

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

From: Nathan Bortner, Secretary
Warren R. Mowery, Jr., Chief Counsel

Date: May 6, 2020

RE: Pre-Hearing Conferences and Hearing practices before
the Pennsylvania Labor Relations due to the Covid-19
pandemic

Since the Governor of Pennsylvania's emergency declaration closing Commonwealth offices due to the spread of the coronavirus, including the offices of the Pennsylvania Labor Relations Board (Board), effective March 13, 2020, the Board has continued all hearing indefinitely. This memorandum is intended to provide guidance to the PLRB staff, Hearing Examiners, and the public regarding the resumption of hearing before the Board Hearing Examiners.

Section 1603 of PERA provides that "[i]f any witness resides outside of the Commonwealth or through illness or other cause is unable to testify before the board or its members or agent conducting the hearing or investigation, his or her testimony or deposition may be taken within or without this Commonwealth, in such manner and in such forms as the board or its members or agent conducting the hearing, may by special or general rule prescribe."

Effective immediately, consistent with Section 1603, a Complaint and Notice of Hearing issued by the Board Secretary will provide the name of the Board Hearing Examiner assigned to the case and a date and time for a Pre-Hearing conference call with the Hearing Examiner. Prior to the date of the Pre-Hearing conference the Hearing Examiner will contact the parties, or their representatives, to make necessary arrangements for the telephone conference.

The purpose of the Pre-Hearing Conference is to discuss and reach an agreement on the logistics of conducting the hearing, and if necessary, the exchange of exhibits. The Hearing Examiner has at their disposal and discretion several options, or a

combination thereof, for submission of testimony and exhibits. These methods include the following:

STIPULATIONS: With the Hearing Examiner's approval, the parties may enter into written stipulations as to the facts of the case, and submit the entire case to the Hearing Examiner for disposition on the stipulations and briefs.

In the alternative to resolving all facts of the case, the Hearing Examiner may allow the parties to stipulate to the facts within the knowledge of a particular witness or witnesses, in lieu of that witness's appearance and actual testimony.

Additionally, the parties may stipulate to any or all of the exhibits, documents, or other evidence, intended to be introduced. If the admissibility of a stipulated exhibit is challenged, the parties must set forth in their written stipulations their respective positions on the admissibility of the evidence for review by the Hearing Examiner.

DEPOSITIONS: With the Hearing Examiner's approval, a party may submit some or all of its case on depositions of the parties witness or witnesses. Video depositions are preferred, however, the Hearing Examiner may allow deposition testimony to be taken in-person or by telephone. Deposition testimony must be transcribed, and a copy of the transcript, and video if used, filed with the Board Hearing Examiner.

The deposition transcript should be as complete as possible to preserve issues for the Hearing Examiner. Objections to questioning should be made on the record, as well as any response thereto or offers of proof. Exhibits introduced or used during the deposition testimony should be appended to the deposition transcript. The parties should move for the admission of exhibits on the record, and state the parties' position with regard to any objection to the admissibility of the document or exhibit. All rulings on objections to testimony or the admissibility of evidence, are preliminarily overruled for purposes of taking of the deposition testimony. A final ruling on the admissibility of the testimony or evidence is reserved for the Hearing Examiner upon review of the transcript.

A witness who has testified by deposition is not excused from further questioning or examination by the Hearing Examiner.

If, upon review of the deposition transcript, the Hearing Examiner has questions for the witness relevant to the case the Hearing Examiner may direct the party to have that witness appear, with or without a subpoena, and testify at a later date in such manner as the Hearing Examiner may prescribe.

VIDEO CONFERENCE BY SKYPE FOR BUSINESS: The Commonwealth has made available to Board Hearing Examiners video conferencing through Microsoft's Skype for Business application. Board Hearing Examiners are unable to utilize video conferencing through other apps or software. Therefore, prior to requesting video conferencing for all, or any part of a hearing, the attorneys or representatives presenting the case must verify that they have Microsoft Skype for Business properly installed and working with video and audio, and that all witnesses intending to testify via video conferencing also have the Microsoft Skype for Business app or software with audio and video properly working on their devices.

