

CHAPTER 35. FORMAL PROCEEDINGS

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This chapter cited in 1 Pa. Code § 31.5 (relating to communications and filings generally); 6 Pa. Code § 15.145 (relating to applicant or employee rights of review); 10 Pa. Code § 3.2 (relating to scope); 19 Pa. Code § 13.3 (relating to communications and filings generally); 25 Pa. Code § 1.5 (relating to procedures); 34 Pa. Code § 9.205 (relating to determination of rates); 51 Pa. Code § 21.27 (relating to briefs); 55 Pa. Code § 2430.201 (relating to generally); and 58 Pa. Code § 3.1 (relating to Executive Director).

Notes of Decisions

Failure to pursue the administrative remedies provided by this chapter, which have been willingly made available by an agency, forecloses judicial review. *Canonsburg General Hospital v. Department of Health*, 422 A.2d 141 (Pa. 1980).

Alleged Industrial Board abuses with regard to enforcement of the Fire and Panic Act can be and should be challenged by resort to existing administrative procedures and judicial review. *In re Dwyer*, 406 A.2d 1355 (Pa. 1979) (Concurring Opinion).

Subchapter A. PLEADINGS AND OTHER PRELIMINARY MATTERS

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Cross References

This subchapter cited in 104 Pa. Code § 7.16 (relating to RTKL appeals).

APPLICATIONS**§ 35.1. Applications generally.**

Applications for authorization or permission which an agency may give under statutory or other delegated authority administered by it, in addition to the requirements prescribed in this part, shall conform to the requirements of the regulations promulgated by the agency under the several statutes and delegations of authority administered by it.

Notes of Decisions

If the Insurance Commissioner has set conditions for lifting an order suspending an insurance company and a subsequent court ruling makes such conditions impossible to meet, the conditions of the Commissioner could be the subject of an application for authorization to resume business addressed to the Insurance Department pursuant to 1 Pa. Code § 35.1 (relating to applications generally) or a complaint under 1 Pa. Code § 35.9 (relating to formal complaints generally) *Gibraltar Life Insurance Co. v. Bartle*, 413 A.2d 32 (Pa. Cmwlth. 1980).

Cross References

This section cited in 12 Pa. Code § 11.7 (relating to complaints); 22 Pa. Code § 351.1 (relating to purpose and scope); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 111.21 (relating to content and form); 34 Pa. Code § 111.32 (relating to form/content); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 34 Pa. Code § 131.55 (relating to attorney fees and costs); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 52 Pa. Code § 5.11 (relating to applications generally); 52 Pa. Code § 1003.51 (relating to applications generally); 52 Pa. Code § 1003.53 (relating to applications requiring notice); 55 Pa. Code § 41.31 (relating to request for hearing); 55 Pa. Code § 41.32 (relating to timeliness and perfection of requests for hearing); 55 Pa. Code § 41.33 (relating to appeals nunc pro tunc); 58 Pa. Code § 493a.1 (relating to generally); and 61 Pa. Code § 703.5 (relating to other submissions).

§ 35.2. Contents of applications.

Applications shall be in writing, shall state clearly and concisely the authorization or permission sought, shall cite by appropriate reference the statutory provision or other authority under which the agency authorization or permission is sought, and shall set forth in the order indicated the following (unless otherwise provided by agency regulations for the specific type of application involved):

(1) The exact legal name of the applicant and, if the applicant is a corporation, trust, association or other organized group, the jurisdiction under the laws of which the applicant was created or organized and the location of principal place of business of the applicant.

(2) The name, title and post office address of the person to whom correspondence or communications in regard to the application is to be addressed. The agency will serve, where required, notices, orders and other papers upon the person so named and the service shall be deemed to be serviced upon the applicant.

(3) In cases where notice of the application, or of hearing or opportunity to be heard, is required to be given by publication of a notice in the *Pennsylvania Bulletin* under § 35.105 (relating to notice of nonrulemaking proceedings) or another provision of law, a draft of the appropriate notice, omitting the date, time and place of hearing, or the date of termination of opportunity to be heard, prepared according to the style normally employed by the agency for similar notices in recent issues of the *Pennsylvania Bulletin*, or if no similar notices have been so published, prepared in accordance with the requirements of Chapter 11 (relating to preparation of notices, rulemaking proposals and unpublished regulations).

(4) Other information as required by the statutes and regulations under which a specific type of application is filed, and as may be required by the agency in a particular proceeding.

Cross References

This section cited in 12 Pa. Code § 11.7 (relating to complaints); 22 Pa. Code § 351.1 (relating to purpose and scope); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 111.21 (relating to content and form); 34 Pa. Code § 111.32 (relating to form/content); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 34 Pa. Code § 131.55 (relating to attorney fees and costs); 34 Pa. Code § 131.56a (relating to withdrawal of appearance); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 52 Pa. Code § 5.12 (relating to contents of applications); 52 Pa. Code § 1003.52 (relating to contents of applications); 52 Pa. Code § 1003.53 (relating to applications requiring notice); 55 Pa. Code § 41.31 (relating to request for hearing); 55 Pa. Code § 41.32 (relating to timeliness and perfection of requests for hearing); 55 Pa. Code § 41.33 (relating to appeals nunc pro tunc); 58 Pa. Code § 51.42 (relating to applications); 58 Pa. Code § 71a.5 (relating to Notice of Stocking to the Commission); 58 Pa. Code § 493a.1 (relating to generally); and 61 Pa. Code § 703.5 (relating to other submissions).

INFORMAL COMPLAINTS**§ 35.5. Form and content of informal complaints.**

Informal complaint may be by letter or other writing, and shall be serially numbered and filed as of the date of its receipt. No form of informal complaint is suggested, but in substance the letter or other writing shall contain the essential elements of a formal complaint as specified in § 35.9 (relating to formal complaints generally). Only one copy of an informal complaint need be filed. It may embrace supporting papers.

Cross References

This section cited in 6 Pa. Code § 3.5 (relating to informal complaints); 12 Pa. Code § 11.7 (relating to complaints); 22 Pa. Code § 351.1 (relating to purpose and scope); 25 Pa. Code § 1021.51 (relating to commencement, form and content); 25 Pa. Code § 1021.52 (relating to timeliness of appeal); 25 Pa. Code § 1021.53 (relating to amendment to appeal or complaint); 25 Pa. Code § 1021.71 (relating to complaints filed by the Department); 25 Pa. Code § 1021.72 (relating to answers to complaints filed by other persons); 25 Pa. Code § 1021.73 (relating to transferred matters); 25 Pa. Code § 1021.74 (relating to answers to complaints); 28 Pa. Code § 1230a.38 (relating to commencement, form and content of Notice of Appeal); 28 Pa. Code § 1230a.39 (relating to timeliness of Notice of Appeal); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 37 Pa. Code § 421.21 (relating to reconsideration of adverse determination and request for hearing); 52 Pa. Code § 3.111 (relating to form and content of informal complaints); 52 Pa. Code § 1003.41 (relating to form and content of informal complaints); 55 Pa. Code § 41.31 (relating to request for hearing); 55 Pa. Code § 41.32 (relating to timeliness and perfection of requests); 55 Pa. Code § 41.33 (relating to appeals nunc pro tunc); and 61 Pa. Code § 703.5 (relating to other submissions).

§ 35.6. Correspondence handling of informal complaints.

If the informal complaint appears to be susceptible of informal adjustment, a copy or a statement of the substance thereof will be transmitted by the agency to each person complained of in an endeavor to have it satisfied by correspondence and thus obviate the filing of a formal complaint.

Cross References

This section cited 6 Pa. Code § 3.5 (relating to informal complaints); in 22 Pa. Code § 351.1 (relating to purpose and scope); 25 Pa. Code § 1021.51 (relating to commencement, form and content); 25 Pa. Code § 1021.52 (relating to timeliness of appeal); 25 Pa. Code § 1021.53 (relating to amendments to appeal or complaint); 25 Pa. Code § 1021.71 (relating to complaints filed by the Department); 25 Pa. Code § 1021.72 (relating to answers to complaints filed by other persons); 25 Pa. Code § 1021.73 (relating to transferred matters); 25 Pa. Code § 1021.74 (relating to answers to complaints); 28 Pa. Code § 1230a.38 (relating to commencement, form and content of Notice of Appeal); 28 Pa. Code § 1230a.39 (relating to timeliness of Notice of Appeal); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 52 Pa. Code § 3.112 (relating to action on informal complaints); 52 Pa. Code § 1003.42 (relating to authority action on informal complaints); 55 Pa. Code § 41.31 (relating to

request for hearing); 55 Pa. Code § 41.32 (relating to timeliness and perfection of requests); 55 Pa. Code § 41.33 (relating to appeals nunc pro tunc); and 61 Pa. Code § 703.5 (relating to other submissions).

§ 35.7. Discontinuance of informal complaints without prejudice.

A proceeding instituted on an informal docket is without prejudice to the right of the complainant to file and prosecute a formal complaint, in which event the proceeding on the informal docket will be discontinued.

Cross References

This section cited in 6 Pa. Code § 3.5 (relating to informal complaints); 12 Pa. Code § 11.7 (relating to complaints); 22 Pa. Code § 351.1 (relating to purpose and scope); 25 Pa. Code § 1021.51 (relating to commencement, form and content); 25 Pa. Code § 1021.52 (relating to timeliness of appeal); 25 Pa. Code § 1021.53 (relating to amendments to appeal or complaint); 25 Pa. Code § 1021.71 (relating to complaints filed by the Department); 25 Pa. Code § 1021.72 (relating to answers to complaints filed by other persons); 25 Pa. Code § 1021.73 (relating to transferred matters); 25 Pa. Code § 1021.74 (relating to answers to complaints); 28 Pa. Code § 1230a38 (relating to commencement, form and content of Notice of Appeal); 28 Pa. Code § 1230a39 (relating to timeliness of Notice of Appeal); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 52 Pa. Code § 3.112 (relating to action on informal complaints); 52 Pa. Code § 1003.42 (relating to authority action on informal complaints); 55 Pa. Code § 41.31 (relating to request for hearing); 55 Pa. Code § 41.32 (relating to timeliness and perfection of requests for hearing); 55 Pa. Code § 41.33 (relating to appeals nunc pro tunc); and 61 Pa. Code § 703.5 (relating to other submissions).

FORMAL COMPLAINTS

§ 35.9. Formal complaints generally.

A person complaining of anything done or omitted to be done by a person subject to the jurisdiction of an agency, in violation of a statute or regulation administered or issued by the agency may file a complaint with the agency. If the complaint relates to a provision in a tariff, policy form or other similar contract document on file with the agency, the document should be identified. A copy of the complaint will be forwarded by the agency to the respondent who will be called upon to satisfy the complaint or to answer the same in writing within the time specified in § 35.35 (relating to answers to complaints and petitions), or such lesser time as may be prescribed by statute, after the date of service of the complaint, unless the agency with or without motion shall prescribe a different time. If, in the judgment of the agency, a violation of a statute or regulation administered or issued by the agency has been alleged and has not been satisfied adequately the agency will either invite the parties to an informal conference, set the matter for a formal hearing, or take another action which in the judgment of the agency is appropriate. In the event that a hearing is held the complainant automatically shall be a party thereto and need not file a petition for leave to intervene.

Notes of Decisions

Although a competitor of out-patient therapy for cancer patients was denied standing to contest the Department of Health's decision of "non-reviewability", the competitor was permitted to file a formal complaint with the Department alleging that the letter of intent used by the Department to make its determination contained inaccurate facts. *Powers v. Department of Health*, 550 A.2d 857 (Pa. Cmwlth. 1988); appeal denied 574 A.2d 75 (Pa. 1989).

Although contract between Blue Shield and provider was subject to Department of Health approval, the Department does not have authority under this section to settle a contract dispute between Blue Shield and the provider and to award a money judgment. *Pennsylvania Blue Shield v. Department of Health*, 500 A.2d 1244 (Pa. Cmwlth. 1985); appeal denied 522 A.2d 560 (Pa. 1983).

Doctrine of exhaustion of administrative remedies was inapplicable where question was whether Medical Professional Liability Catastrophe Loss Fund was liable over to malpractice defendant's excess insurer since the key question of whether there was one or two occurrences of medical malpractice was not within the Fund's specialized knowledge since the Fund regulations, 31 Pa. Code §§ 242.1—242.20 do not address such claims and since the Health Care Services Malpractice Act makes no specific provision regarding claims between insurance companies and the Fund but does contemplate the Fund's involvement in litigation concerning such claims, 40 P. S. § 1301.702(f). *Ohio Casualty Group of Insurance Companies v. Argonaut Insurance Co.*, 500 A.2d 191 (Pa. Cmwlth. 1985).

The complaint against the issuance of licenses to graduates of the ADIO Institute of Straight Chiropractic, Inc. was properly filed with the State Board of Chiropractic Examiners under this section. *Coder v. State Board of Chiropractic Examiners*, 471 A.2d 563 (Pa. Cmwlth. 1984).

The provisions of 1 Pa. Code § 35.9 grant an agency the discretionary power to review a complaint to determine violations and to determine the *modus operandi*; an agency may permit third parties to proceed, but only aggrieved persons are entitled to judicial review of such proceedings. *Apple v. Insurance Department*, 431 A.2d 1183 (Pa. Cmwlth. 1981).

If the Insurance Commissioner has set conditions for lifting an order suspending an insurance company and a subsequent court ruling makes such conditions impossible to meet, the conditions of the Commissioner could be the subject of an application for authorization to resume business addressed to the Insurance Department under 1 Pa. Code § 35.1 (relating to applications generally) or a complaint under 1 Pa. Code § 35.9 (relating to formal complaints generally) *Gibraltar Life Insurance Co. v. Bartle*, 413 A.2d 32 (Pa. Cmwlth. 1980).

Notice of the requirement that a complaint be answered within twenty days need not be placed on a separate sheet of paper if the notice is neither inconspicuous nor innocuous. *Fusaro v. Pennsylvania Public Utility Commission*, 382 A.2d 794 (Pa. Cmwlth. 1978).

A notice that accompanies the copy of the complaint and which concerns requirements for an answer need not specifically state that the answer must be in writing if the respondents were supplied with a copy of the set of procedures for pleadings. *Fusaro v. Pennsylvania Public Utility Commission*, 382 A.2d 794 (Pa. Cmwlth. 1978).

Cross References

This section cited in 1 Pa. Code § 35.5 (relating to form and content of informal complaints); 4 Pa. Code § 105.12 (relating to requests); 7 Pa. Code § 179.13 (relating to complaints and other pleadings); 12 Pa. Code § 11.7 (relating to complaints); 22 Pa. Code § 351.1 (relating to purpose and scope); 25 Pa. Code § 1021.51 (relating to commencement, form and content); 25 Pa. Code § 1021.52 (relating to timeliness of appeal); 25 Pa. Code § 1021.53 (relating to amendments to appeal or complaint); 25 Pa. Code § 1021.71 (relating to complaints filed by the Department); 25 Pa. Code § 1021.72 (relating to complaints filed by other persons); 25 Pa. Code § 1021.73 (relating to transferred matters); 34 Pa. Code § 81.71 (relating to filing); 34 Pa. Code § 111.15 (relating to no

other pleadings allowed); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 37 Pa. Code § 171.44 (relating to supporting legal authority); 37 Pa. Code § 421.21 (relating to reconsideration of adverse determination and request for hearing); 51 Pa. Code § 21.1 (relating to complaints); 52 Pa. Code § 5.21 (relating to formal complaints generally); 52 Pa. Code § 1005.11 (relating to formal complaints generally); 52 Pa. Code § 1005.12 (relating to content of formal complaints); 52 Pa. Code § 1005.13 (relating to citation complaints by the Authority); 55 Pa. Code § 41.31 (relating to request for hearing); 55 Pa. Code § 41.32 (relating to timeliness and perfection of requests for hearing); 55 Pa. Code § 41.33 (relating to appeals nunc pro tunc); 58 Pa. Code § 493a.1 (relating to generally); 58 Pa. Code § 493a.2 (relating to complaints); and 61 Pa. Code § 703.5 (relating to other submissions).

§ 35.10. Form and content of formal complaints.

A complaint may be made by letter or other writing. It shall contain the name and address of the complainant, the name and address of the party against whom the complaint is made, and a statement of the facts forming the basis for the conclusion that there has been a violation of a statute or regulation administered or issued by the agency. Supporting material may be submitted along with the complaint.

Cross References

This section cited in 4 Pa. Code § 105.12 (relating to requests); 6 Pa. Code § 3.6 (relating to request for a formal hearing); 6 Pa. Code § 22.103 (relating to filing of appeals); 7 Pa. Code § 179.13 (relating to complaints and other pleadings); 22 Pa. Code § 351.1 (relating to purpose and scope); 25 Pa. Code § 1021.51 (relating to commencement, form and content); 25 Pa. Code § 1021.52 (relating to timeliness of appeal); 25 Pa. Code § 1021.53 (relating to amendments to appeal or complaint); 25 Pa. Code § 1021.71 (relating to complaints filed by the Department); 25 Pa. Code § 1021.72 (relating to complaints filed by other persons); 25 Pa. Code § 1021.73 (relating to transferred matters); 34 Pa. Code § 81.71 (relating to filing); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 37 Pa. Code § 79.72 (relating to procedure for officers, CFIs, MIs or schools seeking reconsideration); 37 Pa. Code § 79.82 (relating to notice); 49 Pa. Code § 25.201 (relating to grounds for complaint); 52 Pa. Code § 5.22 (relating to contents of formal complaint); 52 Pa. Code § 1005.12 (relating to content of formal complaints); 52 Pa. Code § 1005.13 (relating to citation complaints by the Authority); 55 Pa. Code § 41.31 (relating to request for hearing); 55 Pa. Code § 41.32 (relating to timeliness and perfection of requests for hearing); 55 Pa. Code § 41.33 (relating to appeals nunc pro tunc); 58 Pa. Code § 493a.1 (relating to generally); 58 Pa. Code § 493a.2 (relating to complaints); and 61 Pa. Code § 703.5 (relating to other submissions).

§ 35.11. Joinder of formal complaints.

Two or more grounds of complaint involving the same purposes, subject or state of facts, may be included in one complaint, but should be separately stated and identified; and two or more complainants may join in one complaint if their respective causes of complaint are against the same respondent or respondents, and involve substantially the same purposes and subject, and a like state of facts.

Cross References

This section cited in 7 Pa. Code § 179.13 (relating to complaints and other pleadings); 12 Pa. Code § 11.7 (relating to complaints); 22 Pa. Code § 351.1 (relating to purpose and scope); 25 Pa. Code § 1021.51 (relating to commencement, form and content); 25 Pa. Code § 1021.52 (relating to timeliness of appeal); 25 Pa. Code § 1021.53 (relating to amendments to appeal or complaint); 25 Pa. Code § 1021.71 (relating to complaints filed by the Department); 25 Pa. Code § 1021.72 (relating to complaints filed by other persons); 25 Pa. Code § 1021.73 (relating to transferred matters); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 34 Pa. Code § 131.36 (relating to joinder); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 52 Pa. Code § 5.23 (relating to joinder of formal complaints); 52 Pa. Code § 1005.12 (relating to content of formal complaints); 52 Pa. Code § 1005.13 (relating to citation complaints by the Authority); 52 Pa. Code § 1005.14 (relating to joinder of formal complaints); 55 Pa. Code § 41.31 (relating to request for hearing); 55 Pa. Code § 41.32 (relating to timeliness and perfection of requests for hearing); 55 Pa. Code § 41.33 (relating to appeals nunc pro tunc); 58 Pa. Code § 493a.1 (relating to generally); 58 Pa. Code § 493a.2 (relating to complaints); and 61 Pa. Code § 703.5 (relating to other submissions).

ORDERS TO SHOW CAUSE**§ 35.14. Orders to show cause.**

Whenever an agency desires to institute a proceeding against a person under statutory or other authority, the agency may commence the action by an order to show cause setting forth the grounds for the action. The order will contain a statement of the particulars and matters concerning which the agency is inquiring, which shall be deemed to be tentative and for the purpose of framing issues for consideration and decision by the agency in the proceeding, and the order will require that the respondent named respond orally, or in writing (as provided in § 35.37 (relating to answers to orders to show cause)) or both.

Notes of Decisions

Since the violation notice contained references pertaining to rulemaking proceedings rather than to appeals from violation charges and since the show cause order did not clearly advise that an answer was to be filed and did not clearly mention appeal to the Industrial Board, the notice and order were inadequate and the case would be remanded to the Industrial Board for hearing and consideration. *In re Hoge*, 410 A.2d 106 (Pa. Cmwlth. 1980).

Cross References

This section cited in 1 Pa. Code § 35.37 (relating to answers to orders to show cause); 4 Pa. Code § 607a.6 (relating to order to show cause); 7 Pa. Code § 131.22 (relating to special actions); 7 Pa. Code § 179.10 (relating to subpoena powers and procedures); 12 Pa. Code § 11.7 (relating to complaints); 16 Pa. Code § 49.62 (relating to notice of noncompliance); 22 Pa. Code § 32.6 (relating to enforcement); 22 Pa. Code § 121.9 (relating to administrative loan collection review procedures); 22 Pa. Code § 233.115 (relating to notice and hearings); 22 Pa. Code § 351.1 (relating to purpose and scope); 28 Pa. Code § 30.60 (relating to hearings and appeals); 28 Pa. Code § 101.104 (relating to form of notice); 28 Pa. Code § 601.14 (relating to reasons for revocation or nonrenewal of license); 28 Pa. Code § 709.17 (relating to refusal or revocation of license); 28 Pa. Code § 711.17 (relating to refusal or revocation); 28 Pa. Code § 717.12 (relating to refusal or revocation of license); 28 Pa. Code § 1230a.43 (relating to orders to show cause, orders or petitions filed by the Office); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 3a.99 (relating to notice of deficiency); 34 Pa. Code § 13.52 (relating to notice of deficiency); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 121.27 (relating to orders to show cause); 34 Pa. Code § 129.1602 (relating to order to show cause/penalties); 34 Pa. Code

§ 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 34 Pa. Code § 131.122 (relating to other penalty proceedings); 34 Pa. Code § 401.14 (relating to decertification or refusal to certify); 34 Pa. Code § 501.8 (relating to hearings/appeals); 37 Pa. Code § 407.32 (relating to initiation of subgrant termination proceedings); 52 Pa. Code § 5.31 (relating to staff-initiated complaints); 52 Pa. Code § 1005.12 (relating to content of formal complaints); 52 Pa. Code § 1005.13 (relating to citation complaints by the Authority); 58 Pa. Code § 51.23 (relating to order to show cause); 58 Pa. Code § 93.112 (relating to suspension, revocation or cancellation of certificate of title); 58 Pa. Code § 493a.2 (relating to complaints); 61 Pa. Code § 703.5 (relating to other submissions); and 67 Pa. Code § 491.9 (relating to order to show cause).

PETITIONS

§ 35.17. Petitions generally.

Petitions for relief under a statute or other authority delegated to an agency shall be in writing, shall state clearly and concisely the grounds of interest of the petitioner in the subject matter, the facts relied upon and the relief sought, and shall cite by appropriate reference the statutory provision or other authority relied upon for relief.

Cross References

This section cited in 12 Pa. Code § 11.8 (relating to petitions for declaratory order); 22 Pa. Code § 233.114 (relating to confidentiality and unauthorized release of information); 22 Pa. Code § 233.120 (relating to expedited hearing procedures); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 111.11 (relating to content and form); 34 Pa. Code § 111.21 (relating to form and content); 34 Pa. Code § 111.32 (relating to form/content); 34 Pa. Code § 111.33 (relating to specific petitions/requirements); 34 Pa. Code § 131.31 (relating to form of pleadings); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 34 Pa. Code § 321.5 (relating to hearings); 37 Pa. Code § 171.44 (relating to supporting legal authority); 37 Pa. Code § 197.11a (relating to motions and petitions); 40 Pa. Code § 15.41 (relating to pleadings and other preliminary matters); 52 Pa. Code § 5.41 (relating to petitions generally); 52 Pa. Code § 1005.21 (relating to petitions generally); 55 Pa. Code § 41.3 (relating to definitions); 55 Pa. Code § 41.44 (relating to transfer of petition for relief); 58 Pa. Code § 493a.4 (relating to petitions generally); and 61 Pa. Code § 703.1 (relating to petitions generally).

§ 35.18. Petitions for issuance, amendment, waiver or deletion of regulations.

A petition to an agency for the issuance, amendment, waiver or repeal of a regulation shall set forth clearly and concisely the interest of the petitioner in the subject matter, the specific regulation, amendment, waiver or repeal requested, and shall cite by appropriate reference the statutory provision or other authority therefor. The petition shall set forth the purpose of, and the facts claimed to constitute the grounds requiring, the regulation, amendment, waiver or repeal. Petitions for the issuance or amendment of a regulation shall incorporate the proposed regulation or amendment.

Notes of Decisions

Petitioner must exhaust all administrative remedies under this section or the Regulatory Review Act (71 P.S. §§ 745.1—745.15) before an action in mandamus can be entertained. *Matesic v. Maleski*, 624 A.2d 776 (Pa. Cmwlth. 1993).

Where Department of Public Welfare had created confusion regarding whether or not Department of Health approval was required for certain Medical Assistance Program health-care providers' facilities, and where DPW had sua sponte waived the approval requirement for a short period of time, DPW abused its discretion in refusing to extend the waiver to encompass the full period of time necessary for the providers to obtain DOH approval. *Eye and Ear Hospital v. Department of Public Welfare*, 514 A.2d 976 (Pa. Cmwlth. 1986).

Cross References

This section cited in 1 Pa. Code § 31.6 (relating to amendments to rules); 1 Pa. Code § 33.61 (relating to applications for waiver of formal requirements); 4 Pa. Code § 1.376 (relating to petitions); 12 Pa. Code § 11.8 (relating to petitions for declaratory order); 22 Pa. Code § 233.120 (relating to expedited hearing procedures); 22 Pa. Code § 351.1 (relating to purpose and scope); 34 Pa. Code § 81.95 (relating to requests for exemptions); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.3 (relating to waiver and modification of rules); 34 Pa. Code § 131.12 (relating to modification of time); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 34 Pa. Code § 131.202 (relating to first hearing information and stay); 52 Pa. Code § 5.43 (relating to petitions for issuance, amendment, waiver or repeal of regulations); 52 Pa. Code § 1005.21 (relating to petitions generally); 52 Pa. Code § 1005.23 (relating to petitions for issuance, amendment, repeal or waiver of Authority regulations); 55 Pa. Code § 41.3 (relating to definitions); 55 Pa. Code § 41.31 (relating to request for hearing); 55 Pa. Code § 41.31 (relating to request for hearing) 55 Pa. Code § 41.41 (relating to waiver request); 55 Pa. Code § 41.43 (relating to request for issuance, amendment or deletion of regulations); 58 Pa. Code § 51.6 (relating to petitions or requests for regulations); 58 Pa. Code § 493a.4 (relating to petitions generally); and 61 Pa. Code § 703.2 (relating to petition content).

§ 35.19. Petitions for declaratory orders.

Petitions for the issuance, in the discretion of an agency, of a declaratory order to terminate a controversy or remove uncertainty, shall state clearly and concisely the controversy or uncertainty which is the subject of the petition, shall cite the statutory provision or other authority involved, shall include a complete statement of the facts and grounds prompting the petition, together with a full disclosure of the interest of the petitioner.

Notes of Decisions

Controversy Required

Preliminary objections to complaint seeking declaratory judgment were sustained since challenge to proposed regulations was premature as there was no controversy. *American Council of Life Insurance v. Foster*, 580 A.2d 448 (Pa. Cmwlth. 1990).

Declaratory Order Inappropriate

Where insurer is a defendant in a pending class action, its request for a declaratory order is inappropriate, as the relief requested will not terminate a controversy or remove uncertainty. Therefore, there is no basis for maintaining an action for a declaratory order and the request was properly denied. *Independence Blue Cross v. Insurance Department*, 802 A.2d 715 (Pa. Cmwlth. 2002).

Review

It was within the powers of the Board of Property to review an action for declaratory judgment regarding title to real property between private parties and the Commonwealth. *Kaiser Energy, Inc. v. Department of Environmental Resources*, 535 A.2d 1255 (Pa. Cmwlth. 1988).

-Statutory Basis

The petition for declaratory order authorized by 1 Pa. Code Part II assumes an underlying statutory basis for the agency's exercise of an adjudicatory function. *Sunrise Energy, LLC v. FirstEnergy Corp.*, 148 A.3d 894 (Pa. Cmwlth. 2016).

Cross References

This section cited in 12 Pa. Code § 11.8 (relating to petitions for declaratory order); 22 Pa. Code § 351.1 (relating to purpose and scope); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 52 Pa. Code § 5.42 (relating to petitions for declaratory orders); 52 Pa. Code § 1005.22 (relating to petitions for declaratory orders); 55 Pa. Code § 41.3 (relating to definitions); 55 Pa. Code § 41.31 (relating to request for hearing); 55 Pa. Code § 41.42 (relating to request for declaratory relief); and 61 Pa. Code § 703.2 (relating to petition content).

§ 35.20. Appeals from actions of the staff.

Actions taken by a subordinate officer under authority delegated by the agency head may be appealed to the agency head by filing a petition within 10 days after service of notice of the action.

Notes of Decisions*Application*

A facility which desired to be recognized as a hospital-based nursing facility under the exception criteria of 55 Pa. Code § 9424.6(b) (relating to skilled nursing facility participation requirements) has 10 days to appeal the denial of HBNF status. *Renovo Hospital Association v. Department of Public Welfare*, 480 A.2d 1260 (Pa. Cmwlth. 1984).

Failure to Appeal

The Commonwealth Court lacks appellate jurisdiction over the Department of Education's final approval of the school board's plan for bid awards, where the petitioners twice failed to appeal to the Secretary of Education the issues addressed by the division chief and the division chief's failure to grant them a hearing on those issues. *Citizens Concerned About Taxes v. Department of Education*, 739 A.2d 1129 (Pa. Cmwlth. 1999).

