

DRAFT

BUSINESS MEETING
BOARD OF COAL MINING EXAMINERS

Department of Mines, Minerals and Energy
Buchanan-Smith Building, Big Stone Gap, Virginia
Thursday, June 21, 2007 – 10:00 A.M.

MINUTES**BUSINESS MEETING
BOARD OF COAL MINING EXAMINERS**Members Present

Joe Buchanan
Gerald Kendrick
Frank Linkous
Arvil McConnell
Ricky O'Quinn

Others Present

Mary Gibson, Regulatory Boards Administrator
Donna McFaddin, DM Administrative Program Specialist
Sharon Pigeon, Assistant Attorney General
Benny Wampler, DMME Deputy Director

Meeting Called To Order

Chairman Frank Linkous called the meeting to order at 10:00 a.m. All members were present and the Board acknowledged their new member, Ricky O'Quinn.

Focus of Meeting

The focus of the meeting was to review provisions of the Bill that was approved April 4, 2007, and becomes effective July 1, 2007. Implications for the Board of Coal Mining Examiners (Board) that will confirm the law change, most particularly the portions that deal with substance abuse. A motion was made, seconded with unanimous vote taken to approve the agenda for the June 21, 2007, meeting.

Minutes for May 1, 2007, Meeting

No additions or corrections. A motion was made, seconded with unanimous vote taken to accept the minutes for May 1, 2007, meeting.

Senate Bill 1091

- § 45.1-161.32 The Code has been amended to allow the Board to set fees for certifications, cost for persons wishing to be certified. (This topic will be discussed in detail later in the meeting.)
- § 45.1-161.35 (B) Change of the language under the sections that relate to the Board and the Board Authority to include the word *suspend* or *take other action regarding* as opposed to just revoke. The Board has already been using that tool of suspension as opposed to just revoking certifications.
- § 45.1-161.35 (C) "Any person holding a certification issued by the Board shall report to the Chief, within 30 days of any criminal conviction in any court of competent jurisdiction for possession or use of any controlled substance with the prescription of a licensed prescriber. This conviction shall result in the immediate temporary suspension of all certificates held by such person pending hearing before the Board.

Basically, an individual who is convicted for possession and use of any control substance without the prescription of a licensed prescriber. If an individual is convicted, it is incumbent upon him/her within 30 day to notify the Board. The Board has procedures in

place for that notification and they are currently being communicated. There may be a problem with convicted individuals complying with this requirement. The Board has ways of dealing with this other than relying on reporting by the individual. Capabilities are being set up for going on line with the clerks of the Circuit Courts for information on local convictions. Convictions in Kentucky and West Virginia will take more research.

- § 45.1-161.35 (D) Any miner present at any mine shall be deemed to have given consent to reasonable search, at the direction of the Chief by employees of the Department of Mines, Minerals and Energy (Department), of his person and his personal property located at the mine. This search shall be limited to the investigation of potential violations of the Coal Mine Safety Act.

“All information regarding substance abuse test results of certified persons, written or otherwise received by the Department or Board, shall be confidential. Any hearing of the Board in which this information is presented shall be conducted as a closed session in accordance with the Virginia Freedom of Information Act (Sec 2.2-3700 et seq.).

- § 45.1-161.35 (H) Any hearing conducted after the temporary suspension of a miner’s certificate due to (i) a criminal conviction in any court of competent jurisdiction for possession or use of any controlled substance without the prescription of a licensed prescriber as provided for in subsection C, (ii) a failure to pass a substance abuse test required by the Chief pursuant to Sec 45.1-161.78 (iii) a failure to pass a pre-employment substance abuse screening test (that’s required under a mandated operator’s policy & program), (iv) a discharge for violation of the company’s substance or alcohol abuse policies (that may be the fact that they refuse to take a test and, therefore, they’re discharged – that would be required to be reported), (v) a positive test for the use of any controlled substance without the prescription of a licensed prescriber, (vi) a positive test for intoxication, while on duty status, or (vii) a failure to complete a substance abuse program pursuant to Sec 45.1-161.87 shall be conducted within 60 days of the temporary suspension. The Board shall make every effort to hold the hearing within 40 days of the temporary suspension.

