

**ENVIRONMENTAL HEARING BOARD  
RULES COMMITTEE**

**MINUTES OF MEETING OF JANUARY 8, 2015**

**Attendance:**

The Environmental Hearing Board Rules Committee met on January 8, 2015 at 10:30 a.m. Attending in Harrisburg were the following Rules Committee members: Maxine Woelfling, Jim Bohan, Brian Clark, Rep. Kate Harper and Dennis Whitaker. The following Rules Committee members participated in the meeting by teleconference: Committee Chairman Howard Wein, Gail Conner, Phil Hinerman and Matt Wolford. Representing the Environmental Hearing Board (Board or EHB) were the following: In Harrisburg – Judge Rick Mather, Eric Delio and John Dixon, and Board Secretary Vince Gustitus. By teleconference – Chief Judge and EHB Chairman Tom Renwand; Judge Steve Beckman, Tim Estep, Christine Walker and Maryanne Wesdock, who took the minutes.

**Welcome:**

The Rules Committee extended a warm welcome to John Dixon, Judge Mather's new Assistant Counsel. Mr. Dixon will be taking on responsibility for the Rules Committee.

**Approval of Minutes of October 23, 2014 Meeting:**

Rep. Harper felt that the discussion on page 7 of the minutes of the October 23, 2014 meeting should be clarified to indicate that there was no discussion of eliminating an individual's right to appear *pro se* in a Board proceeding. Mr. Clark moved to approve the minutes with the change recommended by Rep. Harper. Mr. Whitaker seconded the motion. All were in favor.

Ms. Wesdock will revise the minutes accordingly.

**Rules Package 106-11:**

Rules Package 106-11, which contained revisions to Rules 1021.94 (dispositive motions other than summary judgment) and 1021.94a (summary judgment) addressing the issue of responses to dispositive motions that are in support of the motion, went into effect upon publication in the November 13, 2014 issue of the *Pennsylvania Bulletin*.

**Electronic Filing of Complaints:**

LT Court Tech provided an estimate of \$11,310 to update the Board's electronic filing system to allow for the electronic filing of complaints. This cost was substantially higher than the Board anticipated. Ms. Wesdock and Mr. Gustitus will explore other options with LT Court Tech. If the cost remains around \$11,000 the Board will not pursue this project.

Rep. Harper suggested notifying LT Court Tech that the Board may consider putting out Requests for Proposals (RFP's) for other vendors. Mr. Gustitus noted that LT Court Tech's three year contract expires June 30, 2015, but he felt there was not sufficient time to pursue other options this late in the contract term. However, if LT Court Tech knows that the Board is considering other vendors for future contracts they may be more willing to negotiate on pricing.

**Rule 1021.33(a) – Service by the Board:**

At the October 23, 2014 meeting, Mr. Bohan had proposed revisions to Rule 1021.33(a). Mr. Clark asked that the language be circulated before voting on it. A discussion was held on whether additional changes needed to be made to the language of this rule. Rep. Harper proposed the following revision to Mr. Bohan's language:

The Board will serve the orders, notices and other documents it issues upon counsel designated **[in the entries of appearance] on the docket**. For any parties not represented by counsel, the Board will serve the person who filed the complaint or notice of appeal, or the person upon whom the notice of appeal or complaint was served.

Ms. Woelfling felt that the second sentence was confusing since the Department files complaints and is always represented by counsel. It was pointed out, however, that a complaint could be filed by someone other than the Department. An example is a complaint filed by a private party under the Hazardous Sites Cleanup Act. After discussion, Ms. Woelfling agreed with the majority vote.

On the motion of Mr. Clark, seconded by Mr. Bohan, the Committee voted unanimously in favor of the language above.

**IOLTA Fee:**

At the October 23, 2014 meeting, Ms. Wesdock was asked to draft a comment to Rule 1021.21 notifying attorneys that payment of the Interest on Lawyers Trust Account (IOLTA) fee under 204 Pa. Code § 81.505(a) was not required for admission *pro hac vice* in a Board proceeding. Ms. Woelfling suggested a revision to the language drafted by Ms. Wesdock, and on the motion of Ms. Woelfling, seconded by Mr. Whitaker, the following language was approved as a comment to Rule 1021.21:

Comment: Payment of the Interest on Lawyers Trust Account (IOLTA) fee under 204 Pa. Code § 81.505(a) is not required as a condition to *pro hac vice* admission in a proceeding before the Board.

