

**INDEPENDENT REGULATORY REVIEW COMMISSION
PUBLIC MEETING MINUTES**

10:00 A.M.

Thursday, June 17, 2021
14th Floor Conference Room
333 Market Street

I. CALL OF THE MEETING

The June 17, 2021 public meeting of the Independent Regulatory Review Commission (Commission) was called to order by Chairman Bedwick at 10:14 a.m. in the 14th Floor Conference Room, 333 Market Street, Harrisburg, PA.

Commissioners Present: George D. Bedwick, Chairman
 John F. Mizner, Esq., Vice Chairman
 John J. Soroko, Esq.
 Murray Ufberg, Esq.

Absent: Dennis A. Watson, Esq.

II. APPROVAL OF THE MAY 20, 2021 PUBLIC MEETING MINUTES

Chairman Bedwick asked for a motion for approval of the May 20, 2021 public meeting minutes, as submitted. Commissioner Ufberg made the motion and Commissioner Soroko seconded, and the motion passed 3-0.

III. NEW BUSINESS

A. ACTION ITEMS

1. No. 3262 Pennsylvania Gaming Control Board #125-230: Video Gaming

Scott Schalles, Regulatory Analyst, explained that this rulemaking converts the Pennsylvania Gaming Control Board's (PGCB) temporary regulations to permanent regulations regarding video gaming at truck stop establishments in Pennsylvania. He reported the Commission received no comments on the final regulation and both of the standing legislative committees have deemed it approved.

Doug Sherman, Chief Counsel, PGCB, was present to answer any questions. He commented that the PGCB made some slight modifications in the wording in response to the Commission's submitted comments.

Commissioner Bedwick made a motion for approval. Commissioner Soroko seconded, and the motion passed 3-0, with Commissioner Watson voting by proxy and Commissioner Ufberg recusing.

2. No. 3255 Pennsylvania Liquor Control Board #54-101: Cleaning of Malt or Brewed Beverage Dispensing Systems

Michelle Elliott, Regulatory Analyst, said this regulation updates requirements regarding the cleaning of malt or brewed beverage dispensing systems to decrease the frequency of required cleaning from every seven days to every 14 days. She also said the regulation clarifies that every licensee including limited wineries, limited distilleries and distilleries, using a dispensing system for selling malt or brewed beverages must comply with this regulation. According to Ms. Elliott, the Commission received one comment from a member of the regulated community, Ryan O'Neill, on the final regulation opposing the change and he intends to speak on the regulation. She reported that the House and Senate standing committees have deemed the regulation approved.

Norina Foster, Assistant Counsel, Pennsylvania Liquor Control Board (PLCB), was present to answer any questions.

Commissioner Ufberg commented that he paid heed to the person who submitted comments to the Commission. He said he assumes the PLCB does not have the same view that he does or they would not have promulgated the regulation. Commissioner Ufberg said he does not understand the necessity of making the cleaning process less stringent rather than retaining where it is now. He wanted to know what prompted that. Ms. Foster described the regulation as "a great example of how this entire regulatory process is designed to produce the best regulation possible." She explained that this regulation began when the Pennsylvania Brewers Association and the Pennsylvania Restaurant and Lodging Association approached the PLCB and said they would like this change to be made. Ms. Foster said the PLCB went forward with this proposed change. She conceded that Mr. O'Neill "makes a valid point." According to Ms. Foster, "The Liquor Control Board, for this particular regulation, is taking the position much like we do with legislation. It is decided by someone else and we execute what others have decided and at this point we defer to your wise counsel and judgement as to how to split this baby." She said on the one hand you have the Brewers Association, the Restaurant Association and the Tavern Association who are saying all of the licensees are suffering because of the cost of weekly cleanings and the waste of beer and you have someone else with 30-years' experience saying you really have to keep this frequency.

Commissioner Ufberg pointed out the people consulted by the PLCB are all related to the business of brewing and serving and Mr. O'Neill's comments outline some of the potential harm to the public. Ms. Foster responded, "There is a certain amount of self-interest in licensees having clean lines because if the lines aren't clean then the beer and the malted brewed beverage are going to taste off and they can lose business." She also reported her research has not indicated anyone would sustain any type of harm from drinking beer from a bad line. Commissioner Ufberg wanted to know if he can assume the PLCB is satisfied that this change should not cause any harm to the public. Ms. Foster responded, "Correct."