The avenues have been set forth here through which those who are screened or who have violated a substance abuse policy will be in suspension and who will have the right to appeal to this Board for review and administration of the issue.

- § 45.1-161.37 General Coal Miner Certification (enacted August 1996)

It was optional for experienced miners at that time to be grandfathered into receive certification. If a miner elected not to be certified, that was their choice. From that day forward, every miner working surface or underground has been required to have a General Coal Miner Certification. In order to have the capability of suspending miners for the Substance Abuse Act, it was necessary to have everyone hold a General Coal Miner Certification. This requirement provides that by September 30, 2007, that all miners, including grandfathered miners, must have the General Coal Miner Certification.

- § 45.1-161.39 Surface Foreman Certification

This deals with the amending of the requirement for surface foreman certification. The Board previously discussed the need to have a surface foreman criteria set that was comparable to the underground foreman as far as experience requirements. Previously the wording required five years of surface coal mine experience. The code was amended to allow for other relevant experience to be considered that included education and other mining experience. However, the surface foreman must have at least three years of experience in a surface coal mine.

- § 45.1-161.78(D) The Chief shall require substance abuse testing as part of an inspection or complaint investigation if there is reasonable cause to suspect a miner's impairment, due to the presence of intoxicants or any controlled substance not used in accordance with the prescription of a licensed prescriber, or has been a contributing factor to any accident in which a serious personal injury or death occurs at a mine. The Chief shall require substance abuse testing of any miner killed or seriously injured and of any other person who may have contributed to the accident. Any substance abuse testing required by the Chief will be paid for by the Department. Refusal by any miner to submit to substance abuse testing, or the failure to pass such a test, shall result in the immediate temporary suspension of all certificates, pending hearing before the Board of Coal Mining Examiners.

This statute will be the means by which individuals will be suspended as a result of Department mandated testing. That would come through reasonable cause to believe there's impairment identified through inspections, through investigation of complaints, and through accidents and serious injuries that occur.

- § 45.1-161.87(D) The mine operator shall implement a substance abuse screening policy and program for all miners that shall, at a minimum, include a pre-employment, 11-panel urine test for the following substances:
 1. Amphetamines
 2. Cannabinoids/THC
 3. Cocaine
 4. Opiates
 5. Phencyclidine (PCP)
 6. Benzodiazepines
 7. Propoxyphene
 8. Methaqualone
 9. Methadone
 10. Barbiturates
 11. Synthetic Narcotics

There are different panels, the DOT 5 panel screening is very different from the 11-panel. The 11-panel screening catches most of the major areas of concern in terms of depressants, legal and illegal drugs. The 11-panel screening is not routinely done in the industry at this time, but it will give a good comprehensive evaluation for pre-employment.

“Samples shall be collected by providers who are certified as complying with standards and procedures set out in the US Dept of Transportation's rule, 49 CFR Part 40. Collected samples shall be tested by laboratories certified by the U.S. Dept of Health and Human Services. Substance Abuse and Mental Health Services Administration (SAMHSA) for collection and testing.

SAMHSA is the national accredited sampling entity in our nation. There are two major companies that administer through the nation, one in Charlotte and one in Utah.

- § 45.1-161.87(E) The operator or his agent shall notify the Chief, on a form prescribed by the Chief, within 7 days, of any failure of a pre-employment substance abuse screening test. Notice shall result in the immediate temporary suspension of all certificates held by the applicant, pending hearing before the Board of Coal Mining Examiners.

There's a notification or determination required by the samples that we mandate and with the confirmation of a positive or a violation of a substance abuse policy and program, there's immediate temporary suspension. The remedy is before this Board if there's a desire for a remedy.

