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GOVERNOR'S OFFICE OF GENERAL COUNSEL

June 10, 2013

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VIA EMAIL AND FIRST CLASS MAIL

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RE: Comments on Board's proprosed rulemaking published in the May 11, 2013, *Pennsylvania Bulletin*.

Dear Maryanne:

The Department submits for the Board's and the Rules Committee's consideration the following comments concerning the proposed rulemaking published in the *Pennsylvania Bulletin* on May 11, 2013.

I. Proposed amendments to Sections 1021.94 and 1021.94a of the Board's Rules

Unfortunately, there was an oversight in the Preamble with respect to the proposed amendments of both of these rules. The Rules Committee minutes for the September 13, 2012 meeting note that the Preamble was to "set forth ... that two approaches were discussed and had equal merit and that the Board was soliciting comments on both approaches."[1] Unfortunately, however, the Preamble fails to do so. The Summary of Proposed Rulemaking with respect to Section 1021.94 states that "two options *were* proposed" (as opposed to "*are* proposed") and summarizes both options. However, it is

[1] September 13, 2012, Rules Committee Minutes (September 2012 Minutes), 7.

not clear from the text that the Board was in fact considering both options, nor does the Preamble state anywhere that both options have equal merit. Moreover, the Summary of Proposed Rulemaking with respect to Section 1021.94a fails even to mention the alternative not included in Annex A, much less describe that alternative, state that it is being considered, or state that it has equal merit.

Turning to the substance of the proposed amendments to Sections 1021.94 and 1021.94a listed in Annex A (Annex amendments), the Department has serious concerns about the Annex amendments to the extent that they would prohibit parties from filing responses in support of dispositive motions except by order of the Board.

a. Parties often have appropriate reasons for not wanting to join in one another's dispositive motions.

The Rules Committee minutes refer to only one supposed advantage that the Annex amendments would have over the alternatives: the Annex amendments might encourage aligned parties to cooperate and file joint dispositive motions.[2] However, even where parties share some common interests, they may have entirely legitimate reasons for not wanting to join in one another's dispositive motions.

Even parties that are aligned can have different interests with respect to the filing of a particular dispositive motion. For instance, in third-party appeals, the Department ordinarily has no interest in whether the recipient of the action actually prevails in the litigation, so long as the integrity of the Department process that resulted in the action is defended, and the litigation does not adversely affect the Department's mission or programs going forward. The recipient of the action, by contrast, is focused on prevailing in the current litigation, in which it typically has a significant financial stake, and it has no particular interest in how the litigation may affect the Department's mission or programs. The difference in the parties' interests is reflected in their approaches to dispositive motions. Thus, for instance, the Department's experience is that recipients of Department actions tend to be more anxious to file dispositive motions, and tend to take a more aggressive approach with respect to issues likely to arise in dispositive motions—such as mootness, ripeness, administrative finality, and (especially) standing—than the Department.

[2] July 12, 2012, Rules Committee Minutes (July 2012 Minutes), 5.

Similarly, the Department will occasionally refuse to join in a dispositive motion because it feels the motion is unlikely to be granted and may annoy the judge, or because the Department feels that the motion is needlessly provocative in other respects. However, if the recipient of the action insists on filing the dispositive motion anyway, the Department has sometimes chosen to file a response in support of the motion, reasoning that, if the Board must address the issues raised in the motion anyway, the Board might as well have the benefit of the full factual and legal context the Department believes is relevant prior to rendering a decision. Significantly, the Department is often in a special position to provide facts or legal argument that might be helpful to resolving issues raised in a dispositive motion—such as the interpretation of statutes or regulations that the Department enforces—and which the Department may not know will be raised prior to the motion being filed.

The Department is reluctant to align itself too closely with the interests of recipients of Department actions in third-party appeals for at least two reasons. One is simply a matter of resources. Unfortunately, recipients of Department actions are sometimes content to sit back and have the Department take the primary responsibility for defending appeals of the actions issued to them, despite the fact that the recipients benefit from the actions.[3] The Department should be free to marshal its resources so as to best protect the Department's interests in litigation. Second, the Department is leery of aligning itself too closely with the recipients of Department actions lest the Department be perceived as being invested in the recipient having received the action, as opposed to the Department simply discharging its duties as an impartial regulator.