Vice Chairman Mizner wanted to know if it is safe to assume the PLCB looked at the totality of all of the circumstances including the costs to the licensees and the concerns related to

the customers of the licensees and deemed this to be the kind of change that could be made. Ms. Foster noted the licensees could clean more frequently than the 14 days if they would like.

Chairman Bedwick wanted to know the chances the PLCB is going to inspect to see if the licensees are doing the cleaning every two weeks or not. Ms. Foster explained the Bureau of Liquor Control Enforcement conducts inspections and when they inspect they look at the records and they may also physically look at the lines.

Ryan O'Neill, O'Neill Tap Cleaning Service, said he believes the regulatory change actually has two regulatory changes. He expressed support for the clarification that every licensee including limited wineries, limited distilleries and distilleries using a dispensing system for selling malt or brewed beverages must comply with the regulation. Mr. O'Neill went on to tell the Commission members, "Based on my observations as a professional in the beverage cleaning industry, changing the frequency of required cleanings from once every seven days to once every 14 days is not in the public interest and does not aid in the protection of public health. He argued, "The proposed regulatory change puts the interest of the Pennsylvania state licensees above the interest of the public and would lessen standards of cleanliness that have been proven to protect public health in the commonwealth for many years." Mr. O'Neill also commented, "Based on my personal experience, the draft drinking public could potentially be affected by drinking beer out of systems that are cleaned half as often as they used to be." He concluded his testimony by saying that "I believe that the proposed regulatory change to the frequency of cleaning of malt or brewed beverage dispensing systems from once every seven days to once every 14 days does not benefit the public and could possibly be a concern for public health. The change only serves to benefit the bottom line of the licensees of the Commonwealth at the cost of the quality of the product that they serve the public."

Chairman Bedwick noted that Mr. O'Neill stated he supported part of the regulation and opposed another part of the regulation. He explained that the Commissioners cannot separate the regulation and they have to approve the regulation or disapprove it in its entirety.

Commissioner Soroko asked Mr. O'Neill if he was writing this regulation what period of time he would propose. Mr. O'Neill responded that the current interval of seven days is what the regulation should be left at. He said that at the current interval most of the tap systems he cleans would be fit and safe to use. Mr. O'Neill added that his fear is that if this regulation is changed to 14 days there will be an increase in the number of tap systems that are not fit and safe. Commissioner Soroko asked if any of Mr. O'Neill's accounts have asked him to perform cleaning on an interval of less than seven days. Mr. O'Neill said he has before and the reason is because there are solid precipitates that come out of the line and into the beer these establishments are serving. Commissioner Soroko wanted to know if any of the accounts include a provision in which Mr. O'Neill is contractually obligated to come in sooner than seven days. Mr. O'Neill said he does not have any accounts where he comes in on a regular basis any sooner than seven days.

Commissioner Ufberg asked Mr. O'Neill how many systems his company services. Mr. O'Neill responded, "Hundreds." He said he travels 75 miles from his home base in all directions. Commissioner Ufberg commented that Mr. O'Neill makes some very compelling points but he is curious why there has not been a greater outcry from other people in the tap cleaning business

about this proposed change. Mr. O'Neill explained that he believes that has to do with the overall regulatory process. He pointed out he was not aware of this proposed change being considered until very well into the process and once he found out about it he contacted ten other beer tap cleaning establishments within the Commonwealth and out of those ten establishments, eight of them had no idea that this was being proposed. Commissioner Ufberg asked once they found out about it is there a reason they have not joined Mr. O'Neill in opposing the proposed change. Mr. O'Neill said he believes it is because those in the industry are busier trying to run and operate their businesses. He said it is a matter of time and understanding the process.

Vice Chairman Mizner commented that almost every regulation that comes before the Commission involves very busy people and it is all a matter of prioritization. He said he is trying to balance whether the change to 14 days presents a real increase in the risk of harm to the customer from a health and safety perspective or not. Vice Chairman Mizner asked Mr. O'Neill if he has any anecdotal evidence of people being sick or having other problems as a result of a line that had not been cleaned every seven days. Mr. O'Neill said the evidence that the frequency of seven days for being the right frequency is the fact that has been in place for 35 years in Pennsylvania and there have been no issues.

Chairman Bedwick asked about the cost factor. Mr. O'Neill said the estimated cost that is part of the final review of the regulation is "a gross overestimate of the amount of money." He added he has zero accounts where it is more than \$120 for a tap system being cleaned. Chairman Bedwick said they were told the cost was based on per line and the Commission does not have information on the average number of lines. Mr. O'Neill responded that the average for his account is at most ten lines and the cost per line is about \$3.