Cross References

This section cited in 4 Pa. Code § 39.12 (relating to criminal cases); 4 Pa. Code § 39.13 (relating to civil cases); 4 Pa. Code § 250.2 (relating to period from decisions of administrative staff); 7 Pa. Code § 131.21 (relating to appeals); 7 Pa. Code § 179.52 (relating to nature of Commission hearings); 12 Pa. Code § 11.8 (relating to petitions for declaratory order); 22 Pa. Code § 121.7 (relating to notice of denial and preliminary review procedures); 22 Pa. Code § 121.34 (relating to institutional appeals and hearings for other than the Federal Family Education Loan Program); 22 Pa. Code § 201.3a (relating to nonadjudicatory benefit appeal); 22 Pa. Code § 233.116 (relating to petitions requiring action prior to appointment of hearing officer); 22 Pa. Code § 233.124 (relating to power of subpoena); 22 Pa. Code § 351.1 (relating to purpose and scope); 28 Pa. Code § 1230a.38 (relating to commencement, form and content of Notice of Appeal); 28 Pa. Code § 1230a.39 (relating to timeliness of Notice of Appeal); 34 Pa. Code § 111.11 (relating to content and form); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 34 Pa. Code § 213.8 (relating to grievances arising from administration of the act); 43 Pa. Code § 5.7 (relating to reconsideration and appeals); 43 Pa. Code § 5.20 (relating to reconsideration and appeals); 43 Pa. Code § 5.27 (relating to reconsideration and appeal); 43 Pa. Code § 5.34 (relating to appeals); 43 Pa. Code § 5.46 (relating to appeals); 49 Pa. Code § 21.33a (relating to failure to comply with standards); 49 Pa. Code § 21.162a (relating to failure to comply with standards); 52 Pa. Code § 5.44 (relating to petitions for reconsideration from actions of the staff); 52 Pa. Code § 1005.24 (relating to appeals from actions of the staff); 55 Pa. Code § 20.82 (relating to written request for appeal); 55 Pa. Code § 41.31 (relating to request for hearing); 55 Pa. Code § 2380.12 (relating to appeals); 55 Pa. Code § 2390.12 (relating to appeals).

to appeals); 55 Pa. Code § 2800.12 (relating to appeals); 55 Pa. Code § 3130.82 (relating to appeals); 55 Pa. Code § 3270.12 (relating to appeals); 55 Pa. Code § 3280.12 (relating to appeals); 55 Pa. Code § 3290.13 (relating to appeals); 55 Pa. Code § 3700.72 (relating to family approved appeals); 58 Pa. Code § 51.44 (relating to appeals); 58 Pa. Code § 53.4 (relating to limiting access to Commission property and other restrictions); 58 Pa. Code § 53.24 (relating to tournament and fishing derby permits); 58 Pa. Code § 63.40 (relating to fishing tournaments and fishing derbies); 58 Pa. Code § 75.5 (relating to qualified surveyors for endangered and threatened species and their habitat); 58 Pa. Code § 493a.1 (relating to generally); and 61 Pa. Code § 703.2 (relating to petition content).

PROTESTS

§ 35.23. Protest generally.

A person objecting to the approval of an application, petition, motion or other matter which is, or will be, under consideration by an agency may file a protest. No particular form of protest is required but the letter or writing should contain the name and address of the protestant, the proceeding or matter to which the protest is addressed and a concise statement of the protest. Only one copy of a protest need be filed. Service need not be effected upon the parties.

Cross References

This section cited in 12 Pa. Code § 11.8 (relating to petitions for declaratory order); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 34 Pa. Code 131.121 (relating to penalty proceedings initiated by a party); 40 Pa. Code § 17.13 (relating to protests/intervention procedure); 52 Pa. Code § 5.51 (relating to protest to an application); 52 Pa. Code § 1003.54 (relating to protests); 55 Pa. Code § 41.61 (relating to filing of petitions to intervene); 61 Pa. Code § 703.2 (relating to petition content); and 67 Pa. Code § 441.3 (relating to permit application procedure).

§ 35.24. Effect of protest.

A protest is intended solely to alert the agency and the parties to a proceeding of the fact and nature of the objection of the protestant to the proposed agency action, other than a notice of proposed rulemaking (timely filed responses to notices of proposed rulemaking will be treated as “comments” and considered by the agency as such). The filing of a protest does not make the protestant a party to the proceeding; a separate petition to intervene is required for this purpose. Nor will a protest be considered by the agency as establishing the truth of the assertions of the protest. Where a timely protest is received prior to any final action by the agency in the matter, or designating a proceeding for formal hearing, the protest will be considered in determining what action is appropriate. If a hearing has been ordered, the protest will be placed into a public file associated with, but not part of, the record upon which the decision of the agency is made, and will be available for further exploration of the substantive matters raised therein by the agency staff and the other parties as may be appropriate.

Cross References

This section cited in 12 Pa. Code § 11.8 (relating to petitions for declaratory order); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 34 Pa. Code 131.121 (relating to penalty proceedings initiated by a party); 40 Pa. Code § 17.13 (relating to protests/intervention procedure); 52 Pa. Code § 1003.54 (relating to protests); 55 Pa. Code § 41.61 (relating to filing of petitions to intervene); 61 Pa. Code § 703.2 (relating to petition content); and 67 Pa. Code § 441.3 (relating to permit application procedure).

INTERVENTION

§ 35.27. Initiation of intervention.

Participation in a proceeding as a party intervenor may be initiated as follows:

- (1) By the filing of a notice of intervention by another agency of the Commonwealth which is authorized by statute to participate in the proceeding.
- (2) By order of the agency upon petition to intervene.

Cross References

This section cited in 1 Pa. Code § 31.3 (relating to definitions); 7 Pa. Code § 131.14 (relating to intervenors); 7 Pa. Code § 179.17 (relating to intervention); 25 Pa. Code § 1021.81 (relating to intervention); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 40 Pa. Code § 17.13 (relating to protests/intervention procedure); 49 Pa. Code § 19.33 (relating to intervention); 52 Pa. Code § 5.71 (relating to initiation of intervention); 52 Pa. Code § 1005.31 (relating to initiation of intervention); 58 Pa. Code § 493a.12 (relating to intervention); 61 Pa. Code § 703.2 (relating to petition content); 67 Pa. Code § 441.3 (relating to permit application procedure); and 67 Pa. Code § 491.6 (relating to notice and conduct of hearings).

§ 35.28. Eligibility to intervene.

(a) *Persons.* A petition to intervene may be filed by a person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. The right or interest may be one of the following:

- (1) A right conferred by statute of the United States or of this Commonwealth.
- (2) An interest which may be directly affected and which is not adequately represented by existing parties, and as to which petitioners may be bound by the action of the agency in the proceeding. The following may have an interest: consumers, customers or other patrons served by the applicant or respondent; holders of securities of the applicant or respondent; employees of the applicant or respondent; competitors of the applicant or respondent.
- (3) Other interest of such nature that participation of the petitioner may be in the public interest.

(b) *Commonwealth.* The Commonwealth or an officer or agency thereof may intervene as of right in a proceeding subject to this part.

Source

The provisions of this § 35.28 amended January 25, 1980, effective January 26, 1980, 10 Pa.B. 256.

Notes of Decisions

Due Process

Department of Banking which granted Banks' petition to intervene in proceeding on credit unions' proposal to reorganize by geographic communities pursuant to the public interest prong, improperly dismissed the Banks' petition based on their failure to prove they had a direct interest in the proceedings under the direct interest prong; due process required that the Banks had notice their status as intervenors was in dispute and that additional proof of standing to intervene was required. *Pennsylvania Bankers Ass'n v. Pennsylvania Dep't of Banking*, 956 A.2d 956, 960-961 (Pa. 2008).

Denial of the Pennsylvania Dental Association's petition to intervene in a statutory comment procedure did not violate procedural due process in part because the Association failed to show that the changes in payment rates to its members would adversely affect their ability to remain in business

and because nearly 40% of its members would not be affected by the rate change. *Pennsylvania Dental Asso. v. Insurance Department*, 551 A.2d 1148 (Pa. Cmwlth. 1988); 560 A.2d 870 (Pa. Cmwlth. 1989).

Scope of Provisions

Alleged Industrial Board abuses with regard to enforcement of the Fire and Panic Act can be and should be challenged by resort to existing administrative procedures and judicial review. *In re Petition of Dwyer*, 406 A.2d 1355 (Pa. 1979).

Standing

Taxpaying residents of adjacent school districts had no standing to intervene in an action involving a charter school application. The taxpayers fail to satisfy any of the requirements for intervention. *West Chester Area School District v. Collegium Charter School*, 812 A.2d 1172 (Pa. Cmwlth. 2002).

An organization has no standing to pursue an action before an agency if the organization is representing those of its members who have no standing, even though the organization has other members who would have standing to pursue the action. *Apple v. Insurance Department*, 431 A.2d 1183 (Pa. Cmwlth. 1981).

Statute or Harm Requirement

There was no statute which conferred on the education association the right to intervene in the Secretary of Education's consideration of the school district's request to alter its educational program at the elementary school. In addition, the association was not directly affected by the Secretary's consideration of the school district's request and was not bound by the Secretary's response to that request. Thus, because the association was not aggrieved by the decision, it lacked standing to challenge the determinations. *Wilkinsburg Educ. Ass'n v. Wilkinsburg School Dist.*, 690 A.2d 1252 (Pa. Cmwlth. 1996).

Cross References

This section cited in 1 Pa. Code § 31.3 (relating to definitions); 7 Pa. Code § 131.14 (relating to interveners); 7 Pa. Code § 179.17 (relating to intervention); 22 Pa. Code § 233.115 (relating to notice and hearings); 25 Pa. Code § 1021.81 (relating to intervention); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 37 Pa. Code § 171.143 (relating to notice to Attorney General; constitutionality of statute); 37 Pa. Code § 197.40a (relating to petition to intervene); 40 Pa. Code § 17.13 (relating to protests/intervention procedure); 49 Pa. Code § 19.33 (relating to intervention); 52 Pa. Code § 5.72 (relating to eligibility to intervene); 52 Pa. Code § 1005.32 (relating to eligibility to intervene); 58 Pa. Code § 493a.12 (relating to intervention); 61 Pa. Code § 703.2 (relating to petition content); 67 Pa. Code § 441.3 (relating to permit application procedure); and 67 Pa. Code § 491.6 (relating to notice and conduct of hearing).

§ 35.29. Form and contents of petitions to intervene.

Petitions to intervene shall set out clearly and concisely the facts from which the nature of the alleged right or interest of the petitioner can be determined, the grounds of the proposed intervention, and the position of the petitioner in the proceeding, so as fully and completely to advise the parties and the agency as to the specific issues of fact or law to be raised or controverted, by admitting, denying or otherwise answering, specifically and in detail, each material allegation of fact or law asserted in the proceeding, and citing by appropriate reference the statutory provisions or other authority relied on.

Cross References

This section cited in 1 Pa. Code § 31.3 (relating to definitions); 7 Pa. Code § 131.14 (relating to interveners); 7 Pa. Code § 179.17 (relating to intervention); 25 Pa. Code § 1021.81 (relating to intervention); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 34 Pa. Code § 225.8 (relating to petition to intervene); 37 Pa. Code § 197.40a (relating to petition to intervene); 40 Pa. Code § 17.13 (relating to protests/intervention procedure); 49 Pa. Code § 19.33 (relating to intervention); 52 Pa. Code § 5.73 (relating to form and content of petitions to intervene); 52 Pa. Code § 1005.33 (relating to form and content of petitions to intervene); 58 Pa. Code § 493a.12 (relating to intervention); 61 Pa. Code § 703.2 (relating to petition content); 67 Pa. Code § 441.3 (relating to permit application procedure); and 67 Pa. Code § 491.6 (relating to notice and conduct of hearing).

§ 35.30. Filing of petitions to intervene.

Petitions to intervene and notices of intervention may be filed at any time following the filing of an application, petition, complaint, or other document seeking agency action, but in no event later than the date fixed for the filing of petitions to intervene in any order or notice with respect to the proceedings published in the *Pennsylvania Bulletin*, unless, in extraordinary circumstances for good cause shown, the agency authorizes a late filing. Where a person has been permitted to intervene notwithstanding his failure to file his petition within the time prescribed in this section, the agency head or presiding officer may, where the circumstances warrant, permit the waiver of the requirements of § 35.169 (relating to copies to parties and agency) with respect to copies of exhibits for the intervenor.

Cross References

This section cited in 1 Pa. Code § 31.3 (relating to definitions); 7 Pa. Code § 131.14 (relating to interveners); 7 Pa. Code § 179.17 (relating to intervention); 25 Pa. Code § 1021.81 (relating to intervention); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 37 Pa. Code § 197.40a (relating to petition to intervene); 40 Pa. Code § 17.13 (relating to protests/intervention procedure); 49 Pa. Code § 19.33 (relating to intervention); 52 Pa. Code § 5.74 (relating to filing of petitions to intervene); 52 Pa. Code § 1005.34 (relating to filing of petitions to intervene); 58 Pa. Code § 493a.12 (relating to intervention); 61 Pa. Code § 703.2 (relating to petition content); 67 Pa. Code § 441.3 (relating to permit application procedure); and 67 Pa. Code § 491.6 (relating to notice and conduct of hearing).

§ 35.31. Notice and action on petitions to intervene.

(a) *Notice and service.* Petitions to intervene, when tendered to an agency for filing, shall show service thereof upon participants to the proceeding in conformity with § 33.32 (relating to service by a participant).

(b) *Action on petitions.* As soon as practicable after the expiration of the time for filing answers to the petitions or default thereof, as provided in § 35.36 (relating to answers to petitions to intervene), the agency will grant or deny the petition in whole or in part or may, if found to be appropriate, authorize limited participation. No petitions to intervene may be filed or will be acted upon during a hearing unless permitted by the agency after opportunity for all parties to object thereto. Only to avoid detriment to the public interest will any presiding officer tentatively permit participation in a hearing in advance of, and then only subject to, the granting by the agency of a petition to intervene.

Notes of Decisions

If a party who has been granted intervenor status actually presents evidence during the course of an administrative hearing, the only way for that intervenor to withdraw its appearance would be by leave of the presiding officers. *Pennsylvania Association of Home Health Agencies v. Insurance Department*, 547 A.2d 824 (Pa. Cmwlth. 1988).

Cross References

This section cited in 1 Pa. Code § 31.3 (relating to definitions); 7 Pa. Code § 131.11 (relating to time); 7 Pa. Code § 131.14 (relating to interveners); 7 Pa. Code § 179.17 (relating to intervention); 25 Pa. Code § 1021.81 (relating to intervention); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 40 Pa. Code § 17.13 (relating to protests/intervention procedure); 49 Pa. Code § 19.33 (relating to intervention); 52 Pa. Code § 5.75 (relating to notice, service and action on petitions to intervene); 52 Pa. Code § 1005.35 (relating to notice, service and action on petitions to intervene); 58 Pa. Code § 493a.12 (relating to intervention); 61 Pa. Code § 703.2 (relating to petition content); 67 Pa. Code § 441.3 (relating to permit application procedure); and 67 Pa. Code § 491.6 (relating to notice and conduct of hearing).

§ 35.32. Limitation of participation in hearings.

Where there are two or more interveners having substantially like interests and positions, the agency head or presiding officer may, in order to expedite the hearing, arrange appropriate limitations on the number of attorneys who will be permitted to cross-examine and make and argue motions and objections on behalf of the interveners.

Cross References

This section cited in 7 Pa. Code § 179.17 (relating to intervention); 25 Pa. Code § 1021.81 (relating to intervention); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 131.32 (relating to petitions except petitions for joinder and challenge proceedings); 40 Pa. Code § 17.13 (relating to protests/intervention procedure); 49 Pa. Code § 19.33 (relating to intervention); 52 Pa. Code § 5.76 (relating to limitation of participation in hearings); 52 Pa. Code § 1005.36 (relating to limitation of participation in hearings); 58 Pa. Code § 493a.12 (relating to intervention); 61 Pa. Code § 703.2 (relating to petition content); 67 Pa. Code § 441.3 (relating to permit application procedure); and 67 Pa. Code § 491.6 (relating to notice and conduct of hearing).

ANSWERS**§ 35.35. Answers to complaints and petitions.**

Answers to complaints and petitions, other than petitions to intervene and petitions of appeal from delegated actions of subordinate officers, shall be filed with the agency within 20 days after the date of service, unless for cause the agency with or without motion shall prescribe a different time, but in no case may an answer be required in less than 10 days after the date of service. Answers to petitions of appeal from delegated actions of subordinate officers shall be filed with the agency within 10 days after the date of service. A respondent failing to file an answer within the applicable period shall be deemed in default, and relevant basic facts stated in the complaint or petition may be deemed admitted. Answers shall be in writing, and so drawn as fully and completely to advise the parties and the agency as to the nature of the defense. They shall admit or deny specifically and in detail each material allegation of the pleading answered, and state clearly and concisely the facts and matters of law relied upon.

Notes of Decisions

When taxi company was advised by letter that failure to file a responsive pleading within the prescribed time period could result in Pennsylvania Public Utility Commission's deeming all allegations against taxi company to be admitted, company's failure to respond prevented it from raising issue of improper muzzling of guide dog as defense against handicapped person's charge of unlawfully refusing service under 52 Pa. Code § 29.102. *Metro Transportation Company v. Pennsylvania Public Utility Commission*, 525 A.2d 24 (Pa. Cmwlth. 1987).

An order conditioning the reinstatement of a cancelled certificate was affirmed where that order merely affirmed an earlier order cancelling the certificate and added conditions for its reinstatement, and where the certificate holder had not timely answered a complaint based upon her failure to provide evidence of insurance and failure to file an annual report, so the facts in that complaint were deemed admitted. *De Gregorio v. Pennsylvania Public Utility Commission*, 481 A.2d 1241 (Pa. Cmwlth. 1984).

A notice by the agency that accompanies the copy of the complaint and which concerns requirements for an answer need not specifically state that the answer must be in writing if the respondents were supplied with a copy of the set of procedures for pleadings. *Fusaro v. Pennsylvania Public Utility Commission*, 382 A.2d 794 (Pa. Cmwlth. 1978).

An administrative agency may not enter default judgments without notice and hearing on those complaints to which answers have been filed. *Bates Taxi, Inc. v. Pennsylvania Public Utility Commission*, 381 A.2d 1328 (Pa. Cmwlth. 1978).

Cross References

This section cited in 1 Pa. Code § 35.9 (relating to formal complaints generally); 4 Pa. Code § 60.6 (relating to procedure); 7 Pa. Code § 179.14 (relating to answers to complaints, petitions, motions and other filings requiring a response); 12 Pa. Code § 11.9 (relating to answers to complaints and petitions); 25 Pa. Code § 1021.74 (relating to answers to complaints); 28 Pa. Code § 1230a.39 (relating to timeliness of Notice of Appeal); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 111.23 (relating to answers); 34 Pa. Code § 111.34 (relating to answers to petitions); 34 Pa. Code § 131.33 (relating to answers except to answers for joinder and challenge proceedings); 34 Pa. Code § 131.36 (relating to joinder); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 37 Pa. Code § 171.44 (relating to supporting legal authority); 37 Pa. Code § 197.11a (relating to motions and petitions); 40 Pa. Code § 17.13 (relating to protests/intervention procedure); 49 Pa. Code § 19.35 (relating to subsequent pleadings); 52 Pa. Code § 5.61 (relating to answers to complaints, petitions, motions and preliminary objections); 52 Pa. Code § 5.405 (relating to effect of pleadings); 52 Pa. Code § 1005.41 (relating to answers to complaints, petitions, motions and other filings requiring a response); 52 Pa. Code § 1005.145 (relating to effect of pleadings); 55 Pa. Code § 41.71 (relating to answers generally); 58 Pa. Code § 493a.5 (relating to answers to complaints, petitions, motions and other filings requiring a response); 61 Pa. Code § 703.2 (relating to petition content); 61 Pa. Code § 703.8 (relating to timeliness of submissions); and 67 Pa. Code § 491.6 (relating to notice and conduct of hearing).

§ 35.36. Answers to petitions to intervene.

A participant may file an answer to a petition to intervene, and in default thereof, may be deemed to have waived an objection to the granting of the petition. If made, answers shall be filed within 10 days after the date of service of the petition, but no later than 5 days prior to the date set for the commencement of the hearing, if any, unless for cause the agency with or without motion shall prescribe a different time.

Cross References

This section cited in 1 Pa. Code § 35.31 (relating to notice and action on petitions to intervene); 7 Pa. Code § 179.14 (relating to answers to complaints, petitions, motions and other filings requiring a response); 7 Pa. Code § 179.17 (relating to intervention); 12 Pa. Code § 11.9 (relating to answers

to complaints and petitions); 25 Pa. Code § 1021.81 (relating to intervention); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.33 (relating to answers except answers to petitions for joinder and challenge proceedings); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 34 Pa. Code § 225.8 (relating to petition to intervene); 40 Pa. Code § 17.13 (relating to protests/intervention procedure); 52 Pa. Code § 5.66 (relating to answers to petitions to intervene); 52 Pa. Code § 1005.45 (relating to answers to petitions to intervene); 55 Pa. Code § 41.72 (relating to answers to petitions to intervene); 58 Pa. Code § 493a.5 (relating to answers to complaints, petitions, motions and other filings requiring a response); 58 Pa. Code § 493a.12 (relating to intervention); 61 Pa. Code § 703.2 (relating to petition content); and 67 Pa. Code § 491.6 (relating to notice and conduct of hearing).

§ 35.37. Answers to orders to show cause.

A person upon whom an order to show cause has been served under § 35.14 (relating to orders to show cause) shall, if directed so to do, respond to the same by filing within the time specified in the order an answer in writing. The answer shall be drawn so as specifically to admit or deny the allegations or charges which may be made in the order, set forth the facts upon which respondent relies and state concisely the matters of law relied upon. Mere general denials of the allegations of an order to show cause which general denials are unsupported by specific facts upon which respondent relies, will not be considered as complying with this section and may be deemed a basis for entry of a final order without hearing, unless otherwise required by statute, on the ground that the response has raised no issues requiring a hearing or further proceedings. A respondent failing to file answer within the time allowed shall be deemed in default, and relevant facts stated in the order to show cause may be deemed admitted.

Notes of Decisions

Admission Based on Denial

A member of the Amish community was found guilty of practicing dentistry without a license based in part upon this regulation which as the State Board of Dentistry noted provides that a mere general denial is deemed an admission following the Amish gentleman's comment that he was "willing to take [his] punishment for the sake of [his] people." *Zook v. State Board of Dentistry*, 683 A.2d 713 (Pa. Cmwlth. 1996).

Default

If an educator fails to timely respond to Notice of Charges, an educator is deemed to have defaulted under this regulation, and the Professional Standards and Practices Commission may deem admitted the relevant facts stated in the Notice of Charges and proceed to consideration of discipline based upon the admitted facts and exhibits to the Notice of Charges. *Kinniry v. Professional Standards & Practices Commission*, 678 A.2d 1230 (Pa. Cmwlth. 1996).

Cross References

This section cited in 1 Pa. Code § 35.14 (relating to orders to show cause); 4 Pa. Code § 607a.7 (relating to answer to order to show cause); 7 Pa. Code § 131.22 (relating to special actions); 7 Pa. Code § 179.14 (relating to answers to complaints, petitions, motions and other filings requiring a response); 12 Pa. Code § 11.9 (relating to answers to complaints and petitions); 22 Pa. Code § 233.115 (relating to notice and hearings); 22 Pa. Code § 351.1 (relating to purpose and scope); 28 Pa. Code § 101.121 (relating to demand for hearing); 28 Pa. Code § 709.18 (relating to hearings); 28 Pa. Code § 711.18 (relating to hearings); 28 Pa. Code § 717.13 (relating to hearings); 28 Pa. Code § 1230a.44 (relating to answers to orders to show cause, orders or other petitions filed by the Office); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 3a.99 (relating to notice of deficiency); 34 Pa. Code § 13.52 (relating to notice of deficiency); 34 Pa. Code § 49.14 (relating to answer to order to show cause); 34 Pa. Code § 60.11 (relating to enforcement); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code

§ 121.27 (relating to orders to show cause); 34 Pa. Code § 129.1602 (relating to order to show cause/penalties); 34 Pa. Code § 131.33 (relating to answers except answers to petitions for joinder and challenge proceedings); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 34 Pa. Code § 131.122 (relating to other penalty proceedings); 34 Pa. Code § 401.14 (relating to decertification or refusal to certify); 34 Pa. Code § 501.8 (relating to hearings/appeals); 40 Pa. Code § 17.13 (relating to protests/intervention procedure); 43 Pa. Code § 7.12 (relating to discipline and discharge); 52 Pa. Code § 1005.41 (relating to answers to complaints, petitions, motions and other filings requiring a response); 58 Pa. Code § 51.24 (relating to answer to order to show cause); 58 Pa. Code § 493a.5 (relating to answers to complaints, petitions, motions and other filings requiring a response); and 61 Pa. Code § 703.2 (relating to petition content).

§ 35.38. Respondents seeking affirmative relief.

Respondents seeking relief against other parties in a proceeding by reason of the presence of common questions of law or fact shall set forth in their answer the facts constituting the grounds of complaint; the provisions of the statutes, rules, regulations or orders relied upon; the injury complained of; and the relief sought. The answer shall in all other respects conform to the requirements of this part for answers generally.

Cross References

This section cited in 7 Pa. Code § 179.14 (relating to answers to complaints, petitions, motions and other filings requiring a response); 12 Pa. Code § 11.9 (relating to answers to complaints and petitions); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.33 (relating to answers except answers to petitions for joinder and challenge proceedings); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 40 Pa. Code § 17.13 (relating to protests/intervention procedure); 52 Pa. Code § 1005.42 (relating to answers seeking affirmative relief or raising new matter); 58 Pa. Code § 493a.5 (relating to answers to complaints, petitions, motions and other filings requiring a response); and 61 Pa. Code § 703.2 (relating to petition content).

§ 35.39. Replies to respondents seeking affirmative relief.

Unless otherwise ordered by the agency, replies to answers seeking affirmative relief shall be filed and served within 15 days after the service of the answer, but not later than 5 days prior to the date set for the commencement of the hearing, if any.

Cross References

This section cited in 1 Pa. Code § 35.55 (relating to motions as to answer); 7 Pa. Code § 179.14 (relating to answers to complaints, petitions, motions and other filings requiring a response); 12 Pa. Code § 11.9 (relating to answers to complaints and petitions); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.33 (relating to answers except answers to petitions for joinder and challenge proceedings); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 40 Pa. Code § 17.13 (relating to protests/intervention procedure); 52 Pa. Code § 5.63 (relating to replies to answers seeking affirmative relief); 52 Pa. Code § 1005.43 (relating to replies to answers seeking affirmative relief or new matter); 55 Pa. Code § 41.61 (relating to filing of petitions to intervene); 58 Pa. Code § 493a.5 (relating to answers to complaints, petitions, motions and other filings requiring a response); and 61 Pa. Code § 703.2 (relating to petition content).

§ 35.40. Answers to amendments of pleadings.

A participant may file an answer to an amendment, modification or supplement to an application, complaint, petition or other pleading. If made, answers shall be filed within 15 days after the date of service of the amendment, modification or supplement, unless for cause the agency head or presiding officer with or without motion shall prescribe a different time.

Cross References

This section cited in 7 Pa. Code § 179.14 (relating to answers to complaints, petitions, motions and other filings requiring a response); 12 Pa. Code § 11.9 (relating to answers to complaints and petitions); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.33 (relating to answers except answers to petitions for joinder and challenge proceedings); 34 Pa. Code § 131.35 (relating to amendments to pleadings); 34 Pa. Code § 131.36 (relating to joinder); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 40 Pa. Code § 17.13 (relating to protests/intervention procedure); 52 Pa. Code § 5.65 (relating to answers to amendments of pleadings); 52 Pa. Code § 1005.44 (relating to answers to amendments of pleadings); 55 Pa. Code § 41.61 (relating to filing of petitions to intervene); 58 Pa. Code § 493a.5 (relating to answers to complaints, petitions, motions and other filings requiring a response); 58 Pa. Code § 493a.7 (relating to amendments and withdrawal of pleadings); and 61 Pa. Code § 703.2 (relating to petition content).

§ 35.41. Satisfaction of complaints.

If the respondent satisfies a formal complaint either before or after answering, a statement to that effect signed by the opposing parties shall be filed, setting forth when and how the complaint has been satisfied and requesting dismissal.

Cross References

This section cited in 12 Pa. Code § 11.9 (relating to answers to complaints and petitions); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.33 (relating to answers except answers to petitions for joinder and challenge proceedings); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 40 Pa. Code § 17.13 (relating to protests/intervention procedure); 52 Pa. Code § 5.24 (relating to satisfaction of formal complaints); 52 Pa. Code § 1005.15 (relating to satisfaction of formal complaints); 55 Pa. Code § 41.61 (relating to filing of petitions to intervene); 58 Pa. Code § 493a.3 (relating to satisfaction of complaints); and 61 Pa. Code § 703.2 (relating to petition content).

CONSOLIDATION**§ 35.45. Consolidation.**

By order of the agency, proceedings involving a common question of law or fact may be joined for hearing of the matters in issue in the proceedings, and the proceedings may be consolidated; and the agency may make the orders concerning the conduct of the proceedings as may avoid unnecessary costs or delay.

Cross References

This section cited in 4 Pa. Code § 607a.9 (relating to consolidation of proceedings); 7 Pa. Code § 179.58 (relating to consolidation); 25 Pa. Code § 1021.82 (relating to consolidation); 34 Pa. Code § 131.30 (relating to consolidation); 37 Pa. Code § 197.39 (relating to consolidation of appeals); 37 Pa. Code § 197.63 (relating to consolidation of petitions); 52 Pa. Code § 5.81 (relating to consolidation); 52 Pa. Code § 1005.51 (relating to consolidation); 55 Pa. Code § 41.81 (relating to consolidation of provider appeals); 58 Pa. Code § 493a.6 (relating to consolidation); 61 Pa. Code § 703.2 (relating to petition content); and 61 Pa. Code § 703.7 (relating to consolidation).

AMENDMENT AND WITHDRAWAL OF PLEADINGS**§ 35.48. Amendments of pleadings generally.**

(a) A modification of or supplement to an application, complaint, petition or other pleading shall be deemed as an amendment to the pleading, and shall comply with the requirements of this subchapter relating to the pleading amended insofar as appropriate. Upon its own motion or upon motion promptly filed by a

participant, the agency may for good cause decline to permit, or may strike in whole or part, an amendment.

(b) Except as otherwise provided in this subsection, no amendment to a pleading may be filed within 5 days next preceding the commencement of or during a hearing unless directed or permitted by the agency head or the presiding officer after opportunity for all parties to be heard thereon. An amendment in a licensing or certification proceeding which reduces the scope of the application may be filed at any time, if permitted by the agency head or the presiding officer.

