

**INDEPENDENT REGULATORY REVIEW COMMISSION
PUBLIC MEETING MINUTES**

10:00 A.M.

Thursday, February 27, 2014
14th Floor Conference Room
333 Market Street

I. CALL OF THE MEETING

The February 27, 2014 public meeting of the Independent Regulatory Review Commission (Commission) was called to order by Vice Chairman Bedwick at 10:04 a.m. in the 14th Floor Conference Room, 333 Market Street, Harrisburg, PA.

Commissioners Present: John F. Mizner, Esq., Chairman
 George D. Bedwick, Vice Chairman
 Dennis A. Watson, Esq.

Telephone: W. Russell Faber
 Lawrence J. Tabas, Esq.

Vice Chairman Bedwick noted that this is the first meeting for Commissioner Faber, who was appointed by the Speaker of the House Samuel H. Smith (R-Jefferson), and is the replacement for Silvan Lutkewitte. "We're very pleased to have Russ with us," he stated. "He brings with him a series of expertise in various areas that are going to be extremely helpful to us on the Commission."

II. APPROVAL OF THE JANUARY 16, 2014 PUBLIC MEETING MINUTES

Vice Chairman Bedwick asked for a motion for approval of the January 16, 2014 public meeting minutes, as submitted. Commissioner Watson made the motion and Commissioner Mizner seconded, and the motion passed 4-0, with Commissioner Faber abstaining.

III. OFFICER ELECTIONS

1. Vice Chairman Bedwick made a motion for approval of Commissioner Mizner as Chairman. Commissioner Watson seconded, and the motion passed 5-0.
2. Chairman Mizner made a motion for approval of Commissioner Bedwick to continue as Vice Chairman. Commissioner Watson seconded, and the motion passed 5-0.

IV. NEW BUSINESS

A. ACTION ITEMS

1. No. 3045 Department of Revenue #15-458: Payments by Electronic Funds Transfer

Corinne Brandt, Regulatory Analyst, gave an overview of the regulation and explained that it implements a statutory change which lowers the electronic funds transfer mandate from “payments of \$10,000 or more” to “payments of \$1,000 or more.”

Douglas A. Berguson, Deputy Chief Counsel, Department of Revenue, was present to answer any questions.

Commissioner Watson made a motion for approval. Vice Chairman Bedwick seconded, and the motion passed 5-0.

2. No. 2996 State Board of Cosmetology #16A-4515: Fees – Cosmetology

Scott Schalles, Regulatory Analyst, explained that the regulation increases biennial renewal fees and adjusts certain application fees. “The 13 affected fees were previously increased between 2001 and 2005,” he stated. “The new fee structure will be implemented with the license renewals due by January 15, 2015.”

Cynthia Montgomery, Regulatory Counsel, Department of State, was present to answer any questions. She said the fee increase is necessary because at the present fee level the State Board of Cosmetology receives more than \$6 million over a two-year period but Board expenditures are nearly \$8 million. “It’s now in a position of mounting deficits and they need a fee increase to continue operations of the State Board of Cosmetology,” she stated.

Vice Chairman Bedwick made a motion for approval. Commissioner Watson seconded, and the motion passed 5-0.

3. No. 2998 State Board of Barber Examiners #16A-428: Fees

Mr. Schalles said the regulation increases biennial renewal fees and adjusts certain application fees. “The 11 affected fees were previously increased between 1998 and 2001,” he stated. “The increases will be effective for the April 30, 2014 renewal cycle.”

Ms. Montgomery said the increase is necessary because at the current fee structure the board receives \$650,000 over a two-year period, but projected expenditures over the next two years are near \$1.1 million.

Chairman Mizner made a motion for approval. Vice Chairman Bedwick seconded, and the motion passed 5-0.

4. No. 3021 Department of Banking and Securities #3-51: Assessments

Mr. Schalles gave an overview of the regulation and explained that it implements an assessment schedule for state-chartered institutions and streamlines reporting and billing requirements.