Ms. Foster told the Commissioners that the PLCB got the average cost of \$6 to \$12 per line from an industry organization source.

After the vote, Commissioner Ufberg told Mr. O'Neill, "I voted aye because overall, as you pointed out, there are different sections of this regulation which apply and in my overall summation I voted in favor of it. But I have to tell you that you made a very thorough, very compelling and very excellent presentation." He continued, "I am sorry you are disappointed by the result but I don't want you to think what you said went without notice or serious consideration."

Chairman Bedwick suggested that in the future the PLCB reach out to the public when looking at these types of regulation.

Vice Chairman Mizner asked that the PLCB be mindful of the public health concerns expressed at today's meeting.

Commissioner Soroko made a motion for approval. Chairman Bedwick seconded, and the motion passed 5-0, with Commissioner Watson voting by proxy.

3. No. 3240 Milk Marketing Board #47-18: Transactions Between Dealers and Producers; Termination of Dealer-Producer Contract

Corinne Brandt, Regulatory Analyst, explained that the regulation extends the current 28-day notice requirement to terminate a dealer-producer contract to 90 days for dealers. She further explained it also permits the dealer to petition the Milk Marketing Board for a shorter notice period if the dealer is in financial distress. Ms. Brandt said there were no public comments on the final-form regulation and the standing committees have deemed the regulation approved.

Robert Barley, Chairman, Milk Marketing Board, was present to answer any questions. He briefly outlined the background on the Board's proposed change.

Chairman Bedwick made a motion for approval. Chairman Bedwick seconded, and the motion passed 5-0, with Commissioner Watson voting by proxy.

4. No. 3273 Bureau of Professional and Occupational Affairs #16A-7103: Schedule of Civil Penalties - Crane Operators

Ms. Brandt reported the regulation implements a schedule of civil penalties for various violations of the Crane Operator Licensure Act and the regulation of the State Board of Crane Operators (Board). She said no public comments were received on the final rulemaking and the standing committees have deemed the regulation approved.

Dean F. Picarella, Senior Counsel, and Cynthia K. Montgomery, Deputy Chief Counsel, Department of State (DOS), were present virtually to answer any questions.

Mr. Picarella pointed out that this is the Board's first use of the particular section of the Code authorizing the Commissioner of the Bureau of Professional and Occupational Affairs (BPOA) to promulgate a schedule of civil penalties for the violations of the Crane Operators Licensure Act. He explained the Board and the Commissioner of BPOA looked at those offenses that occur most regularly and are most likely to occur within the profession. He said the Board and the Commissioner of BPOA will continually monitor and as they gain experience with this particular authority. They will make adjustments and add more violations if it becomes warranted. Chairman Bedwick commented that when looking at the Crane Operators Licensure Act there is already a provision that allows the Board to assess civil penalties through a formal disciplinary process and the maximum amount of fines appeared to be the same as being proposed in the regulation. He wanted to know if that means there are two different paths you can take to assess a civil penalty. Ms. Montgomery explained that the case law has developed that the state boards may either impose a civil penalty under their independent authority or may impose a civil penalty under Title 63.

Chairman Bedwick expressed his concern with the responses to the Commission's comments on the proposed regulations. According to Chairman Bedwick, one of the comments asked whether the Board should consider limiting the citation process to violations that are listed which don't include bodily harm or substantial property damage. He said the written response to the comment seems to say "trust us" and it seems to say that you are in total agreement that the process should not or would not be used if there is bodily harm or if there is substantial property

damage. Chairman Bedwick asked if the BPOA is in agreement why they are asking the Commission to trust what they are going to do. He said wouldn't it have been easier to accept the comment and limit the citation process to situations that did not involve bodily injury or substantial property damage. Mr. Picarella responded that it might have been a miscommunication or an "artful answer." He explained that the Board and the Commissioner consider that while citations may be available for violations of these acts, they are not mandatory. There is an option of disciplinary action being filed because of the facts and circumstances or the incident. Mr. Picarella described the Board as "a complaint-driven board" and explained they do not have inspectors going out.