Notes of Decisions

Where petitioner has failed to describe, during the hearings and in his briefs, the specific nonmerit factor on which he alleges his furlough was based, and where the Civil Service Commission gave extensive rein in the introduction of evidence and specifically found a lack of discrimination, it cannot be said that the Commission abused its discretion in denying petitioner's motion to amend his complaint to include an allegation that furlough was based on political, religious, union, race, national origin or other nonmerit factors under 71 P. S. § 741.905(a). *O'Byrne v. Department of Transportation*, 498 A.2d 1385 (Pa. Cmwlth. 1985).

Cross References

This section cited in 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.35 (relating to amendments to pleadings); 34 Pa. Code § 131.36 (relating to joinder); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.60 (relating to resolution hearings); 52 Pa. Code § 5.91 (relating to amendments of pleadings generally); 52 Pa. Code § 1005.61 (relating to amendments of pleadings generally); 52 Pa. Code § 1005.62 (relating to amendments to conform to the evidence); 55 Pa. Code § 41.82 (relating to amendments of requests for hearing); 58 Pa. Code § 493a.7 (relating to amendments and withdrawal of pleadings); and 61 Pa. Code § 703.2 (relating to petition content).

§ 35.49. Amendments to conform to the evidence.

(a) When, at a hearing, issues not raised by the pleadings are introduced by express or implied consent of the parties, they shall be treated as if they had been raised in the pleadings. The amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these new issues may be made upon motion of a participant at any time during the hearing. If evidence upon the new issues is objected to on the ground that it is not within the issues raised by the pleadings, the agency head or the presiding officer may allow the pleadings to be amended and the evidence to be received, when it appears that the presentation of the merits of the proceeding will be served thereby without prejudicing the public interest or the rights of any participant. When in the discretion of the agency head or the presiding officer, a continuance is necessary in order to enable the objecting participant to meet the new issues and evidence, a continuance may be granted by the agency head or the presiding officer, as provided in § 31.15 (relating to extensions of time).

(b) If an amendment adopted under subsection (a) has the effect of broadening the issues in the proceeding, notice of the amendment shall be given in the same manner as notice was given at the commencement of the proceeding and to the same class of persons who received the notice.

Notes of Decisions

Due Process Violated

The bureau's motion to amend to include new charges was entered after all of the witnesses had testified at the hearing, and after all of the evidence had been presented to the board. By allowing the

amendment of the orders at that stage of the proceedings, the board denied the doctor the opportunity to hear the evidence as it related to the new charges, or to cross-examine witnesses and introduce exculpatory evidence as to those charges. As a result, the board denied the doctor's due process rights and the opportunity to address the new charges in a post-hearing brief was insufficient to satisfy the due process requirements. *White v. State Board of Optometry*, 682 A.2d 404 (Pa. Cmwlth. 1996).

Notice

The amendment of the orders to include the alleged violations of a separate and distinct provision of the Optometric Practice and Practices Act certainly broadened the issues which were to be considered by the board at the hearings. As a result, the doctor was entitled to receive notice of the amendment in the same manner as notice was given at the commencement of these disciplinary proceedings. *White v. State Board of Optometry*, 682 A.2d 404 (Pa. Cmwlth. 1996).

Cross References

This section cited in 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.35 (relating to amendments to pleadings); 34 Pa. Code § 131.36 (relating to joinder); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.60 (relating to resolution hearings); 52 Pa. Code § 5.92 (relating to amendments to conform to the evidence); 52 Pa. Code § 1005.62 (relating to amendments to conform to the evidence); 55 Pa. Code § 41.82 (relating to amendments of requests for hearing); 58 Pa. Code § 493a.7 (relating to amendments and withdrawal of pleadings); and 61 Pa. Code § 703.2 (relating to petition content).

§ 35.50. Directed amendments.

The agency head may at any time, or during a hearing the presiding officer may on his own motion or the motion of a participant, direct a party to state his case by way of amendment more fully or in more detail. The amendment shall be reduced to writing and filed within the time as may be fixed therefor.

Cross References

This section cited in 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.35 (relating to amendments to pleadings); 34 Pa. Code § 131.36 (relating to joinder); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.60 (relating to resolution hearings); 52 Pa. Code § 5.93 (relating to directed amendments); 52 Pa. Code § 1005.63 (relating to directed amendments); 55 Pa. Code § 41.82 (relating to amendments of requests for hearing); 58 Pa. Code § 493a.7 (relating to amendments and withdrawal of pleadings); and 61 Pa. Code § 703.2 (relating to petition content).

§ 35.51. Withdrawal of pleadings.

A participant desiring to withdraw a pleading filed with an agency may file a notice of withdrawal thereof with the agency. The notice shall set forth the reasons for the withdrawal. Unless otherwise ordered by the agency for good cause, the notice shall, 30 days after the filing thereof, be deemed to have effected the withdrawal of the pleading, including amendments, if any, except that this section shall not be construed as effecting, without express permission of the agency, withdrawal of the following:

- (1) A pleading in a proceeding in which a hearing has been held or convened.
- (2) A formal complaint, answer thereto, answer to order to show cause, or an amendment to any of the aforesaid pleadings.

Cross References

This section cited in 1 Pa. Code § 33.42 (relating to withdrawal or termination); 12 Pa. Code § 11.10 (relating to withdrawal of pleadings); 34 Pa. Code § 95.97 (relating to motions for withdrawal); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 111.17 (relating to oral argument); 34 Pa. Code § 131.34 (relating to other filings); 34 Pa. Code § 131.35 (relating to amendments to pleadings); 34 Pa. Code § 131.36 (relating to joinder); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.60 (relating to resolution hearings); 37 Pa. Code § 171.47 (relating to withdrawal of motions); 52 Pa. Code § 5.94 (relating to withdrawal of pleadings in a contested proceeding); 52 Pa. Code § 1005.64 (relating to withdrawal of pleadings in a contested proceeding); 55 Pa. Code § 41.83 (relating to withdrawal of provider appeals); 58 Pa. Code § 493a.7 (relating to amendments and withdrawal of pleadings); 61 Pa. Code § 703.2 (relating to petition content); and 61 Pa. Code § 703.9 (relating to withdrawal or termination of appeal).

MOTIONS**§ 35.54. Motions as to complaint.**

A respondent may file with his answer a motion that the allegations in the complaint be made more definite and certain, the motion to point out the defects complained of and details desired. A respondent may also file with his answer a motion to dismiss a complaint because of lack of legal sufficiency appearing on the face of the complaint.

Notes of Decisions

It was permissible for the Department of Community Affairs to dismiss the petitioners' complaint as a matter of law, because the school district's response contained affidavits which clearly refuted the petitioner's allegations and as a result of the petitioners' failure to respond to the school district's affidavits, no genuine issue of material fact remained. *Property Owners, Residents and/or Taxpayers of Pleasant Valley School District v. Department of Community Affairs*, 552 A.2d 769 (Pa. Cmwlth. 1989).

Where no material facts were in dispute, it was proper for the presiding officer to decide a motion to dismiss after briefs and oral arguments and without an evidentiary hearing under this section. *Meltinger v. Department of Community Affairs*, 533 A.2d 1119 (Pa. Cmwlth. 1987).

Cross References

This section cited in 12 Pa. Code § 11.11 (relating to motions); 34 Pa. Code § 111.14 (relating to motions to quash); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.3 (relating to waiver and modification of rules); 34 Pa. Code § 131.24 (relating to recusal of judge); 34 Pa. Code § 131.33 (relating to answers except answers to petitions for joinder and challenge proceedings); 34 Pa. Code § 131.36 (relating to joinder); 34 Pa. Code § 131.53b (relating to bifurcation and motions for disposition of a petition); 34 Pa. Code § 131.101 (relating to briefs, findings of fact and close of record); 34 Pa. Code § 131.112 (relating to correction or amendment of decision); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 37 Pa. Code § 197.40 (relating to preliminary motions); 52 Pa. Code § 5.101 (relating to preliminary objections); 52 Pa. Code § 1005.71 (relating to motions); 55 Pa. Code § 41.131 (relating to motions in general); and 61 Pa. Code § 703.2 (relating to petition content).

§ 35.55. Motions as to answer.

Except as provided in § 35.39 (relating to replies to respondents seeking affirmative relief), no replication to the answer shall be filed, but a participant may

file, within 10 days after the filing of an answer, a motion that the answer be made more definite and certain, the motion to point out the defects complained of and the details desired.

Cross References

This section cited in 12 Pa. Code § 11.11 (relating to motions); 34 Pa. Code § 111.14 (relating to motions to quash); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.3 (relating to waiver and modification of rules); 34 Pa. Code § 131.24 (relating to recusal of judge); 34 Pa. Code § 131.33 (relating to answers except answers to petitions for joinder and challenge proceedings); 34 Pa. Code § 131.36 (relating to joinder); 34 Pa. Code § 131.53b (relating to bifurcation and motions for disposition of a petition); 34 Pa. Code § 131.101 (relating to briefs, findings of fact and close of record); 34 Pa. Code § 131.112 (relating to correction or amendment of decision); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 52 Pa. Code § 5.101 (relating to preliminary objections); 52 Pa. Code § 1005.71 (relating to motions); 55 Pa. Code § 41.131 (relating to motions in general); and 61 Pa. Code § 703.2 (relating to petition content).

Subchapter B. HEARINGS AND CONFERENCES

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Cross References

This subchapter cited in 7 Pa. Code § 179.96 (relating to conduct of hearing); 34 Pa. Code § 111.35 (relating to dispositions of petitions); 58 Pa. Code § 491a.8 (relating to hearings generally); and 104 Pa. Code § 7.16 (relating to RTKL appeals).

GENERAL

§ 35.101. Waiver of hearing.

In any proceeding in which an agency is authorized to act after opportunity for hearing, if the participants waive hearing, such opportunity shall be deemed to have been afforded by publication in the *Pennsylvania Bulletin* of notice of the application or other initial pleading, request, or other filing, such notice fixing a reasonable period of time within which any person desiring to be heard may file a petition to intervene and a request for a hearing. Upon the expiration of such period of time, in the absence of a request for hearing, the agency may forthwith dispose of the matter upon the basis of the pleadings or submittals and the studies and recommendations of the staff. A party not requesting oral hearing in its pleadings shall be deemed to have waived a hearing for the purpose of such disposition, but shall not be bound by such waiver for the purposes of any application for reopening, rehearing or reconsideration with respect to an order so entered.

Cross References

This section cited in 7 Pa. Code § 131.32 (relating to hearings); 7 Pa. Code § 175.8 (relating to waiver of hearings); 7 Pa. Code § 177.8 (relating to waiver of hearings); 7 Pa. Code § 179.57 (relating to waiver of hearing); 7 Pa. Code § 179.103 (relating to waiver of oral hearing); 12 Pa. Code § 11.12 (relating to hearings); 22 Pa. Code § 351.1 (relating to purpose and scope); 25 Pa. Code § 1021.112 (relating to waiver of hearings); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.203 (relating to hearing procedures); 52 Pa. Code § 5.201 (relating to notice of proceeding; hearing; waiver of hearing); 52 Pa. Code § 1005.81 (relating to notice of proceeding; hearing; waiver of hearing); 55 Pa. Code § 41.91 (relating to waiver of hearings); 58 Pa. Code § 491a.8 (relating to hearings generally); and 61 Pa. Code § 703.31 (relating to disposition of petitions).

§ 35.102. Hearing calendar.

(a) The agency will maintain a hearing calendar of all proceedings set for hearing.

(b) In the absence of cause requiring otherwise, and as time, the nature of the proceedings, and the proper execution of the functions of the agency permit, matters required to be determined upon the record after hearing or opportunity for hearing will be placed upon the hearing calendar. Proceedings pending upon this calendar will in their order of assignment, so far as practicable, be heard at the times and places fixed by the agency head or presiding officer, giving due regard to the convenience and necessity of the parties or their attorneys. The agency, in its discretion with or without motion, for cause may at any time with due notice to the participants advance or postpone any proceeding on the hearing calendar.

Cross References

This section cited in 1 Pa. Code § 35.187 (relating to authority delegated to presiding officers); 7 Pa. Code § 179.51 (relating to generally); 7 Pa. Code § 179.54 (relating to scheduling of hearing); 12 Pa. Code § 11.12 (relating to hearings); 22 Pa. Code § 351.1 (relating to purpose and scope); 34 Pa. Code § 131.13 (relating to continuances or postponements of hearings); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.203 (relating to hearing procedures); 52 Pa. Code § 5.202 (relating to scheduling of hearing); 52 Pa. Code § 1005.82 (relating to scheduling of hearing); 58 Pa. Code § 494a.1 (relating to generally); and 61 Pa. Code § 703.33 (relating to scheduling of hearing).

NOTICE OF HEARING**§ 35.103. Preliminary notice to Department of Justice.**

Before notice of any hearing leading to an adjudication is given, any agency subject to 2 Pa.C.S. § 508 (relating to notice to Department of Justice) will submit the matter to its representative in the Department of Justice who will pass upon the legality of the proposed action or defense.

Cross References

This section cited in 12 Pa. Code § 11.13 (relating to notice of hearings); 22 Pa. Code § 351.1 (relating to purpose and scope); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.203 (relating to hearing procedures); 40 Pa. Code § 15.45 (relating to notice of hearings; effect of waiver of hearing); 52 Pa. Code § 5.201 (relating to notice of proceeding; hearing; waiver of hearing); 52 Pa. Code § 1005.81 (relating to notice of proceeding; hearing; waiver of hearing); 55 Pa. Code § 41.5 (relating to jurisdiction of the Bureau); 61 Pa. Code § 703.32 (relating to notice of proceeding); and 61 Pa. Code § 703.33 (relating to scheduling of hearing).

§ 35.104. Notice of rulemaking proceedings.

(a) Before the adoption of any regulation, or the commencement of any hearing on any proposed rulemaking, the agency will cause general notice to be published as provided in Chapter 7 (relating to procedure for adoption or change of regulations).

(b) If a hearing will be held to consider the rulemaking proposal, the order or notice will state the time and place of hearing, and nature of the proceeding, recite the statutory or other authority under which the regulation is proposed to be adopted, and include either the terms of the proposed regulation as provided in § 7.1(1) (relating to notice of proposed rulemaking required), or a description of the subjects and issues involved to inform interested persons of the nature of the proceeding, so as to permit any interested persons to submit data, views or proposals relative thereto; and such notice will set forth a time period within which interested persons may submit written data, views, arguments or other comments concerning the proposed regulation, or request oral argument thereon.

Cross References

This section cited in 1 Pa. Code § 35.105 (relating to notice of nonrulemaking proceedings); 12 Pa. Code § 11.13 (relating to notice of hearings); 22 Pa. Code § 351.1 (relating to purpose and scope); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.203 (relating to hearing procedures); 40 Pa. Code § 15.45 (relating to notice of hearings; effect of waiver of hearing); 52 Pa. Code § 5.211 (relating to notice of rulemaking proceedings); 52 Pa. Code § 1001.112 (relating to notice of rulemaking proceedings); 61 Pa. Code § 703.32 (relating to notice of proceeding); and 61 Pa. Code § 703.33 (relating to scheduling of hearing).

§ 35.105. Notice of nonrulemaking proceedings.

(a) In proceedings other than those referred to in § 35.104 (relating to notice of rulemaking proceedings), notices and orders initiating hearings which are ordered by the agency to be published in a legal newspaper or a newspaper of general circulation, or which are designated by the Joint Committee on Documents or by the agency for this purpose, shall be published in the *Pennsylvania Bulletin*.

(b) In the case of a notice or order initiating a hearing without specifying the time and place thereof such notice or order shall be published in the *Pennsylvania Bulletin* not less than 15 days prior to the date fixed therein for the filing of protests, petitions to intervene or notices of intervention.

(c) In the case of a notice or order fixing the time and place for the initial convening of the hearing the notice or order shall be published in the *Pennsylvania Bulletin* not less than 15 days prior to the date fixed in said notice or order for the convening of the hearing, unless the agency finds that a shorter period of notice is reasonable and consistent with the public interest.

(d) In addition to the publication in the *Pennsylvania Bulletin*, copies of the notice or orders will be mailed to the parties. Similar notice shall be served of the time when and place where a hearing will be reconvened unless announcement was made thereof by the presiding officer at the adjournment of the earlier session of the hearing, but no such notice will be published in the *Pennsylvania Bulletin*. In fixing the time and place of hearing, due regard will be given to the convenience and necessity of the parties or their attorneys so far as time and the proper execution of the functions of the agency permit.

Notes of Decisions

The Department of Community Affairs' failure to provide 15 days notice of a hearing in the *Pennsylvania Bulletin* was reasonable in light of the possible failure of the refunding bond issue and loss of interest savings. *Property Owners, Residents and/or Taxpayers of Pleasant Valley School District v. Department of Community Affairs*, 552 A.2d 769 (Pa. Cmwlth. 1989).

Cross References

This section cited in 1 Pa. Code § 35.2 (relating to contents of applications); 4 Pa. Code § 89.23 (relating to notice); 6 Pa. Code § 22.95 (relating to formal appeals and hearings); 6 Pa. Code § 30.14 (relating to procedure for designation); 6 Pa. Code § 30.23 (relating to procedure for redesignation); 7 Pa. Code § 131.13 (relating to service); 12 Pa. Code § 11.13 (relating to notice of hearings); 22 Pa. Code § 121.9 (relating to administrative loan collection review procedures); 22 Pa. Code § 351.1 (relating to purpose and scope); 22 Pa. Code § 121.10 (relating to administrative wage garnishment procedures for Federal loans); 28 Pa. Code § 1113.2 (relating to administrative appeal procedures); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.203 (relating to hearing procedures); 37 Pa. Code § 79.84 (relating to hearings); 37 Pa. Code § 197.89 (relating to scheduling and announcement of hearings); 40 Pa. Code § 15.45 (relating to notice of hearings; effect of waiver of hearing); 52 Pa. Code § 5.212 (relating to notice of nonrulemaking proceedings); 52 Pa. Code § 1005.83 (relating to notice of nonrulemaking proceedings); 55 Pa. Code § 41.32 (relating to timeliness and perfection of requests for hearing); 58 Pa. Code § 51.43 (relating to staff review); 61 Pa. Code § 703.32 (relating to notice of proceeding); and 61 Pa. Code § 703.33 (relating to scheduling of hearing).

§ 35.106. Contents of notice of nonrulemaking proceedings.

The order or notice initiating a hearing for a purpose other than rulemaking will set forth the authority and jurisdiction under which the hearing is to be held, will state the nature of the proceeding, and will specify the final date for the filing of protests to the authorization sought and for the filing of petitions and notices to intervene except in cases where such date has been fixed by a former notice. The order or notice initiating the hearing will not specify the date of hearing unless the agency deems it appropriate that it do so.

Cross References

This section cited in 4 Pa. Code § 89.23 (relating to notice); 6 Pa. Code § 30.14 (relating to procedure for designation); 12 Pa. Code § 11.13 (relating to notice of hearings); 22 Pa. Code § 351.1 (relating to purpose and scope); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.203 (relating to hearing procedures); 40 Pa. Code § 15.45 (relating to notice of hearings; effect of waiver of hearing); 52 Pa. Code § 5.212 (relating to notice of nonrulemaking proceedings); 52 Pa. Code § 1005.83 (relating to notice of nonrulemaking proceedings); 55 Pa. Code § 41.32 (relating to timeliness and perfection of requests for hearing); 61 Pa. Code § 703.32 (relating to notice of proceeding); and 61 Pa. Code § 703.33 (relating to scheduling of hearing).

PREHEARING CONFERENCES**§ 35.111. Conferences to adjust, settle or expedite proceedings.**

In order to provide opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment, for settlement of a

proceeding, or any of the issues therein, or consideration of means by which the conduct of the hearing may be facilitated and the disposition of the proceeding expedited, conferences between the participants for such purposes may be held at any time prior to or during hearings before the agency head or the presiding officer as time, the nature of the proceeding, and the public interest may permit.

Cross References

This section cited in 6 Pa. Code § 22.95 (relating to formal appeals and hearings); 7 Pa. Code § 131.31 (relating to conferences); 7 Pa. Code § 179.60 (relating to prehearing and other conferences); 10 Pa. Code § 3.10 (relating to prehearing conferences); 16 Pa. Code § 42.75 (relating to conciliation meetings and prehearing conferences); 22 Pa. Code § 121.191 (relating to approved lending institutions in Federal Stafford Loan, Federal PLUS Loan and Federal Consolidation Loan Programs); 25 Pa. Code § 1021.105 (relating to prehearing conferences); 25 Pa. Code § 1021.106 (relating to voluntary mediation); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.58 (relating to informal conferences); 34 Pa. Code § 131.59 (relating to mediation); 34 Pa. Code § 131.59a (relating to voluntary mediation); 34 Pa. Code § 131.59b (relating to mandatory mediation); 34 Pa. Code § 131.60 (relating to resolution hearings); 34 Pa. Code § 131.203 (relating to hearing procedures); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 37 Pa. Code § 79.84 (relating to hearings); 37 Pa. Code § 171.61 (relating to conciliation conference); 37 Pa. Code § 171.81 (relating to prehearing conference); 37 Pa. Code § 197.46 (relating to prehearing conference); 37 Pa. Code § 197.88 (relating to prehearing conference); 40 Pa. Code § 15.43 (relating to prehearing memoranda or conferences); 49 Pa. Code § 19.37 (relating to prehearing conference); 52 Pa. Code § 5.221 (relating to conferences to adjust, settle or expedite proceedings); 52 Pa. Code § 1005.91 (relating to conferences generally); 55 Pa. Code § 41.101 (relating to prehearing procedure in certain provider appeals); 58 Pa. Code § 491a.9 (relating to prehearing and other conferences); and 61 Pa. Code § 703.21 (relating to prehearing conference).

§ 35.112. Conferences to expedite hearings.

At a prehearing or other conferences which may be held to expedite the orderly conduct and disposition of a hearing, there may be considered, in addition to offers of settlement or proposals of adjustment, the possibility of the following:

- (1) The simplification of the issues.
- (2) The exchange and acceptance of service of exhibits proposed to be offered in evidence.
- (3) The obtaining of admission as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which might properly shorten the hearing.
- (4) The limitation of the number of witnesses.
- (5) The discovery or production of data.
- (6) Other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

Cross References

This section cited in 1 Pa. Code § 35.113 (relating to initiation of conferences); 1 Pa. Code § 35.137 (relating to oral examination); 1 Pa. Code § 35.155 (relating to presentation and effect of stipulations); 7 Pa. Code § 179.60 (relating to prehearing and other conferences); 10 Pa. Code § 3.10 (relating to prehearing conferences); 16 Pa. Code § 42.75 (relating to conciliation meetings and prehearing conferences); 22 Pa. Code § 121.191 (relating to approved lending institutions in Federal Stafford Loan, Federal PLUS Loan and Federal Consolidation Loan Programs); 25 Pa. Code § 1021.105 (relating to prehearing conferences); 31 Pa. Code § 56.3 (relating to admissions as to facts and documents); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34

Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.58 (relating to informal conferences); 34 Pa. Code § 131.59 (relating to mediation); 34 Pa. Code § 131.59a (relating to voluntary mediation); 34 Pa. Code § 131.59b (relating to mandatory mediation); 34 Pa. Code § 131.60 (relating to resolution hearings); 34 Pa. Code § 131.203 (relating to hearing procedures); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 37 Pa. Code § 171.61 (relating to conciliation conference); 37 Pa. Code § 171.81 (relating to prehearing conference); 37 Pa. Code § 197.46 (relating to prehearing conference); 37 Pa. Code § 197.88 (relating to prehearing conference); 40 Pa. Code § 15.43 (relating to prehearing memoranda or conferences); 52 Pa. Code § 5.222 (relating to initiation of prehearing conferences in nonrate proceedings); 52 Pa. Code § 1005.91 (relating to conferences generally); 58 Pa. Code § 491a.9 (relating to prehearing and other conferences); and 61 Pa. Code § 703.21 (relating to prehearing conference).

§ 35.113. Initiation of conferences.

(a) The agency head or the presiding officer, with or without motion, and after consideration of the probability of beneficial results to be derived therefrom, may direct that a conference be held, and direct the parties to the proceeding, the staff of the agency and staff counsel to appear thereat to consider the matters enumerated in § 35.112 (relating to conferences to expedite hearings). Due notice of the time and place of the conference shall be given to all parties to the proceeding, the staff of the agency and staff counsel.

(b) Parties will be expected to come to the conference fully prepared for a useful discussion of problems involved in the proceeding, both procedural and substantive, and fully authorized to make commitments with respect thereto. The preparation should include, among other things, advance study of relevant material, and advance informal communication between the participants, including requests for additional data and information, to the extent it appears feasible and desirable. Failure of a participant to attend the conference, after being served with due notice of the time and place thereof, shall constitute a waiver of all objections to the agreements reached, if any, and any order or ruling with respect thereto.

Cross References

This section cited in 4 Pa. Code § 105.14d (relating to prehearing conferences); 7 Pa. Code § 179.60 (relating to prehearing and other conferences); 10 Pa. Code § 3.10 (relating to prehearing conferences); 16 Pa. Code § 42.75 (relating to conciliation meetings and prehearing conferences); 22 Pa. Code § 121.191 (relating to approved lending institutions in Federal Stafford Loan, Federal PLUS Loan and Federal Consolidation Loan Programs); 25 Pa. Code § 1021.105 (relating to prehearing conferences); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.58 (relating to informal conferences); 34 Pa. Code § 131.59 (relating to mediation); 34 Pa. Code § 131.59a (relating to voluntary mediation); 34 Pa. Code § 131.59b (relating to mandatory mediation); 34 Pa. Code § 131.60 (relating to resolution hearings); 34 Pa. Code § 131.203 (relating to hearing procedures); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 37 Pa. Code § 171.61 (relating to conciliation conference); 37 Pa. Code § 171.81 (relating to prehearing conference); 37 Pa. Code § 197.46 (relating to prehearing conference); 37 Pa. Code § 197.88 (relating to prehearing conference); 40 Pa. Code § 15.43 (relating to prehearing memoranda or conferences); 52 Pa. Code § 5.222 (relating to initiation of prehearing conferences in nonrate proceedings); 52 Pa. Code § 1005.91 (relating to conferences generally); 58 Pa. Code § 491a.9 (relating to prehearing and other conferences); and 61 Pa. Code § 703.21 (relating to prehearing conference).

§ 35.114. Authority of presiding officer at conference.

The presiding officer at a conference may dispose of by ruling, irrespective of the consent of the participants, procedural matters which he is authorized to rule

upon during the course of the proceeding, and which it appears may appropriately and usefully be disposed of at that stage. In addition, if it appears that the proceeding would be substantially expedited by distribution of proposed exhibits and written prepared testimony reasonably in advance of the hearing session, the presiding officer at his discretion and with due regard for the convenience and necessity of the parties, the staff of the agency and staff counsel, may direct the advance distribution by a prescribed date. The rulings of the presiding officer made at the conference shall control the subsequent course of the hearing, unless modified for good cause shown.

Cross References

This section cited in 7 Pa. Code § 131.31 (relating to conferences); 7 Pa. Code § 179.60 (relating to prehearing and other conferences); 10 Pa. Code § 3.10 (relating to prehearing conferences); 16 Pa. Code § 42.75 (relating to conciliation meetings and prehearing conferences); 22 Pa. Code § 121.191 (relating to approved lending institutions in Federal Stafford Loan, Federal PLUS Loan and Federal Consolidation Loan Programs); 25 Pa. Code § 1021.105 (relating to prehearing conferences); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.58 (relating to informal conferences); 34 Pa. Code § 131.59 (relating to mediation); 34 Pa. Code § 131.59a (relating to voluntary mediation); 34 Pa. Code § 131.59b (relating to mandatory mediation); 34 Pa. Code § 131.60 (relating to resolution hearings); 34 Pa. Code § 131.203 (relating to hearing procedures); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 37 Pa. Code § 171.61 (relating to conciliation conference); 37 Pa. Code § 171.81 (relating to prehearing conference); 37 Pa. Code § 197.46 (relating to prehearing conference); 37 Pa. Code § 197.88 (relating to prehearing conference); 40 Pa. Code § 15.43 (relating to prehearing memoranda or conferences); 49 Pa. Code § 19.37 (relating to prehearing conference); 52 Pa. Code § 5.223 (relating to authority of presiding officer at conferences); 52 Pa. Code § 1005.91 (relating to conferences generally); 58 Pa. Code § 491a.9 (relating to prehearing and other conferences); and 61 Pa. Code § 703.21 (relating to prehearing conference).

§ 35.115. Offers of settlement.

Nothing contained in these rules shall be construed as precluding a participant in a proceeding from submitting at any time offers of settlement or proposals of adjustment to all parties and to the agency, or to staff counsel for transmittal to the agency, or from requesting conferences for that purpose. Unaccepted proposals of settlement or of adjustment or as to procedure to be followed and proposed stipulations not agreed to shall be privileged and are not admissible in evidence against a counsel or person claiming such privilege.

Cross References

This section cited in 7 Pa. Code § 179.18 (relating to offers of settlement); 7 Pa. Code § 179.60 (relating to prehearing and other conferences); 10 Pa. Code § 3.10 (relating to prehearing conferences); 16 Pa. Code § 42.75 (relating to conciliation meetings and prehearing conferences); 22 Pa. Code § 121.191 (relating to approved lending institutions in Federal Stafford Loan, Federal PLUS Loan and Federal Consolidation Loan Programs); 25 Pa. Code § 1021.105 (relating to prehearing conferences); 25 Pa. Code § 1021.106 (relating to voluntary mediation); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.58 (relating to informal conferences); 34 Pa. Code § 131.59 (relating to mediation); 34 Pa. Code § 131.59a (relating to voluntary mediation); 34 Pa. Code § 131.59b (relating to mandatory mediation); 34 Pa. Code § 131.60 (relating to resolution hearings); 34 Pa. Code § 131.203 (relating to hearing procedures); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 37 Pa. Code § 171.61 (relating to conciliation conference); 37 Pa. Code § 171.81 (relating to prehearing conference); 37 Pa. Code § 171.121 (relating to offers of

settlement); 37 Pa. Code § 197.46 (relating to prehearing conference); 37 Pa. Code § 197.88 (relating to prehearing conference); 40 Pa. Code § 15.43 (relating to prehearing memoranda or conferences); 52 Pa. Code § 5.231 (relating to offers of settlement); 52 Pa. Code § 1005.91 (relating to conferences generally); 58 Pa. Code § 491a.9 (relating to prehearing and other conferences); 61 Pa. Code § 703.11 (relating to compromise generally); and 61 Pa. Code § 703.21 (relating to prehearing conference).

§ 35.116. Refusal to make admissions or stipulate.