Carter Frantz, Chief Counsel, Department of Banking and Securities (Department), was present to answer any questions. He said the regulation has been worked on for ten years and provided the Commission background on the issue. “The new assessment schedules are based on the Department’s cost structure and are scaled to the 2013 assessment schedules issued by the federal banking and credit union regulators,” he stated. “We have vetted all aspects of this regulation extensively with the affected regulated community and their trade associations to the extent of Secretary Moyer personally meeting with several institutions on the issue. As a result, the regulated community, while obviously wishing assessments would not increase, is completely supportive of the need for the regulation and how it would be implemented; with the only suggestion being that the credit unions also receive the three-year phase in. We are unable to provide a phase in for the credit unions because at full implementation the credit unions are not completely covering their costs, although we expect as the credit union assets increase that will even out and they will cover their costs.”

Vice Chairman Bedwick questioned if the reduction in fees at the federal level will “cushion” the credit unions against the state increase in fees. Mr. Frantz stated, “The state chartered credit unions will not be affected by the federal reduction.”

Commissioner Faber inquired about the use of the Consumer Price Index (CPI). “The CPI is merely a reference point in time of any of the industries under the CPI, it’s not necessarily a measurement of inflation in and of itself,” he stated. “In order to determine inflation amount you have to use two different time periods.” He noted that the regulation states that the Department is “using the CPI for June” but does not indicate a prior period and questioned how the Department is going to determine the time period it is going to use. Mr. Frantz said the Department believes “using a CPI adjustment and putting them in regulation is a more transparent approach to this issue” and discussed the budget process for the Department. “If the regulation was in place, the Department will have looked at revenues in September of a certain year and if we see the revenues generated by the regulation are lagging behind in a material way from the CPI we will add in the CPI to our proposed budget which would then go to the Governor’s Budget Office and onto the General Assembly,” he stated. “For example, this year we would have used the June 2013 CPI based on the increase in 2012. In other words, a year difference between the CPI we would add that June 2013 CPI adjustment into our projected budget numbers. Assuming the Governor’s Office and the General Assembly approved the budget, we would then announce to our institutions in July 2014 that our budget’s been approved, we had to use the CPI adjustor based on the 2013 CPI number and then we would put that assessment out to all institutions in July 2014 to include that CPI adjustment.”

Commissioner Faber questioned if the calculation is based on June 2013 in comparison with June 2012. Mr. Frantz responded “yes.” He suggested, “Wouldn’t it be helpful to put that in the regulation to indicate it’s a one-year comparison?” Mr. Frantz opined, “I believe frankly that the regulated community would assume we’re going year to year because our budget year is fiscal year.” Vice Chairman Bedwick expressed concern about the CPI wording in the regulation and suggested that they clarify that “you are using the June CPI from the prior year and that is in comparison with the June CPI two years prior.” Commissioner Faber agreed with Vice Chairman Bedwick and stated, “I still have some concern about the lack of clarity in the specific time period you are going to use with the CPI. If you look at some other Pennsylvania statutes,

their use of the CPI specifically defines the beginning and the ending period so that everybody knows exactly what that inflation factor is going to be when it is published by the Department of Justice.” Chairman Mizner added “I just don’t think a regulation that is susceptible to being read different ways has the clarity that is required and necessary to both the Department and the stakeholders.” He asked Leslie Lewis Johnson, Chief Counsel, when the regulation would be considered again if it is disapproved. Ms. Johnson indicated that depending upon when it is redelivered the regulation would likely be considered at the April meeting.

Commissioner Tabas made a motion for disapproval. Vice Chairman Bedwick seconded, and the motion passed 5-0.

5. No. 2999 Pennsylvania Liquor Control Board #54-73: Sale by Licensed Limited Distilleries and Distilleries

Mr. Schalles gave an overview of the regulation and explained that it permits licensed limited distilleries to deliver their products directly to consumers, retail licensees, or the Pennsylvania Liquor Control Board.

Norina Blynn, Assistant Counsel, Pennsylvania Liquor Control Board, was present to answer any questions.

Chairman Mizner made a motion for approval. Vice Chairman Bedwick seconded, and the motion passed 4-0, with Commissioner Tabas abstaining.

6. No. 2962 Department of Agriculture #2-174: Food Code; Food Employee Certification

James Smith, Regulatory Analyst, discussed the regulation and stated that the rulemaking incorporates the Model Food Code published by the US Department of Health, Food and Drug Administration.