Even where their interests do align closely, parties may be apprehensive about filing a joint dispositive motion for other reasons. For instance, when parties do attempt to cooperate, one party is often dissatisfied with the motion filed by another. Cooperation can break down close to the filing deadline, leaving each of the parties scrambling to draft and file its own motion. And the courts have yet to address whether draft

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[3] *See, e.g., Pine Creek Valley Watershed Association, Inc. v. Dep't of Envtl. Prot.*, EHB Docket No. 2009-168-K, slip op. at 4:

> We would have taxpayers paying with public funds and with public employee time for what is in reality a private interest litigation. It is the private individuals who own the property and want to develop it or have it developed for them.... They have neglected to or refused to participate and have stepped away saying, in essence, "you, DEP and Township, do it for me."

documents shared with the Department would be protected as privileged from Right-to-Know Law requests.[4]

b. Prohibiting parties from filing responses in support of dispositive motions except as permitted by order of the Board would create more problems than it solves and frustrate the "just, speedy, and inexpensive" determination of Board proceedings.

Section 1021.4 of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.4, provides:

> The rules ... shall be liberally construed to secure the just, speedy, and inexpensive determination of every appeal or proceeding in which they are applicable. The Board at every stage of an appeal or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

However, the Annex amendments would impede the "just, speedy, and inexpensive" determination of Board proceedings, and would create more problems than they solve.

The Rules Committee minutes identified only one problem with current Board rules with respect to supporting responses: the current rules do not address whether parties opposing the motions have a right to respond to the supporting responses. The most reasonable way to address this problem is to amend the rules to provide that the party opposed to the dispositive motion has a right to respond, rather than to amend the rules to prohibit the filing of supporting responses except as permitted by order of the Board. In at least some instances, the Board may be able to dispose of issues or entire cases based on what is included in the supporting response, saving the parties and Board the expense and time that would be necessary to resolve them after a hearing on the merits. What purpose is served by forcing a matter to proceed to a hearing if it would be possible to dispose of it based on what could be filed in a supporting response?

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[4] Section 305(a)(2) of the Right-to-Know Law, 65 P.S. § 67.305(a)(2), does create a presumption that records that are privileged are not "public records." However, whether a draft dispositive motion and supporting documents shared with the Department would be protected is not clear. Arguably such documents might fall within the joint defense privilege (*i.e.*, the "common interest" or "common legal interest" privilege). However, what, if anything is protected by that privilege is unclear. Commonwealth Court has recently noted that "many issues concerning the joint defense or common interest privilege have yet to be addressed by [Pennsylvania] courts." *In re Condemnation of 16.2626 Acre Area*, 981 A.2d 391, 398 (Pa. Commw. Ct. 2009)

The Annex amendments do allow for the possibility that a party may raise additional legal or factual bases in support of a dispositive motion "if permitted by order of the Board." However, the fact that the party must obtain a Board order to file a supporting response will itself deter parties from filing them. Furthermore, the process for obtaining such an order, and the procedure after one is issued, are problematic under the Annex amendments. The most basic problem is that the Annex amendments fail to address the principal problem that the amendments were supposed to resolve: *They do not provide that a party opposing a dispositive motion shall have an opportunity to respond to a supporting response when one is filed.* But there are other problems as well. For instance, the Annex amendments:

- do not address when an opposing party must respond to a supporting response (assuming the opposing party is permitted to respond).

- do not provide that an opposing party may have additional time to respond to a dispositive motion when a supporting response is filed after the dispositive motion.[5]

- do not address whether a party that files a supporting response may file a reply brief if the opposing party is permitted to respond to the supporting response.

- do not address whether a supporting response should take the form of a motion or memorandum.

- do not address which "response" controls for purposes of calculating the deadline for replies where a supporting response is filed.[6] (*I.e.,* Assuming that the party opposing the dispositive motion is permitted to file a response to the supporting response, does the deadline for filing a reply run from the date of service of the supporting response or the date of service of the opposing party's response to the supporting response?)

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[5] *See* the Annex amendments §§ 1021.94(b) and 1021.94a(g).
[6] *See* the Annex amendments §§ 1021.94(d) and 1021.94a(k).

- do not address whether a party opposing a dispositive motion is to file one response to both the motion and supporting response, or file separate responses to the motion and supporting response (assuming that the opposing party is permitted to respond to the supporting response).