If a party attending a conference convened under these rules refuses to admit or stipulate the genuineness of a document or the truth of a matter of fact and if the participant requesting the admissions or stipulations thereafter proves the genuineness of the document or the truth of the matter of fact, he may apply to the agency head or presiding officer for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the agency head or presiding officer finds that there were good reasons for the refusal to admit or stipulate or that the admissions or stipulations sought were of no substantial importance, the order shall be made. An appeal may be taken to the agency head immediately from any such order made by a presiding officer. If a party refuses to comply with such order after it becomes final, the agency may strike all or any part of such pleadings of such party or limit or deny further participation by such party.

Cross References

This section cited in 7 Pa. Code § 179.60 (relating to prehearing and other conferences); 10 Pa. Code § 3.10 (relating to prehearing conferences); 16 Pa. Code § 42.75 (relating to conciliation meetings and prehearing conferences); 22 Pa. Code § 121.191 (relating to approved lending institutions in Federal Stafford Loan, Federal PLUS Loan and Federal Consolidation Loan Programs); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.58 (relating to informal conferences); 34 Pa. Code § 131.59 (relating to mediation); 34 Pa. Code § 131.59a (relating to voluntary mediation); 34 Pa. Code § 131.59b (relating to mandatory mediation); 34 Pa. Code § 131.60 (relating to resolution hearings); 34 Pa. Code § 131.203 (relating to hearing procedures); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 37 Pa. Code § 171.61 (relating to conciliation conference); 37 Pa. Code § 171.81 (relating to prehearing conference); 37 Pa. Code § 197.46 (relating to prehearing conference); 37 Pa. Code § 197.88 (relating to prehearing conference); 40 Pa. Code § 15.43 (relating to prehearing memoranda or conferences); 52 Pa. Code § 5.233 (relating to refusal to make admissions or stipulate); 52 Pa. Code § 1005.91 (relating to conferences generally); 58 Pa. Code § 491a.9 (relating to prehearing and other conferences); and 61 Pa. Code § 703.21 (relating to prehearing conference).

HEARING

§ 35.121. Initiation of hearings.

Hearings for the purpose of taking evidence will be initiated by the agency by issuance of an order or by notice announcing the initiation of a hearing.

Cross References

This section cited in 4 Pa. Code § 265.3 (relating to level II hearings); 4 Pa. Code § 607a.6 (relating to order to show cause); 4 Pa. Code § 607a.11 (relating to notice of hearing); 4 Pa. Code § 607a.25 (relating to generally); 4 Pa. Code § 607a.26 (relating to notice of list cancellation hearing); 7 Pa. Code § 131.32 (relating to hearings); 7 Pa. Code § 179.53 (relating to Commission hearings); 10 Pa. Code § 3.11 (relating to hearing rules); 25 Pa. Code § 1021.101 (relating to prehearing procedure); 25 Pa. Code § 1021.111 (relating to initiation of hearings); 34 Pa. Code § 131.53a (relat-

ing to consolidated hearing procedure); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.203 (relating to hearing procedures); 40 Pa. Code § 15.46 (relating to hearings); 52 Pa. Code § 5.201 (relating to notice of proceeding; hearing; waiver of hearing); 52 Pa. Code § 5.203 (relating to hearing in rate proceedings); 52 Pa. Code § 1005.81 (relating to notice of proceeding; hearing; waiver of hearing); 55 Pa. Code § 41.151 (relating to initiation of hearings); 58 Pa. Code § 145.6 (relating to scheduling of the hearing); 58 Pa. Code § 494a.2 (relating to oral hearings); 67 Pa. Code § 491.3 (relating to request for hearing); 61 Pa. Code § 703.31 (relating to disposition of petitions); 61 Pa. Code § 703.33 (relating to scheduling of hearing); and 67 Pa. Code § 491.4 (relating to institution of proceedings).

§ 35.122. Consolidation of formal proceedings.

The agency, with or without motion, may order proceedings involving a common question of law or fact to be consolidated for hearing of the matters in issue in such proceedings.

Cross References

This section cited in 4 Pa. Code § 607a.9 (relating to consolidation of proceedings); 7 Pa. Code § 131.32 (relating to hearings); 7 Pa. Code § 179.53 (relating to Commission hearings); 10 Pa. Code § 3.11 (relating to hearing rules); 34 Pa. Code § 131.53a (relating to consolidated hearing procedures); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.203 (relating to hearing procedures); 40 Pa. Code § 15.46 (relating to hearings); 52 Pa. Code § 5.81 (relating to consolidation); 52 Pa. Code § 1005.51 (relating to consolidation); 55 Pa. Code § 41.81 (relating to consolidation of provider appeals); 58 Pa. Code § 494a.2 (relating to oral hearings); 61 Pa. Code § 703.7 (relating to consolidation); and 61 Pa. Code § 703.31 (relating to disposition of petitions).

§ 35.123. Conduct of hearings.

Hearings will be held before the agency head or a presiding officer designated under Subchapter E (relating to presiding officers).

Notes of Decisions

Finder of Fact

The Secretary of the Department of Public Welfare is clearly an “agency head” and this chapter permits the Secretary to act in a fact-finding capacity in provider appeals. *Siemon’s Lakeview Manor Estate v. Department of Public Welfare*, 703 A.2d 551 (Pa. Cmwlth. 1997); appeal denied 727 A.2d 134 (Pa. 1998).

Cross References

This section cited in 4 Pa. Code § 607a.15 (relating to form of hearings); 4 Pa. Code § 607a.27 (relating to format of hearing); 6 Pa. Code § 22.95 (relating to formal appeals and hearings); 7 Pa. Code § 179.51 (relating to generally); 7 Pa. Code § 179.53 (relating to Commission hearings); 10 Pa. Code § 3.11 (relating to hearing rules); 25 Pa. Code § 1021.116 (relating to conduct of hearings); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 131.53a (relating to consolidated hearing procedures); 34 Pa. Code § 131.56a (relating to withdrawal of appearance); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.202 (relating to first hearing information and stay); 34 Pa. Code § 131.203 (relating to hearing procedures); 40 Pa. Code § 15.46 (relating to hearings); 52 Pa. Code § 5.203 (relating to hearing in rate proceedings); 52 Pa. Code § 1005.82 (relating to scheduling of hearing); 58 Pa. Code § 145.8 (relating to conduct of the formal hearing); 58 Pa. Code § 494a.1 (relating to generally); 58 Pa. Code § 494a.2 (relating to oral hearings); 61 Pa. Code § 703.31 (relating to disposition of petitions); 61 Pa. Code § 703.34 (relating to hearing procedure); 67 Pa. Code § 491.6 (relating to notice and conduct of hearing); and 67 Pa. Code § 491.10 (relating to hearings).

§ 35.124. Appearances.

The agency head or the presiding officer before whom the hearing is held shall cause to be entered upon the record all appearances, with a notation in whose behalf each appearance is made. Included in the appearances shall be staff counsel participating, and a notation shall be made in the record of the names of the members of the technical staff of the agency participating, including accountants, engineers and other experts, who have been assigned to work on the investigation or to assist in the trial of the case.

Cross References

This section cited in 7 Pa. Code § 179.51 (relating to generally); 7 Pa. Code § 179.53 (relating to Commission hearings); 10 Pa. Code § 3.11 (relating to hearing rules); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.56a (relating to withdrawal of appearance); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.202 (relating to first hearing information and stay); 34 Pa. Code § 131.203 (relating to hearing procedures); 40 Pa. Code § 15.46 (relating to hearings); 52 Pa. Code § 5.241 (relating to appearances); 58 Pa. Code 494a.1 (relating to generally); 58 Pa. Code § 494a.2 (relating to oral hearings); 61 Pa. Code § 703.31 (relating to disposition of petitions); and 61 Pa. Code § 703.35 (relating to failure to appear at hearing).

§ 35.125. Order of procedure.

(a) In hearings upon applications, formal complaints or petitions, the complainant, petitioner or other party having the burden of proof, shall open and close, unless otherwise directed by the presiding officer. In hearings on investigations and in proceedings which have been consolidated for hearing, the presiding officer may direct who shall open and close.

(b) Interveners shall follow the parties in whose behalf the intervention is made. Where the intervention is not in support of an original party, the presiding officer shall designate at what stage the intervenor shall be heard.

(c) In proceedings where the evidence is peculiarly within the knowledge or control of another party or participant, the order of presentation set forth in subsections (a) and (b) may be varied by the presiding officer.

(d) The following shall also apply:

(1) The applications (including attached exhibits), complaints, orders to show cause and answers thereto and similar formal documents upon which hearings are fixed shall, without further action, be considered as parts of the record as pleadings.

(2) In no event, except in the case of a noncontested proceeding, may the pleadings be considered as evidence of fact other than that of the filing thereof unless offered and received in evidence in under this part.

Notes of Decisions*Burden of Proof*

The petitioner failed to demonstrate that the chiropractic services could reasonably be expected to reduce the petitioner's multiple chemical sensitivity or to overcome petitioner's vocational handicaps and enable petitioner to achieve suitable employment. Given the limited amount of medical and or other literature available on the disability of multiple chemical sensitivity in general, in order to determine whether or not any form of chiropractic treatment would be of benefit to someone in peti-

tioner's condition, an expert opinion is required; petitioner's chiropractor offered insufficient evidence. *Brooks v. Office of Vocational Rehabilitation*, 682 A.2d 850 (Pa. Cmwlth. 1996).

Conflicting Regulations

The specific procedural rules of the State Ethics Commission contained in 51 Pa. Code § 21.25 (relating to conduct of hearing) supersede 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure). *Bartholomew v. State Ethics Commission*, 795 A.2d 1073 (Pa. Cmwlth. 2002).

Pleadings

Where the employer failed to file its answer to the claim petition in a timely manner, the matter was properly considered a noncontested proceeding and there was no need for claimant to move the admission of the claim petition. *William J. Donovan Sheet Metal v. Workers' Compensation Appeal Board*, 789 A.2d 344 (Pa. Cmwlth. 2001); appeal denied 800 A.2d 936 (Pa. 2002).

Cross References

This section cited in 4 Pa. Code § 89.27 (relating to order of presentation); 4 Pa. Code § 137.9 (relating to caveator as plaintiff); 7 Pa. Code § 179.53 (relating to Commission hearings); 7 Pa. Code § 179.61 (relating to hearing procedure); 10 Pa. Code § 3.11 (relating to hearing rules); 22 Pa. Code § 121.9 (relating to administrative loan collection review procedures); 22 Pa. Code § 121.10 (relating to administrative wage garnishment procedures for Federal loans); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.202 (relating to first hearing information and stay); 34 Pa. Code § 131.203 (relating to hearing procedures); 37 Pa. Code § 171.96 (relating to arbitration hearing procedure); 37 Pa. Code § 197.48 (relating to procedure at hearing); 37 Pa. Code § 197.70 (relating to hearings); 37 Pa. Code § 197.90 (relating to procedure at hearing); 40 Pa. Code § 15.46 (relating to hearings); 51 Pa. Code § 21.25 (relating to conduct of the hearing); 52 Pa. Code § 5.242 (relating to order of procedure); 52 Pa. Code § 5.405 (relating to effect of pleadings); 52 Pa. Code § 1005.82 (relating to scheduling of hearing); 52 Pa. Code § 1005.111 (relating to order of procedure); 52 Pa. Code § 1005.145 (relating to effect of pleadings); 55 Pa. Code § 41.153 (relating to burden of proof and production); 58 Pa. Code § 494a.2 (relating to oral hearings); 61 Pa. Code § 703.31 (relating to disposition of petitions); 61 Pa. Code § 703.34 (relating to hearing procedure); and 67 Pa. Code § 491.10 (relating to hearings).

§ 35.126. Presentation by the parties.

(a) Parties and staff counsel shall have the right of presentation of evidence, cross-examination, objection, motion and argument. The taking of evidence and subsequent proceedings shall proceed with reasonable diligence and with the least practicable delay.

(b) When objections to the admission or exclusion of evidence before the agency head or the presiding officer are made, the grounds relied upon shall be stated briefly. Formal exceptions are unnecessary and may not be taken to rulings thereon.

Cross References

This section cited in 4 Pa. Code § 89.28 (relating to presentation); 7 Pa. Code § 131.33 (relating to evidence); 7 Pa. Code § 179.53 (relating to Commission hearings); 10 Pa. Code § 3.11 (relating to hearing rules); 22 Pa. Code § 121.8 (relating to applicant and recipient appeals and hearings); 22 Pa. Code § 121.9 (relating to administrative loan collection review procedures); 22 Pa. Code

§ 121.34 (relating to institutional appeals and hearings); 25 Pa. Code § 1021.117 (relating to presentation by the parties); 34 Pa. Code § 95.91 (relating to hearings); 34 Pa. Code § 131.53 (relating to procedures subsequent to the first hearing); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.66 (relating to admissibility of oral depositions); 34 Pa. Code § 131.202 (relating to first hearing information and stay); 34 Pa. Code § 131.203 (relating to hearing procedures); 37 Pa. Code § 171.96 (relating to arbitration hearing procedure); 37 Pa. Code § 197.48 (relating to procedure at hearing); 37 Pa. Code § 197.70 (relating to hearings); 37 Pa. Code § 197.90 (relating to procedure at hearing); 40 Pa. Code § 15.46 (relating to hearings); 51 Pa. Code § 21.23 (relating to scope of hearing); 52 Pa. Code § 5.243 (relating to presentation by participants); 52 Pa. Code § 1005.112 (relating to presentation by parties); 55 Pa. Code § 41.153 (relating to burden of proof and production); 58 Pa. Code § 494a.2 (relating to oral hearings); 61 Pa. Code § 703.31 (relating to disposition of petitions); and 61 Pa. Code § 703.35 (relating to failure to appear at hearing).

§ 35.127. Limiting number of witnesses.

The agency head or the presiding officer may limit appropriately the number of witnesses who may be heard upon an issue.

Notes of Decisions

The hearing examiner having the authority to limit the number of witnesses did not violate the insurance agent's rights of due process by precluding the testimony of a witness since the examiner determined such irrelevant. *Park v. Chronister*, 617 A.2d 863 (Pa. Cmwlth. 1992); appeal denied 627 A.2d 231 (Pa. 1993).

Cross References

This section cited in 1 Pa. Code § 35.162 (relating to reception and ruling on evidence); 10 Pa. Code § 3.11 (relating to hearing rules); 25 Pa. Code § 1021.126 (relating to limiting number of witnesses and additional evidence); 34 Pa. Code § 131.53 (relating to procedures subsequent to the first hearing); 34 Pa. Code § 131.53a (relating to consolidated hearing procedures); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.202 (relating to first hearing information and stay); 34 Pa. Code § 131.203 (relating to hearing procedures); 37 Pa. Code § 197.48 (relating to procedure at hearing); 37 Pa. Code § 197.90 (relating to procedure at hearing); 40 Pa. Code § 15.46 (relating to hearings); 52 Pa. Code § 5.403 (relating to control of receipt of evidence); 52 Pa. Code § 1005.143 (relating to control of receipt of evidence); 61 Pa. Code § 703.31 (relating to disposition of petitions); and 61 Pa. Code § 703.34 (relating to hearing procedure).

§ 35.128. Additional evidence.

At a stage of the hearing the agency head or the presiding officer may call for further evidence upon an issue, and require the evidence to be presented by the party or parties concerned or by the staff counsel, either at that hearing or at the adjournments thereof. At the hearing, the agency head or the presiding officer may, if deemed advisable, authorize a participant to file specific documentary evidence as a part of the record within a fixed time, expiring not less than 10 days before the date fixed for filing and serving briefs.

Cross References

This section cited in 1 Pa. Code § 35.131 (relating to recording of proceedings); 1 Pa. Code § 35.162 (relating to reception and ruling on evidence); 4 Pa. Code § 607a.17 (relating to additional hearings and evidence); 10 Pa. Code § 3.11 (relating to hearing rules); 25 Pa. Code § 1021.126 (relating to limiting number of witnesses and additional evidence); 34 Pa. Code § 131.53 (relating to procedures subsequent to the first hearing); 34 Pa. Code § 131.53a (relating to consolidated hearing procedures); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.202 (relating to first hearing information and stay); 34 Pa. Code § 131.203 (relating to hearing

procedures); 40 Pa. Code § 15.46 (relating to hearings); 52 Pa. Code § 5.404 (relating to additional evidence); 52 Pa. Code § 1005.144 (relating to additional evidence); 61 Pa. Code § 703.31 (relating to disposition of petitions); and 61 Pa. Code § 703.34 (relating to hearing procedure).

TRANSCRIPT

§ 35.131. Recording of proceedings.

Hearings shall be stenographically reported by the official reporter of the agency, and a transcript of the report shall be a part of the record and the sole official transcript of the proceeding. The transcripts shall include a verbatim report of the hearings and nothing shall be omitted therefrom except as is directed on the record by the agency head or the presiding officer. After the closing of the record, there shall not be received in evidence or considered as part of the record any document submitted after the close of testimony except as provided in § 35.128 (relating to additional evidence) or changes in the transcript as provided in § 35.132 (relating to transcript corrections).

Cross References

This section cited in 4 Pa. Code § 89.24 (relating to record); 4 Pa. Code § 265.3 (relating to level II hearings); 4 Pa. Code § 265.4 (relating to appeals—level III); 4 Pa. Code § 607a.18 (relating to record of proceedings); 4 Pa. Code § 607a.28 (relating to record of proceedings); 6 Pa. Code § 30.14 (relating to procedure for designation); 6 Pa. Code § 30.23 (relating to procedure for redesignation); 7 Pa. Code § 131.35 (relating to transcript); 7 Pa. Code § 179.67 (relating to transcript); 10 Pa. Code § 3.11 (relating to hearing rules); 12 Pa. Code § 81.210 (relating to transcripts, reports and prepared statements); 12 Pa. Code § 81.233 (relating to transcript); 22 Pa. Code § 121.8 (relating to applicant and recipient appeals and hearings); 22 Pa. Code § 121.34 (relating to institutional appeals and hearings); 25 Pa. Code § 1021.118 (relating to transcript); 28 Pa. Code § 1111.9 (relating to hearing record); 28 Pa. Code § 1113.3 (relating to adjudication and order); 34 Pa. Code § 95.91 (relating to hearings); 34 Pa. Code § 121.27 (relating to orders to show cause); 34 Pa. Code § 125.6 (relating to decision on application); 34 Pa. Code § 131.101 (relating to briefs, findings of fact and close of record); 37 Pa. Code § 21.57 (relating to transcript); 37 Pa. Code § 171.105 (relating to recording of proceedings); 37 Pa. Code § 197.15 (relating to recording of proceedings); 40 Pa. Code § 15.46 (relating to hearings); 40 Pa. Code § 15.47 (relating to transcript); 52 Pa. Code § 5.251 (relating to recording of proceedings); 52 Pa. Code § 1005.121 (relating to transcripts generally); 58 Pa. Code § 145.10 (relating to stenographic record); 61 Pa. Code § 703.34 (relating to hearing procedure); and 104 Pa. Code § 7.16 (relating to RTKL appeals).

§ 35.132. Transcript corrections.

Corrections in the official transcript may be made only to make it conform to the evidence presented at the hearing and to speak the truth. No corrections or physical changes shall be made in or upon the official transcript of the proceeding, except as provided in this section. Transcript corrections agreed to by opposing attorneys may be incorporated into the record, if and when approved by the agency head or the presiding officer, at any time during the hearing or after the close of evidence, as may be permitted by the agency head, or by the presiding officer before the filing of his proposed report, but not less than 10 days in advance of the time fixed for filing final briefs. The agency head or the presiding officer may call for the submission of proposed corrections and may make disposition thereof at appropriate times during the course of a proceeding.

Notes of Decisions

Judge did not abuse his discretion in denying NOW's motion, submitted 1 month after the time fixed for filing briefs, despite NOW's argument that it did not discover errors by the presiding hearing officer's incorrect transcript until the need arose to review the final pages of the transcript. *Pennsylvania National Organization for Women v. Insurance Department*, 551 A.2d 1162 (Pa. Cmwlth. 1988); appeal denied 561 A.2d 744 (Pa. 1989).

Cross References

This section cited in 1 Pa. Code § 35.131 (relating to recording of proceedings); 4 Pa. Code § 89.24 (relating to record); 10 Pa. Code § 3.11 (relating to hearing rules); 12 Pa. Code § 81.210 (relating to transcripts, reports and prepared statements); 12 Pa. Code § 81.233 (relating to transcript); 25 Pa. Code § 1021.118 (relating to transcript); 34 Pa. Code § 95.91 (relating to hearings); 34 Pa. Code § 131.101 (relating to briefs, findings of fact and close of record); 37 Pa. Code § 21.57 (relating to transcript); 37 Pa. Code § 197.49 (relating to correction of transcript); 37 Pa. Code § 197.91 (relating to correction of transcript); 40 Pa. Code § 15.46 (relating to hearings); 40 Pa. Code § 15.47 (relating to transcript); 52 Pa. Code § 5.253 (relating to transcript corrections); 52 Pa. Code § 1005.123 (relating to transcript corrections); and 61 Pa. Code § 703.34 (relating to hearing procedure).

§ 35.133. Copies of transcripts.

(a) *Availability to participants in public hearings.* The agency will cause to be made a stenographic record of all public hearings and the copies of the transcript thereof as it requires for its own purposes. Participants desiring copies of the transcript may obtain copies from the official reporter upon payment of the fees fixed therefor.

(b) *Availability to persons who give evidence in investigations and nonpublic proceedings.* A person compelled to furnish data or to give evidence in an investigation shall be entitled to retain or, upon payment of the lawfully prescribed fees therefor to the official reporter or to the office of the agency, to obtain a copy of the official transcript thereof; except that if the data or evidence have been furnished or given in a nonpublic investigatory proceeding conducted by the agency, the person may, for good cause, be limited to an inspection only, either in person or by a duly authorized representative, of the official transcript of his testimony.

Cross References

This section cited in 4 Pa. Code § 110.4 (relating to transcripts); 4 Pa. Code § 607a.18 (relating to record of proceedings); 4 Pa. Code § 607a.28 (relating to record of proceedings); 6 Pa. Code § 30.14 (relating to procedure for designation); 6 Pa. Code § 30.14 (relating to procedure for redesignation); 7 Pa. Code § 131.35 (relating to transcript); 7 Pa. Code § 179.67 (relating to transcript); 10 Pa. Code § 3.11 (relating to hearing rules); 12 Pa. Code § 81.210 (relating to transcripts, reports and prepared statements); 12 Pa. Code § 81.233 (relating to transcript); 25 Pa. Code § 1021.118 (relating to transcript); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 131.101 (relating to briefs, findings of fact and close of record); 37 Pa. Code § 21.57 (relating to transcript); 37 Pa. Code § 171.105 (relating to recording of proceedings); 37 Pa. Code § 197.49 (relating to correction of transcript); 37 Pa. Code § 197.91 (relating to correction of transcript); 40 Pa. Code § 15.46 (relating to hearings); 40 Pa. Code § 15.47 (relating to transcript); 52 Pa. Code § 5.254 (relating to copies of transcripts); 52 Pa. Code § 1005.124 (relating to copies of transcripts); 58 Pa. Code § 145.14 (relating to transcripts); and 61 Pa. Code § 703.34 (relating to hearing procedure).

Subchapter C. EVIDENCE AND WITNESSES**GENERAL**

- Sec.
35.137. Oral examination.
35.138. Expert witnesses.
35.139. Fees of witnesses.

SUBPOENAS

- 35.142. Subpoenas.

DEPOSITIONS

- 35.145. Depositions.
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35.169. Copies to parties and agency.

OFFICIAL NOTICE

- 35.173. Official notice of facts.

Cross References

This subchapter cited in 34 Pa. Code § 111.35 (relating to dispositions of petitions); 58 Pa. Code § 494a.2 (relating to oral hearings); and 104 Pa. Code § 7.16 (relating to RTKL appeals).

GENERAL**§ 35.137. Oral examination.**

Witnesses shall be examined orally unless the testimony is taken by deposition as provided in §§ 35.145—35.152 (relating to depositions) or the facts are stipulated in the manner provided in § 35.112 (relating to conferences to expedite hearings) or in § 35.155 (relating to presentation and effect of stipulations) or the testimony is submitted in prepared written form as provided in § 35.138 (relating to expert witnesses). Witnesses whose testimony is to be taken shall be sworn, or shall affirm, before their testimony shall be deemed evidence in the proceeding or any questions are put to them.

Cross References

This section cited in 4 Pa. Code § 265.3 (relating to level II hearings); 12 Pa. Code § 81.231 (relating to witness to be advised); 25 Pa. Code § 1021.123 (relating to evidence); 34 Pa. Code § 95.94 (relating to depositions); 34 Pa. Code § 131.42 (relating to evidence relating to supersedeas); 34 Pa. Code § 131.49 (relating to disposition of automatic request for special supersedeas under section 413(a.1) of the act (77 P. S. § 774(1))); 34 Pa. Code § 131.53 (relating to procedures subsequent to the first hearing); 34 Pa. Code § 131.53a (relating to consolidated hearing procedures); 34 Pa. Code § 131.203 (relating to hearing procedures); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 37 Pa. Code § 123.10 (relating to testimony); 37 Pa. Code § 171.96 (relating to arbitration hearing procedure); 37 Pa. Code § 197.48 (relating to procedure at hearing); 37 Pa. Code § 197.90 (relating to procedure at hearing); 51 Pa. Code § 21.25 (relating to conduct of the hearing); 52 Pa. Code § 5.411 (relating to oral examination); 52 Pa. Code § 1005.151 (relating to oral examination); 58 Pa. Code § 145.11 (relating to order of formal hearing); and 61 Pa. Code § 703.34 (relating to hearing procedure).

§ 35.138. Expert witnesses.

Written testimony of an expert witness may be received as provided in § 35.166 (relating to prepared expert testimony), where properly supported by the oral testimony of its author on direct examination, subject to cross-examination and motions to strike.

Cross References

This section cited in 1 Pa. Code § 35.137 (relating to oral examination); 4 Pa. Code § 265.3 (relating to level II hearings); 25 Pa. Code § 1021.123 (relating to evidence); 34 Pa. Code § 131.42 (relating to evidence relating to supersedeas); 34 Pa. Code § 131.49 (relating to disposition of automatic request for special supersedeas under section 413(a.1) of the act (77 P. S. § 774(1))); 34 Pa. Code § 131.53 (relating to procedures subsequent to the first hearing); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.203 (relating to hearing procedures); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 52 Pa. Code § 5.412

(relating to written testimony); 52 Pa. Code § 1005.152 (relating to written testimony); 55 Pa. Code § 41.161 (relating to written testimony); and 61 Pa. Code § 703.34 (relating to hearing procedure).

§ 35.139. Fees of witnesses.

Witnesses subpoenaed by the agency shall be paid the same fees and mileage as are paid for like services in the courts of common pleas. Witnesses subpoenaed at the instance of participants shall be paid the same fees by the participant at whose instance the witness is subpoenaed; and the agency, before issuing any subpoena as provided in § 35.142(a) (relating to subpoenas), may require a deposit of an amount adequate to cover the fees and mileage involved.

Cross References

This section cited in 1 Pa. Code § 35.142 (relating to subpoenas); 4 Pa. Code § 105.14a (relating to subpoenas); 4 Pa. Code § 265.3 (relating to level II hearings); 7 Pa. Code § 179.10 (relating to subpoena powers and procedures); 22 Pa. Code § 201.7 (relating to service and return of subpoenas); 25 Pa. Code § 1021.103 (relating to subpoenas, notices to attend and notices to produce); 25 Pa. Code § 1021.123 (relating to evidence); 34 Pa. Code § 95.95 (relating to witnesses and subpoenas); 34 Pa. Code § 131.81 (relating to subpoenas); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 37 Pa. Code § 21.58 (relating to witness fees); 37 Pa. Code § 171.134 (relating to witness fees and mileage allowance); 55 Pa. Code § 41.161 (relating to written testimony); and 61 Pa. Code § 703.34 (relating to hearing procedure).

SUBPOENAS

§ 35.142. Subpoenas.

(a) *Issuance.* Subpoenas for the attendance of witnesses or for the production of documentary evidence, unless directed by the agency upon its own motion, will issue only upon application in writing to the agency head or the presiding officer, except that during sessions of a hearing in a proceeding, such application may be made orally on the record before the agency head or presiding officer, who is hereby given authority to determine the relevancy and materiality of the evidence sought and to issue such subpoenas in accordance with such determination. Such written applications shall specify as nearly as may be the general relevance, materiality, and scope of the testimony or documentary evidence sought, including as to documentary evidence, specification as nearly as may be, of the documents desired and the facts to be proved by them in sufficient detail to indicate the materiality and relevance of such documents.

(b) *Service and return.* If service of subpoena is made by a sheriff or like officer or his deputy, such service shall be evidenced by his return thereof. If made by another person, such person shall make affidavit thereof, describing the manner in which service was made, and shall return such affidavit on or with the original subpoena. In case of failure to make service, the reasons for the failure shall be stated on the original subpoena. In making service, a copy of the subpoena shall be exhibited to and left with the person to be served. The original subpoena, bearing or accompanied by the authorized return, affidavit, or state-

ment, shall be returned forthwith to the office of the agency or, if so directed on the subpoena, to the presiding officer before whom the person named in the subpoena is required to appear.

(c) *Fees of witnesses.* Witnesses who are subpoenaed shall be paid fees as provided in § 35.139 (relating to fees of witnesses).

Notes of Decisions

A party was deprived of a right incident to a hearing since her application for issuance of a subpoena was in proper form but the hearing body did not act on the application. *Weinberg v. Insurance Department*, 398 A.2d 1120 (Pa. Cmwlth. 1979).

Failure to comply with the requirements of this section justifies the refusal to issue subpoenas. *Henley v. Civil Service Commission*, 395 A.2d 330 (Pa. Cmwlth. 1978).