Vice Chairman Bedwick spoke in support of the regulation but spoke against the practice of “adopting by reference” when crafting regulations. “The problem for the people who have to comply with the regulation is when you adopt by reference you are in effect requiring at a minimum, they retain two documents, the model federal code and your regulations somehow assimilate those to better understand what their obligations are,” he stated.

Dwight-Jared Smith, Assistant Counsel, Department of Agriculture, was present to answer any questions. Commissioner Watson questioned what happens to the regulations when changes are made to the Model Food Code. Dwight-Jared Smith stated “when those changes take effect they would be our changes as well.”

Vice Chairman Bedwick made a motion for approval. Commissioner Watson seconded, and the motion passed 5-0.

7. No. 2955 Environmental Quality Board #7-477: Measurement and Reporting of Condensable Particulate Matter Emissions

Mr. Smith explained that the regulation updates and clarifies the applicability of sampling and testing methods used to demonstrate compliance with certain particulate matter emission standards and limitations

Dean E. Van Orden, Assistant Director, Bureau of Air Quality, and Robert Reiley, Assistant Counsel, Bureau of Regulatory Counsel, Department of Environmental Protection, were present to answer any questions.

Commissioner Watson made a motion for approval. Vice Chairman Bedwick seconded. and the motion passed 5-0.

8. No. 2922 Department of Transportation #18-420: Public Transportation – Sustainable Mobility

Mr. Smith explained that the regulation addresses the application for and awarding of financial assistance to public transportation entities, local match funding requirements, establishment of minimum system performance criteria, and the impact of performance on future funding.

LaVerne Collins, Director, Bureau of Public Transportation, and Jeffrey Spotts, Assistant Counsel, Department of Transportation, were present to answer any questions.

Vice Chairman Bedwick inquired about a 15 percent local match required in the regulation. Ms. Collins stated “Act 44 of 2007 [(Act 44)] requires a local match to be 15 percent of the state award” and noted that only three systems, Southeastern Pennsylvania Transit Authority (SEPTA), the Port Authority and Fayette County, are providing at the 15 percent level. “If they are at that maximum level of local match and state funding is reduced, then local funding would be reduced,” she stated. “If they were only at ten percent local match, they haven’t reached the maximum yet; their local funding would not be reduced.”

Commissioner Watson asked to what extent the temporary regulation that was in effect differs from the final regulation. Ms. Collins said there is not a significant difference. Commissioner Watson questioned how Act 44 was administered in the absence of regulations. Ms. Collins stated “in the same way the temporary regulations allowed us to.”

Commissioner Tabas made a motion for approval. Vice Chairman Bedwick seconded, and the motion passed 5-0.

9. No. 2957 Department of Labor and Industry #12-91: Prohibition of Excessive Overtime in Health Care Act Regulations

Mr. Schalles explained that the regulation implements the Prohibition of Excessive Overtime in Health Care Act provisions on complaint and investigation procedures and administrative penalty assessment provisions.

Karen Galli, Deputy Chief Counsel, and Scott Robinette, Deputy Secretary for Safety and Labor-Management Relations, Department of Labor & Industry (L & I), were present to answer any questions.

Vice Chairman Bedwick questioned why L & I included a 60-day filing deadline for an investigation. Mr. Robinette stated “while the bureau is responsible for Act 102 of 2008, it’s also responsible for enforcing the Minimum Wage Act, the Child Labor Act and at any given time the priority of those investigations may vary based on the severity of the issues that are raised.” He added “we’re loathe to try to set up a system that would handcuff L & I and require them to address some violations while other more significant cases have to wait on a shelf that aren’t similarly subject to the same type of investigation deadline.” Mr. Robinette added “as far as the commencement of an investigation we have amended the proposed regulations to provide at a minimum, we will review and commence an investigation within 60 days.” Vice Chairman Bedwick said the regulations says “review” and does not include “commence.” Ms. Galli stated “we do commence it within 60 days, once we review it is assigned.” Vice Chairman Bedwick suggested including the word “commence” to the regulation. “The word ‘review’ means something to me different than the word ‘commence’,” he stated. “Understanding what you’re saying, it may be one in the same but from the outside they are two distinct and different words being used.”