- do not contain deadlines for filing supporting responses or for filing motions requesting that the Board permit the filing of a supporting response.[7]

With respect to the last item listed above, regardless of when motions for the Board to permit the filing of a supporting response should be filed under the Annex amendments, it is difficult to imagine how that process could play out in a meaningful way without a significant delay in later filings concerning the dispositive motion. For instance, assuming that the motion to file a supporting response were filed 15 days after service of the dispositive motion (the deadline for filing a notification that a party joins in a dispositive motion), only 15 days would remain prior to the deadline for filing a response in opposition, since that deadline runs from the date of filing the dispositive motion.[8] Even if the opposing party were to respond to the motion to file a supporting response and that the Board were to grant that motion before the 15 remaining days expired, little time would remain for the party filing the supporting response to prepare and submit that filing, much less for the opposing party to address the issues raised in the supporting response in its response in opposition. As a practical matter, the party requesting permission to file a supporting response will likely have to prepare the supporting response prior to receiving the Board's decision on whether it will even permit the filing, and, where the filing is permitted, the Board will likely need to grant the party opposing the dispositive motion additional time to respond to the supporting response beyond that permitted in the Annex amendments.[9] This approach conflicts with the goal of a "just, speedy, and inexpensive" resolution of the proceedings.

c. The alternative amendments are a better way for the Board's rules to ensure that the substantial rights of the parties are protected, while at the same time fostering the "just, speedy, and inexpensive" resolution of the proceedings.

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[7] *See* the Annex amendments §§ 1021.94(c) and 1021.94a(f).
[8] *See* the Annex amendments §§ 1021.94(b) and 1021.94a(f).
[9] *See* the Annex amendments §§ 1021.94(b) and 1021.94a(g).

Given the realities of litigation before the Board—where virtually all third-party appeals will involve parties with at least three distinct interests in the proceedings—regulator, recipient of the action, and appellant—allowing the filing of supporting responses is a more productive way to foster the "just, speedy, and inexpensive" resolution of proceedings, than attempting to compel parties to cooperate on joint dispositive motions by prohibiting supporting responses except by order of the Board. Thus, the Department supports the adoption of the amendments that the Rules Committee considered that would allow parties to support a pending dispositive motion (alternative amendments) without a Board order.

When the alternative amendments were discussed at the Rules Committee meetings, those present raised three concerns. The first was that, allowing a supporting party to file a dispositive motion within 15 days of a dispositive motion would result in delay because other parties might file a supporting response to a dispositive motion filed by the supporting party, and so on.[10] This objection can easily be addressed with a slight revision to the alternative amendments the Rules Committee considered—for instance, providing in § 1021.94(b) and § 1021.94a(f) that "Parties, other than the moving party, that wish to support a pending [dispositive motion/motion for summary judgment] may file a memorandum of law within 15 days of service of the motion or within 15 days of the deadline for filing dispositive motions, whichever comes first."[11] This would ensure that, even where a response in support was filed, it would delay the proceedings no more than 15 days. Under the Annex amendments, by contrast, the proceedings would likely be delayed at least that long, the procedure is unclear, and—because the Annex amendments will have a chilling effect on the filing of supporting responses--there is less chance that the Board would be able to dispose of issues or even entire matters without proceeding to a hearing on the merits.

The second objection raised was that, while previous amendments to the Board's rules have brought the Board's rules closer to the Pennsylvania Rules of Civil Procedure, the alternative amendments would create a hybrid and could create more problems than they solve.[12] However, both criticisms apply at least as much to the Annex amendments as to the alternative amendments. The Rules of Civil Procedure, like the Board's existing

[10] July 2012 Minutes, 4.

[11] The Department has included an enclosure showing the proposed revisions to the alternative amendments in context.

[12] July 2012 Minutes, 5.

rules, do not address responses in support of dispositive motions. Thus, the Annex amendments are as much of a hybrid approach and departure from the Rules of Civil Procedure as the alternative amendments. Furthermore, for the reasons explained previously, the Annex amendments are at least as likely to cause problems as the alternative amendments. The difference is that the alternative amendments expressly address the major problem with the current rules. The alternative amendments make it clear that a party opposing a dispositive motion has an opportunity to respond to issues raised in a supporting response when one is filed. The Annex amendments fail to do so.

II. Proposed amendments to Section 1021.34(g)

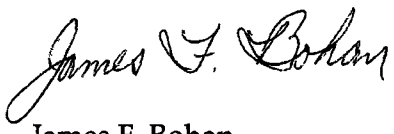
The Department suggests adding a provision to Section 1021.34(g) of the proposed rules to allow parties to effect service by email when there is problem with the electronic service using the Board's electronic filing system. Although the current rule allows for service by the usual means for serving filings (mail, facsimile, hand, or other personal service), the Department believes that allowing service by email, where the receiving party consents to service in that manner, will be more convenient for both the filer and the receiving party—particularly for those filers who may lack a facsimile machine.