Cross References

This section cited in 1 Pa. Code § 35.139 (relating to fees of witnesses); 4 Pa. Code § 89.31 (relating to investigation); 4 Pa. Code § 105.14a (relating to subpoenas); 4 Pa. Code § 250.13 (relating to information); 4 Pa. Code § 265.3 (relating to level II hearings); 4 Pa. Code § 607a.13 (relating to subpoenas); 7 Pa. Code § 131.15 (relating to subpoenas); 7 Pa. Code § 179.2 (relating to definitions); 7 Pa. Code § 179.10 (relating to subpoena powers and procedures); 12 Pa. Code § 81.221 (relating to issuing subpoenas); 12 Pa. Code § 81.222 (relating to persons required to appear); 12 Pa. Code § 81.223 (relating to producing documents or review by Authority staff); 12 Pa. Code § 81.224 (relating to service of subpoenas); 22 Pa. Code § 201.7 (relating to service and return of subpoenas); 22 Pa. Code § 233.124 (relating to power of subpoena); 25 Pa. Code § 1021.103 (relating to subpoenas, notices to attend and notices to produce); 28 Pa. Code § 1111.8 (relating to rights of the appellant); 34 Pa. Code § 95.95 (relating to witnesses and subpoenas); 34 Pa. Code § 131.81 (relating to subpoenas); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 37 Pa. Code § 21.60 (relating to subpoenas); 37 Pa. Code § 123.3 (relating to subpoenas); 37 Pa. Code § 171.35 (relating to subpoenas); 37 Pa. Code § 197.13a (relating to subpoenas); 40 Pa. Code § 15.48 (relating to subpoenas); 40 Pa. Code § 17.5 (relating to subpoenas); 51 Pa. Code § 21.5 (relating to conduct of investigations); 52 Pa. Code § 5.343 (relating to procedures in deposition by oral examination); 52 Pa. Code § 5.421 (relating to subpoenas); 52 Pa. Code § 5.424 (relating to issuance of subpoenas); 52 Pa. Code § 1005.161 (relating to subpoenas); and 55 Pa. Code § 41.162 (relating to subpoenas).

DEPOSITIONS

§ 35.145. Depositions.

The testimony of a witness may be taken by deposition, upon application by a participant in a proceeding pending before the agency, before the hearing is closed, upon approval by the agency head or the presiding officer.

Cross References

This section cited in 1 Pa. Code § 35.137 (relating to oral examination); 4 Pa. Code § 89.31 (relating to investigation); 4 Pa. Code § 265.3 (relating to level II hearings); 4 Pa. Code § 607a.13 (relating to subpoenas); 7 Pa. Code § 179.16 (relating to limited discovery); 25 Pa. Code § 1021.102 (relating to discovery); 34 Pa. Code § 95.94 (relating to depositions); 34 Pa. Code § 131.62 (relating to oral depositions); 34 Pa. Code § 131.63 (relating to time for taking oral depositions); 34 Pa. Code

§ 131.64 (relating to notice of oral depositions); 34 Pa. Code § 131.65 (relating to objections to taking of oral depositions); 34 Pa. Code § 131.68 (relating to discovery of records); 34 Pa. Code § 131.70 (relating to discovery of statements of parties or witnesses); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 40 Pa. Code § 15.49 (relating to deposition); 40 Pa. Code § 17.6 (relating to depositions and discovery); 51 Pa. Code § 21.5 (relating to conduct of investigations); 52 Pa. Code § 5.321 (relating to scope); 52 Pa. Code § 5.343 (relating to procedures in deposition by oral examination); 52 Pa. Code § 1005.162 (relating to depositions); 55 Pa. Code § 41.120 (relating to limitations on scope of discovery); and 58 Pa. Code § 493a.11 (relating to discovery).

§ 35.146. Notice and application.

Unless notice is waived, no deposition may be taken except after at least 10 days' notice to the participants if the deposition is to be taken within this Commonwealth, and 15 days' notice when a deposition is to be taken elsewhere. The notice shall be given in writing by the participant proposing to take a deposition to the other participants and to the agency. In such notice and application to take evidence by deposition, the participant desiring to take the deposition shall state the name and post office address of the witness, the subject matter concerning which the witness is expected to testify, the time and place of taking the deposition, the name and post office address of the notarial officer before whom it is desired that the deposition be taken and the reason why the deposition should be taken. The other participants may, within the time stated in this section, make an appropriate response to the notice and application.

Cross References

This section cited in 1 Pa. Code § 35.137 (relating to oral examination); 4 Pa. Code § 89.31 (relating to investigation); 4 Pa. Code § 265.3 (relating to level II hearings); 4 Pa. Code § 607a.13 (relating to subpoenas); 7 Pa. Code § 179.16 (relating to limited discovery); 25 Pa. Code § 1021.102 (relating to discovery); 34 Pa. Code § 95.94 (relating to depositions); 34 Pa. Code § 131.62 (relating to oral depositions); 34 Pa. Code § 131.63 (relating to time for taking oral depositions); 34 Pa. Code § 131.64 (relating to notice of oral depositions); 34 Pa. Code § 131.65 (relating to objections to taking of oral depositions); 34 Pa. Code § 131.68 (relating to discovery of records); 34 Pa. Code § 131.70 (relating to discovery of statements of parties or witnesses); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 40 Pa. Code § 15.49 (relating to deposition); 52 Pa. Code § 5.343 (relating to procedures in deposition by oral examination); 52 Pa. Code § 1005.162 (relating to depositions); 55 Pa. Code § 41.120 (relating to limitations on scope of discovery); and 58 Pa. Code § 493a.11 (relating to discovery).

§ 35.147. Authorization of taking deposition.

If an application for the taking of a deposition so warrants, the agency head or presiding officer will issue and serve, within a reasonable time in advance of the time fixed for taking testimony, upon the participants an authorization naming the witness whose deposition is to be taken, and the time, place and notarial officer before whom the witness is to testify, but the time, place and notarial officer so specified may or may not be the same as those named in the notice and application.

Cross References

This section cited in 1 Pa. Code § 35.137 (relating to oral examination); 4 Pa. Code § 89.31 (relating to investigation); 4 Pa. Code § 265.3 (relating to level II hearings); 4 Pa. Code § 607a.13 (relating to subpoenas); 7 Pa. Code § 179.16 (relating to limited discovery); 25 Pa. Code § 1021.102 (relating to discovery); 34 Pa. Code § 95.94 (relating to depositions); 34 Pa. Code § 131.62 (relating to oral depositions); 34 Pa. Code § 131.63 (relating to time for taking oral depositions); 34 Pa. Code § 131.64 (relating to notice of oral depositions); 34 Pa. Code § 131.65 (relating to objections to taking of oral depositions); 34 Pa. Code § 131.68 (relating to discovery of records); 34 Pa. Code § 131.70 (relating to discovery of statements of parties or witnesses); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 40 Pa. Code § 15.49 (relating to deposition); 52 Pa. Code § 5.343 (relating to procedures in deposition by oral examination); 52 Pa. Code § 1005.162 (relating to depositions); 55 Pa. Code § 41.120 (relating to limitations on scope of discovery); and 58 Pa. Code § 493a.11 (relating to discovery).

to oral depositions); 34 Pa. Code § 131.63 (relating to time for taking oral depositions); 34 Pa. Code § 131.64 (relating to notice of oral depositions); 34 Pa. Code § 131.65 (relating to objections to taking of oral depositions); 34 Pa. Code § 131.68 (relating to discovery of records); 34 Pa. Code § 131.70 (relating to discovery of statements of parties or witnesses); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 40 Pa. Code § 15.49 (relating to deposition); 52 Pa. Code § 5.344 (relating to approval by presiding officer); 52 Pa. Code § 1005.162 (relating to depositions); 55 Pa. Code § 41.120 (relating to limitations on scope of discovery); and 58 Pa. Code 493a.11 (relating to discovery).

§ 35.148. Officer before whom deposition is taken.

(a) *Within the United States.* Depositions may be taken before the agency head, a member of a board or commission comprising the agency, a presiding officer or other authorized representative of the agency, a notary public or another person authorized to administer oaths not being counsel or attorney for a participant, or interested in the proceeding or investigation, according to the designation as may be made in the authorization.

(b) *In foreign countries.* Where the deposition is taken in a foreign country, it may be taken before a secretary of an embassy or legation, consul general, consul, vice consul or consular agent of the United States, or before the person or officer as may be designated in the authorization or agreed upon by the participants by stipulation in writing filed with and approved by the agency head or the presiding officer.

Cross References

This section cited in 1 Pa. Code § 31.3 (relating to definitions); 1 Pa. Code § 35.137 (relating to oral examination); 4 Pa. Code § 89.31 (relating to investigation); 4 Pa. Code § 265.3 (relating to level II hearings); 4 Pa. Code § 607a.13 (relating to subpoenas); 7 Pa. Code § 179.16 (relating to limited discovery); 25 Pa. Code § 1021.102 (relating to discovery); 34 Pa. Code § 131.62 (relating to oral depositions); 34 Pa. Code § 131.63 (relating to time for taking oral depositions); 34 Pa. Code § 131.64 (relating to notice of oral depositions); 34 Pa. Code § 131.65 (relating to objections to taking of oral depositions); 34 Pa. Code § 131.68 (relating to discovery of records); 34 Pa. Code § 131.67 (relating to expenses of taking depositions); 34 Pa. Code § 131.70 (relating to discovery of statements of parties or witnesses); 40 Pa. Code § 15.49 (relating to deposition); 52 Pa. Code § 5.346 (relating to persons before whom depositions may be taken); 52 Pa. Code § 1005.162 (relating to depositions); 55 Pa. Code § 41.120 (relating to limitations on scope of discovery); 58 Pa. Code § 493a.11 (relating to discovery); and 61 Pa. Code § 702.5 (relating to oaths).

§ 35.149. Oath and reduction to writing.

Every person whose testimony is taken by deposition shall be sworn, or shall affirm concerning the matter about which he shall testify, before a question is put or testimony given. The testimony shall be reduced to writing by the notarial officer, or under his direction, after which the deposition shall be subscribed by the witness and certified in the usual form by the notarial officer. Unless otherwise directed in the authorization, after the deposition has been subscribed and certified, it shall, together with the number of copies specified in the authorization, the copies being made by such notarial officer or under his direction, be forwarded by such notarial officer in a sealed envelope addressed to the office of the agency at Harrisburg, Pennsylvania, with sufficient stamps for postage affixed. Upon receipt thereof, the office of the agency shall file the original in the proceeding and shall forward a copy to a participant.

Cross References

This section cited in 1 Pa. Code § 35.137 (relating to oral examination); 4 Pa. Code § 89.31 (relating to investigation); 4 Pa. Code § 265.3 (relating to level II hearings); 4 Pa. Code § 607a.13 (relating to subpoenas); 7 Pa. Code § 179.16 (relating to limited discovery); 25 Pa. Code § 1021.102 (relating to discovery); 34 Pa. Code § 131.62 (relating to oral depositions); 34 Pa. Code § 131.63 (relating to time for taking oral depositions); 34 Pa. Code § 131.64 (relating to notice of oral depositions); 34 Pa. Code § 131.65 (relating to objections to taking of oral depositions); 34 Pa. Code § 131.68 (relating to discovery of records); 34 Pa. Code § 131.69 (relating to form of deposition affidavit); 34 Pa. Code § 131.70 (relating to discovery of statements of parties or witnesses); 40 Pa. Code § 15.49 (relating to deposition); 52 Pa. Code § 5.348 (relating to transcript of deposition, objections and filing); 52 Pa. Code § 1005.162 (relating to depositions); 55 Pa. Code § 41.120 (relating to limitations on scope of discovery); and 58 Pa. Code § 493a.11 (relating to discovery).

§ 35.150. Scope and conduct of examination.

Unless otherwise directed in the authorization, the deponent may be examined regarding a matter which is relevant to the issues involved in the pending proceeding, including the existence, description, nature, custody, condition and location of a book, document or other tangible thing, and the identity and location of persons having knowledge of relevant facts. A participant shall have the right of cross-examination, objection and exception. In making objections to questions or evidence, the grounds relied upon shall be stated briefly, but no transcript filed by the notarial officer may include argument or debate. Objections to questions or evidence shall be noted by the notarial officer upon the deposition, but he may not have the power to decide on the competency, materiality or relevancy of evidence. Objections to questions or evidence not taken before the notarial officer shall be deemed waived.

Cross References

This section cited in 1 Pa. Code § 35.137 (relating to oral examination); 4 Pa. Code § 89.31 (relating to investigation); 4 Pa. Code § 265.3 (relating to level II hearings); 4 Pa. Code § 607a.13 (relating to subpoenas); 7 Pa. Code § 179.16 (relating to limited discovery); 25 Pa. Code § 1021.102 (relating to discovery); 34 Pa. Code § 95.94 (relating to depositions); 34 Pa. Code § 131.62 (relating to oral depositions); 34 Pa. Code § 131.63 (relating to time for taking oral depositions); 34 Pa. Code § 131.64 (relating to notice of oral depositions); 34 Pa. Code § 131.65 (relating to objections to taking of oral depositions); 34 Pa. Code § 131.68 (relating to discovery of records); 34 Pa. Code § 131.70 (relating to discovery of statements of parties or witnesses); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 40 Pa. Code § 15.49 (relating to deposition); 52 Pa. Code § 5.412 (relating to written testimony); 52 Pa. Code § 1005.152 (relating to written testimony); 52 Pa. Code § 1005.162 (relating to depositions); 55 Pa. Code § 41.120 (relating to limitations on scope of discovery); and 58 Pa. Code § 493a.11 (relating to discovery).

§ 35.151. Status of deposition as part of record.

No part of a deposition may constitute a part of the record in the proceeding, unless received in evidence by the agency head or presiding officer. Objection may be made at the hearing in the proceeding to receiving in evidence a deposition or part thereof for a reason which would require the exclusion of the evidence if the witnesses were then present and testifying.

Cross References

This section cited in 1 Pa. Code § 35.137 (relating to oral examination); 4 Pa. Code § 89.31 (relating to investigation); 4 Pa. Code § 265.3 (relating to level II hearings); 4 Pa. Code § 607a.13 (relating to subpoenas); 7 Pa. Code § 179.16 (relating to limited discovery); 25 Pa. Code § 1021.102 (relating to discovery); 34 Pa. Code § 131.62 (relating to oral depositions); 34 Pa. Code § 131.63 (relating to time for taking oral depositions); 34 Pa. Code § 131.64 (relating to notice of oral depositions); 34 Pa. Code § 131.65 (relating to objections to taking of oral depositions); 34 Pa. Code § 131.66 (relating to admissibility of oral depositions); 34 Pa. Code § 131.68 (relating to discovery of records); 34 Pa. Code § 131.70 (relating to discovery of statements of parties or witnesses); 37 Pa. Code § 171.102 (relating to admission of exhibits and deposition into evidence); 40 Pa. Code § 15.49 (relating to deposition); 52 Pa. Code § 5.347 (relating to taking of depositions—objections); 52 Pa. Code § 1005.162 (relating to depositions); 55 Pa. Code § 41.120 (relating to limitations on scope of discovery); and 58 Pa. Code § 493a.11 (relating to discovery).

§ 35.152. Fees of officers and deponents.

Deponents whose depositions are taken and the notarial officers taking the depositions shall be entitled to the same fees as are paid for like services in the courts of common pleas, which fees shall be paid by the participant at whose instance the depositions are taken.

Cross References

This section cited in 1 Pa. Code § 35.137 (relating to oral examination); 4 Pa. Code § 89.31 (relating to investigation); 4 Pa. Code § 265.3 (relating to level II hearings); 4 Pa. Code § 607a.13 (relating to subpoenas); 7 Pa. Code § 179.16 (relating to limited discovery); 25 Pa. Code § 1021.102 (relating to discovery); 34 Pa. Code § 131.62 (relating to oral depositions); 34 Pa. Code § 131.63 (relating to time for taking oral depositions); 34 Pa. Code § 131.64 (relating to notice of oral depositions); 34 Pa. Code § 131.65 (relating to objections to taking of oral depositions); 34 Pa. Code § 131.67 (relating to expenses of taking depositions); 34 Pa. Code § 131.68 (relating to discovery of records); 34 Pa. Code § 131.70 (relating to discovery of statements of parties or witnesses); 37 Pa. Code § 171.135 (relating to fees of officers and deponents); 40 Pa. Code § 15.49 (relating to depositions); 52 Pa. Code § 5.324 (relating to discovery of expert testimony); 52 Pa. Code § 1005.162 (relating to depositions); 55 Pa. Code § 41.120 (relating to limitations on scope of discovery); and 58 Pa. Code § 493a.11 (relating to discovery).

STIPULATIONS**§ 35.155. Presentation and effect of stipulations.**

Independently of the orders or rulings issued as provided by § 35.112 (relating to conferences to expedite hearings) the participants may stipulate as to a relevant matter of fact or the authenticity of relevant documents. The stipulations may be received in evidence at a hearing, and when so received shall be binding on the participants with respect to the matters therein stipulated.

Cross References

This section cited in 1 Pa. Code § 35.137 (relating to oral examination); 4 Pa. Code § 265.3 (relating to level II hearings); 31 Pa. Code § 56.3 (relating to admissions as to facts and documents); 34 Pa. Code § 111.33 (relating to specific petitions/requirements); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.57 (relating to compromise and release agreements); 34 Pa. Code § 131.91 (relating to stipulations of fact); 34 Pa. Code § 131.203 (relating to hearing procedures); 37 Pa. Code § 171.103 (relating to presentation and effect of stipulations); 40 Pa. Code § 15.50 (relating to stipulations); 52 Pa. Code § 5.234 (relating to presentation and effect of stipulations); 52 Pa. Code § 1005.101 (relating to presentation and effect of stipulations); and 58 Pa. Code § 491a.10 (relating to presentation and effect of stipulations).

EVIDENCE**§ 35.161. Form and admissibility of evidence.**

In a proceeding before the agency head or a presiding officer, relevant and material evidence shall be admissible, but there shall be excluded evidence that is repetitious or cumulative, or evidence that is not of the kind which would affect reasonable and fair-minded men in the conduct of their daily affairs.

Notes of Decisions

The referee has discretion to limit repetitive testimony and did not err in denying claimant the opportunity to further testify concerning why he had retired when he already testified that he retired because he was 64. *Vitelli v. Workmen's Compensation Appeal Board (St. Johnsbury Trucking Co.)*, 630 A.2d 923 (Pa. Cmwlth. 1993); appeal denied 641 A.2d 591 (Pa. 1994); appeal denied 641 A.2d 591 (Pa. 1994).

Workmen's Compensation referee prematurely excluded surveillance films without viewing them even though the referee had before him still photographs printed from the surveillance film, testimony of the private investigator regarding his observations while filming, and the testimony of employer's witnesses who had observed the films. *Westinghouse Electric Co. v. Workmen's Compensation Appeal Board (Pollock)*, 507 A.2d 1287 (Pa. Cmwlth. 1986).

Cross References

This section cited in 4 Pa. Code § 89.29 (relating to evidence); 4 Pa. Code § 265.3 (relating to level II hearings); 7 Pa. Code § 131.33 (relating to evidence); 7 Pa. Code § 179.61 (relating to hearing procedure); 10 Pa. Code § 3.11 (relating to hearing rules); 12 Pa. Code § 81.209 (relating to rules of evidence not to apply); 22 Pa. Code § 201.9 (relating to introduction of documents for the system's records); 34 Pa. Code § 131.33 (relating to answers except answers to petitions for joinder and challenge proceedings); 34 Pa. Code § 131.42 (relating to evidence relating to supersedeas); 34 Pa. Code § 131.49 (relating to disposition of automatic request for special supersedeas under section 413(a.1) of the act (77 P. S. § 774(1))); 34 Pa. Code § 131.50a (relating to employee request for special supersedeas hearing under section 413(c) and (d) of the act); 34 Pa. Code § 131.53 (relating to procedures subsequent to the first hearing); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.61 (relating to exchange of information); 34 Pa. Code § 131.63 (relating to time for taking oral depositions); 34 Pa. Code § 131.66 (relating to admissibility of oral depositions); 34 Pa. Code § 131.203 (relating to hearing procedures); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 37 Pa. Code § 21.55 (relating to evidence); 37 Pa. Code § 171.97 (relating to applicability of laws and rules); 37 Pa. Code § 197.44 (relating to limitation of issues and evidence); 40 Pa. Code § 15.51 (relating to evidence); 51 Pa. Code § 21.25 (relating to conduct of the hearing); 52 Pa. Code § 5.401 (relating to admissibility of evidence); 52 Pa. Code § 1005.141 (relating to admissibility of evidence); 58 Pa. Code § 145.11 (relating to order of formal hearing); and 61 Pa. Code § 702.6 (relating to formal rules of evidence).

§ 35.162. Reception and ruling on evidence.

The presiding officer, subject to § 35.190 (relating to appeals to agency head from rulings of presiding officers), shall rule on the admissibility of evidence, and shall otherwise control the reception of evidence so as to confine it to the issues in the proceeding. The number of expert witnesses to be heard on an issue may be limited appropriately as provided in § 35.127 (relating to limiting number of witnesses), or the production of further evidence upon any issue may be called for, as provided in § 35.128 (relating to additional evidence).

Cross References

This section cited in 4 Pa. Code § 89.29 (relating to evidence); 4 Pa. Code § 265.3 (relating to level II hearings); 7 Pa. Code § 131.33 (relating to evidence); 7 Pa. Code § 179.61 (relating to hearing procedure); 10 Pa. Code § 3.11 (relating to hearing rules); 12 Pa. Code § 81.209 (relating to rules of evidence not to apply); 25 Pa. Code § 1021.123 (relating to evidence); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 131.42 (relating to evidence relating to supersedeas); 34 Pa. Code § 131.49 (relating to disposition of automatic request for special supersedeas under section 413(a.1) of the act (77 P. S. § 774(1))); 34 Pa. Code § 131.50a (relating to employee request for special supersedeas hearing under section 413(c) and (d) of the act); 34 Pa. Code § 131.53 (relating to procedures subsequent to the first hearing); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.61 (relating to exchange of information); 34 Pa. Code § 131.63 (relating to time for taking oral depositions); 34 Pa. Code § 131.66 (relating to admissibility of oral depositions); 34 Pa. Code § 131.203 (relating to hearing procedures); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 37 Pa. Code § 21.55 (relating to evidence); 40 Pa. Code § 15.51 (relating to evidence); 52 Pa. Code § 5.402 (relating to admission of evidence); 52 Pa. Code § 5.403 (relating to control of receipt of evidence); 52 Pa. Code § 1005.142 (relating to admission of evidence); 52 Pa. Code § 1005.143 (relating to control of receipt of evidence); and 61 Pa. Code § 702.6 (relating to formal rules of evidence).

§ 35.163. Designation of relevant portions of documentary evidence.

Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, the participant offering such document shall plainly designate the matter so offered, segregating and excluding insofar as practicable the immaterial or irrelevant parts. If other matter is in such document in such bulk or extent as would unnecessarily encumber the record, such document will not be received in evidence, but may be marked for identification, and, if properly authenticated, the relevant and material parts thereof may be read into the record, or if the agency head or the presiding officer so directs, a true copy of such matter in proper form shall be received in evidence as an exhibit, and copies shall be delivered by the participant offering the same to the other participants appearing at the hearing, who shall be afforded an opportunity to examine the entire document and to offer in evidence in like manner other material and relevant portions thereof.

Cross References

This section cited in 4 Pa. Code § 89.29 (relating to evidence); 4 Pa. Code § 265.3 (relating to level II hearings); 10 Pa. Code § 3.11 (relating to hearing rules); 12 Pa. Code § 81.209 (relating to rules of evidence not to apply); 34 Pa. Code § 131.53 (relating to procedures subsequent to the first hearing); 34 Pa. Code § 121.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.101 (relating to briefs and findings of fact and close of record); 34 Pa. Code § 131.203 (relating to hearing procedures); 37 Pa. Code § 21.55 (relating to evidence); 40 Pa. Code § 15.51 (relating to evidence); 52 Pa. Code § 5.403 (relating to control of receipt of evidence); 52 Pa. Code § 1005.143 (relating to control of receipt of evidence); and 61 Pa. Code § 702.6 (relating to formal rules of evidence).

§ 35.164. Documents on file with agency.

In case any matter contained in a report or other document on file with the agency is offered in evidence, such report or other document need not be produced or marked for identification, but may be offered in evidence by specifying the report, document, or other file containing the matter so offered.

Cross References

This section cited in 4 Pa. Code § 89.29 (relating to evidence); 4 Pa. Code § 265.3 (relating to level II hearings); 7 Pa. Code § 131.33 (relating to evidence); 10 Pa. Code § 3.11 (relating to hearing rules); 12 Pa. Code § 81.209 (relating to rules of evidence not to apply); 22 Pa. Code § 201.9 (relating to introduction of documents from the system's records); 34 Pa. Code § 131.53 (relating to procedures subsequent to the first hearing); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.203 (relating to hearing procedures); 37 Pa. Code § 21.55 (relating to evidence); 40 Pa. Code § 15.51 (relating to evidence); 52 Pa. Code § 1005.146 (relating to public documents); 55 Pa. Code § 41.113 (relating to content of provider position paper); 55 Pa. Code § 41.114 (relating to content of program office position paper); and 61 Pa. Code § 702.6 (relating to formal rules of evidence).

§ 35.165. Public documents.

Whenever there is offered in evidence (in whole or in part) a public document, such as an official report, decision, opinion or published scientific or economic statistical data issued by any of the executive departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations) or a similar document issued by a State or its agencies, and such document (or part thereof) has been shown by the offerer to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered in evidence as a public document item by specifying the document or relevant part thereof without regard to the requirements of § 35.169 (relating to copies to parties and agency).

Cross References

This section cited in 4 Pa. Code § 89.29 (relating to evidence); 4 Pa. Code § 265.3 (relating to level II hearings); 7 Pa. Code § 179.61 (relating to hearing procedure); 10 Pa. Code § 3.11 (relating to hearing rules); 12 Pa. Code § 81.209 (relating to rules of evidence not to apply); 34 Pa. Code § 131.53 (relating to procedures subsequent to the first hearing); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.203 (relating to hearing procedures); 37 Pa. Code § 21.55 (relating to evidence); 40 Pa. Code § 15.51 (relating to evidence); 52 Pa. Code § 5.406 (relating to public documents); 52 Pa. Code § 1005.146 (relating to public documents); 55 Pa. Code § 41.113 (relating to content of provider position paper); 55 Pa. Code § 41.114 (relating to content of program office position paper); and 61 Pa. Code § 702.6 (relating to formal rules of evidence).

§ 35.166. Prepared expert testimony.

(a) Direct testimony of any witness within his special field may be offered as an exhibit, or as prepared written testimony to be copied into the transcript. Cross examination of the witness presenting such written testimony or exhibit shall proceed at the hearing at which such testimony or exhibit is authenticated if, not less than 20 days prior to such hearing, service thereof is made upon each participant of record, unless the presiding officer for good cause shall otherwise direct.

(b) Whenever in the circumstances of a particular case it is deemed necessary or desirable, the agency head or the presiding officer may direct that expert tes-

timony to be given upon direct examination shall be reduced to exhibit form or to the form of prepared written testimony and be served and offered in the manner provided in subsection (a). A reasonable period of time shall be allowed for the preparation of such written testimony.

(c) All participants offering prepared written testimony whether in the form of an exhibit, or to be copied into the transcript, shall insert line numbers on each page, in the left-hand margin.

Cross References

This section cited in 1 Pa. Code § 35.138 (relating to expert witnesses); 4 Pa. Code § 89.29 (relating to evidence); 4 Pa. Code § 265.3 (relating to level II hearings); 7 Pa. Code § 131.33 (relating to evidence); 7 Pa. Code § 179.61 (relating to hearing procedure); 10 Pa. Code § 3.11 (relating to hearing rules); 12 Pa. Code § 81.209 (relating to rules of evidence not to apply); 25 Pa. Code § 1021.123 (relating to evidence); 34 Pa. Code § 131.42 (relating to evidence relating to supersedeas); 34 Pa. Code § 131.49 (relating to disposition of automatic request for special supersedeas under section 413(a.1) of the act (77 P.S. § 774(1))); 34 Pa. Code § 131.53 (relating to procedures subsequent to the first hearing); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.203 (relating to hearing procedures); 37 Pa. Code § 21.55 (relating to evidence); 40 Pa. Code § 15.51 (relating to evidence); 52 Pa. Code § 5.406 (relating to public documents); 52 Pa. Code § 5.412 (relating to written testimony); 52 Pa. Code § 1005.146 (relating to public documents); 52 Pa. Code § 1005.152 (relating to written testimony); and 61 Pa. Code § 702.6 (relating to formal rules of evidence).

§ 35.167. Records in other proceedings.

When any portion of the record in any other proceeding before the agency is offered in evidence and shown to be relevant and material to the instant proceeding, a true copy of such record shall be presented in the form of an exhibit, together with additional copies as provided in § 35.169 (relating to copies to parties and agency), unless:

- (1) The participant offering such record agrees to supply, within a period of time specified by the agency head or the presiding officer, such copies at his own expense, if and when so required.
- (2) The portion is specified with particularity in such manner as to be readily identified, and upon motion is admitted in evidence by reference to the records of the other proceedings.

Cross References

This section cited in 4 Pa. Code § 89.29 (relating to evidence); 4 Pa. Code § 265.3 (relating to level II hearings); 10 Pa. Code § 3.11 (relating to hearing rules); 12 Pa. Code § 81.209 (relating to rules of evidence not to apply); 34 Pa. Code § 131.53 (relating to procedures subsequent to the first hearing); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.203 (relating to hearing procedures); 37 Pa. Code § 21.55 (relating to evidence); 40 Pa. Code § 15.51 (relating to evidence); 52 Pa. Code § 5.407 (relating to records of other proceedings); 52 Pa. Code § 1005.147 (relating to records of other proceedings); and 61 Pa. Code § 702.6 (relating to formal rules of evidence).

§ 35.168. Form and size of documentary evidence.

Wherever practicable, all exhibits of a documentary character received in evidence shall be on paper of good quality and so prepared as to be plainly legible

and durable, whether printed, photostated, or typewritten, and shall conform to the requirements of Chapter 33 (relating to documentary filings) whenever practicable.

Cross References

This section cited in 4 Pa. Code § 89.29 (relating to evidence); 4 Pa. Code § 265.3 (relating to level II hearings); 10 Pa. Code § 3.11 (relating to hearing rules); 12 Pa. Code § 81.209 (relating to rules of evidence not to apply); 34 Pa. Code § 131.53 (relating to procedures subsequent to the first hearing); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.203 (relating to hearing procedures); 37 Pa. Code § 21.55 (relating to evidence); 40 Pa. Code § 15.51 (relating to evidence); 52 Pa. Code § 5.409 (relating to copies and form of documentary evidence); 52 Pa. Code § 1005.149 (relating to copies and form of documentary evidence); and 61 Pa. Code § 702.6 (relating to formal rules of evidence).

§ 35.169. Copies to parties and agency.

Except as otherwise provided in these rules, when exhibits of a documentary character are offered in evidence, copies shall be furnished to the presiding officer and to the participants present at the hearing, unless the agency head or the presiding officer otherwise directs. In addition, unless otherwise directed by the agency head or the presiding officer, three copies of each exhibit of documentary character shall be furnished for the use of the agency.

