 15.46 is proposed to be renamed to clarify that it is applicable only to hearings before the OALJ.

Section 17.16 is proposed to be added to the Board's regulations. Subsection (a) provides for various pre-hearing procedures that have generally been in place since the start of the COVID-19 pandemic, albeit informally. Specifically, subsection (a) requires the parties to exchange pre-marked exhibits prior to the scheduled date of a hearing and provides that objections relating to an exhibit must be made at the time the proponent moves for admission during the hearing. It further gives the Board's Office of Chief Counsel and the assigned hearing

examiner discretion to require the submission of pre-hearing memoranda. Subsection (b) allows for pre-hearing conferences, conducted by means of telephone, upon the request of a party. Subsection (c) specifies that hearings on licensing matters will generally be conducted virtually, although the Board's Office of Chief Counsel has the discretion to hold in-person hearings. It further provides the procedure for the scheduling of hearings as well the requirements for participation. It also requires the Board to publish a dial-in number on the Board's web site to allow members of the public to listen in to any licensing hearing.

Finally, § 17.32(a) is proposed to be amended to allow for virtual hearings. Further, since § 17.16 governs hearings on license applications, § 17.32(a), which is simply titled "Hearings," could cause confusion. Section 17.32 is therefore proposed to be renamed to clarify that it is applicable only to hearings on supersedeas applications.

Affected Parties

Parties to a licensing hearing before the Board, as well as a hearing before the OALJ, will be affected. Additionally, any witnesses or other hearing participants will be affected.

Paperwork Requirements

This proposed rulemaking requires Board attorneys and licensees/applicants or their counsel to exchange pre-marked exhibits electronically prior to the hearing. It also requires the Board to provide advance notice and instructions electronically to hearing participants. While this proposed rulemaking codifies the Board's pre-hearing procedures, such as, the exchange of exhibits, these procedures have been in place informally for many years.

Fiscal Impact

This proposed rulemaking is expected to have a positive fiscal impact on the Board, including the OALJ, as well as the BLCE, licensees and applicants, as previously explained.

Effective Date

This proposed rulemaking will become effective upon final-form publication in the *Pennsylvania Bulletin*.

Public Comments

Interested persons are invited to submit written comments about this proposed rulemaking to Rodrigo Diaz, Chief Counsel, or Justin Blake, Assistant Counsel, Office of Chief Counsel, Liquor Control Board, Room 401, Northwest Office Building, Harrisburg, PA 17124-0001, or ra-lblegal@pa.gov, within 30 days after publication of this proposed rulemaking in the *Pennsylvania Bulletin*. E-mail is preferred. When commenting, individuals should indicate if they wish to be apprised of future developments regarding this proposed rulemaking, and include a name, address and e-mail address. Comments submitted by facsimile will not be accepted.

Public comments will be posted on the Independent Regulatory Review Commission's (IRRC) web site. Personal information will not be redacted from the public comments received.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on May 18, 2023, the Board submitted a copy of the proposed regulation to IRRC and to the Chairpersons of the House Liquor Control Committee and Senate Committee on Law and Justice. A copy of this material is available to the public upon request.

Under Section 5(g) of the Regulatory Review Act, IRRC may convey comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the regulation, by the agency, the General Assembly and the Governor.

TIM HOLDEN,
Chairperson

Fiscal Note: 54-103. No fiscal impact; recommends adoption.

Annex A

TITLE 40. LIQUOR

PART I. LIQUOR CONTROL BOARD

CHAPTER 15. SPECIAL RULES OF ADMINISTRATIVE PRACTICE AND PROCEDURE REGARDING MATTERS BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGE

Subchapter D. FORMAL PROCEEDINGS

§ 15.46. Hearings before the OALJ.

(a) Hearings shall be in accordance with 1 Pa. Code §§ 35.121—35.128 and 35.131—35.133 (**relating to hearing; and transcript.**)

(b) No person except the reporter engaged by the OALJ to record its proceedings may record mechanically or electronically a part of the proceedings in a hearing.

(c) Hearings before the OALJ shall be conducted by video teleconference. Hearings may be conducted in-person at the discretion of the ALJ.