**Rule 1021.21 – Representation:**

At the October 23, 2014 meeting it was suggested that the language “in good standing” should be added to subsection (a) of Rule 1021.21 to make it consistent with subsection (b), as follows:

**§ 1021.21. Representation.**

- (a) Parties, except individuals appearing on their own behalf, shall be represented by an attorney **in good standing** at all stages of

the proceedings subsequent to the filing of the notice of appeal.

- (b) Corporations shall be represented by an attorney of record admitted to practice before the Supreme Court of Pennsylvania. Corporations may also be represented by an attorney in good standing and admitted to practice before the highest court of another state on a motion *pro hac vice* filed by the Pennsylvania attorney of record.

Mr. Hinerman questioned whether the Board's rule on representation contradicted statutory law regarding representation of partnerships. Judge Mather stated that the Board follows case law holding that general partners can represent their own interest in a legal proceeding. Rep. Harper noted that whereas only lawyers can represent groups of individuals, the Committee had never considered restricting individuals from appearing on their own behalf. Under the Board's rule, a partner can represent his own interest in a partnership but cannot represent the interests of his other partners.

Ms. Conner expressed a concern with subsection (c) of Rule 1021.21 that reads as follows:

- (c) Groups of individuals acting in concert, whether formally or informally, shall be represented by an attorney admitted to practice law before the Supreme Court of Pennsylvania or by an attorney in good standing admitted to practice before the highest court of another state who has made a motion to appear specially in the case and agrees therein to abide by the Rules of the Board and the Rules of Professional Conduct.

She felt that the language is very stringent and establishes a high threshold that must be met by individuals who wish to represent themselves. In particular, her concern was with the language "acting in concert" since it may be unclear whether several individuals appealing the same action are, in fact, acting in concert.

Ms. Wesdock stated that concerns regarding subsection (c) had been raised at a prior Rules Committee meeting but inadvertently had not been added to the agenda of subsequent meetings. At the prior meeting, a proposal had been made to eliminate subsection (c) and simply rely on subsection (d) which states as follows:

(d) Individuals may appear in person on their own behalf; however, they are encouraged to appear through counsel and may be required to appear through counsel under subsection (c) if the Board determines they are acting in concert with or as a representative of a group of individuals.

The reference to subsection (c) would be eliminated. Ms. Conner stated she was in favor of that proposal.

Mr. Wein explained his understanding of the problem by presenting two hypotheticals: In hypothetical 1, if several families appeal an action by completing one notice of appeal, the Board will order them to get an attorney. In hypothetical 2, if those same families fill out separate notices of appeal, the Board will not require them to get an attorney. Mr. Wein opined that by eliminating subsection (c) the Board would not automatically dismiss the appellants in hypothetical 1 for not having an attorney but would require the Department or permittee to demonstrate why the appeal should be dismissed for failure to obtain counsel. Judge Renwand stated that by eliminating subsection (c) it gives the Board more flexibility. The Board may wish to see where the case is heading before ordering appellants to obtain counsel. Under the current rules, that action must be taken immediately. He stated that if it appears that one individual is acting on behalf of a group, the Board would step in and address it.

Mr. Bohan recommended the following revision to subsection (d):

(d) Individuals may appear in person on their own behalf; however, they are encouraged to appear through counsel and may

be required to appear through counsel [**under subsection (c)**] if the Board determines [**they are acting in concert with or as a representative of a group of individuals**] that they are not merely appearing on their own behalf.

On the motion of Rep. Harper, seconded by Ms. Conner, the following changes to Rule 1021.21 were approved:

**§ 1021.21. Representation.**

(a) Parties, except individuals appearing on their own behalf, shall be represented by an attorney **in good standing** at all stages of the proceedings subsequent to the filing of the notice of appeal **or complaint**.<sup>1</sup>

(b) Corporations shall be represented by an attorney of record admitted to practice before the Supreme Court of Pennsylvania. Corporations may also be represented by an attorney in good standing and admitted to practice before the highest court of another state on a motion pro hac vice filed by the Pennsylvania attorney of record.

[(c) Groups of individuals acting in concert, whether formally or informally, shall be represented by an attorney admitted to practice law before the Supreme Court of Pennsylvania or by an attorney in good standing admitted to practice before the highest court of another state who has made a motion to appear specially in the case and agrees therein to abide by the Rules of the Board and the Rules of Professional Conduct.]

(c) Individuals may appear in person on their own behalf; however, they are encouraged to appear through counsel and may be required to appear through counsel [**under subsection (c)**] if the Board determines [**they are acting in concert with or as a representative of a group of individuals**] that they are not merely appearing on their own behalf.

