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LAW OFFICES

MANCKE, WAGNER, HERSHEY & TULLY

2233 NORTH FRONT STREET

HARRISBURG, PA 17110

JOHN B. MANCKE  
P. RICHARD WAGNER  
DAVID E. HERSHEY  
WILLIAM T. TULLY

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234 7051

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VIA FACSIMILE  
783-2664

Independent Regulatory Review Commission  
333 Market Street  
Harrisburg, Pennsylvania

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INDEPENDENT REGULATORY  
REVIEW COMMISSION

Re: Proposed Rulemaking - Title 67, Pa. Code Regulation # 16-349

Dear Sir or Madam:

In preparation for the Commission's hearing of March 22, 2001, please consider the enclosed comments relative to the proposed rulemaking.

1. The proposed regulations indicate at 491.3, *Requests for a Hearing*, that "except as otherwise provided in paragraph (2) whereby statute or regulation, every request for a hearing shall be filed within 30 days of the Department's determination which gives rise to the appeal." By implication in (2), this provision pertains to the timeliness of every request of the Department of Transportation in the context of driver licensing other than a request for credit towards serving driving privilege or vehicle registration suspension.

The Vehicle Code currently at §1516(d) gives the motorist a statutory right to have their driver record updated. That section reads, in pertinent part:

*Drivers wishing to have their record reviewed by the Department may make such a request in order that the record be brought up to date. See 75 Pa.C.S. §1516(d).*

The plain application of 493.3(b)(1) would be confusing at best in determining the timeliness of a request to update a driver record. In particular, it is believed and therefore averred that the Department does not send a notice to the motorist in those cases where a summary appeal from a conviction or a summary appeal nunc pro tunc from a conviction has been adjudicated in the motorist's favor in county court. Accordingly, the Department has no mechanism to advise the motorist that the Department is refusing to update the motorist's record. Accordingly, it would be suggested that with respect to §1516(d), *Requests by the Motorist*, that the same flexibility in (b)(2) (§491.3(b)(2)) be afforded to the motorist, i.e. 30 days after the date the person requesting the hearing knew or should have known that the Department would not bring the motorist's record up to date.

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STATE OF PENNSYLVANIA  
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For example, in a recent case in which I was involved, a commercial driver served a 60-day disqualification as the result of receiving two major violations while operating his commercial motor vehicle within a three year period. Unbeknownst to that motorist, a license disqualification appeal was not filed on his behalf; however, a summary appeal challenging the second serious traffic offense was timely filed and was ultimately successful in Lancaster County Court of Common Pleas. The Department issued no notice to the motorist indicating whether or not his record would be corrected pursuant to §1516. On the contrary, it was only after intervention of counsel that counsel determined that the Department would not honor a request to update the commercial driver's record pursuant to §1516(d). The Department relied on §1516(c) in holding that "the Department may keep a record of the offense for the purpose of showing the suspension was imposed against the person." In sum, the Department did not issue an official notice to the motorist indicating that they would not update his driver record as a result of his acquittal notwithstanding the fact that the section the Department relies on under §1516(c) does not specifically apply to commercial driver disqualifications but, rather, only applies to "suspensions". Accordingly, in a §1516(c) request, the 30-day rule would be difficult, if not impossible, to apply since the Department does not send a "notice of determination" to the motorist who has been successful as the result of either a summary appeal or an appeal nunc pro tunc. The effect of the strict application of that rule in the above scenario precludes the commercial driver from getting his/her day in court on the administrative side of this action. As the Court of Common Pleas would not be the appropriate venue for updating a driver record, the motorist therefore would have no remedy. This author suggests that the same flexibility built into the credit section of 493.3(b)(2) be extended to requests pursuant to §1516(d) pertaining to updating driver records.

2. With respect to §491.6(h), *Dispositive Motions*, the hearing examiner on motion of a party may dismiss the action in whole or in part "for failure to preserve the right to an appeal by a timely filing." See 67 Pa.Code §491.6(h)(1)(ii). In addition, this subsection specifically supersedes 1 Pa.Code 35.180 relating to actions on motions. The rule is unclear whether the motion of a party may be oral or must be in writing.

Because the provisions of 491.9 (orders to show cause) are not specifically applicable to a motion to dismiss for failure to preserve the right to an appeal by a timely filing, the motorist could be precluded from ever being able to argue to the hearing examiner why the petition was filed within 30 days of the date the motorist knew or should have known he/she was not receiving credit. A suggested change to the regulation would require that on a motion to dismiss for an untimely filing in any case the Department be required to issue a rule to show cause pursuant to 491.9(a).

The requirement that the Department apply for a rule to show cause in those instances would impose a minimal burden on the Department in terms of utilization of resources and would ensure that there would be some written record as to the allegations of timeliness on behalf of the motorist in the event that the disposition of the motion in favor of the Department and against the motorist terminates the motorist's right to be heard and thereby leaves the motorist without a remedy.