

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES**

Meeting of March 11, 2010

Attendance:

The Environmental Hearing Board Rules Committee met on March 11, 2010 at 10:15 a.m. Chairman Howard Wein presided. The following members were present: Jim Bohan, Brian Clark, Rep. Kate Harper, Phil Hinerman, Susan Shinkman, Maxine Woelfling and Tom Scott. Joe Manko joined via phone conference. Attending on behalf of the Environmental Hearing Board were The Honorable Chairman and Chief Judge Tom Renwand, The Honorable Rick Mather, The Honorable Michelle Coleman and Intern Kris Gazsi. Senior Assistant Counsel Maryanne Wesdock joined via conference call. Acting Administrative Assistant Jean Clegg and Maryanne Wesdock took the minutes.

Approval of Minutes:

There was one correction to the January 14, 2010 minutes to add Ms. Woelfling to the list of committee members who attended the meeting. With that correction, the minutes of the January 14, 2010 meeting were approved on the motion of Mr. Bohan and seconded by Rep. Harper.

Discussion of Proposed Non Pros Rule:

Discussion was held on whether the Board should adopt a non pros rule for the purpose of dismissing appeals where the appellant has shown a lack of intent to pursue his or her appeal. Under the Board's current rules, inactive cases are generally dismissed under the Board's rule on sanctions, 1021.161, for failure to comply with an order or failure to file a prehearing memorandum or a response to a motion. The Board asked the Rules Committee to consider the question of whether having a specific rule on non pros would be beneficial. Such a rule would be similar to Pa. R.C.P. 230.2 which allows for the dismissal of a case where there has been no activity.

EHB Intern Kris Gazsi gave a presentation on the advantages and disadvantages of the Board adopting a non pros rule. Mr. Gazsi also submitted a draft of a proposed non pros rule. He noted that the Supreme Court has interpreted all docket clearing rules and actions in non pros by rule and by common law prior to the promulgation of Pa. R.C.P. 230.2 as requiring a showing of actual prejudice.¹ Very limited case law supports the application of Pa. R.C.P. 230.2 without a finding of prejudice, but this issue has not yet been ruled on by an appellate court. Several committee members and those attending on behalf of the Board expressed a concern that a non pros rule might make it more difficult for the Board to dismiss an appeal for inactivity, particularly if it required a showing of actual prejudice. As noted earlier, under the current rules the Board has the ability to dismiss an appeal as a sanction where the appellant fails to respond to Board orders or fails to file documents in furtherance of the appeal, such as a pre-hearing memorandum. The Board also has the ability to dismiss an appeal where the appellant fails to respond to a motion to dismiss or motion for summary judgment. The current rules appear to give the Board more flexibility in dismissing a case for inactivity than would a non pros rule which may require a showing of prejudice.

The Rules Committee considered the proposed rule drafted by Mr. Gazsi:

Proposed Non Pros Rule

§ 1021.142. Termination of an inactive proceeding

- (a) The Board may initiate proceedings to terminate a proceeding in which there has been no activity of record for 90 days [this number is flexible] or more by serving a notice of proposed appeal.²

¹ See, *Jacobs v. Halloran*, 551 Pa. 350, 358 (1998) (Pa. Supreme Court abandoned the presumption that two years constituted actual prejudice against a defendant, overturning *Penn Piping, Inc. v. Insurance Co. of N. America*, 529 Pa. 350 (1990)).

² The word “appeal” should read “termination.”

- (b) The notice shall be served according to § 1021.33 sixty days prior to the date of the proposed termination. The notice shall contain the date of the proposed termination and the procedure to avoid termination.
- (c) If no statement of intention to proceed has been filed, the Board shall enter an order as of course terminating the matter for failure to prosecute.
- (d) (1) If an action has been terminated pursuant to this rule, an aggrieved party may petition the Board to reinstate the action.

(2) If the petition is filed within thirty days after the entry of the order of termination on the docket, the Board shall grant the petition and reinstate the action.

Whereas Pa. R.C.P. 230.2 deals with inactivity for a period of two years, Mr. Gazsi proposed a 90 day period for Board cases. Judge Renwand agreed that allowing an appeal to sit inactive for two years is not feasible. Judge Renwand also noted that subsection (d) should be eliminated since the Board does not reopen appeals once there has been a dismissal.

A question was raised on when this rule would apply. It would apply in the following types of situations:

1. failure to perfect an appeal despite one or more orders from the Board
2. failure to answer discovery
3. failure to respond to dispositive motions
4. failure to file a pre-hearing memorandum

The EHB judges attending the meeting expressed the opinion that the Board may be sacrificing flexibility by adopting a non pros rule rather than simply relying on the Board's rule on sanctions. Where a party fails to comply with a Board order or fails to file a pre-hearing memorandum, the current practice is either to issue a rule to show cause why the appeal should not be dismissed or to issue an order requiring compliance. If the appellant fails to respond to the rule to show cause or the order, then the Board dismisses the appeal as a sanction for failure to comply with a Board order or the Board's rules of

practice and procedure. Board Rule 1021.161 specifies that sanctions will be imposed where a party has failed to follow a rule of practice and procedure.