- § 45.1-161.87(F) “The operator or his agent shall notify the Chief, on a form prescribed by the Chief, within seven days of (i) discharging a miner due to a violation of the company's substance or alcohol abuse policies, (ii) a miner testing positive for intoxication while on duty status, or (iii) a miner testing positive as using any controlled substance without the prescription of a licensed prescriber. An operator having a substance abuse program shall not be required to notify the Chief under subdivision (iii) unless the miner having tested positive fails to complete the operators substance abuse program. Notice shall result in the immediate temporary suspension of all certificates held by the applicant, pending hearing before the Board of Coal Mining Examiners.

Many miners hold only General Coal Miner Certification or Gas Testing Certification, but there are others that hold eight or more certifications. These individuals would be losing their right to exercise those certified privileges in the coal industry until they address this issue before the Board.

- § 45.1-161.87(G) The provisions of this chapter shall not be construed to preclude an employer from developing or maintaining a drug and alcohol abuse policy, testing program, or substance program that exceeds the minimum requirements set forth in this section.

How the screening is going in the coal industry, how it's going to be reported, what will result from a failure of policy procedure or policy test, and then it comes to the Board to understand that our role will be to receive those appeals

Frank Linkous reported on DMME's efforts to implement this new law. DMME didn't have a lot of opportunity time wise, but moved forward quickly to prepare and equip our personnel to assist operators in understanding the new law and the new reporting process. By June 29th, DMME's goal is that all mine sites will have received this information. DM's intentions are to put as complete of information as possible at this time in the hands of every coal miner.

DM has tried to address some of the questions up front. Since then, we have received many more questions, which have been consolidated. All the packets of information given to the

Board today will be placed on the DMME and DM web sites. DM will also be preparing an Operators Bulletin to be released this week. Mike Abbott, DMME Public Relations Officer, will be putting out a general press release. Mr. Carroll Green has been appointed coordinator of the DM Substance Abuse Program.

DM personnel have scheduled meetings with the medical community and physicians to alert them of the new program and how it will affect them. The concern over controlled substances that are used in the work place, the emphasis that the Board and DMME are going to put on policy and programs to say that those must be disclosed to the operator, that it must be understood that individuals are on the drugs legally, and that they need to advise their patients of the seriousness of over medicating and what it can mean.

A meeting has also been scheduled with the County Sheriff and the Drug Task Force's offices to inform them of the program.

Examination Fees

Mary Gibson distributed a "Certification Fee Structure". This chart provided cost comparisons for Kentucky, West Virginia, and Virginia. There is a maximum of \$50 that cannot be exceeded. Virginia is currently charging a fee of \$10.00 for all certifications and a \$1 fee for replacement cards.

DM currently has a high percentage of no-shows for the scheduled exams, with statements such as, "well its only \$10". With the increase in fees, the desired effect is that it will be taken more seriously and attendance will be higher. The bulk paper work for exams and postage is costly. This increase will help cover this expense as well.

The initial proposal set before the Board was: \$35 for all certifications, except for General Miner, which would be \$15. Replacement cards would be increased to \$5 from \$1.

Sharon Pigeon noted that there could be some significant legal ramifications from this new consent to search substance abuse, and suspects that there could be a market for the replacement cards.

Frank Linkous reported that DM inspectors could confirm certifications on their laptop computers. The inspectors work at a mine on an average of two years and know the people. When a new person starts, the inspector confirms the certification not based on the card but against DM files. Also, DM relies on the employer to pre-screen employees for proper documentation.

The question on the table was "should we go more than \$5 for a replacement card?" Sharon's reply was, "Yes, to deter fraudulent use of these cards."

A motion was made to increase all Virginia mining certifications to \$40, with the exception of the General Coal Miner Certification, which would be increased to \$20, and the Replacement of Cards increased to \$10, seconded with unanimous vote taken.

A motion was for the implementation date for the increase of certification fees to be effective July 1, 2007, seconded with unanimous vote taken.