Chairman Bedwick asked for an explanation of licensure versus certification. According to Mr. Picarella, a license is issued by the state and it is a license to operate a crane within the Commonwealth. He explained that certification is "more of a national thing" and a crane operator, in order to be certified, must go through training and is outside of the licensing in Pennsylvania, but it is a national or regional certification where they test and certify on certain machines for two, three or five years. Mr. Picarella pointed out the Pennsylvania license is for a period of two years. He noted only about 17 states require licensure of crane operators. Mr. Picarella offered an overview of what occurs when an operator's certification and their license do not coincide. He also explained that licensees will sometimes allow their certification to lapse before the end of their biennial license period because they are no longer employed as a crane operator or practicing the profession or have retired.

Commissioner Ufberg wanted to know how a person can continue to work in Pennsylvania under a license without verification of certification if it is a necessity to achieve a license in the first place. Mr. Picarella explained that once the certification lapses you must recertify for your license to be valid. He said, "Once that certification lapses your license is invalidated." Mr. Picarella explained you cannot practice in Pennsylvania without being certified. Commissioner Ufberg asked if the Board maintains the current status of all certifications of people who are licensed. Mr. Picarella explained that when people apply for their renewal of their license they provide certification. Commissioner Ufberg then asked if the DOS knows when someone is no longer certified and if they require verification whether or not the person has achieved recertification. Mr. Picarella said when they are issued a license and when they renew they supply the Board with a copy of their certification.

Commissioner Ufberg asked if there is any immediacy to or need for the regulations to be approved. He asked if this regulation could be revisited by the Commission and to let the Board address the questions that have been raised today. Mr. Picarella said he saw no problem with that and there was no urgent need for the regulation to pass today.

Commissioner Ufberg asked Leslie Lewis Johnson, Chief Counsel, if it is possible for the Commission to defer this regulation for further action. Ms. Johnson said the Commissioners have to actually take action on the regulation by either approving or disapproving it. She explained the Commission would issue a disapproval order based upon the concerns raised today and then the Board would have 40 days within receipt of the order to respond.

Chairman Bedwick made a motion for disapproval. Vice Chairman Mizner seconded, and the motion passed 4-1, with Commissioner Watson dissenting by proxy.

5. No. 3285 State Board of Physical Therapy #16A-6518: Child Abuse Reporting Requirements

Laura Campbell, Regulatory Analyst, explained that this final-rulemaking amends the State Board of Physical Therapy's child abuse reporting regulations to be consistent with the Child Protective Services Law. She further explained that under this law physical therapists and physical therapist assistants are mandated reporters who are required to immediately report expected child abuse. According to Ms. Campbell, no public comments were received by the Commission on the final-form regulations, and both standing committees have deemed the regulation approved.

Ms. Montgomery and Thomas Davis, Board Counsel, State Board of Physical Therapy were virtually present to answer any questions.

Commissioner Ufberg made a motion for approval. Vice Chairman Mizner seconded, and the motion passed 5-0, with Commissioner Watson voting by proxy.

6. No 3233 Professional Standards and Practices Commission #6-340: Code of Professional Practice and Conduct for Educators

Mr. Schalles said that this regulation updates the Commission's Code of Professional Practice and Conduct for professional educators and addresses the implications of shifts in technology and society since the code's adoption in 1992. He explained that inappropriate use of technology by educators was cited as the primary reason for this rulemaking. Mr. Schalles reported no comments were received on the final regulation and both standing committees have deemed it approved.

Shane Crosby, Executive Director/Legal Counsel, Professional Standards and Practices Commission, was virtually present to answer any questions.

Chairman Bedwick made a motion for approval. Vice Chairman Mizner seconded, and the motion passed 5-0, with Commissioner Watson voting by proxy.

IV. OTHER BUSINESS

1. Former Commissioner Russell Faber was presented with a plaque in recognition of his six years of service as a member of the Commission.

2. Approval of Vouchers

Chairman Bedwick made motions to approve vouchers and expenses for the period April 16, 2021 through May 20, 2021. Vice Chairman seconded, and the motions passed 3-0.

V. DATE AND PLACE OF SUBSEQUENT MEETING

Chairman Bedwick announced the next public meeting is scheduled for Thursday, July 15, 2021, at 10:00 a.m. in the 14th Floor Conference Room, 333 Market Street, Harrisburg.

VI. EXECUTIVE SESSION ANNOUNCEMENTS

Chairman Bedwick announced that no executive session would be held.

VII. ADJOURNMENT

Chairman Bedwick adjourned the meeting at 12:20 p.m.