Mr. Hinerman suggested adding language to Rule 1021.141 “Termination of Proceedings” to state that an appeal may be terminated “for non prosecution.” Mr. Clark agreed with this proposal since it would provide the Board with a specific section of the rules that could be cited for dismissing a case for non pros.

It was agreed that if the Board wished to adopt a non pros rule, it should be very general. A more specific rule that could be interpreted as requiring a showing of prejudice could subject the Board to being reversed if a dismissal for non pros were appealed.

Mr. Hinerman stated that as a practitioner representing a client whose appeal is being dismissed, he would rather see the case dismissed for non pros rather than as a sanction. Judge Renwand pointed out that most dismissals for non pros are with pro se appellants. Mr. Hinerman also would like to see a requirement of notice before a case is dismissed for non pros. Judge Renwand stated that the Board does give some form of notice, either by order or rule to show cause, and often gives more than one opportunity to comply.

Representative Harper provided some background on how Pa. R.C.P. 230.2 came into being. The rule was adopted as a result of cases taking a very long period of time to get to trial due to a heavy docket. She posed the question: “Is it kinder to dismiss an appeal for non pros than as a ‘sanction.’?” Mr. Bohan noted that appellants are given plenty of opportunity to remedy the situation before an appeal ever reaches the point of facing dismissal. Mr. Scott noted that dismissal for failure to move a case forward puts the onus on the party that brought the appeal.

Judge Mather stated that any rule that is developed requires an examination of two questions: 1) Can the Board dismiss an inactive appeal sua sponte, or is a motion to dismiss required? 2) Should the rule require a showing of prejudice and, if so, could the committee craft a rule to make it easier to get over the hurdle of showing prejudice? Mr. Bohan felt that it would be difficult to show “prejudice” in a typical Board appeal. Judge Renwand agreed and felt that the Board was much more likely to be reversed on a finding of “prejudice” than on a dismissal for failure to comply with a Board order. Mr. Gaszi

noted that in one of the cases he researched, the Supreme Court remanded the matter to the lower court to hold a hearing on the issue of prejudice.

Revisiting Mr. Hinerman's earlier proposal to add language "for failure to prosecute" to Board Rule 1021.141 on Termination of Proceedings, Ms. Woelfling posed the questions: What does "termination of proceedings" mean in the context of a dismissal for failure to pursue one's appeal? Does it mean with or without prejudice? What if an appeal is terminated for failure to prosecute and then the appellant comes back to Board wishing to reactivate his or her appeal?

There was agreement among the committee and the judges at the meeting that the current rules provide the best mechanism for dismissing an appeal for non pros. On the motion of Ms. Shinkman, seconded by Ms. Woelfling, the committee recommended that the Board not adopt a separate rule on non pros. All were in favor.

Mr. Wein asked that the minutes reflect that the Rules Committee was very impressed with Mr. Gaszi's research and presentation of the non pros issue.

Electronic Filing and Protective Orders:

Judge Renwand proposed that the Board adopt a rule that would make electronic filing mandatory. He asked the Rules Committee to begin work on drafting such a rule. In the meantime, the Board will continue to encourage the use of electronic filing. Judge Renwand explained that electronic filing simplifies matters for the Board from the standpoint of staffing and case management.

A concern was expressed about filing confidential materials and the fact that some attorneys prefer not to have their briefs and other filings available online. It was noted that most documents filed with the Board are available for public viewing; however, documents that are filed electronically are much more accessible and therefore, more likely to be viewed by the public. This led into a discussion of protective orders. Judge Renwand asked that the committee develop a standard for determining what should be covered by a protective order and what should not be covered. It is his opinion that filings with the Board should be open and that protective orders should be issued in only rare cases. However, he noted that Judge Miller used to issue rather comprehensive

protective orders. Mr. Manko asked the Board to include a discussion of this issue at the Environmental Law Forum.

Rep. Harper noted that certain types of cases are more likely to have a need for confidentiality, e.g., matters in family court. However, even in cases where there is a need for confidentiality it does not call for the entire case to be protected, just certain documents. Mr. Wein noted that certain environmental statutes allow for the protection of confidential material and others do not. Rep. Harper suggested that the Board include the language “what is protected by law” to its protective orders. Ms. Woelfling noted that the Board would still have to determine “what is protected by law.”

Mr. Clark commented that any guidelines adopted by the Board should address the issue of how to implement a protective order in a case where documents are e-filed. Ms. Shinkman stated that in federal court the party making the filing has the burden not to refer to anything that is under seal.