Vice Chairman Bedwick expressed concern about the ability of L & I to dismiss a complaint without posting it on its website or giving a reason. Ms. Galli stated “we didn’t want to tie ourselves into providing a basis for our dismissal because we were concerned we might jeopardize another current investigation.” She emphasized “our goal is for compliance; we try to resolve all of these complaints, we try to get health care facilities that may have violated it to be compliant in the future and resolve any complaints they may have.” Vice Chairman Bedwick disputed that posting an explanation would “hinder other prosecutions.” Mr. Robinette said that posting a generic statement such as “after a complete investigation of all the facts and circumstances the department does not deem this appropriate for investigation in light of the evidence available and our limited resources” would not be meaningful. Chairman Mizner argued that a “boilerplate statement” would serve a purpose. “Somebody who has a complaint filed against them would be happy with a statement like the one you just gave because they have a professional record to protect,” he stated. “I assume one of the incentives is people in that industry don’t want to be known as somebody who does not comply.”

Vice Chairman Bedwick questioned why the regulation does not require employers to maintain records. Ms. Galli said requiring employers to maintain records is “beyond the scope of the statute” and noted that many employers do keep records. Vice Chairman Bedwick said filing deadlines are not explicitly permitted in the statute either but the department included the deadline.

Vice Chairman Bedwick questioned if the definition of “employer” and “health care facility” have the same meaning. Mr. Robinette stated, “It’s the same.”

Commissioner Watson asked if L & I investigations have the power to subpoena employer records. Mr. Robinette responded “no.” Commissioner Watson questioned what would happen if an employer “stone-walled” an investigation and would not give L & I access to the records. Mr. Robinette said L & I has never had that experience. “If that did happen, the recourse that would be available to the department would be to go ahead with an order to show cause against the employer,” he stated.

Commissioner Watson stated, “I’m concerned about whether these regulations as drafted serve as deterrents to complainants.” He noted that the regulation states that consumers, patrons, stock holders of the company, competitors of the respondent all have the potential right to intervene in a hearing but not unions and union representatives. Ms. Galli stated “we thought unions were an obvious intervener.” Chairman Mizner responded “what’s obvious to you may not be obvious to others” and noted “our regulations are for all Pennsylvania citizens not just those who have experience in the law or an advanced education.”

Commissioner Watson indicated that the regulation includes a provision that allows L & I to award interest on back pay. He questioned when there would be an inappropriate circumstance to award interest on back pay. Ms. Galli stated, “It may depend on what the factors are when the person was reinstated, there may be other willful misconduct, and we just don’t know what those factors would be.” Commissioner Watson noted that he practices civil litigation and said he could not think of an instance where a person would not get interest when awarded a judgment for money.

Mr. Robinette noted that L & I worked with stakeholders after receiving the Commission’s comments on the regulation. “We addressed every comment they made,” he stated. “In ten instances comments and questions that came from the Commission previously resulted in a change to the regulation. Likewise, there were approximately a dozen questions and comments that came from stakeholders which resulted in a change in the proposed regulations that are before the Commission today.”

Commissioner Watson said, “It took 36 months for this agency to promulgate regulations that by statute they were supposed to promulgate in 18 months. We can wait until you get it right.”

Vice Chairman Bedwick made a motion for disapproval. Commissioner Watson seconded, and the motion passed 5-0.

V. OTHER BUSINESS

1. Silvan Lutkewitte was thanked for his service to the Commission as a Commissioner and Chairman from 2009 to 2014.

2. Approval of Vouchers

Commissioner Watson made motions to approve vouchers and expenses for the period January 16 through February 26, 2014. Vice Chairman Bedwick seconded, and the motions passed 5-0.

VI. DATE AND PLACE OF SUBSEQUENT MEETING

Chairman Mizner announced the next public meeting is scheduled for Thursday, March 13, 2014, at 10:00 a.m. in the 14th Floor Conference Room, 333 Market Street, Harrisburg.

VII. EXECUTIVE SESSION ANNOUNCEMENTS

Chairman Mizner announced that no executive session would be held.

VIII. ADJOURNMENT

Chairman Mizner announced the meeting adjourned at 11:52 a.m.