Cross References

This section cited in 1 Pa. Code § 35.30 (relating to filing of petitions to intervene); 1 Pa. Code § 35.165 (relating to public documents); 1 Pa. Code § 35.167 (relating to records in other proceedings); 4 Pa. Code § 89.29 (relating to evidence); 4 Pa. Code § 265.3 (relating to level II hearings); 10 Pa. Code § 3.11 (relating to hearing rules); 12 Pa. Code § 81.209 (relating to rules of evidence not to apply); 22 Pa. Code § 121.9 (relating to administrative loan collection review procedures); 34 Pa. Code § 131.34 (relating to other filings); 34 Pa. Code § 131.53 (relating to procedures subsequent to the first hearing); 34 Pa. Code § 131.53a (relating to consolidated hearing procedure); 34 Pa. Code § 131.203 (relating to hearing procedures); 37 Pa. Code § 21.55 (relating to evidence); 40 Pa. Code § 15.51 (relating to evidence); 52 Pa. Code § 5.409 (relating to copies and form of documentary evidence); 52 Pa. Code § 1005.149 (relating to copies and form of documentary evidence); and 61 Pa. Code § 702.6 (relating to formal rules of evidence).

OFFICIAL NOTICE

§ 35.173. Official notice of facts.

Official notice may be taken by the agency head or the presiding officer of such matters as might be judicially noticed by the courts of this Commonwealth, or any matters as to which the agency by reason of its functions is an expert. Any participant shall, on timely request, be afforded an opportunity to show the contrary. Any participant requesting the taking of official notice after the conclusion of the hearing shall set forth the reasons claimed to justify failure to make the request prior to the close of the hearing.

Notes of Decisions*Official Notice*

Medical doctor being disciplined for allegedly allowing other doctor licensed in another state to practice in Pennsylvania without a license, argued the Board of Medicine violated his due process rights when it considered other doctor's consent agreement which was withdrawn by the Bureau of Professional and Occupational Affairs before the hearing officer; Board properly took judicial notice of its own records and therefore, in doing so, did not violate doctor's due process rights. *Gleeson v. State Board of Medicine*, 900 A.2d 430, 440 (Pa. Cmwlth. 2006).

The Civil Service Commission's taking of official notice of a supplemental appropriation granted to the Department of State was proper, since an administrative agency may take notice of any matter that may be judicially noticed by the court. *Department of State v. Stecher*, 459 A.2d 851 (Pa. Cmwlth. 1983); 484 A.2d 755 (Pa. 1984).

The Civil Service Commission was within its powers of official notice under this section when, in ordering four employees reinstated, it took official notice of the enactment of a law. *Department of State v. Stecher*, 459 A.2d 851 (Pa. Cmwlth. 1983); 484 A.2d 755 (Pa. 1984).

Cross References

This section cited in 1 Pa. Code § 35.205 (relating to contents of proposed reports); 4 Pa. Code § 265.3 (relating to level II hearings); 7 Pa. Code § 131.33 (relating to evidence); 7 Pa. Code § 179.62 (relating to Commission official notice); 34 Pa. Code § 131.101 (relating to briefs, findings of fact and close of record); 37 Pa. Code § 21.55 (relating to evidence); 37 Pa. Code § 171.104 (relating to limitation on matters considered); 40 Pa. Code § 15.52 (relating to official notice of facts); and 52 Pa. Code § 5.408 (relating to official and judicial notice of fact); 52 Pa. Code § 1005.148 (relating to official and judicial notice of fact); 58 Pa. Code § 494a.4 (relating to report or recommendation of the presiding officer); 61 Pa. Code § 702.6 (relating to formal rules of evidence); and 61 Pa. Code § 703.34 (relating to hearing procedure).

Subchapter D. MOTIONS

- Sec.
35.177. Scope and contents of motions.
35.178. Presentation of motions.
35.179. Objections to motions.
35.180. Action on motions.

Cross References

This subchapter cited in 22 Pa. Code § 121.10 (relating to administrative wage garnishment procedures for Federal loans); 34 Pa. Code § 111.14 (relating to motions to quash); 34 Pa. Code § 131.3 (relating to waiver and modification of rules); 34 Pa. Code § 131.24 (relating to recusal of judge); 34 Pa. Code § 131.33 (relating to answers except answers to petitions for joinder and challenge proceedings); 34 Pa. Code § 131.36 (relating to joinder); 34 Pa. Code § 131.101 (relating to briefs, findings of fact and close of record); 34 Pa. Code § 131.112 (relating to correction or amendment of decision); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by a party); 40 Pa. Code § 15.53 (relating to motions); 58 Pa. Code § 493a.10 (relating to motions for summary judgment and judgment on the pleadings); and 104 Pa. Code § 7.16 (relating to RTKL appeals).

§ 35.177. Scope and contents of motions.

After a hearing has commenced in a proceeding, a request may be made by motion for any procedural or interlocutory ruling or relief desired, except as may be otherwise expressly provided in this chapter. Other motions may be made as provided for elsewhere in this chapter. Motions shall set forth the ruling or relief sought, and state the grounds therefor and the statutory or other authority relied upon.

Cross References

This section cited in 4 Pa. Code § 89.30 (relating to motions); 12 Pa. Code § 11.11 (relating to motions); 25 Pa. Code § 1021.91 (relating to general); 25 Pa. Code § 1021.92 (relating to procedural motions); 25 Pa. Code § 1021.93 (relating to discovery motions); 25 Pa. Code § 1021.94 (relating to dispositive motions other than summary judgment motions); 34 Pa. Code § 131.53b (relating to bifurcation and motions for disposition of a petition); 51 Pa. Code § 21.26 (relating to motions); 52 Pa. Code § 5.103 (relating to motions); 52 Pa. Code § 1005.71 (relating to motions); 58 Pa. Code § 493a.8 (relating to motions generally); 58 Pa. Code § 493a.9 (relating to preliminary motions); and 61 Pa. Code § 703.34 (relating to hearing procedure).

§ 35.178. Presentation of motions.

Motions may be made in writing at any time and motions made during hearings may be stated orally upon the record, or the presiding officer may require that such oral motions be reduced to writing and filed separately.

Notes of Decisions*Jurisdiction; Motion to Dismiss*

Although a motion can be made “in writing at any time,” a Motion to Dismiss for lack of jurisdiction is improper where the Charter School Appeal Board properly retained jurisdiction of an appeal even after the District Board acted on a charter application after the expiration of the statutory time period. *Philadelphia School District v. Independence Charter School*, 774 A.2d 798 (Pa. Cmwlth. 2001); appeal denied 797 A.2d 412 (Pa. Cmwlth. 2002).

Cross References

This section cited in 4 Pa. Code § 89.30 (relating to motions); 12 Pa. Code § 11.11 (relating to motions); 25 Pa. Code § 1021.91 (relating to general); 34 Pa. Code § 95.91 (relating to hearings); 34 Pa. Code § 131.53b (relating to bifurcation and motions for disposition of a petition); 37 Pa. Code § 197.11a (relating to motions and petitions); 52 Pa. Code § 5.103 (relating to motions); 52 Pa. Code § 1005.71 (relating to motions); 58 Pa. Code § 493a.8 (relating to motions generally); 58 Pa. Code § 493a.9 (relating to preliminary motions); and 61 Pa. Code § 703.34 (relating to hearing procedure).

§ 35.179. Objections to motions.

Any participant shall have 10 days within which to answer or object to any motion unless the period of time is otherwise fixed by the agency head or the presiding officer.

Notes of Decisions

Board did not err by failing to conduct a hearing or motion to dismiss based on automobile dealer’s failure to file answer thereto within 10 days. *University Lincoln Mercury, Inc. v. Board of Vehicle Manufacturers, Dealers and Salespersons*, 576 A.2d 1146 (Pa. Cmwlth. 1990).

Cross References

This section cited in 1 Pa. Code § 35.225 (relating to interlocutory orders); 4 Pa. Code § 89.30 (relating to motions); 12 Pa. Code § 11.11 (relating to motions); 25 Pa. Code § 1021.92 (relating to procedural motions); 25 Pa. Code § 1021.93 (relating to discovery motions); 25 Pa. Code § 1021.94 (relating to dispositive motions other than summary judgment motions); 34 Pa. Code § 131.53b (relating to bifurcation and motions for disposition of a petition); 37 Pa. Code § 197.11a (relating to motions and petitions); 52 Pa. Code § 5.103 (relating to motions); 52 Pa. Code § 1005.71 (relating to motions); 55 Pa. Code § 41.131 (relating to motions in general); 58 Pa. Code § 493a.8 (relating to motions generally); 58 Pa. Code § 493a.9 (relating to preliminary motions); and 61 Pa. Code § 703.34 (relating to hearing procedure).

§ 35.180. Action on motions.

(a) The presiding officer designated to preside at a hearing is authorized to rule upon any motion not formally acted upon by the agency head prior to the commencement of the hearing where immediate ruling is essential in order to proceed with the hearing, and upon any motion filed or made after the commencement of the hearing and prior to the submission of his proposed report in the proceedings, except that no motion made before or during a hearing, a ruling upon which would involve or constitute a final determination of the proceeding, shall be ruled upon by a presiding officer except as a part of his proposed report submitted after the conclusion of the hearing. A presiding officer may refer any motion to the agency head for ultimate determination. The agency head will rule upon all other motions and upon such motions as presiding officers may certify to the agency head for disposition.

(b) With respect to any motion filed with the agency head after a hearing has commenced, or made to a presiding officer after a hearing has commenced and referred to the agency head, unless the agency head acts within 30 days after such filing or referral, whichever is later, the motion shall be deemed to have been denied. The presiding officer, either by an announcement on the record where the hearing is in session or by written notice if the hearing is in recess, shall notify the parties to the proceeding of the date on which a motion is referred to the agency head.

Notes of Decisions*Finder of Fact*

The Public School Employees Retirement Board is an agency head and factfinder under this section and the hearing examiner is not the factfinder. *Dowler v. Public School Employees Retirement Board*, 620 A.2d 639 (Pa. Cmwlth. 1993).

The Deputy Insurance Commissioner, who reviewed and granted a motion for summary judgment after finding no factual dispute, complied with this section when he acted on behalf of the Commissioner and not as a presiding officer. *United Health-Care Benefits Trust v. Insurance Commission of Pennsylvania*, 620 A.2d 81 (Pa. Cmwlth. 1993).

The rules of the EHB supplemented those under this section to provide that final decisions of the EHB shall be by majority vote. *Snyder v. Department of Environmental Resources*, 588 A.2d 1001 (Pa. Cmwlth. 1991); appeal granted 606 A.2d 904 (Pa. 1992); appeal dismissed 632 A.2d 308 (Pa. 1993).

Where no material facts were in dispute, it was proper for the presiding officer to decide a motion to dismiss after briefs and oral arguments and without an evidentiary hearing under this section. *Melinger v. Department of Community Affairs*, 533 A.2d 1119 (Pa. Cmwlth. 1987).

It is improper for an administrative law judge to grant summary judgment, which constitutes a final determination of the proceedings under subsection (a), prior to the conclusion of a hearing. *Carol Lines, Inc. v. Pennsylvania Public Utility Commission*, 439 A.2d 838 (Pa. Cmwlth. 1981); appeal after remanded 480 A.2d 1324 (Pa. Cmwlth. 1984).

A hearing is not required when the entire board rather than the presiding officer alone dismisses a claim of a petitioner. *Lebanon County Sewage Council v. Department of Environmental Resources*, 382 A.2d 1310 (Pa. Cmwlth. 1978).

Waiver of Error

While it was procedural error for a hearing officer to dismiss proceedings prior to the submission of a final report, that error was waived by the contractor and will not be heard on appeal. *Balfour Beatty Construction Co. v. Department of Transportation*, 783 A.2d 901 (Pa. Cmwlth. 2001).

Cross References

This section cited in 4 Pa. Code § 89.30 (relating to motions); 12 Pa. Code § 11.11 (relating to motions); 34 Pa. Code § 131.53b (relating to bifurcation and motions for disposition of a petition); 52 Pa. Code § 5.103 (relating to hearing motions); 52 Pa. Code § 1005.71 (relating to motions); 55 Pa. Code § 41.132 (relating to actions on motions); 58 Pa. Code § 493a.8 (relating to motions generally); 58 Pa. Code § 493a.9 (relating to preliminary motions); and 61 Pa. Code § 703.34 (relating to hearing procedure).

Subchapter E. PRESIDING OFFICERS

Sec.

- 35.185. Designation of presiding officers.
- 35.186. Disqualification of a presiding officer.
- 35.187. Authority delegated to presiding officers.
- 35.188. Restrictions on duties and activities.
- 35.189. Manner of conduct of hearings.
- 35.190. Appeals to agency head from rulings of presiding officers.

Cross References

This subchapter cited in 1 Pa. Code § 35.123 (relating to conduct of hearings); 4 Pa. Code § 607a.14 (relating to authority of presiding officer); 6 Pa. Code § 3.7 (relating to appointment of a hearing examiner); 22 Pa. Code § 201.4a (relating to adjudicatory benefits appeal and request for administrative hearing); 34 Pa. Code § 111.35 (relating to dispositions of petitions); 34 Pa. Code § 131.54 (relating to manner and conduct of hearings); 34 Pa. Code § 501.8 (relating to hearings/appeals); 43 Pa. Code § 7.10 (relating to appeals); 67 Pa. Code § 491.6 (relating to notice and conduct of hearing); and 104 Pa. Code § 7.16 (relating to RTKL appeals).

§ 35.185. Designation of presiding officers.

When evidence is to be taken in a proceeding, either the agency head or, when designated for that purpose, one or more of its members, examiners or other representative appointed according to law, may preside at the hearing.

Notes of Decisions*Finder of Fact*

The Secretary of the Department of Public Welfare is clearly an “agency head,” and this chapter permits the Secretary to act in a fact-finding capacity in provider appeals. *Siemon’s Lakeview Manor Estate v. Department of Public Welfare*, 703 A.2d 551 (Pa. Cmwlth. 1997); appeal denied 727 A.2d 134 (Pa. 1998).

The Public School Employees Retirement Board is an agency head and factfinder under this section and the hearing examiner is not the fact finder. *Dowler v. Public School Employees Retirement Board*, 620 A.2d 639 (Pa. Cmwlth. 1993).

Cross References

This section cited in 4 Pa. Code § 89.22 (relating to hearing examiner); 4 Pa. Code § 265.3 (relating to level II hearings); 4 Pa. Code § 265.4 (relating to appeals—level III); 4 Pa. Code § 607a.3 (relating to presiding officer); 6 Pa. Code § 22.95 (relating to formal appeals and hearings); 6 Pa. Code § 30.14 (relating to procedure for designation); 6 Pa. Code § 30.23 (relating to procedure for redesignation); 7 Pa. Code § 179.59 (relating to presiding officers); 7 Pa. Code § 179.96 (relating to conduct of hearing); 12 Pa. Code § 11.14 (relating to presiding officer); 22 Pa. Code § 121.9 (relating to administrative loan collection review procedures); 22 Pa. Code § 201.2a (relating to definitions); 28 Pa. Code § 1113.2 (relating to administrative appeal procedures); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 71.25 (relating to hearing procedures); 34 Pa. Code § 95.91 (relating to hearings); 34 Pa. Code § 131.60 (relating to resolution hearings); 34 Pa. Code § 401.14 (relating to decertification or refusal to certify); 37 Pa. Code § 21.54 (relating to hearing examiner); 37 Pa. Code § 79.83 (relating to appointment of hearing examiner); 37 Pa. Code § 123.8 (relating to presiding officer); 37 Pa. Code § 407.33 (relating to hearings); 52 Pa. Code § 5.481 (relating to designation of presiding officers); 52 Pa. Code § 1003.73 (relating to Adjudication Department); 52 Pa. Code § 1005.181 (relating to designation of presiding officer); 58 Pa. Code § 51.27 (relating to hearings); 58 Pa. Code § 51.107 (relating to hearings); 58 Pa. Code § 491a.7 (relating to presiding officers); and 61 Pa. Code § 703.34 (relating to hearing procedure).

§ 35.186. Disqualification of a presiding officer.

A presiding officer may withdraw from a proceeding when he deems himself disqualified, or he may be withdrawn by the agency head for good cause found after timely affidavits alleging personal bias or other disqualification have been filed and the matter has been heard by the agency head or by another presiding officer to whom the agency head has delegated the matter for investigation and report.

Notes of Decisions

An allegation that the Acting Commissioner presided over some initial hearings although he had appointed a presiding officer to conduct the hearings in the case, thus allegedly commingling investigative, prosecutorial and adjudicative functions in contravention of the companies’ constitutional due process rights, was not sufficient to render the available administrative remedy inadequate, so the companies’ petition was dismissed for failure to exhaust their administrative remedies. *National Home Life Assurance Co. v. Insurance Department*, 483 A.2d 1036, 1038 (Pa. Cmwlth. 1984).

Failure to move at the hearing that the hearing examiner disqualify himself on the grounds of bias constitutes a waiver of the issue. *Savka v. Department of Education*, 403 A.2d 142 (Pa. Cmwlth. 1979).

Cross References

This section cited in 4 Pa. Code § 89.22 (relating to hearing examiner); 7 Pa. Code § 179.59 (relating to presiding officers); 7 Pa. Code § 179.96 (relating to conduct of hearing); 12 Pa. Code § 11.14 (relating to presiding officer); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 131.24 (relating to recusal of judge); 34 Pa. Code § 131.59 (relating to mediation); 34 Pa. Code § 401.14 (relating to decertification or refusal to cer-

tify); 52 Pa. Code § 5.482 (relating to disqualification of a presiding officer); 52 Pa. Code § 1003.73 (relating to Adjudication Department); 52 Pa. Code § 1005.183 (relating to disqualification of a presiding officer); 58 Pa. Code § 491a.6 (relating to hearing officers); 58 Pa. Code § 491a.7 (relating to presiding officers); and 61 Pa. Code § 703.34 (relating to hearing procedure).

§ 35.187. Authority delegated to presiding officers.

Presiding officers designated by the agency head to preside at hearings shall have the authority, within the powers and subject to the regulations of the agency, as follows:

- (1) To regulate the course of hearings, including the scheduling thereof, subject to the approval of the agency head, and the recessing, reconvening, and the adjournment thereof, unless otherwise provided by the agency head, as provided in § 35.102(b) (relating to hearing calendar).
- (2) To administer oaths and affirmations.
- (3) To issue subpoenas.
- (4) To rule upon offers of proof and receive evidence.
- (5) To take or cause depositions to be taken.
- (6) To hold appropriate conferences before or during hearings.
- (7) To dispose of procedural matters but not, before their proposed report, if any, to dispose of motions made during hearings to dismiss proceedings or other motions which involve final determination of proceedings.
- (8) Within their discretion, or upon direction of the agency head, to certify any question to the agency head for consideration and disposition by the agency head.
- (9) To submit their proposed reports in accordance with § 35.202 (relating to proceedings in which proposed reports are prepared).
- (10) To take other action necessary or appropriate to the discharge of the duties vested in them, consistent with the statutory or other authorities under which the agency functions and with the regulations and policies of the agency.

Notes of Decisions

Waiver of Error

While it was procedural error for a hearing officer to dismiss proceedings prior to the submission of a final report, that error was waived by the contractor and will not be heard on appeal. *Balfour Beatty Construction Co. v. Department of Transportation*, 783 A.2d 901 (Pa. Cmwlth. 2001).

Cross References

This section cited in 4 Pa. Code § 89.22 (relating to hearing examiner); 6 Pa. Code § 3.10 (relating to hearing authority); 6 Pa. Code § 22.95 (relating to formal appeals and hearings); 7 Pa. Code § 179.59 (relating to presiding officers); 7 Pa. Code § 179.96 (relating to conduct of hearing); 10 Pa. Code § 3.11 (relating to hearing rules); 12 Pa. Code § 11.14 (relating to presiding officer); 22 Pa. Code § 121.9 (relating to administrative loan collection review procedures); 22 Pa. Code § 121.10 (relating to administrative wage garnishment procedures for Federal loans); 25 Pa. Code § 1021.107 (relating to authority delegated to hearing examiners); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 71.25 (relating to hearing procedures); 34 Pa. Code § 95.91 (relating to hearings); 34 Pa. Code § 131.202 (relating to first hearing information and stay); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 34 Pa. Code § 401.14 (relating to decertification or refusal to certify); 37 Pa. Code § 79.83 (relating to appointment of hearing examiner); 37 Pa. Code § 123.8 (relating to presiding officer); 37 Pa. Code § 197.37 (relating to objections to the record); 37 Pa. Code § 203.103 (relating to hearing procedures); 49 Pa. Code § 16.53 (relating to powers and duties of hearing examiners); 51 Pa. Code § 21.24 (relating to hearing officer); 52 Pa. Code § 5.483 (relating to authority of presiding officers); 52 Pa. Code § 1003.73 (relating to Adjudication Department); 52 Pa. Code § 1005.184

(relating to authority of presiding officer); 58 Pa. Code § 145.12 (relating to hearing authority); 58 Pa. Code § 491a.7 (relating to presiding officers); and 61 Pa. Code § 703.34 (relating to hearing procedure).

§ 35.188. Restrictions on duties and activities.

(a) Presiding officers may perform no duties inconsistent with their duties and responsibilities as such.

(b) Save to the extent required for the disposition of ex parte matters as authorized by law and by the regulations of the agency, no presiding officer shall, in a proceeding which the agency head has directed be conducted under this subsection, consult a person or party on a fact in issue unless upon notice and opportunity for participants to participate.

Cross References

This section cited in 4 Pa. Code § 89.22 (relating to hearing examiner); 7 Pa. Code § 179.59 (relating to presiding officers); 7 Pa. Code § 179.96 (relating to conduct of hearing); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 131.59 (relating to mediation); 34 Pa. Code § 131.59a (relating to voluntary mediation); 34 Pa. Code § 131.59b (relating to mandatory mediation); 34 Pa. Code § 131.202 (relating to first hearing information and stay); 34 Pa. Code § 131.204 (relating to UEGF subpoenas and interrogatories); 34 Pa. Code § 401.14 (relating to decertification or refusal to certify); 37 Pa. Code § 203.103 (relating to hearing procedures); 52 Pa. Code § 5.484 (relating to restrictions on duties and activities); 52 Pa. Code § 1005.185 (relating to restrictions on duties and activities); 58 Pa. Code § 491a.7 (relating to presiding officers); and 61 Pa. Code § 703.34 (relating to hearing procedure).

§ 35.189. Manner of conduct of hearings.

It is the duty of the presiding officer to conduct a fair and impartial hearing and to maintain order. Any disregard by participants or counsel of rulings of the presiding officer on matters of order and procedure shall be noted on the record, and if he deems it necessary, shall be made the subject of a special written report to the agency head. In the event that participants or counsel should be guilty of disrespectful, disorderly or contumacious language or conduct in connection with any hearing, the presiding officer immediately may submit to the agency head his report thereon, together with his recommendations, and in his discretion suspend the hearing.

Cross References

This section cited in 4 Pa. Code § 607a.15 (relating to form of hearings); 7 Pa. Code § 179.59 (relating to presiding officers); 7 Pa. Code § 179.96 (relating to conduct of hearing); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 81.83 (relating to conduct of hearings); 34 Pa. Code § 401.14 (relating to decertification or refusal to certify); 37 Pa. Code § 203.103 (relating to hearing procedures); 52 Pa. Code § 5.485 (relating to manner of conduct of hearings); 52 Pa. Code § 1005.186 (relating to manner of conduct of hearings); 58 Pa. Code § 491a.7 (relating to presiding officers); and 61 Pa. Code § 703.34 (relating to hearing procedure).

§ 35.190. Appeals to agency head from rulings of presiding officers.

(a) *During hearing or conference.* Rulings of presiding officers may not be appealed from during the course of hearings or conferences except in extraordinary circumstances where prompt decision by the agency head is necessary to prevent detriment to the public interest. In such instance the matter shall be referred forthwith by the presiding officer to the agency head for determination.

(b) *Offers of proof.* An offer of proof made in connection with an objection taken to a ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by testimony; and if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of the evidence shall be marked for identification and shall constitute the offer of proof.

(c) *Action by agency head.* Unless the agency head acts upon a question referred by a presiding officer to the agency head for determination or upon an appeal taken to the agency head from a ruling of a presiding officer within 30 days after referral or filing of the appeal, whichever is later, such referral or appeal shall be deemed to have been denied. The participants in the proceeding shall be given appropriate notice of the date of the referral or appeal, by the presiding officer or the appellant, as the case may be.

Notes of Decisions

Regulation Inapplicable

Convicted voluntary murderer and former doctor in Massachusetts incorrectly maintained that the Commonwealth's appeal from the hearing examiner's decision was deemed denied because the appeal was not acted upon within 30 days by the State Board of Medicine. The Board delegated the application to a hearing examiner for hearing and decision. The procedure provides that an application for review may be made to the Board within 20 days of the date of a hearing examiner's decision and that the Board may hear arguments and additional evidence if deemed advisable. There is, however, no time limitation on the issuance of a determination by an agency on appeal; nor is there a "deemed denial" period in the applicable statutes. Therefore, reliance on this regulation lent no support to applicant's position. *Barran v. State Board of Medicine*, 670 A.2d 765 (Pa. Cmwlth. 1996); appeal denied 679 A.2d 320 (Pa. 1996).

Cross References

This section cited in 1 Pa. Code § 35.162 (relating to reception and ruling on evidence); 4 Pa. Code § 607a.21 (relating to exceptions); 7 Pa. Code § 179.59 (relating to presiding officers); 7 Pa. Code § 179.96 (relating to conduct of hearing); 12 Pa. Code § 11.14 (relating to presiding officer); 22 Pa. Code § 351.1 (relating to purpose and scope); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 111.21 (relating to content and form); 34 Pa. Code § 111.24 (relating to disposition of request for supersedeas); 34 Pa. Code § 125.6 (relating to decision on application); 34 Pa. Code § 131.24 (relating to recusal of judge); 34 Pa. Code § 131.41 (relating to request for supersedeas or reconsideration of supersedeas); 34 Pa. Code § 131.43 (relating to disposition of request for supersedeas); 34 Pa. Code § 131.49 (relating to disposition of automatic request for special supersedeas under section 413(a.1) of the act (77 P. S. § 774(1))); 34 Pa. Code § 131.50a (relating to employee request for special supersedeas under sections 413(c) and (d) of the act); 34 Pa. Code § 131.111 (relating to decisions of judges); 34 Pa. Code § 131.112 (relating to correction or amendment of decision); 34 Pa. Code § 401.14 (relating to decertification or refusal to certify); 37 Pa. Code § 203.103 (relating to hearing procedures); 40 Pa. Code § 17.9 (relating to briefs); 52 Pa. Code § 5.301 (relating to interlocutory review generally); 52 Pa. Code § 5.414 (relating to offers of proof); 52 Pa. Code § 1005.131 (relating to interlocutory review generally); 52 Pa. Code § 1005.153 (relating to offers of proof); 58 Pa. Code § 491a.7 (relating to presiding officers); 61 Pa. Code § 703.34 (relating to hearing procedure) and 61 Pa. Code § 703.45 (relating to appeal rights).

Subchapter F. BRIEFS

Sec.

- 35.191. Proceedings in which briefs are to be filed.
- 35.192. Content and form of briefs.
- 35.193. Filing and service of briefs.

Cross References

This subchapter cited in 4 Pa. Code § 607a.19 (relating to post-hearing brief); 31 Pa. Code § 111.16 (relating to briefs: content and form and time for filing); and 104 Pa. Code § 7.16 (relating to RTKL appeals).

§ 35.191. Proceedings in which briefs are to be filed.

Unless waived by the participants with the consent of the presiding officer, whether oral argument is heard or not, at the close of the taking of testimony in each proceeding, the presiding officer shall fix the time for the filing and service of briefs, giving due regard to the nature of the proceeding, the magnitude of the record and the complexity or importance of the issues involved; and he shall fix the order in which the briefs shall be filed. The first or initial brief shall be filed by the participant or participants upon whom rests the burden of proof, except that the presiding officer, when in his judgment the circumstances or exigencies require, may direct that briefs shall be filed simultaneously. In no proceeding, whether briefs are to be filed simultaneously or otherwise, shall a participant upon whom rests the burden of proof be denied the right to file a reply brief.

Cross References

This section cited in 4 Pa. Code § 89.32 (relating to briefs and oral argument); 7 Pa. Code § 131.34 (relating to briefs, suggested findings); 7 Pa. Code § 179.66 (relating to briefs and oral argument); 10 Pa. Code § 3.13 (relating to briefs); 22 Pa. Code § 201.10 (relating to briefs); 25 Pa. Code § 1021.131 (relating to posthearing briefs); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 131.101 (relating to briefs, findings of fact and close of record); 37 Pa. Code § 21.56 (relating to briefs); 51 Pa. Code § 21.27 (relating to briefs); 52 Pa. Code § 5.502 (relating to filing and service of briefs); 52 Pa. Code § 1005.192 (relating to filing and service of briefs); 55 Pa. Code § 41.181 (relating to posthearing briefs); 58 Pa. Code § 51.27 (relating to hearings); 58 Pa. Code § 51.107 (relating to hearings); and 61 Pa. Code § 703.5 (relating to other submissions).

§ 35.192. Content and form of briefs.

- (a) Briefs shall contain the following:
 - (1) A concise statement of the case.
 - (2) An abstract of the evidence relied upon by the participant filing, preferably assembled by subjects, with references to the pages of the record or exhibits where the evidence appears.
 - (3) Proposed findings and conclusions and, if desired, a proposed form of order or regulation, together with the reasons and authorities therefor, separately stated.

(b) Exhibits should not be reproduced in the brief, but may, if desired, be reproduced in an appendix to the brief. An analysis of exhibits relied on should be included in the part of the brief containing the abstract of evidence under the subjects to which they pertain. Every brief of more than 20 pages shall contain on its front leaves a subject index, with page references and a list of cases cited, alphabetically arranged, with references to the pages where the citations appear. Briefs shall be as concise as possible.

Cross References

This section cited in 4 Pa. Code § 89.32 (relating to briefs and oral argument); 7 Pa. Code § 131.34 (relating to briefs, suggested findings); 7 Pa. Code § 179.66 (relating to briefs and oral argument); 10 Pa. Code § 3.13 (relating to briefs); 22 Pa. Code § 201.10 (relating to briefs); 25 Pa. Code § 1021.131 (relating to posthearing briefs); 34 Pa. Code § 131.101 (relating to briefs, findings of fact and close of record); 49 Pa. Code § 19.38 (relating to posthearing briefs); 52 Pa. Code § 5.501 (relating to content and form of briefs); 52 Pa. Code § 1005.191 (relating to content and form of briefs); 55 Pa. Code § 41.181 (relating to posthearing briefs); 58 Pa. Code § 51.27 (relating to hearings); 58 Pa. Code § 51.107 (relating to hearings); and 61 Pa. Code § 703.5 (relating to other submissions).