The language that the Department suggests adding (underlined) to the proposed Section 1021.34(g) is shown in context below.

> **If a person filing electronically becomes aware that the notice of electronic filing was not successfully transmitted to a registered user, or that the notice transmitted to the registered user is defective, the filer shall serve the electronically filed document upon the registered user by hand, mail, other personal delivery or facsimile immediately upon notification of the deficiency. <u>The filer may also effect service by electronic mail, provided the registered user consents to service in that manner.</u>**

Thank you for considering the Department's comments on the Board's proposed amendments to its Rules of Practice and Procedure. Please call if you have any questions.

Very truly yours,



James F. Bohan
Assistant Counsel

Enclosures (1)

cc: David Raphael

§ 1021.94. Dispositive motions other than summary judgment motions.

(a) Dispositive motions, responses and replies shall be in writing, signed by a party or its attorney and served on the opposing party in accordance with § 1021.34 (relating to service). Dispositive motions shall be accompanied by a supporting memorandum of law or brief. The Board may deny a dispositive motion if a party fails to file a supporting memorandum of law or brief.

(b) Parties, other than the moving party, that wish to support a pending dispositive motion may file a memorandum of law within 15 days of service of the motion ~~(notwithstanding the deadlines for filing dispositive motions in the Board's prehearing orders) within 15 days of the deadline for filing dispositive motions, whichever comes first~~. The scope of facts that the Board will consider in support of the motion is limited to the scope in the original motion unless a separate dispositive motion accompanies the supporting party's memorandum of law.

(c) A response to a dispositive motion ~~may~~ shall be filed within 30 days of service of the motion, or, if a supporting party files a memorandum of law alone, within 30 days of service of that memorandum of law. ~~and~~ The response to a dispositive motion shall be accompanied by a supporting memorandum of law or brief.

(d~~e~~) A moving party, or a supporting party that files a memorandum of law alone, may file a~~A~~ reply to a response to a dispositive motion ~~may be filed~~ within 15 days of the date of service of the response. The reply~~, and~~ may be accompanied by a supporting memorandum of law or brief. Reply briefs or memoranda of law shall be as concise as possible and may not exceed 25 pages. Longer briefs or memoranda of law may be permitted at the discretion of the ~~Board, presiding administrative law judge~~.

(e~~d~~) An affidavit or other document relied upon in support of a dispositive motion or response, that is not already a part of the record, shall be filed at the same time as the motion or response or it will not be considered by the Board in ruling thereon.

(f~~e~~) When a dispositive motion is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response must set forth specific issues of fact or law showing there is a genuine issue for hearing. If the adverse party fails to adequately respond, the dispositive motion may be granted against the adverse party.

(g) Subsection (a) supersedes 1 Pa. Code § 35.177 (relating to ~~the~~ scope and content of motions). Subsection (b) supersedes 1 Pa. Code § 35.179 (relating to ~~objections~~ objecting to motions).

Source

Comment [JFB1]: Changes tracked from existing Board Rules. Highlighting in green show additions to the rule since the last version of the rule proposed by the Department. Highlighting in yellow shows items omitted from the rule since the last version proposed by the Department. (The changes to the proposed language in § 1021.94(d) and (g), and to § 1021.94e(k), track changes that the Board made to the rules after they were recommended to the Board by the Rules Committee.)

Comment [JFB2]: This change previously approved at a prior Rules Committee meeting, according to the minutes for the 3-15-2012 meeting.

Comment [JFB3]: This change previously approved at the 3-15-2012 Rules Committee meeting.

The provisions of this § 1021.94 amended June 28, 2002, effective June 29, 2002, 32 Pa.B. 3085; amended November 29, 2002, effective November 30, 2002, 32 Pa.B. 5883; amended February 10, 2006, effective February 11, 2006, 36 Pa.B. 709. Immediately preceding text appears at serial pages (313862) to (313863).

Cross References

This section cited in 25 Pa. Code § 1021.95 (relating to miscellaneous motions); and 25 Pa. Code § 1021.133 (relating to reopening of record prior to adjudication).

§ 1021.94a. Summary judgment motions.

(a) *Rules governing summary judgment motions.* Except as otherwise provided by these rules, motions for summary judgment shall be governed by Pa.R.C.P. Rules 1035.1—1035.5.