(d) Subsections (a)—([**d**] c) supersede 1 Pa. Code §§ 31.21—31.23 (relating to appearance in person; appearance by attorney; and other representation prohibited at hearings).

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<sup>1</sup> Addition of the words “or complaint” at the end of subsection (a) were approved at the October 23, 2014 meeting.

**Interlocutory Appeals:**

Mr. Delio reported that the EHB judges are in favor of having a rule that would set forth the format and time period for filing a request for certification of interlocutory orders for appeal pursuant to 42 Pa.C.S. § 702(b). The judges prefer the following: 1) the request should be in the form of a motion; 2) the motion should be filed within 10 days of the order; and 3) the time for responding to the motion should be short.

Mr. Delio prepared a proposed draft rule that does the following: 1) employs the language set forth in the Rules of Appellate procedure; 2) requires the filing of a memorandum of law with the motion; 3) provides a 10 day response time; 4) includes a default rule. He raised the following questions: 1) where should the proposed rule be placed in the Board's rules of practice and procedure; 2) should there be page limits on the motion, memorandum and/or response; and 3) should there be a reference to the Board's general rule on motions?

Mr. Delio's proposed draft rule reads as follows:

**Proposed EHB Rule**

25 Pa. Code § 1021.\_\_\_\_.

- (a) Applications to amend an interlocutory order to certify one or more issues for appeal in accordance with 42 Pa.C.S. § 702(b) shall be filed within 10 days of service of the order and shall take the form of a motion pursuant to 25 Pa. Code § 1021.91 (relating to motions).
- (b) Motions filed pursuant to subsection (a) shall be accompanied by a memorandum of law setting forth the reasons why the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.

- (c) Responses to motions filed under this section shall be filed within 10 days of service of the motion.
- (d) Unless the Board acts on the motion within 30 days of it being filed, the motion shall be deemed denied.
- (e) The filing of a motion under this section or the amendment of an interlocutory order containing the requested finding shall not stay a proceeding unless otherwise ordered by the Board or by Commonwealth Court.
- (f) Subsections (a) through (e) supersede 1 Pa. Code § 35.225 (relating to interlocutory orders).

With regard to the question of where to place the proposed rule, Ms. Woelfling suggested moving the reconsideration rule to 1021.135 and making this rule 1021.152. However, Judge Mather felt that the rule should be included with the rules on reconsideration.

Mr. Bohan pointed out that the definition of “miscellaneous motion” in rule 1021.95 says it covers everything other than discovery, procedural and dispositive motions. Therefore, he suggested also carving out an exception for motions to amend interlocutory orders.<sup>2</sup>

With regard to the question of whether the rule should impose page limits, Judge Mather stated he did not think it was necessary. Ms. Woelfling agreed that page limits were not necessary, especially given the very short timeframe for filing the motion.

Mr. Delio suggested adding the following language at the end of subsection (c): “...and shall be consistent with § 1021.91 (related to motions).”

Ms. Woelfling pointed out that subsection (a) refers to “applications” whereas subsection (b) refers to “motions.” She felt that the terms were inconsistent. Mr. Bohan suggested changing subsection (a) to state “requests to amend...”

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<sup>2</sup> Mr. Clark had to leave the meeting at this point of the discussion due to another commitment.

Judge Mather suggested numbering this rule 1021.153. Ms. Woelfling suggested naming it “Amendment of Interlocutory Orders.” Mr. Delio asked whether the heading for this group of rules should be changed. It currently reads, “Reconsideration.” Judge Mather explained that a new heading could not be created for rule 1021.153. He suggested leaving the heading as “Reconsideration.”

Upon the motion of Mr. Bohan, seconded by Ms. Woelfling, the following rule was approved:

**§ 1021.153. Amendment of interlocutory orders.**

- (a) Requests to amend an interlocutory order to certify one or more issues for appeal in accordance with 42 Pa.C.S. § 702(b) shall be filed within 10 days of service of the order and shall take the form of a motion pursuant to 25 Pa. Code § 1021.91 (relating to motions).
- (b) Motions filed pursuant to subsection (a) shall be accompanied by a memorandum of law setting forth the reasons why the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.
- (c) Responses to motions filed under this section shall be filed within 10 days of service of the motion and shall be consistent with § 1021.91 (relating to motions).
- (d) Unless the Board acts on the motion within 30 days of it being filed, the motion shall be deemed denied.
- (e) The filing of a motion under this section or the amendment of an interlocutory order containing the requested finding shall not stay a proceeding unless otherwise ordered by the Board or by Commonwealth Court.
- (f) Subsections (a) through (e) supersede 1 Pa. Code § 35.225 (relating to interlocutory orders).