A question was posed as to the level of scrutiny a document receives at the Board before it is uploaded to the Board’s electronic docket. The Board’s Administrative Assistant, Jean Clegg, explained that when a document is electronically filed, the Harrisburg administrative staff has to “accept” it before it is uploaded. The process of “acceptance” involves simply verifying that the document is an actual filing and that it fits one of the designated e-filing categories (such as motion, brief, etc.) Once the document is “accepted” by the Harrisburg staff, it is immediately uploaded to the Board’s electronic docket. Mr. Wein asked if the staff could simply not “accept” a document covered by a protective order. Ms. Clegg explained that the process of “accepting” the document includes providing electronic notice to the other attorneys in the case that a document has been e-filed and includes a link to the document. Mr. Hinerman suggested that if the Board wishes to adopt a mandatory e-filing rule that it apply only to documents for which a party is not seeking a protective order.

Mr. Bohan suggested that the Board develop a “standing order” pertaining to mandatory e-filing. Rep. Harper suggested that it be similar to the Right to Know Law which makes everything public unless it is covered by an exception. Mr. Wein suggested that the Board order should clearly define what may be covered or not covered by a protective order, rather than simply making reference to other statutes

Mr. Bohan suggested a pilot project where certain cases are designated for mandatory e-filing. Ms. Wesdock noted that Judge Renwand has done that on an unofficial basis and thought it was a good idea to adopt a more formal version of it. Cases selected for the pilot project should be those that are not likely to involve requests for protective orders.

Ms. Shinkman noted that she has been asking Department lawyers to e-file, so from a fairness standpoint, she would like to see private practitioners do the same.

Judge Renwand advised the group that Board orders, in addition to opinions and adjudications, are now available on the electronic docket.

Mr. Wein asked Mr. Gaszi to begin preparations for the drafting of a rule or standing order for electronic filing by putting together some guidelines. It was suggested that Mr. Gaszi look at the standing order for electronic filing used by the federal courts.

Frequency of Meetings and Budgetary Issues:

Judge Renwand and Ms. Wesdock recently met with Mr. Wein to discuss how budget and personnel cuts will impact the Rules Committee. Mr. Wein proposed that the Rules Committee temporarily change its meeting dates to a quarterly schedule rather than every other month. Further discussions on this topic will begin at the next meeting, which will be May 13, 2010.

Judge Renwand outlined the Board's budgetary cuts for the remainder of this fiscal year and for fiscal year 2010-11. He noted that the total number of personnel employed at the Board has been cut in half over the last 15 years. When he first joined the Board, each judge was entitled to one assistant counsel and the chairman was entitled to three. In addition, each judge had his own secretary. Today, the Board employs a total of only three assistant counsel for five judges. Of the assistant counsel, one has minimal experience and one is also serving as the Acting Board Secretary. The Board has a total of only two full-time secretaries, one of whom is in Pittsburgh and the other in Harrisburg. Due to the hiring freeze, the Board is not sure when it will be able to hire a full time Board Secretary or additional assistant counsel or administrative staff.

In addition to personnel cuts, Judge Renwand explained that the Board's operating expenses have been drastically cut for fiscal year 2010-11. He would like to

propose attaching a filing fee of \$50 to appeals, with the option to waive the fee on a showing of financial inability to pay. Judge Renwand reported on financial increases that the Board has had to incur, the largest being rent for the Pittsburgh office that has been relocated to Piatt Place. When the Legislature had approved the relocation of the Pittsburgh state offices, all rental payments were to be incurred by the Department of General Services. Subsequently, the Department of General Services determined that each agency should pay its own rent. The yearly rent for the Pittsburgh office will be approximately \$90,000, an expense that had not been foreseen when the Board's budget was approved.

Judge Renwand has scheduled a meeting with the Governor's Office of the Budget in an effort to increase the amount approved for the Board's operating budget³. The amount awarded to the Board for operating expenses for fiscal year 2009-2010 was \$365,606.01. In contrast, the amount awarded for the next fiscal year is only \$190,000, and of that amount \$90,000 will be going toward the Pittsburgh office's rent. Rep. Harper informed the group that the House would be voting on the budget on March 22, 2010.

Mr. Wein asked for a report on Judge Renwand's meeting at the next Rules Committee meeting.

Plaque for Judge Miller:

At the last meeting, Joe Manko had suggested honoring Judge Miller at the Environmental Law Forum dinner. Since the dinner program is planned by the PBA Environmental and Energy Law Section, which is chaired by Phil Hinerman, Mr. Hinerman asked the group what they would like to do to honor Judge Miller at the dinner. It was suggested that he be presented with a plaque from the Section.

Next Meeting:

The next meeting of the Rules Committee will be on May 13, 2010 at 10:15 a.m.

Adjournment:

³ The "operating budget" includes all costs associated with operating the agency other than personnel costs.

On the motion of Rep. Kate Harper, seconded by Jim Bohan, the meeting was adjourned.