(b) *Summary judgment motion record.*

(1) A summary judgment motion record must contain the following separate items:

(i) A motion prepared in accordance with subsection (c).

(ii) A statement of undisputed material facts in accordance with subsection (d).

(iii) A supporting brief prepared in accordance with subsection (e).

(iv) The evidentiary materials relied upon by the movant.

(v) A proposed order.

(2) Motions and responses must be in writing, signed by a party or its attorney, and served on the opposing party in accordance with § 1021.34 (relating to service).

(c) *Motion.* A motion for summary judgment must contain only a concise statement of the relief requested and the reasons for granting that relief. The motion should not include any recitation of the facts and should not exceed two pages in length.

(d) *Statement of undisputed material facts.* A statement of undisputed material facts must consist of numbered paragraphs and contain only those material facts to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation must identify the document and specify the paragraphs and pages or lines thereof or the specific portions of exhibits relied on. The statement of undisputed material facts, absent the portions of exhibits and affidavits relied upon, may not exceed five pages in length unless leave of the Board is granted.

(e) *Brief in support of the motion for summary judgment.* The motion for summary judgment shall be accompanied by a brief containing an introduction, summary of the case, and the legal argument supporting the motion.

(f) *Other parties supporting a motion for summary judgment.* Parties, other than the moving party, that wish to support a pending motion for summary judgment may file a memorandum of law within 15 days of service of the motion ~~(notwithstanding the deadlines for filing dispositive motions in the Board's prehearing orders)~~ [redacted]. The scope of facts that the Board will consider in support of the motion is limited to the scope in the original motion unless a separate motion for summary judgment accompanies the supporting party's memorandum of law.

(g~~f~~) *Opposition to motion for summary judgment.* Within 30 days of ~~the date of~~ service of the motion, or, if a supporting party files a memorandum of law alone, within 30 days of service of the memorandum of law, a party opposing the motion shall file the following:

(1) A response to the motion for summary judgment which includes a concise statement, not to exceed two pages in length, as to why the motion should not be granted.

(2) A response to the statement of undisputed material facts either admitting or denying or disputing each of the facts in the movant's statement. Any response must include citation to the portion of the record contraverting a material fact. The citation must identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on demonstrating existence of a genuine issue as to the fact disputed. An opposing party may also include in the responding statement additional facts the party contends are material and as to which there exists a genuine issue. Each fact shall be stated in separately numbered paragraphs and contain citations to the motion record. The response to the statement of undisputed material facts may not exceed five pages in length unless leave of the Board is granted.

(3) A brief containing the legal argument in opposition to the motion.

(h~~g~~) *Length of brief in support of and in opposition to summary judgment.* Unless leave of the Board is granted, the brief in support of or in opposition to the motion may not exceed 30 pages.

(i~~h~~) *Evidentiary materials.* Affidavits, deposition transcripts or other documents relied upon in support of a motion for summary judgment or response must accompany the motion or response and be separately bound and labeled as exhibits. Affidavits must conform to Pa.R.C.P. 76 and 1035.4 (relating to definitions; and affidavits).

(j~~i~~) *Proposed order.* The motion shall be accompanied by a proposed order.

(kj) *Reply brief.* Within 15 days of service of the response, the movant, or a supporting party that files a memorandum of law alone, may file ~~A~~ a reply brief ~~may be filed by the movant within 15 days of the date of service of the response~~. ~~It~~ The reply brief may not exceed 15 pages unless leave of the Board is granted. Additional briefing may be permitted at the discretion of the ~~Board presiding administrative law judge~~.

(lk) *Summary judgment.* When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for hearing. If the adverse party does not so respond, summary judgment may be entered against the adverse party. Summary judgment may be entered against a party who fails to respond to a summary judgment motion.

(ml) *Judgment rendered.* The judgment sought shall be rendered forthwith if the motion record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Comment

The statement of material facts should be limited to those facts which are material to disposition of the summary judgment motion and should not include lengthy recitations of undisputed background facts or legal context.

Source

The provisions of this § 1021.94a adopted February 10, 2006, effective February 11, 2006, 36 Pa.B. 709; amended October 16, 2009, effective October 17, 2009, 39 Pa.B. 6035. Immediately preceding text appears at serial pages (317409) to (317411).

Cross References

This section cited in 25 Pa. Code § 1021.133 (relating to reopening of record prior to adjudication).