§ 35.193. Filing and service of briefs.

Briefs not filed and served on or before the dates fixed therefore may not be accepted for filing, except by special permission of the agency head or the presiding officer. Except where filing of a different number is permitted or directed by the agency head or presiding officer, 5 copies of each brief shall be furnished for the use of the agency.

Cross References

This section cited in 1 Pa. Code § 33.15 (relating to number of copies); 4 Pa. Code § 89.32 (relating to briefs and oral argument); 4 Pa. Code § 110.3 (relating to briefs); 7 Pa. Code § 131.34 (relating to briefs, suggested findings); 10 Pa. Code § 3.13 (relating to briefs); 25 Pa. Code § 1021.131 (relating to posthearing briefs); 34 Pa. Code § 131.101 (relating to briefs, findings of fact and close of record); 34 Pa. Code § 213.5 (relating to briefs); 40 Pa. Code § 17.9 (relating to briefs); 52 Pa. Code § 5.502 (relating to filing and service of briefs); 52 Pa. Code § 1005.192 (relating to filing and service of briefs); 55 Pa. Code § 41.181 (relating to posthearing briefs); 58 Pa. Code § 51.27 (relating to hearings); 58 Pa. Code § 51.107 (relating to hearings); and 61 Pa. Code § 703.5 (relating to other submissions).

Subchapter G. PROPOSED REPORTS

PROPOSED REPORTS GENERALLY

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| Sec. | |
| 35.201. | Certification of record without proposed report. |
| 35.202. | Proceedings in which proposed reports are prepared. |
| 35.203. | Unavailability of presiding officer. |
| 35.204. | Oral argument before presiding officer. |
| 35.205. | Contents of proposed reports. |
| 35.206. | Proposed report a part of the record. |
| 35.207. | Service of proposed reports. |

EXCEPTIONS TO PROPOSED REPORTS

- 35.211. Procedure to except to proposed report.
- 35.212. Content and form of briefs on exceptions.
- 35.213. Effect of failure to except to proposed report.
- 35.214. Oral argument on exceptions.

Cross References

This subchapter cited in 25 Pa. Code § 973.7 (relating to fee dispute procedure); 34 Pa. Code § 125.6 (relating to decision on application); 43 Pa. Code § 5.7 (relating to reconsideration and appeals); 43 Pa. Code § 5.20 (relating to reconsideration and appeals); 43 Pa. Code § 5.27 (relating to reconsideration and appeals); 43 Pa. Code § 5.46 (relating to appeals); and 43 Pa. Code § 7.10 (relating to appeals).

PROPOSED REPORTS GENERALLY

§ 35.201. Certification of record without proposed report.

In proceedings in which the agency head has not presided at the reception of evidence, except as otherwise provided in this part, the presiding officer, as soon as practicable after the conclusion of the hearing and expiration of the time for filing of briefs, shall certify and file with the office of the agency, for the consideration of the agency head, a copy of the record of the hearing, and the briefs, if any, filed in the proceeding. When certifying the record to the agency head under this section the presiding officer may not include a proposed report concerning action to be taken by the agency on the matters in issue in the proceeding.

Cross References

This section cited in 4 Pa. Code § 39.12 (relating to criminal cases); 4 Pa. Code § 39.13 (relating to civil cases); 4 Pa. Code § 265.2 (relating to level I review); 4 Pa. Code § 265.3 (relating to level II hearings); 4 Pa. Code § 265.4 (relating to appeals—level III); 4 Pa. Code § 607a.20 (relating to proposed decision and order); 6 Pa. Code § 22.95 (relating to formal appeals and hearings); 12 Pa. Code § 11.15 (relating to final orders); 22 Pa. Code § 351.1 (relating to purpose and scope); 28 Pa. Code § 301.7 (relating to fair hearing); 28 Pa. Code § 1111.10 (relating to hearing examiner decisions); 28 Pa. Code § 1113.3 (relating to adjudication and order); 31 Pa. Code § 56.1 (relating to applicability of general rules); 31 Pa. Code § 56.2 (relating to adjudication procedure); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 81.83 (relating to conduct of hearings); 34 Pa. Code § 111.18 (relating to decisions of the Board); 34 Pa. Code § 121.27 (relating to show cause); 34 Pa. Code § 125.6 (relating to decision on application); 34 Pa. Code § 131.60 (relating to resolution hearings); 34 Pa. Code § 131.111 (relating to decisions of judges); 34 Pa. Code § 401.14 (relating to decertification or refusal to certify); 34 Pa. Code § 501.8 (relating to hearings/appeals); 37 Pa. Code § 21.61 (relating to hearing examiner's recommendation); 52 Pa. Code § 5.531 (relating to certification of record without decision); 52 Pa. Code § 1005.202 (relating to certification of record without decision); 55 Pa. Code § 41.191 (relating to determinations and recommendations by the Bureau); 58 Pa. Code § 494a.4 (relating to report or recommendation of the presiding officer); 61 Pa. Code § 703.5 (relating to other submissions); 61 Pa. Code § 703.34 (relating to hearing procedure); and 67 Pa. Code § 491.11 (relating to proposed report).

§ 35.202. Proceedings in which proposed reports are prepared.

In proceedings in which prior to the conclusion of the hearing, the agency head, with notice to the parties, directs (in specific cases or by regulation) the presiding

officer to prepare a proposed report, the presiding officer shall retain the record, hold oral argument as he deems necessary under § 35.204 (relating to oral argument before presiding officer), review the record in light of the applicable law, and prepare, certify and file with the office of the agency:

- (1) A proposed report.
- (2) A copy of the record of the hearing.
- (3) The briefs, if any, filed in the proceeding.

Cross References

This section cited in 1 Pa. Code § 35.187 (relating to authority delegated to presiding officers); 1 Pa. Code § 35.204 (relating to oral argument before presiding officer); 1 Pa. Code § 35.226 (relating to final orders); 4 Pa. Code § 265.2 (relating to level I review); 4 Pa. Code § 265.3 (relating to level II hearings); 4 Pa. Code § 265.4 (relating to appeals—level III); 4 Pa. Code § 607a.20 (relating to proposed decision and order); 12 Pa. Code § 11.15 (relating to final orders); 22 Pa. Code § 121.8 (relating to applicant and recipient appeals and hearings); 22 Pa. Code § 121.34 (relating to institutional appeals and hearings); 22 Pa. Code § 201.4a (adjudicatory benefit appeal and request for administrative hearing); 22 Pa. Code § 201.11 (relating to proposed opinion and recommendation); 22 Pa. Code § 351.1 (relating to purpose and scope); 28 Pa. Code § 301.7 (relating to fair hearing); 28 Pa. Code § 1113.3 (relating to adjudication and order); 31 Pa. Code § 56.1 (relating to applicability of general rules); 31 Pa. Code § 56.2 (relating to adjudication procedure); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 81.83 (relating to conduct of hearings); 34 Pa. Code § 95.91 (relating to hearings); 34 Pa. Code § 111.18 (relating to decisions of the Board); 34 Pa. Code § 131.60 (relating to resolution hearings); 34 Pa. Code § 131.111 (relating to decisions of judges); 34 Pa. Code § 401.14 (relating to decertification or refusal to certify); 34 Pa. Code § 501.8 (relating to hearings/appeals); 37 Pa. Code § 21.61 (relating to hearing examiner's recommendation); 37 Pa. Code § 197.51 (relating to decision of the Hearing Board); 37 Pa. Code § 197.71 (relating to decision of the Hearing Board); 37 Pa. Code § 197.93 (relating to decision of the Hearing Board); 37 Pa. Code § 407.34 (relating to posthearing actions); 52 Pa. Code § 5.531 (relating to certification of record without decision); 52 Pa. Code § 1005.202 (relating to certification of record without decision); 55 Pa. Code § 41.191 (relating to determinations and recommendations by the Bureau); 58 Pa. Code § 51.45 (relating to procedures); 58 Pa. Code § 494a.4 (relating to report or recommendation of the presiding officer); 61 Pa. Code § 703.5 (relating to other submissions); and 67 Pa. Code § 491.11 (relating to proposed report).

§ 35.203. Unavailability of presiding officer.

If a presiding officer becomes unavailable to the agency, the agency head will either designate another qualified officer to prepare a proposed report or will cause the record to be certified to it for decision, as may be deemed appropriate, giving notice to the parties.

Notes of Decisions

Application

This regulation does not apply to proceedings in the Insurance Department. *Kramer v. Insurance Department*, 654 A.2d 203 (Pa. Cmwlth. 1995).

Compliance

If the hearing officer who denied an application for an insurance agent's license leaves the Insurance Department after the initial hearing but before the matter is reviewed by the Insurance Commissioner and this section is not complied with, the matter will be remanded to the Department for a new hearing. *Insurance Department v. MacFarland*, 366 A.2d 957 (Pa. Cmwlth. 1976).

Cross References

This section cited in 4 Pa. Code § 607a.20 (relating to proposed decision and order); 12 Pa. Code § 11.14 (relating to presiding officer); 22 Pa. Code § 351.1 (relating to purpose and scope); 28 Pa. Code § 301.7 (relating to fair hearing); 31 Pa. Code § 56.1 (relating to applicability of general rules); 31 Pa. Code § 56.2 (relating to adjudication procedure); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 111.18 (relating to decisions of the Board); 34 Pa. Code § 131.60 (relating to resolution hearings); 34 Pa. Code § 131.111 (relating to decisions of judges); 34 Pa. Code § 401.14 (relating to decertification or refusal to certify); 34 Pa. Code § 501.8 (relating to hearings/appeals); 37 Pa. Code § 21.61 (relating to hearing examiner's recommendation); 52 Pa. Code § 5.486 (relating to unavailability of presiding officer); 52 Pa. Code § 5.531 (relating to certification of record without decision); 52 Pa. Code § 1005.187 (relating to unavailability of presiding officer); 52 Pa. Code § 1005.202 (relating to certification of record without decision); 55 Pa. Code § 41.191 (relating to determinations and recommendations by the Bureau); 58 Pa. Code § 494a.4 (relating to report or recommendation of the presiding officer); 61 Pa. Code § 703.5 (relating to other submissions); and 67 Pa. Code § 491.11 (relating to proposed report).

§ 35.204. Oral argument before presiding officer.

(a) If, in the opinion of the presiding officer in a proceeding subject to § 35.202 (relating to proceedings in which proposed reports are prepared), time permits and the nature of the proceedings, the complexity or importance of the issues of fact or law involved, and the public interest warrant, the presiding officer may, either of his own motion or at the request of a party or staff counsel at or before the close of the taking of testimony, allow and fix a time for the presentation of oral argument, imposing the limits of time on the argument as he deems appropriate. Such argument shall be transcribed and bound with the transcript of testimony.

(b) In oral argument there may be presented proposed findings and conclusions and, if desired, the reasons therefor, and the proposed forms of order or regulation as may be deemed requisite in view of the facts, the law, and the public interest.

Cross References

This section cited in 1 Pa. Code § 35.202 (relating to proceedings in which proposed reports are prepared); 4 Pa. Code § 607a.20 (relating to proposed decision and order); 12 Pa. Code § 11.14 (relating to presiding officer); 22 Pa. Code § 351.1 (relating to purpose and scope); 25 Pa. Code § 1021.132 (relating to oral argument after hearing); 31 Pa. Code § 56.1 (relating to applicability of general rules); 31 Pa. Code § 56.2 (relating to adjudication procedure); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 111.17 (relating to oral argument); 34 Pa. Code § 111.18 (relating to decisions of the Board); 34 Pa. Code § 131.60 (relating to resolution hearings); 34 Pa. Code § 131.102 (relating to oral argument); 34 Pa. Code § 131.111 (relating to decisions of judges); 34 Pa. Code § 401.14 (relating to decertification or refusal to certify); 34 Pa. Code § 501.8 (relating to hearings/appeals); 37 Pa. Code § 21.61 (relating to hearing examiner's recommendation); 52 Pa. Code § 5.531 (relating to certification of record without decision); 52 Pa. Code § 5.532 (relating to oral argument before presiding officer); 52 Pa. Code § 1005.202 (relating to certification of record without decision); 52 Pa. Code § 1005.204 (relating to briefs and oral argument before presiding officer); 55 Pa. Code § 41.191 (relating to determinations and recommendations by the Bureau); 58 Pa. Code § 51.27 (relating to hearings); 58 Pa. Code § 51.107 (relating to hearings); 58 Pa. Code § 494a.4 (relating to report or recommendation of the presiding officer); 61 Pa. Code § 703.5 (relating to other submissions); and 67 Pa. Code § 491.11 (relating to proposed report).

§ 35.205. Contents of proposed reports.

Proposed reports shall include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, and (2) the appropriate regulation, order, sanction, relief, or denial thereof. There shall be stated all facts officially noticed under § 35.173 (relating to official notice of facts), relied upon in the decision.

Notes of Decisions

Where a Medicare provider hearing is conducted by a hearing attorney designated by the Secretary of the Department of Public Welfare, the finder of fact is the Director of the Office of Hearings and Appeals, not the hearing attorney; to the extent inconsistent, the decisions in *Klingerman Nursing Center, Inc. v. Department of Public Welfare*, 458 A.2d 653 (Pa. Cmwlth. 1983) and *Temple University v. Department of Public Welfare*, 480 A.2d 1267 (Pa. Cmwlth. 1984) are specifically overruled. *Northwestern Institute of Psychiatry v. Department of Public Welfare*, 513 A.2d 495 (Pa. Cmwlth. 1986).

If the proposed report contains no recommended resolution to the matter, but only orders additional hearings, the Commission may properly return the matter to the administrative law judge with the direction to conduct further hearings, if necessary, or to resolve the issues and to present them to the Commission for its final determination. *Hillman Coal and Coke Co. v. Pennsylvania Public Utility Commission*, 433 A.2d 634 (Pa. Cmwlth. 1981).

Cross References

This section cited in 4 Pa. Code § 265.2 (relating to level I review); 4 Pa. Code § 607a.20 (relating to proposed decision and order); 12 Pa. Code § 11.14 (relating to presiding officer); 22 Pa. Code § 121.9 (relating to administrative loan collection review procedures); 22 Pa. Code § 121.10 (relating to administrative wage garnishment procedures for Federal loans); 22 Pa. Code § 201.4a (relating to adjudicatory benefit appeal and request for administrative hearing); 22 Pa. Code § 201.11 (relating to proposed opinion and recommendation); 22 Pa. Code § 351.1 (relating to purpose and scope); 28 Pa. Code § 1113.3 (relating to adjudication and order); 31 Pa. Code § 56.1 (relating to applicability of general rules); 31 Pa. Code § 56.2 (relating to adjudication procedure); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 111.18 (relating to decisions of the Board); 34 Pa. Code § 131.60 (relating to resolution hearings); 34 Pa. Code § 131.111 (relating to decisions of judges); 34 Pa. Code § 401.14 (relating to decertification or refusal to certify); 34 Pa. Code § 501.8 (relating to hearings/appeals); 37 Pa. Code § 21.61 (relating to hearing examiner's recommendation); 49 Pa. Code § 37.83 (relating to hearing examiners); 52 Pa. Code § 5.531 (relating to certification of record without decision); 52 Pa. Code § 1005.202 (relating to certification of record without decision); 55 Pa. Code § 41.191 (relating to determinations and recommendations by the Bureau); 58 Pa. Code § 51.28 (relating to report of the presiding officer); 58 Pa. Code § 51.108 (relating to report of the presiding officer); 58 Pa. Code § 494a.4 (relating to report or recommendation of the presiding officer); 61 Pa. Code § 703.5 (relating to other submissions); and 67 Pa. Code § 491.11 (relating to proposed report).

§ 35.206. Proposed report a part of the record.

Proposed reports shall become a part of the record.

Cross References

This section cited in 4 Pa. Code § 607a.20 (relating to proposed decision and order); 12 Pa. Code § 11.14 (relating to presiding officer); 22 Pa. Code § 351.1 (relating to purpose and scope); 31 Pa. Code § 56.1 (relating to applicability of general rules); 31 Pa. Code § 56.2 (relating to adjudica-

tion procedure); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 111.18 (relating to decisions of the Board); 34 Pa. Code § 131.60 (relating to resolution hearings); 34 Pa. Code § 131.111 (relating to decisions of judges); 34 Pa. Code § 401.14 (relating to decertification or refusal to certify); 34 Pa. Code § 501.8 (relating to hearings/appeals); 37 Pa. Code § 21.61 (relating to hearing examiner's recommendation); 52 Pa. Code § 5.531 (relating to certification of record without decision); 52 Pa. Code § 1005.202 (relating to certification of record without decision); 55 Pa. Code § 41.191 (relating to determinations and recommendations by the Bureau); 58 Pa. Code § 494a.4 (relating to report or recommendation of the presiding officer); 61 Pa. Code § 703.5 (relating to other submissions); and 67 Pa. Code § 491.11 (relating to proposed report).

§ 35.207. Service of proposed reports.

Proposed reports shall be filed with the office of the agency, which shall serve copies thereof upon all parties and staff counsel, whose appearances have been entered under § 31.24 (relating to notice of appearance).

Notes of Decisions

A claimant who is not provided with a report of an examiner who rules in favor of the claimant is not harmed by the omission so as to require reversal or remand of a Board decision reversing the examiner. *Luckhardt v. State Employees Retirement Board*, 459 A.2d 1347 (Pa. Cmwlth. 1983).

Cross References

This section cited in 4 Pa. Code § 265.2 (relating to level I review); 4 Pa. Code § 265.4 (relating to appeals—level III); 4 Pa. Code § 607a.20 (relating to proposed decision and order); 12 Pa. Code § 11.14 (relating to presiding officer); 22 Pa. Code § 121.9 (relating to administrative loan collection review procedures); 22 Pa. Code § 121.10 (relating to administrative wage garnishment procedures for Federal loans); 22 Pa. Code § 201.11 (relating to proposed opinion and recommendation); 22 Pa. Code § 351.1 (relating to purpose and scope); 31 Pa. Code § 56.1 (relating to applicability of general rules); 31 Pa. Code § 56.2 (relating to adjudication procedure); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 111.18 (relating to decisions of the Board); 34 Pa. Code § 131.60 (relating to resolution hearings); 34 Pa. Code § 131.111 (relating to decisions of judges); 34 Pa. Code § 401.14 (relating to decertification or refusal to certify); 34 Pa. Code § 501.8 (relating to hearings/appeals); 37 Pa. Code § 21.61 (relating to hearing examiner's recommendation); 52 Pa. Code § 5.531 (relating to certification of record without decision); 52 Pa. Code § 1005.202 (relating to certification of record without decision); 55 Pa. Code § 41.191 (relating to determinations and recommendations by the Bureau); 61 Pa. Code § 703.5 (relating to other submissions); and 67 Pa. Code § 491.11 (relating to proposed report).

EXCEPTIONS TO PROPOSED REPORTS

§ 35.211. Procedure to except to proposed report.

A participant desiring to appeal to the agency head shall, within 30 days after the service of a copy of a proposed report or such other time as may be fixed by the agency head, file exceptions to the proposed report or part thereof in a brief (designated “brief on exceptions”). “Briefs opposing exceptions” may be filed in response to briefs on exceptions within 20 days after the time limited for the filing of briefs on exceptions or such other time as may be fixed by the agency head. No further response will be entertained unless the agency head, with or without motion, so orders.

Notes of Decisions*Waiver*

After the Secretary of an agency circulated a copy of the Proposed Report and Recommended Order and advised counsel for the agency that exceptions could be filed within 30 days, and after no exceptions were filed, such inaction constituted a waiver of objections to the Proposed Report and the Proposed Report was deemed a final order by operation of law. *Earth Share v. Office of Administration*, 660 A.2d 138 (Pa. Cmwlth. 1995).

Brief on exceptions, although delivered to counsel for Department of Transportation within 30 days, was not filed with the administrative docket clerk until 31 days after the hearing examiner's proposed report was mailed, therefore, applicant's exceptions were irrevocably waived. *J. B. Steven, Inc. v. Department of Transportation*, 627 A.2d 278 (Pa. Cmwlth. 1993).

Cross References

This section cited in 1 Pa. Code § 35.213 (relating to effect of failure to except to proposed report); 1 Pa. Code § 35.226 (relating to final orders); 4 Pa. Code § 265.3 (relating to level II hearings); 4 Pa. Code § 265.4 (relating to appeals—level III); 4 Pa. Code § 607a.21 (relating to exceptions); 6 Pa. Code § 22.95 (relating to formal appeals and hearings); 7 Pa. Code § 179.66 (relating to briefs and oral argument); 12 Pa. Code § 11.15 (relating to final orders); 22 Pa. Code § 121.9 (relating to administrative loan collection review procedures); 22 Pa. Code § 121.10 (relating to administrative wage garnishment procedures for Federal loans); 22 Pa. Code § 351.1 (relating to purpose and scope); 28 Pa. Code § 301.7 (relating to fair hearing); 31 Pa. Code § 56.1 (relating to applicability of general rules); 31 Pa. Code § 56.2 (relating to adjudication procedure); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 95.98 (relating to decisions of the Board); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 125.6 (relating to decision on application); 34 Pa. Code 131.112 (relating to correction or amendment of decision); 34 Pa. Code § 401.14 (relating to decertification or refusal to certify); 34 Pa. Code § 501.8 (relating to hearings/appeals); 43 Pa. Code § 7.12 (relating to discipline and discharge); 52 Pa. Code § 5.533 (relating to procedure to except to initial, tentative and recommended decisions); 52 Pa. Code § 5.535 (relating to replies); 52 Pa. Code § 1005.211 (relating to exceptions to recommended decisions); 52 Pa. Code § 1005.212 (relating to replies); 55 Pa. Code § 41.191 (relating to determinations and recommendations by the Bureau); 58 Pa. Code § 51.28 (relating to report of the presiding officer); 58 Pa. Code § 51.108 (relating to report of the presiding officer); 58 Pa. Code § 494a.7 (relating to exceptions); 61 Pa. Code § 703.5 (relating to other submissions); and 67 Pa. Code § 491.12 (relating to exceptions).

§ 35.212. Content and form of briefs on exceptions.**(a) Briefs on exceptions.****(1) Briefs on exceptions shall contain:**

- (i) A short statement of the case.
- (ii) A summary of the basic position of the party filing.
- (iii) The grounds upon which the exceptions rest.
- (iv) The argument in support with appropriate references to the record and legal authorities.

(2) There may also be included specific findings and conclusions proposed in lieu of those to which exception is taken and any proposed additional findings and conclusions.

(3) Exceptions to the form of order or regulation shall specify the portions thereof to which exception is taken, and may set forth a form of order or regulation suggested in lieu of that served.

(b) *Briefs opposing exceptions.* Briefs opposing exceptions shall generally follow the same style prescribed for briefs on exceptions, but may omit a statement of the case if it was correctly stated in a brief on exceptions.

(c) *Length.* Briefs on exceptions and briefs opposing exceptions shall be self contained and limited to 50 pages in length, provided that for good cause the limitation on length may be altered or waived for either class of briefs upon application to and order of the agency head of at least 5 days before the time fixed for filing of the respective briefs.

(d) *Copies.* Five copies of each brief shall be filed with the office of the agency in addition to the copies served on the participants in the proceedings.

Cross References

This section cited in 1 Pa. Code § 33.15 (relating to number of copies); 4 Pa. Code § 607a.21 (relating to exceptions); 4 Pa. Code § 607a.22 (relating to brief opposing exceptions); 7 Pa. Code § 179.66 (relating to briefs and oral argument); 12 Pa. Code § 11.15 (relating to final orders); 22 Pa. Code § 201.11 (relating to proposed opinion and recommendation); 22 Pa. Code § 351.1 (relating to purpose and scope); 28 Pa. Code § 301.7 (relating to fair hearing); 31 Pa. Code § 56.1 (relating to applicability of general rules); 31 Pa. Code § 56.2 (relating to adjudication procedure); 34 Pa. Code § 95.98 (relating to decisions of the Board); 34 Pa. Code § 111.16 (relating to briefs: content and form and time for filing); 34 Pa. Code § 125.6 (relating to decision on application); 34 Pa. Code § 131.101 (relating to briefs, findings of fact and close of record); 34 Pa. Code § 131.112 (relating to correction or amendment of decision); 34 Pa. Code § 213.5 (relating to briefs); 49 Pa. Code § 37.101 (relating to exceptions to the hearing examiner's decision); 52 Pa. Code § 5.533 (relating to procedure to except to initial, tentative and recommended decisions); 52 Pa. Code § 1005.211 (relating to exceptions to recommended decisions); 55 Pa. Code § 41.191 (relating to determination and recommendations by the Bureau); 58 Pa. Code § 494a.7 (relating to exceptions); 61 Pa. Code § 703.5 (relating to other submissions); and 67 Pa. Code § 491.12 (relating to exceptions).

§ 35.213. Effect of failure to except to proposed report.

Failure to file a brief on exceptions within the time allowed under § 35.211 (relating to procedure to except to proposed report) shall constitute a waiver of all objections to the proposed report. Objections to any part of a proposed report which is not the subject of exceptions may not thereafter be raised before the agency head in oral argument, or in an application for agency rehearing or reconsideration, and shall be deemed to have been waived. The agency head may refuse to consider exceptions to a ruling admitting or excluding evidence unless there was an objection at the time the ruling was made or within any deferred time provided by the presiding officer.

Notes of Decisions

Exceptions Adequate

Exceptions to the Administrative Law Judge's recommended decision which allege mathematical errors in ratemaking acknowledged by all parties and harmful to one of them, are not too general and unspecific under this section and may be dismissed out of hand by the Commission. *T. W. Phillips Gas and Oil Co. v. Pennsylvania Public Utility Commission*, 474 A.2d 355 (Pa. Cmwlth. 1984).

Jurisdictional Issues

A party is not required to challenge the authority of an administrative law judge to grant summary judgment in exceptions to the initial decision because such an issue is jurisdictional and may be raised at any time. *Carol Lines, Inc. v. Pennsylvania Public Utility Commission*, 439 A.2d 838 (Pa. Cmwlth. 1981); appeal after remanded 480 A.2d 1324 (Pa. Cmwlth. 1984).

Waiver

The Commission ordered a review of the hearing officer's proposed order almost 5 months after the latest date to do so as provided by the Rules of Administrative Procedure. It would be improper to allow the Commission to arbitrarily initiate a review outside the applicable time limits. Therefore, the issues not raised by the staff's exceptions are deemed to be waived. *Kalin v. Securities Commission*, 805 A.2d 1258 (Pa. Cmwlth. 2002).

After the Secretary of an agency circulated a copy of the Proposed Report and Recommended Order and advised counsel for the agency that exceptions could be filed within 30 days, and after no exceptions were filed, such inaction constituted a waiver of objections to the Proposed Report and the Proposed Report was deemed a final order by operation of law. *Earth Share v. Office of Administration*, 660 A.2d 138 (Pa. Cmwlth. 1995).

Taxi company could not raise issue of improper muzzling in Petition for Review where it failed to answer complaint brought by visually handicapped person, offer evidence, cross-examine complainant at Administrative Law Judge hearing, raise issue of improper muzzling and failed to file exceptions to ALJ's order. *Metro Transportation Company v. Pennsylvania Public Utility Commission*, 525 A.2d 24 (Pa. Cmwlth. 1987).

Cross References

This section cited in 4 Pa. Code § 265.2 (relating to level I review); 4 Pa. Code § 265.4 (relating to appeals—level III); 4 Pa. Code § 607a.21 (relating to exceptions); 7 Pa. Code § 179.66 (relating to briefs and oral argument); 12 Pa. Code § 11.15 (relating to final orders); 22 Pa. Code § 351.1 (relating to purpose and scope); 28 Pa. Code § 301.7 (relating to fair hearing); 31 Pa. Code § 56.1 (relating to applicability of general rules); 31 Pa. Code § 56.2 (relating to adjudication procedure); 34 Pa. Code § 95.98 (relating to decisions of the Board); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 125.6 (relating to decision on application); 34 Pa. Code § 131.112 (relating to correction or amendment of decision); 37 Pa. Code § 203.103 (relating to hearing procedures); 43 Pa. Code § 7.12 (relating to discipline and discharge); 52 Pa. Code § 5.536 (relating to effect of failure to file exceptions); 52 Pa. Code § 1005.213 (relating to final orders and effect of failure to file exceptions); 55 Pa. Code § 41.191 (relating to determinations and recommendations by the Bureau); 58 Pa. Code § 494a.7 (relating to exceptions); 61 Pa. Code § 703.5 (relating to other submissions); and 67 Pa. Code § 491.12 (relating to exceptions).

§ 35.214. Oral argument on exceptions.

A party or staff counsel filing a brief on exceptions or brief opposing exceptions may by motion request an opportunity to present oral argument to the agency head on the proposed report. The motion shall be filed within the time limited for the filing of briefs opposing exceptions. If oral argument is ordered, it shall be limited, unless otherwise specified, to matters properly raised by the briefs.

Cross References

This section cited in 7 Pa. Code § 179.66 (relating to briefs and oral argument); 12 Pa. Code § 11.15 (relating to final orders); 22 Pa. Code § 121.9 (relating to administrative loan collection review procedures); 22 Pa. Code § 121.10 (relating to administrative wage garnishment procedures for Federal loans); 22 Pa. Code § 201.12 (relating to oral argument before the Board); 22 Pa. Code § 351.1 (relating to purpose and scope); 28 Pa. Code § 301.7 (relating to fair hearing); 31 Pa. Code § 56.1 (relating to applicability of general rules); 31 Pa. Code § 56.2 (relating to adjudication procedure); 34 Pa. Code § 95.98 (relating to decisions of the Board); 34 Pa. Code § 111.17 (relating to oral argument); 34 Pa. Code § 125.6 (relating to decision on application); 34 Pa. Code § 131.102 (relating to oral argument); 34 Pa. Code § 131.112 (relating to correction or amendment of decision); 52 Pa. Code § 5.538 (relating to oral argument before the Commission); 52 Pa. Code § 1005.214 (relating to oral argument before the Authority); 55 Pa. Code § 41.191 (relating to determinations and recommendations by the Bureau); 58 Pa. Code § 51.45 (relating to procedures); 58 Pa. Code § 494a.7 (relating to exceptions); 61 Pa. Code § 703.5 (relating to other submissions); and 67 Pa. Code § 491.12 (relating to exceptions).