### **Dismissal of Appeals With or Without Prejudice:**

Judge Beckman stated that the Board often gets requests to terminate an appeal with or without prejudice, and he feels that Board rule 1021.141 does not speak directly to this issue. He reported on the history of rule 1021.141 which was researched by Tim Estep. In 1996, the rule, which was then located at 25 Pa. Code § 1021.120, stated that when an appeal was withdrawn it was with prejudice unless otherwise indicated by the Board. In 2002, the rule was moved to 25 Pa. Code § 1021.141, and the reference to withdrawal “with prejudice” was removed. Additionally, a comment was added which states as follows:

*Comment:* The prior rule at § 1021.120(b) authorizing dismissal with and without prejudice was deleted because the Board thought it more appropriate to determine this matter by case law rather than by rule.

Judge Beckman stated that his reading of the current rule is that the Board should not terminate an appeal with or without prejudice; whatever the parties agree to should be of no concern to the Board. He felt that the Board should look at the question of whether the appeal was terminated with or without prejudice only if it arises in the future.

Mr. Wolford stated that a problem could arise in situations where an appeal of an order is withdrawn because the order has been complied with but the Department of Environmental Protection (Department) has not yet assessed a civil penalty. He pointed out that there is case law holding that findings in an unappealed order are binding, and therefore, by withdrawing the appeal of the order the appellant may be unable to appeal its findings in an appeal of a future civil penalty assessment. This could be avoided if it were clear that the appeal of the order was terminated without prejudice. Judge Mather pointed to the decision in *Kent Coal Mining Company v. DER*, 550 A.2d 279 (Pa. Cmwlth. 1988), which held that an appellant who challenges a penalty assessment can at the same time challenge the compliance order giving rise

to the penalty even though the appellant did not appeal the order. 550 A.2d at 279. Mr. Whitaker noted, however, that *Kent Coal* was based on the language of specific statutes.

A discussion ensued regarding the *Homes of Distinction* settlement that is on the Board's website. Judge Beckman noted that it predates the 2002 rule change.

Mr. Bohan stated that Rule 1021.141 does not prohibit the Board from dismissing an appeal with or without prejudice. Ms. Wesdock agreed, and stated that the rule was revised in order to give the Board more flexibility. Judge Renwand stated that the practical effect of not including the language "without prejudice" in a Board order is that it could affect the parties' ability to reach a settlement. Mr. Whitaker agreed, noting that an appellant's attorney would not simply take the Department's word for it that a settlement was predicated upon the appeal being dismissed without prejudice, but would want to see the language "without prejudice" in a Board order. Mr. Whitaker also noted that a *Homes of Distinction* type of settlement binds the parties but does not bind anyone else such as third parties in future appeals. Mr. Whitaker expressed the opinion that if the Board were to do away with *Homes of Distinction* type settlements, it would be difficult for the Department to settle cases, especially due to the possibility of attorney's fees.

Judge Beckman stated that when there is a written settlement agreement, it can be incorporated into the record as part of the order. He felt that the problem occurs where the parties reach an oral agreement or simply do not submit a settlement agreement, but want the Board to address it in an order. He suggested that perhaps the comment should be eliminated and new language added to the rule.

Ms. Wesdock provided the history of the comment: When the Rules Committee recommended the deletion of the language "with prejudice" from the rule, there was a concern

that under the law of statutory construction the removal of this language would imply that all appeals were terminated “without prejudice.” The Committee wanted to make it clear that purpose of the rule revision was to give the Board more flexibility to terminate appeals with or without prejudice on a case-by-case basis.

Judge Beckman suggested changing the reference to “case law” in the comment to “on a case-by-case basis.” On the motion of Mr. Bohan, seconded by Mr. Wolford, this change was approved. The comment will read as follows:

*Comment:* The prior rule at § 1021.120(b) authorizing dismissal with and without prejudice was deleted because the Board thought it more appropriate to determine this matter [**by case law**] **on a case-by-case basis** rather than by rule.

Mr. Wein suggested that when the comment is revised, the Board should post a notice on its website. He suggested doing the same for the new IOLTA comment.

**Adjournment and Next Meeting:**

The meeting adjourned at approximately 12:30 p.m. The next meeting will be held on March 12, 2015 at 10:30 a.m.