At the discretion of the Hearing Examiner, and depending on the complexity or number of witnesses involved, the Hearing Examiner may permit some or all of the case to be presented by video conferencing, either by scheduling individual conferencing sessions per witness, or the Hearing Examiner may hear all testimony and witnesses during one video conferencing session. Witnesses, testifying by video conference, will be asked to verify under oath that there are no other persons in the room with them while testifying, and be directed to only refer to or review exhibits when asked to do so during questioning.

The party presenting the witness via video conferencing shall, prior to the testimony, provide copies of any and all exhibits, documents or evidence intended to be introduced or used by the witness during the testimony. Pre-numbered exhibits shall be sent to the Hearing Examiner, any other party or parties' representative(s), the witness who will be testifying as to that document or exhibit, and the stenographer (Sargent's Reporting Company). A Certificate of Service of the exhibits shall be filed with the Board prior to commencement of the video conference testimony. Absent good cause, the Hearing Examiner may preclude from evidence in the case, any document or exhibit that has not been previously served on opposing counsel prior to the commencement of the video conference testimony.

IN-PERSON HEARINGS: If necessary, in-person hearings may be scheduled in the Harrisburg or Pittsburgh office. Seating in the hearing rooms will be limited and set up to facilitate approximately a six-foot social distancing between attendees. Witnesses, who are waiting to be called to testify, will be sequestered outside the hearing room and should practice social distancing while remaining within a five-minute walk to the hearing. Counsel for the party calling the witness is expected to be able to contact the witness when it is time for their testimony. Each witness should have their own copy of the exhibits to which they will testify. Unless otherwise directed by the Hearing Examiner, prenumbered copies of all exhibits should be provided to opposing counsel, the stenographer, and the Hearing Examiner no later than the commencement of the hearing.

Everyone in attendance at the hearing is expected to follow Center for Disease Control (CDC) guidelines in place at the time of the hearing, as well as any Commonwealth, Department of Health, or Labor and Industry guideline or policy with regard to Personal Protective Equipment (PPE) (i.e. masks, gloves, etc.), social distancing, hygiene, or cleaning, to stop the spread of Covid-19. Attorney, parties, and witnesses should ensure that they have all the necessary PPE to be admitted to the hearing room. The failure of a party, their counsel, or a witness, to be allowed admittance into the Labor and Industry Building or Piatt Place at the time of the hearing due to their refusal to comply with federal, state or building guidelines, may not, absent extenuating circumstances, constitute cause for a continuance of the hearing.

Due to changing stay-at-home directives being issued by the Commonwealth on a County basis based on the number of Covid-19 cases in the area, witnesses may be unable to travel to Harrisburg or Pittsburgh. In such circumstances a witnesses' appearance may be excused by the Hearing Examiner, and a supplemental Pre-Hearing Conference held to arrange for the taking of the witnesses' testimony by other means. If an in-person hearing is scheduled for the Board's Harrisburg or Pittsburgh office, and at the time of the Hearing Dauphin County or Allegheny County is under a stay-at-home directive, the Hearing Examiner will notify the parties that the hearing will be continued indefinitely. The parties and Hearing Examiner may agree to reconvene a Pre-Hearing Conference to discuss

presentation of the case through other means, or to discuss rescheduling of the hearing.

The parties are encouraged to narrow the issues in dispute as best as possible through conciliation or settlement discussions prior to the Pre-Hearing Conference. For the Pre-Hearing Conference, counsel should have a general understanding and outline of their case, and the number of witnesses anticipated to be called by the party and also have a general idea of the number and size of exhibits to be offered.

Counsel should have sufficient knowledge of the health, well-being and circumstances of the witnesses and persons involved with the case. During the Pre-Hearing Conference with the Hearing Examiner, counsel must be prepared to discuss the logistics of providing witness testimony and the exchange of exhibits. Counsel must have authority and be able to reach an amicable solution for the presentation of the case through stipulations, depositions, video conferencing, or in-person hearings, or any combination thereof with regard to any and all witnesses and persons involved in the presentation of their case.

Due to the nature and spread of the coronavirus, the health or circumstances of counsel, witness or party may change rapidly. Counsel is expected to advise the Hearing Examiner of any such changes as soon as possible. If necessary, a supplemental Pre-Hearing Conference may be arranged by the Hearing Examiner to discuss appropriate accommodations or arrangements to secure the witness testimony, or presentation of the evidence.