CHAPTER 17. SPECIAL RULES OF PRACTICE AND PROCEDURE FOR MATTERS BEFORE THE BOARD

Subchapter B. LICENSE APPLICATIONS

(Editor's Note: The following section is proposed to be added and is printed in regular type to enhance readability.)

§ 17.16. Hearings on license applications.

(a) *Pre-hearing procedures.*

(1) No later than 2 weeks prior to the date of the hearing, the assigned attorney for the Board's Bureau of Licensing shall electronically forward all Licensing exhibits to the parties, the hearing examiner and the court reporter. When submitting exhibits, the Licensing attorney shall identify the hearing by licensee or applicant name, hearing date and time. Each exhibit must be a separate PDF file named and marked according to its Licensing exhibit number (for example, B1, B2 and the like).

(2) Licensees, applicants, protestants or intervenors, or their counsel, shall electronically submit all exhibits to ra-lbhearings@pa.gov at least 3 business days prior to the date of the hearing. When submitting exhibits, each participant shall, within the subject field of the e-mail, identify the hearing by licensee or applicant name, hearing date and time. Each exhibit must be a separate PDF file and must be named and marked as follows:

(i) For a license applicant, each exhibit must be named: A1, A2 and the like.

(ii) For an existing licensee, each exhibit must be named: L1, L2 and the like.

(iii) For a protestant or intervenor, each exhibit must be marked with the protestant or intervenor's name, followed by a sequential number, such as, Smith1, Smith2 and the like.

(3) Failure to provide a copy of an exhibit prior to the hearing may be grounds for its exclusion.

(4) Objections relating to exhibits shall be made during the hearing, at the time the party moves for admission.

(5) The hearing examiner or the Office of Chief Counsel of the Board may require the submission of pre-hearing memoranda to address issues that may arise at the hearing.

(b) *Pre-hearing conferences.*

(1) Upon the request of any party or the hearing examiner, and subject to approval by the Office of Chief Counsel of the Board, a telephonic pre-hearing conference may be held with the hearing examiner. A party requesting a pre-hearing conference shall submit this request, including the reasons therefore, to the Office of Chief Counsel of the Board and all other parties by means of e-mail.

(2) Pre-hearing conferences may be held no earlier than 14 days, and no later than 3 days, prior to the scheduled date of the hearing.

(3) Notwithstanding the 3-business-day requirement of subsection (a)(2), parties shall electronically exchange all exhibits at least 1 business day prior to a pre-hearing conference.

(c) *Scheduling of hearings and requirements for participation.*

(1) Hearings shall be conducted by video teleconference, unless the Office of Chief Counsel of the Board determines otherwise.

(2) Hearing attendees who participate in a hearing shall use both the audio and video functions of the Internet-based videoconferencing software. Each partici-

pant testifying as a witness shall use a separate electronic device with its own camera and microphone. Unless approved by the Office of Chief Counsel of the Board or the parties agree otherwise, no witness may testify using a device that is shared with another person. However, witnesses may share an electronic device with counsel during the times that the individual is not actively testifying.

(3) The Office of Chief Counsel of the Board will electronically send notice to the parties and the hearing examiner of the date and time set for the hearing. This notice will include the hyperlink needed to access the hearing. Hearing participants who have not received the required hyperlink shall request access by sending an e-mail to ra-lbhearings@pa.gov no later than 3 business days prior to the scheduled hearing.

(4) The Board will provide written instructions explaining the virtual hearing requirements on its web site. Hearing participants requiring assistance shall contact ra-lbhearings@pa.gov no later than 3 business days prior to the hearing to schedule a test of the Internet-based videoconferencing software.

(5) The Board will provide the dial-in number and corresponding access code for each hearing on its web site, to allow members of the public to listen in by telephone.

(d) This section supplements 1 Pa. Code Chapter 35, Subchapter B (relating to hearings and conferences).

Subchapter D. SUPERSEDEAS

§ 17.32. Hearings on supersedeas applications.

(a) The Board may schedule a hearing for the purpose of receiving relevant evidence on the issue of the grant or the removal of a supersedeas. The hearing may be scheduled and held within 10 days of the mailing date of the notice. Continuances will be granted solely at the discretion of the Board. **Hearings will be conducted by video teleconference, unless the Office of Chief Counsel of the Board determines otherwise.**

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