OPEN AGENDA

Administrative Board Activities

Sharon Pigeon recommended that the Board needs to consider meeting on a monthly basis. She stated that at least, initially, when this new procedure starts the Board will have an obligation to people who's certification is potentially effected to have a hearing as quickly as possible and resolve the matter one way or the other. She recommended choosing a specific date such as the second Tuesday of each month. And these certification fees should be considered for the additional costs on this Board to meet its demands.

Frank Linkous distributed examples of the State of Kentucky substance abuse ruling (e-mails). DM has tried to keep in contact with Kentucky as they have implemented this bill. E-mails showing actions taken – Permanent Revocations of Certificates, Drug Policy suspensions. As DM receives this information, the names are cross-reference to see if they hold certifications in Virginia. During the last review, 30+ individuals were found that held certification in Virginia. When this is discovered, the individual is sent a letter advising them that they are temporarily suspended until they come before the Board.

The meeting in Kentucky is tentatively scheduled for 9:00 a.m. in Frankfort, which is approximately a five-hour drive. Frank recommended leaving the night before and traveling together in a van. DM will cover the cost of the lodging and the Board would be entitled to a \$50 per diem per day for any called meeting, as well as expenses. Board members would need to complete the necessary forms. Further information and forms will be provided at a later day.

Sharon Pigeon distributed handouts on “Access to Public Meetings under the Virginia Freedom of Information Act” and “E-Mails and Meeting under the Virginia Freedom of Information Act” – reference materials from a recent FOIA conference.

Information was provided on “What does a public body have to do to close a meeting?” It is not a requirement to poll the members and list the names but if you are dealing with a sensitive matter, it is recommended. It will not validate or invalidate it one way or the other.

The motion that is made in the public meeting while everyone is still together, the subject matter has to be identified for the closed meeting. State the purpose of the closed meeting and then make specific reference to the applicable exemption from the open meeting requirements. What can be discussed in a closed meeting? You can only discuss what you said you were going to talk about in the motion. Nothing else. The motion **must** be set forth in detail in the minutes for the open meeting itself.

A general reference to the provisions of FOIA, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting is not sufficient to satisfy the requirements for holding a closed meeting. Sharon recommended that the Board needs both the statutory reference under the Mine Act and the FOIA reference.

Sharon will prepare a form motion for the Board to use for closed sessions. The one best for the Board is the Personal Information Exclusion.

Will there be a record kept in a closed session? There does not have to be a verbatim transcript. A general synopsis of what you discussed will suffice. The synopsis must be written and it is **confidential**. Open meetings are required verbatim.

If the synopsis is pertaining to one case, does it become part of the case since all of it is confidential? Yes, because that supports what you were doing.

One of the exceptions that allow closed meetings is to discuss probable litigation. Previously, the Board or others had thought that just talking to your lawyer was enough reason to go into a closed meeting and that is not so. Probable litigation means that you have specific information and a law suite has been or is potentially pending to be filed and that is one of the exceptions for going into a closed session.

Only the public business matters, lawfully exempted, can be discussed. When coming back on record, a statement must be made into the record of exactly what happened. Take a roll call or other recorded vote certifying that to the best of each member's knowledge:

1. Only public business matters lawfully exempted from open meeting requirements under this chapter were discussed, and
2. Only such public business matters were identified in the motion by which the closed meeting was convened were heard, discussed, or considered in the meeting by the public body.

The vote must be included in the minutes of the open meeting.

Any member of the public body, who believes that there was a departure from the requirements of (1) or (2) above must state so prior to the vote, and indicate the substance of the departure that, in his/her judgment, has taken place. This statement must also be recorded in the minutes of the open meeting.