Subchapter H. AGENCY ACTION**BRIEFS AND ARGUMENT IN ABSENCE OF
PROPOSED REPORT**

Sec.

35.221. Briefs and oral argument in absence of proposed report.

DECISIONS

35.225. Interlocutory orders.

35.226. Final orders.

Cross References

This section cited in 34 Pa. Code § 125.6 (relating to decision on application).

**BRIEFS AND ARGUMENT IN ABSENCE OF
PROPOSED REPORT****§ 35.221. Briefs and oral argument in absence of proposed report.**

In proceedings in which the agency head has not directed the preparation of a proposed report, a participant filing a brief may by motion request an opportunity to present oral argument to the agency head. The motion shall be filed within the time limited for the filing of reply briefs. If oral argument is ordered, it shall be limited, unless otherwise specified, to matters properly raised by the briefs.

Cross References

This section cited in 4 Pa. Code § 89.32 (relating to briefs and oral argument); 4 Pa. Code § 265.4 (relating to appeals—level III); 12 Pa. Code § 11.15 (relating to final orders); 22 Pa. Code § 351.1 (relating to purpose and scope); 28 Pa. Code § 301.7 (relating to fair hearing); 31 Pa. Code § 56.1 (relating to applicability of general rules); 31 Pa. Code § 56.2 (relating to adjudication procedure); 34 Pa. Code § 95.91 (relating to hearings); 34 Pa. Code § 111.16 (relating to briefs: content and form and time for filing); 34 Pa. Code § 111.17 (relating to oral argument); 34 Pa. Code § 121.27 (relating to orders to show cause); 34 Pa. Code § 125.6 (relating to decision on application); 34 Pa. Code

§ 131.101 (relating to briefs, findings of fact and close of record); 34 Pa. Code § 131.102 (relating to oral argument); 37 Pa. Code § 171.95 (relating to trial briefs); 52 Pa. Code § 5.538 (relating to oral argument before the Commission); 52 Pa. Code § 1005.214 (relating to oral argument before the Authority); 55 Pa. Code § 41.191 (relating to determinations and recommendations by the Bureau); and 61 Pa. Code § 703.5 (relating to other submissions).

DECISIONS

§ 35.225. Interlocutory orders.

(a) When the agency head has made an order which is not a final order, a participant may by motion request that the agency head find, and include the finding in the order by amendment, that 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 under 42 Pa.C.S. § 702 (relating to interlocutory order) may materially advance the ultimate termination of the matter. The motion shall be filed within 10 days after service of the order, and shall be subject to § 35.179 (relating to objections to motions). Unless the agency head acts within 30 days after the filing of the motion, the motion shall be deemed denied.

(b) Neither the filing of a motion under subsection (a), nor the adoption of an amended order containing the requested finding, shall stay a proceeding before the agency head or presiding officer unless otherwise ordered by the agency head or the Commonwealth Court.

Source

The provisions of this § 35.225 amended through May 20, 1977, 7 Pa.B. 1308. Immediately preceding text appears at serial page (19282).

Cross References

This section cited in 4 Pa. Code § 89.33 (relating to decisions); 12 Pa. Code § 11.15 (relating to final orders); 22 Pa. Code § 351.1 (relating to purpose and scope); 25 Pa. Code § 1021.153 (relating to amendment of interlocutory orders); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 111.21 (relating to content and form); 34 Pa. Code § 111.24 (relating to disposition of request for supersedeas); 34 Pa. Code § 131.24 (relating to recusal of judge); 34 Pa. Code § 131.41 (relating to request for supersedeas or reconsideration of supersedeas); 34 Pa. Code § 131.43 (relating to disposition of request for supersedeas); 34 Pa. Code § 131.49 (relating to disposition of automatic request for special supersedeas under section 413(a.1) of the act (77 P.S. § 774(1))); 34 Pa. Code § 131.53b (relating to bifurcation and motions for disposition of a petition); 34 Pa. Code § 131.56a (relating to withdrawal of appearance); 34 Pa. Code § 131.111 (relating to decisions of judges); 52 Pa. Code § 5.633 (relating to certification of interlocutory orders); 52 Pa. Code § 1005.243 (relating to certification of interlocutory orders); and 61 Pa. Code § 703.45 (relating to appeal rights).

§ 35.226. Final orders.

(a) Adjudications of an agency head shall be final orders, subject only to application for rehearing, if any, provided for by the statute under which the proceeding is initiated and conducted, except proposed regulations that may be issued in rulemaking. Final orders shall include:

- (1) Adjudications by the agency head in proceedings in which the agency head has presided at the reception of evidence.
 - (2) Adjudications by the agency head upon appeal of proposed reports by participants, by filing exceptions in the manner and time provided by § 35.211 (relating to procedure to except to proposed report), or upon review initiated by the agency head within 10 days next following the expiration of the time for filing exceptions under the section, or another time as the agency head may fix in specific cases.
 - (3) Proposed reports, upon the expiration of the time provided for an appeal to or review by the agency head without the appeal or review having been initiated.
 - (4) Adjudications by the agency head in proceeding in which a presiding officer has presided at the reception of evidence and which are not subject to § 35.202 (relating to proceedings in which proposed reports are prepared).
- (b) No application for rehearing, provided for by the statute under which a proceeding is initiated and conducted, will be entertained by the agency head until an adjudication is issued and becomes a final order under the provisions of this section.

Notes of Decisions

Lack of Specificity

The Commission ordered a review of the hearing officer's proposed order almost 5 months after the latest date to do so as provided by the Rules of Administrative Procedure. It would be improper to allow the Commission to arbitrarily initiate a review outside the applicable time limits. Therefore, the issues not raised by the staff's exceptions are deemed to be waived. *Kalin v. Securities Commission*, 805 A.2d 1258 (Pa. Cmwlth. 2002).

Waiver

After the Secretary of an agency circulated a copy of the Proposed Report and Recommended Order and advised counsel for the agency that exceptions could be filed within 30 days, and after no exceptions were filed, such inaction constituted a waiver of objections to the Proposed Report and the Proposed Report was deemed a final order by operation of law. *Earth Share v. Office of Administration*, 660 A.2d 138 (Pa. Cmwlth. 1995).

Cross References

This section cited in 1 Pa. Code § 31.13 (relating to issuance of agency orders); 4 Pa. Code § 89.33 (relating to decisions); 4 Pa. Code § 265.4 (relating to appeals—level III); 4 Pa. Code § 607a.20 (relating to proposed decision and order); 4 Pa. Code § 607a.24 (relating to final decision and order); 6 Pa. Code § 22.95 (relating to formal appeals and hearings); 6 Pa. Code § 30.23 (relating to procedure for redesignation); 7 Pa. Code § 179.70 (relating to Commission decisions); 12 Pa. Code § 11.15 (relating to final orders); 22 Pa. Code § 121.9 (relating to administrative loan collection review procedures); 22 Pa. Code § 121.10 (relating to administrative wage garnishment procedures for Federal loans); 22 Pa. Code § 201.11 (relating to proposed opinion and recommendation); 22 Pa. Code § 201.12 (relating to oral argument before the Board); 25 Pa. Code § 1021.134 (relating to adjudications); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 3a.9 (relating to suspension or revocation of Pennsylvania inspector commission); 34 Pa. Code § 111.18 (relating to decisions of the Board); 34 Pa. Code § 131.56a (relating to withdrawal of appearance); 34 Pa. Code § 131.60 (relating to resolution hearings); 34 Pa. Code § 131.111 (relating to decisions of judges);

34 Pa. Code § 401.14 (relating to decertification or refusal to certify); 34 Pa. Code § 501.8 (relating to hearings/appeals); 37 Pa. Code § 73.1 (relating to appeals and petitions for administrative review); 37 Pa. Code § 197.32 (relating to appealable decisions); 37 Pa. Code § 203.103 (relating to hearing procedures); 49 Pa. Code § 37.101 (relating to exceptions to the hearing examiner's decision); 52 Pa. Code § 5.536 (relating to effect of failure to file exceptions); 52 Pa. Code § 1005.213 (relating to final orders and effect of failure to file exceptions); 58 Pa. Code § 51.26 (relating to procedure in lieu of hearing); 58 Pa. Code § 51.106 (relating to procedure in lieu of hearing); and 61 Pa. Code § 703.45 (relating to appeal rights).

Subchapter I. REOPENING AND REHEARING

REOPENING OF RECORD

Sec.

- 35.231. Reopening on application of party.
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REHEARING OR RECONSIDERATION

- 35.241. Application for rehearing or reconsideration.

Cross References

This subchapter cited in 34 Pa. Code § 111.35 (relating to dispositions of petitions).

REOPENING OF RECORD

§ 35.231. Reopening on application of party.

(a) *Petition to reopen.* After the conclusion of a hearing in a proceeding or adjournment thereof sine die, a participant in the proceeding may file with the presiding officer, if before issuance by the presiding officer of a proposed report, otherwise with the agency head, a petition to reopen the proceeding for the purpose of taking additional evidence. The petition shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

(b) *Responses.* Within 10 days following the service of the petition, another participant may file with the presiding officer or the agency head, his answer thereto, and in default thereof shall be deemed to have waived an objection to the granting of the petition.

(c) *Action on petition.* As soon as practicable after the filing of responses to the petitions or default thereof, as the case may be, the presiding officer or agency head will grant or deny the petition.

Notes of Decisions*Application*

Section 21.122 of Title 25 of the *Pennsylvania Code* (relating to rehearing or reconsideration), has no application to a preadjudication petition but applies only to a request for relief after a decision. Therefore, this section applies. *Spang & Co. v. Department of Environmental Resources*, 592 A.2d 815 (Pa. Cmwlth. 1991); appeal denied 600 A.2d 543 (Pa. 1991).

Material Changes

The Board properly denied a widow's petition to reopen the record, where her petition alleging prejudice due to the change of hearing examiners, which change she learned of only 1 day before the hearing, did not amount to a material change of fact or of law. *Stevenson v. State Employees' Retirement Board*, 711 A.2d 533 (Pa. Cmwlth. 1998).

Board of Nurse Examiners acted properly in refusing to reopen the record for taking treating physician's testimony because the letter requesting reopening did not indicate any material changes of fact or law and the Board did not abuse its discretion in determining that the facts set forth in the request did not constitute grounds requiring reopening. *Rafferty v. State Board of Nurse Examiners*, 505 A.2d 357 (Pa. Cmwlth. 1986).

To serve as a basis to reopen the record, the material changes of fact must not have been discoverable prior to the conclusion of the hearing. *Shoemaker v. State Employees' Retirement Board*, 688 A.2d 751 (Pa. Cmwlth. 1997); appeal denied 698 A.2d 597 (Pa. 1997).

Board of Nurse Examiners acted properly in refusing to reopen the record for taking treating physician's testimony because the letter requesting reopening did not indicate any material changes of fact or law and the Board did not abuse its discretion in determining that the facts set forth in the request did not constitute grounds requiring reopening. *Rafferty v. State Board of Nurse Examiners*, 505 A.2d 357 (Pa. Cmwlth. 1986).

Petition Properly Denied

A petition to reopen a proceeding before the Civil Service Commission filed after hearing and before adjudication, permitted by 1 Pa. Code § 35.231 (relating to reopening on application of party) was not improperly denied where the stated purpose for the requested relief is to introduce no new evidence, but only to retry the matter with legal counsel who was absent from the original hearing. *Department of Justice v. Civil Service Commission*, 319 A.2d 692 (Pa. Cmwlth. 1974).

Review Appropriate

Alleged Industrial Board abuses with regard to enforcement of the Fire and Panic Act can be and should be challenged by resort to existing administrative procedures and judicial review. *In re Petition of Dwyer*, 406 A.2d 1355 (Pa. 1979).

Written Petition Inapplicable

As determined by the Environmental Hearing Board, the provisions of this regulation did not apply because these provisions expressly apply only after the conclusion of the hearings or an adjournment without further hearing dates set. In this case, the request for reopening of the record came prior to the conclusion of the hearing and prior to the company's presentation of evidence and, therefore, the written petition set forth in this regulation was inapplicable. *Al Hamilton Contracting Co. v. Department of Environmental Resources*, 659 A.2d 31 (Pa. Cmwlth. 1995).

Cross References

This section cited in 6 Pa. Code § 30.23 (relating to procedure for redesignation); 7 Pa. Code § 179.68 (relating to contents and close of the record); 7 Pa. Code § 179.71 (relating to reopening of record); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 111.15 (relating to no other

pleadings allowed); 34 Pa. Code § 131.101 (relating to briefs, findings of fact and close of record); 51 Pa. Code § 21.29 (relating to finality; reconsideration); 52 Pa. Code § 5.431 (relating to close of the record); 52 Pa. Code § 5.571 (relating to reopening prior to a final decision); 52 Pa. Code § 1005.171 (relating to close of the record); 52 Pa. Code § 1005.221 (relating to reopening prior to a final decision); 55 Pa. Code § 41.201 (relating to reopening of record prior to adjudication); 58 Pa. Code § 494a.6 (relating to reopening of record); and 61 Pa. Code § 703.41 (relating to request for reconsideration).

§ 35.232. Reopening by presiding officer.

Prior to the filing of his proposed report a presiding officer, after notice to the participants, may reopen the proceeding for the reception of further evidence on his own motion, if he has reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of the proceeding.

Notes of Decisions

If the proposed report contains no recommended resolution to the matter, but only orders additional hearings, the Commission may properly return the matter to the administrative law judge with the direction to conduct further hearings, if necessary, or to resolve the issues and to present them to the Commission for its final determination. *Hillman Coal and Coke Co. v. Pennsylvania Public Utility Commission*, 433 A.2d 634 (Pa. Cmwlth. 1981).

Cross References

This section cited in 4 Pa. Code § 89.33 (relating to decisions); 7 Pa. Code § 179.68 (relating to contents and close of the record); 7 Pa. Code § 179.71 (relating to reopening of record); 25 Pa. Code § 1021.133 (relating to reopening of record prior to adjudication); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 131.101 (relating to briefs, findings of fact and close of record); 51 Pa. Code § 21.29 (relating to finality; reconsideration); 52 Pa. Code § 5.431 (relating to close of the record); 52 Pa. Code § 5.571 (relating to reopening prior to a final decision); 52 Pa. Code § 1005.171 (relating to close of the record); 52 Pa. Code § 1005.221 (relating to reopening prior to a final decision); 55 Pa. Code § 41.201 (relating to reopening of record prior to adjudication); 58 Pa. Code § 494a.6 (relating to reopening of record); and 61 Pa. Code § 703.41 (relating to request for reconsideration).

§ 35.233. Reopening by agency action.

Prior to the issuance by the agency head of an adjudication in a proceeding the agency head, after notice to the participants, may without motion reopen the proceeding for the reception of further evidence, if the agency head has reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, the reopening of the proceeding.

Cross References

This section cited in 7 Pa. Code § 179.71 (relating to reopening of record); 25 Pa. Code § 1021.133 (relating to reopening of record prior to adjudication); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 131.101 (relating to briefs, findings of fact and close of record); 51 Pa. Code § 21.29 (relating to finality; reconsideration); 52 Pa. Code § 5.571 (relating to reopening prior to a final decision); 52 Pa. Code § 1005.221 (relating to reopening prior to a final decision); 58 Pa. Code § 494a.6 (relating to reopening of record); and 61 Pa. Code § 703.41 (relating to request for reconsideration).

REHEARING OR RECONSIDERATION**§ 35.241. Application for rehearing or reconsideration.**

(a) *Form, filing and service.* An application for rehearing or reconsideration may be filed by a party to a proceeding within 15 days, or another period as may be expressly provided by statute applicable to the proceeding, after the issuance of an adjudication or other final order by the agency. The application shall be made by petition, stating specifically the grounds relied upon.

(b) *Specification of errors.* The petitions for rehearing or reconsideration shall state concisely the alleged errors in the adjudication or other order of the agency. If an adjudication or other order of the agency is sought to be vacated, reversed or modified by reason of matters that have arisen since the hearing and decision or order, or by reason of a consequence that would result from compliance therewith, the matters relied upon by the petitioner shall be set forth in the petition.

(c) *Response.* No answers to petitions for rehearing or reconsideration will be entertained by the agency. If, and to the extent, however, that rehearing or reconsideration is granted by the agency head, a response in the nature of an answer may be filed by any participant within 15 days after the issuance of the order granting rehearing or reconsideration. The response shall be confined to the issues upon which rehearing or reconsideration has been granted.

(d) *Action on.* Unless the agency head acts upon the application for rehearing or reconsideration within 30 days after it is filed, or within the lesser time as may be provided or prescribed by law (see subsection (e)), the application shall be deemed to have been denied.

(e) *Shortened period for agency action when judicial review is sought.* Under Pa.R.A.P. No. 1701(b)(3)(ii) (relating to effect of appeal generally), if a party files a timely petition for review of an adjudication or other final order which is a quasijudicial order for purposes of judicial review, the agency may grant an application for rehearing or reconsideration only within the time prescribed by Pa.R.A.P. No. 1512 (relating to time for petitioning for review) for the filing of a petition for review; otherwise the application shall be deemed to have been denied. Under Pa.R.A.P. No. 1512, the time prescribed for the filing of a petition for review is measured from the date of entry of the original adjudication or other final order and not from the date of filing of the application for rehearing or reconsideration.

(f) *Concurrent filing of petition for review and application for rehearing or reconsideration.* Under this section, agency denial of an application for rehearing or reconsideration may occur after the expiration of the period permitted by Pa. R.A.P. No. 1512 for the filing of a petition for review. Therefore, Pa.R.A.P. No. 1701(b) contemplates that a party may elect to concurrently petition for review and apply for rehearing or reconsideration of an adjudication or other final order and:

(1) If rehearing or reconsideration is denied, the original adjudication or other order will be subject to judicial review upon the previously filed petition for review.

(2) If rehearing or reconsideration is granted within the time contemplated by subsection (e):

(i) The timely order granting rehearing or reconsideration automatically renders inoperative a petition for review theretofore or thereafter filed with respect to the prior adjudication or other final order.

(ii) The petitioning party shall and another party may file a praecipe with the prothonotary of the court in which the inoperative petition for review is filed to cause a note to be made on the docket of the court that the petition has been stricken under Pa.R.A.P. No. 1701(b).

(iii) If a timely order granting rehearing or reconsideration has been entered under this section, the time for filing a petition for review begins to run anew after the entry of the decision on rehearing or reconsideration, whether or not that decision amounts to a reaffirmation of the prior adjudication or other final order. A new petition for review shall be filed to seek judicial review of the decision on rehearing or reconsideration.

(**Editor's Note:** See also Pa.R.A.P. No. 1701 (relating to authority of trial court or agency after appeal).)

Authority

The provisions of this § 35.241 amended under section 506 of The Administrative Code of 1929 (71 P. S. § 186).

Source

The provisions of this § 35.241 amended through May 20, 1977, effective May 21, 1977, 7 Pa.B. 1308; amended June 17, 1994, effective June 18, 1994, 24 Pa.B. 3025. Immediately preceding text appears at serial pages (172983) to (172984) and (187251).

Notes of Decisions

General Comments

Where the petitioner's letter was a request under § 35.241 and not a subsequent appeal, the Board of Probation and Parole's regulation did not apply. This is evidenced by the Board's statement in 37 Pa. Code § 73.1 supersedes one specified section of the General Rules of Administration Practice and Procedure, but does not mention 1 Pa. Code § 35.241, which governs reconsiderations. *Shaw v. Board of Probation and Parole*, 812 A.2d 769 (Pa. Cmwlth. 2002).

If a party to an agency proceeding did not appeal the agency decision or petition for rehearing under this section, the agency would not be permitted to amend its decision at a later time on the basis of an ex parte letter received from that party. *Liquor Control Board v. Clark*, 349 A.2d 809 (Pa. Cmwlth. 1976).

Judicial Review

42 Pa.C.S. § 5105(a)(2) and recent case law permit appeals from denial of a petition for reconsideration by an administrative agency. *Southwest Pennsylvania Natural Resources, Inc. v. Department of Environmental Resources*, 465 A.2d 108 (Pa. Cmwlth. 1983).

Although it is within the administrative discretion whether to open and reconsider a decision, appellate review is available to determine whether there has been an abuse of discretion. *Board of School Directors of Avon School v. Department of Education*, 375 A.2d 851 (Pa. Cmwlth. 1977).

Reconsideration

The party was not required to raise the contractual issues before the Secretary of the Department of Public Welfare where the Department was the party seeking reconsideration. Pursuant to subsection (c) of this regulation, the party was entitled to file an answer to DPW's request for reconsideration, which that party did and as a consequence those issues have not been waived. *Cameron Manor, Inc. v. Department of Public Welfare*, 681 A.2d 836 (Pa. Cmwlth. 1996); reargument denied (1996).

Although a petition for reconsideration was filed with the Commissioner of the Pennsylvania Department of Insurance, it was deemed denied pursuant to this regulation when the Commissioner failed to act upon it. *Graduate Health Systems v. Insurance Department*, 674 A.2d 367 (Pa. Cmwlth. 1996).

Request for reconsideration deemed denied where agency fails to respond within 30 days. *Twining Village v. Department of Public Welfare*, 564 A.2d 1335 (Pa. Cmwlth. 1989); appeal denied 578 A.2d 931 (Pa. 1990).

Failure by the Secretary to act on a request for reconsideration of decision terminating eligibility for AFDC within 45 days nullified the order entered after that time had passed, and, therefore, order could not be appealed. *Strobhar v. Department of Public Welfare*, 557 A.2d 440 (Pa. Cmwlth. 1989).

By granting reconsideration within 30 days of the Department of Public Welfare's request for reconsideration, the Secretary complied with this section. *Hillcrest Home, Inc. v. Department of Public Welfare*, 553 A.2d 1037 (Pa. Cmwlth. 1989); appeal denied 563 A.2d 500 (Pa. 1989).

Petitioner, who filed for a reconsideration of the OHA's order affirming the hearing officer's decision that petitioner had received an over-issuance of food stamps, but who did not file a timely appeal of the original order, was only entitled to have Commonwealth Court review the Department of Public Welfare's denial of the reconsideration and was not entitled to a review of the merits of the case. *Keith v. Department of Public Welfare*, 551 A.2d 333 (Pa. Cmwlth. 1988).

Since the party had a fair hearing with the opportunity to present testimony or evidence and there were no extraordinary circumstances surrounding the party's failure to apply for rehearing or reconsideration within the 15-day period, the refusal to grant rehearing or reconsideration was proper. *Gordon v. Unemployment Compensation Board of Review*, 403 A.2d 235 (Pa. Cmwlth. 1979).

The Director of Administration of the Pennsylvania Crime Commission appeared in a Civil Service Commission hearing and stated that he was representing the Justice Department and where the Department later requested a rehearing on the grounds that it was not represented by counsel, the Commission was not required to grant a rehearing. *Department of Justice v. Civil Service Commission* 319 A.2d 692 (Pa. Cmwlth. 1974).

Remand; Timeliness of Petition

After remand, District petitioned the Charter School Appeal Board as to the existence of specific charter requirement in light of the court's vacating the Board's order granting the charter. That petition was timely, and the matter was remanded to the Board to consider the District's request. *York County School District v. Lincoln-Edison Charter School*, 798 A.2d 295 (Pa. Cmwlth. 2002).

Specification of Errors

An application for rehearing or reconsideration filed after adjudication of the Civil Service Commission, as governed by this section, requires a specification of errors. If the specification does not

demonstrate a cause for a rehearing or reconsideration, the Civil Service Commission does not abuse its discretion in denying the application. *Department of Justice v. Civil Service Commission*, 319 A.2d 692 (Pa. Cmwlth. 1974).

Time Limits

The 120-day time limit on authority of Board to hear protest to cancellation of automobile franchise at section 7 of the Board of Vehicles Act (63 P.S. § 818.7) controls when in conflict with a general rule of administrative procedure. *Kimmel Pontiac, Inc. v. State Board of Vehicle Manufacturers, Dealers and Salespersons*, 570 A.2d 127 (Pa. Cmwlth. 1990).

Petition for reconsideration of an OHA order revoking the petitioner's personal care home license, which was received 2 days subsequent to date of the 15-day appeal period, was untimely as the date upon which the Department of Public Welfare received the petition and not the post-marked date was the controlling date for the appeal time computation. *Colonial Manor Personal Care Boarding Home v. Department of Public Welfare*, 551 A.2d 347 (Pa. Cmwlth. 1988); appeal denied 574 A.2d 72 (Pa. 1990).

Osteopath's petition for reconsideration and reopening of the Department of Public Welfare denial of a request for appeal nunc pro tunc of an earlier Departmental decision was untimely as a party to a proceeding; the petitioner must request reconsideration within 15 days after the issuance of an adjudication or final order by an agency. *Ziev v. Department of Public Welfare*, 548 A.2d 701 (Pa. Cmwlth. 1988); appeal denied 559 A.2d 529 (Pa. 1989).

The statute of limitations for filing a timely appeal of a decision of the Department of Public Welfare will only be tolled by an Order granting Reconsideration within the 30 day time period and not by the filing of a Petition for Reconsideration. *Monsour Medical Center v. Department of Public Welfare*, 533 A.2d 1114 (Pa. Cmwlth. 1987).

Premature filing of answer to the Department of Public Welfare's petition for reconsideration did not toll the 30-day time period to act. The Department's failure to appeal to Commonwealth Court within the appropriate time from the end of the 30-day period deprived the Department of the power to rule on the merits of the petition. *Brookline Manor Convalescent Rest Home v. Department of Public Welfare*, 492 A.2d 1207 (Pa. Cmwlth. 1985).

In the absence of fraud or wrongful or negligent conduct, the time period for filing an application for reconsideration of an earlier agency decision was not affected by a later agency decision which is contrary to the earlier decision. *Berry v. Unemployment Compensation Board of Review*, 382 A.2d 487 (Pa. Cmwlth. 1978); affirmed 411 A.2d 1198 (Pa. 1980).

A petition for review filed by school board directors and stating only that the decision by the Secretary of Education to reinstate a teacher was an error of law is insufficient to extend the 15-day limitation period because the petition was untimely brought for a reason other than fraud or its equivalent. *Board of School Directors v. Department of Education*, 375 A.2d 851 (Pa. Cmwlth. 1977).

If the appeal is of the order denying the petition for reconsideration only, the appeal time runs from the date of the order dismissing the petition even though the petition was filed untimely and subsequent to the time allowed for appealing the original decision. *Mayer v. Unemployment Compensation Board of Review*, 27 Pa. Cmwlth. 244, 246, 366 A.2d 605, 606, 607 (1977); *Board of School Directors of Avon School v. Department of Education*, 375 A.2d 851 (Pa. Cmwlth. 1976).

A reading of subsection (a) together with 25 Pa. Code § 21.32(g) leads to the conclusion that these rules combine to provide statutory authority as required by section 41 of the Administrative Agency Law (71 P.S. § 1710.41) for the filing of a petition for rehearing or reconsideration with the Environmental Quality Board and require filing within 10 days after the Board has rendered a decision. *Department of Environmental Resources v. Wolford*, 329 A.2d 304 (Pa. Cmwlth. 1974).

Time Limits

Where a teacher petitioner failed to challenge the determination of the Professional Standard and Practices Commission for nearly 2 years, but instead filed for what is the equivalent of reconsideration of the Commissions' decision following an arbitrator's decision issued 2 years after the Commission's, the request for reconsideration was untimely. *Pardue v. Department of Education*, 815 A.2d 1162 (Pa. Cmwlth. 2003).

Untimely Appeal Allowed

Where an appeal is not timely because of non-negligent circumstances, either as they relate to appellant or counsel, and the appeal is filed within a short time after the appellant or counsel learns of and has an opportunity to address the untimeliness, and the time period which elapses is of very short duration, and appellee is not prejudiced by the delay, the court may allow an appeal nunc pro tunc. Such was the case where appellant sought an appeal before the Unemployment Compensation Board and the filing period for filing expired while appellant was hospitalized for cardiac problems. *Cook v. Unemployment Comp. Bd. of Review*, 641 A.2d 692 (Pa. Cmwlth. 1994), appeal granted 655 A.2d 517 (Pa. 1995); reversed and remanded 671 A.2d 1130 (Pa. 1996).

Cross References

This section cited in 4 Pa. Code § 105.17 (relating to petition for reconsideration); 7 Pa. Code § 179.72 (relating to rehearing or reconsideration); 25 Pa. Code § 1021.151 (relating to reconsideration of interlocutory orders); 25 Pa. Code § 1021.152 (relating to reconsideration of final orders); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 95.98 (relating to decisions of the Board); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.111 (relating to decisions of judges); 34 Pa. Code § 213.10 (relating to decisions); 40 Pa. Code § 15.56 (relating to rehearing or reconsideration); 51 Pa. Code § 21.29 (relating to finality; reconsideration); 52 Pa. Code § 5.572 (relating to petitions for relief following a final decision); 52 Pa. Code § 1005.222 (relating to petitions for relief); 55 Pa. Code § 41.211 (relating to reconsideration of interlocutory orders); 55 Pa. Code § 275.61 (relating to right to request reconsideration or right to appeal, or both); 58 Pa. Code § 494a.8 (relating to rehearing or reconsideration); 61 Pa. Code § 703.41 (relating to request for reconsideration); 61 Pa. Code § 703.42 (relating to time for filing request for reconsideration and extension); 61 Pa. Code § 703.43 (relating to filing a request for reconsideration); and 67 Pa. Code § 179.10 (relating to general conditions).

Subchapter J. REPORTS OF COMPLIANCE

Sec.

35.251. Reports of compliance.

Cross References

This subchapter cited in 104 Pa. Code § 7.16 (relating to RTKL appeals).

§ 35.251. Reports of compliance.

When a person subject to the jurisdiction of an agency is required to do or perform an act by agency order, permit or license provision, there shall be filed with the office of the agency within 30 days following the date when the requirement became effective, a notice, stating that the requirement has been met or complied with, unless the agency, by regulation or order, or by making specific provision therefor in a license or permit, may provide otherwise for the giving of the notice of compliance.

Cross References

This section cited in 12 Pa. Code § 11.15 (relating to final orders); 22 Pa. Code § 351.1 (relating to purpose and scope); 28 Pa. Code § 301.7 (relating to fair hearing); 34 Pa. Code § 111.15 (relating to no other pleadings allowed); 34 Pa. Code § 131.121 (relating to penalty proceedings initiated by

a party); 34 Pa. Code § 131.122 (relating to other penalty proceedings); 52 Pa. Code § 5.591 (relating to reports of compliance); 52 Pa. Code § 1005.231 (relating to reports of compliance); and 61 Pa. Code § 703.45 (relating to appeal rights).

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