When do decisions made in a closed meeting become official actions of the public body? *Decisions become official when the public body reconvenes in an open meeting, reasonably identifies the substance of the decision, and takes a recorded vote on the resolution, ordinance, rule, contract, regulation or motion agreed to in the closed meeting.*

Can there be a closed meeting without first having an open meeting? *No. A closed meeting can take place only within the context of an open meeting, even if the closed meeting is the only agenda item.*

In regards to the record of a closed session, if the defendant ever comes back to litigation against the Board, could the record be used in the Board's behalf? *You are protected as far as any kind of litigation potential. Obviously, if you are doing everything reasonably required, you have the sovereign immunity protection that goes with State action.*

Sharon stated “Consider potential disciplinary action of a certified miner, including personal and medical information not related to public business. A lot of this is based on medical information and drug tests results are considered medical information. Personal and medical information receives the highest protection under any of the privacy acts. Some of the defenses may relate to medical information. Personal and medical information not related to public business is the purpose that has the exclusionary language in it under the general FOIA statute. That’s much more specific than the Miner Act statute. The two statutory references at this time are the ones that control what the Board will be doing are: Sec. 2.2-3716A4 - General FOIA exemption statute; and .4 is the personal info exemption 45.1-161.35.E – Confidential mandate.

At the end of a closed session, the public body has to reconvene. The Board is required to return to the public body session.

Confidentially

DM will provide a vaulted-type security cabinet for the appeal files. The individual’s file would be taken out of the general files and placed in the secure locked file.

Additional Questions

1. What about requesting support for the defendant’s case, such as affidavits?

Affidavits are not recommended. People should bring witnesses. The witness can come into the closed session, give their testimony, and go back out. That would not compromise the closed session.

2. Just on verbal testimony, if you’ve had a positive test result, do you think that’s sufficient justification to say all is forgiven?

NO. But it is still relevant that you would hear the verbal testimony because that might determine the degree of punishment.

3. What if an operator dismisses an employee based on a Quick Screen?

The Board will require more than a “Quick Screen”. The Board will require a confirmation of that sample to a full medical review process. Creditability of the sample on which the action was taken is what the Board needs to seek out in the hearing. The operator needs to show the results, the contract they have, who took the sample, etc. The Board may have to subpoena company personnel if they do not agree to be there.

4. What are the time limits on screen results?

24 to 48 hours on a clean confirmation. If it goes beyond that, it can be 5 to 7 days before you get a confirmation on a positive.

5. If the Board is enforcing the language of the regulation now, are we looking at when the operator first suspended the individual or when he actually has the results?

When official notification is in hand.

6. If someone comes before the board, and we accept the witnesses and their testimony, what happens next?

Probation, agreement to random testing, and acceptance of costs for random testing. In regards to the number of testing, a range should be set (5 and 7 times within a certain period). The agency will need to be able to say that they acted on the direction of the Board.

7. I understand the inspectors are having anxiety about having personal contact, how are you going to handle that?

No one DM employee will transport by themselves an individual who they encounter and have reasonable cause to believe to be impaired. DM would like for the operator to participate in transporting them, but if they don't, DM personnel will accompany the operator. Or, if a DM personnel needs a second person, they contact their supervisor. DM inspectors cannot allow an individual to go on his own initiative to be screened.

8. Are you going to have people available at the testing facilities?

We have identified the locations through NTA and they have given the assigned facilities instructions, an information packet, and a special 11-panel identifying form. Those sites are supposed to be prepared to handle incoming drug screening at any time.

9. The operator notifies the agency of a positive result. The Board has a form that the operator has to fill out. Can we ask the operator to submit a copy of that drug screen?

The law doesn't provide for that. If we need that, we could subpoena the drug screen results at the appeal. After the hearing, if the Board revokes someone's certifications, they still have a remedy – they can go to court. At that point, the Board members could be subpoenaed.

The Board's ultimate goal is to confront the situation and work with our mining industry. Even if a miner is guilty, the Board can give them the opportunity to clean up. By implementing the program, we have to let all the miners understand that it is a serious charge when you come before this Board. If our actions doesn't merit that this is a serious charge, then they will get to a point where they will come in and tell anything and expect us to believe it. Then we will be right back where we're at now.

Frank Linkous thanked everyone for coming and adjourned the meeting at 1:50 p.m.

Respectfully submitted,

Donna McFaddin
Recorder