

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

MINUTES OF MEETING OF MARCH 9, 2017

Attendance:

The Environmental Hearing Board Rules Committee met on March 9, 2017 at 10:30 a.m. Rules Committee members in attendance were Committee Chairman Howard Wein (in Pittsburgh), Brian Clark (in Pittsburgh), Jim Bohan (in Harrisburg), and Phil Hinerman (in Harrisburg), and participating by phone were Committee Vice-Chair Maxine Woelfling, Gail Conner and Matt Wolford. Attending from the Environmental Hearing Board were the following: In Pittsburgh - Chief Judge Tom Renwand and Senior Assistant Counsel Maryanne Wesdock, who took the minutes; in Erie – Judge Steve Beckman, Board Secretary Christine Walker and Assistant Counsel Nikolina Smith; and in Harrisburg – Assistant Counsel Eric Delio and Mica Iddings.

Approval of Minutes:

Because the November 10, 2016 meeting did not have a quorum, the minutes of the September 15, 2016 meeting were not approved at that meeting. On the motion of Mr. Bohan, seconded by Ms. Woelfling, the minutes of the September 15, 2016 meeting were approved.

On the motion of Mr. Bohan, seconded by Mr. Clark, the minutes of the November 10, 2016 meeting were approved.

Rules Package 106-12:

Ms. Wesdock reported on the progress of Rules Package 106-12. The rules package was submitted to the Governor's Policy Office and the Office of General Counsel in July 2016. It was approved by the Governor's Policy Office in September 2016. However, the Office of General Counsel (OGC) requested several sets of changes to the language of the Preamble and

the Comment Response document. In particular, OGC had several questions regarding the Policy Office's suggestion during the proposed stage of the rulemaking that the Board consider allowing small corporations to appear *pro se*. OGC also had some concerns about how the Board had explained the proposed deletion of Section 1021.21(c) which required representation for groups of individuals acting in concert. OGC and the Board worked through the language, and in February 2017, the Board received notice from both OGC and the Governor's Policy Office that the redraft of the Preamble and Comment Response document were approved.

The next step is for the final rulemaking to be delivered to the Independent Regulatory Review Commission (IRRC) and the House and Senate Environmental Committees. Once the rules package is delivered, the legislative committees will have 20 days to review it, followed by a 10-day review period by IRRC. The last step in the process is approval by the Attorney General's Office.

Sample Plans for Discovery of Electronically Stored Information:

Prior to the November 10, 2016 Rules Committee meeting, Mr. Bohan and Mr. Hinerman had circulated two sample plans for the discovery of electronically stored information. The plans had been submitted in EHB Docket Nos. 2015-131-L and 2015-164-L. At the November 10, 2016 Rules Committee meeting, the Committee recommended placing the sample plans on the Board's website along with a disclaimer that had been prepared by Mr. Bohan and Mr. Hinerman. The Committee suggested that the judges review the sample plans and, if they were in agreement with the Committee's recommendation, the plans should be posted on the Board's website.

Prior to the March 9, 2017 meeting, the judges reviewed the plans and were in agreement with the Committee's recommendation. The Committee members and judges were in agreement

that the sample plans provide a good starting point for parties who wish to draft a similar document in their case. They also agreed that having the sample plans posted on the Board's website would encourage parties to comply with the Board's prehearing order requiring the submission of such plans in cases where discovery of electronically stored information is likely to occur.

Mr. Bohan made two revisions to the disclaimer: First, the last sentence should be deleted. Second, in the second to last sentence, "conveniences" should be changed to "convenience." With these changes, the disclaimer will read as follows:

These examples are not endorsed by the Environmental Hearing Board as appropriate in all cases, and variations should be considered based on individual cases and facts. As noted in an explanatory comment in the Pennsylvania Rules of Civil Procedure, "As with all other discovery, electronically stored information is governed by a proportionality standard in order that discovery obligations are consistent with the just, speedy and inexpensive determination of disputes." What is appropriate for one case is not necessarily appropriate for another. These examples are provided only for the convenience of parties to EHB proceedings.

Mr. Clark recommended that the Board post the sample plans to its website prior to the Environmental Law Forum, if possible, and alert practitioners to their presence on the Board's website.

Mr. Wein asked where the Board intended to place the sample plans on the website, and Ms. Wesdock recommended that the plans should be placed under "Forms."

Mediation:

Mr. Hinerman provided a report from the Mediation Joint Subcommittee¹ which includes members of the Rules Committee, PBA Environmental and Energy Law Section and PBA

¹ The Mediation Subcommittee grew out of a discussion on whether small corporations should be allowed to appear *pro se* in Board proceedings. There was some concern that allowing corporations to represent themselves could be

Unauthorized Practice of Law Section. Rules Committee members on the Joint Subcommittee include Mr. Hinerman, Mr. Wein, Mr. Wolford and Ms. Chiaruttini. The Subcommittee has held two conference calls and has established a framework for what the program will look like, but has not worked out the financial aspects.

The Mediation Subcommittee intends to distribute a questionnaire to PBA Environmental and Energy Law Section members asking questions such as the following:

- 1) Should mediators be paid and, if so, how much?
- 2) If someone is willing to serve as a mediator would he/she be willing to attend and pay for PBA mediation training?
- 3) Should attorneys without an environmental background be allowed to act as mediators?

A link to the survey will appear on the Pennsylvania Bar Association Environmental and Energy Law Section's website and will be distributed on the Section's listserv by the time of the Environmental Law Forum. It was suggested that the judges make an announcement about the survey during their program at the Forum. Mr. Wein also suggested handing out hard copies of the link to the survey at the Forum. Mr. Hinerman acknowledged Mr. Wolford's role in preparing the survey.

Marty Siegel participates in a mediation program offered by the Office of General Counsel (OGC). This program offers government attorneys as mediators in actions involving other agencies. The advantage to the OGC program is that there is no charge for the mediator.

Mr. Clark, who has served on the Rules Committee since its inception, advised the group that one of the earliest rules the Committee developed was a rule on mediation, yet the rule has rarely been utilized. Since a number of environmental law practitioners have retired or will soon

seen as condoning the unauthorized practice of law. Therefore, some members of the Rules Committee suggested that a mediation program should be developed that would allow small corporations the opportunity to work through a settlement of the appeal through the use of mediation.

be retiring from active practice, Mr. Clark suggested that some of them might want to serve as mediators who would agree to mediate for no fee or for a small stipend. Serving as mediators would allow them to stay active in the practice of environmental law, but involve fewer hours.

Mr. Hinerman reported on the discussions the subcommittee has had regarding payment for mediation. He reported that the Department of Environmental Protection does not have funds in its budget to pay for mediation. Nor does the Environmental Hearing Board. Therefore, the cost of mediation would be borne entirely by the appellant or permittee. Judge Renwand confirmed that there will be no government funding for mediation for the foreseeable future. He suggested looking into the possibility of obtaining a grant from a foundation. He asked whether there is sufficient interest among the bar to pursue a mediation program. Mr. Hinerman confirmed that there is interest among attorneys who wish to serve as mediators. He noted that 11 people immediately volunteered for the program after it was proposed. Judge Renwand stated that unless the attorney has experience in front of the Environmental Hearing Board, his or her success as a mediator might be limited. Mr. Wein agreed that the mediator should understand the nuances of practice before the Environmental Hearing Board.

In Federal District Court, settlement conferences are generally handled by a U.S. Magistrate, rather than the judge to whom the case is assigned. EHB settlement conferences are generally handled by the judge to whom the case is assigned. Mr. Hinerman stated that it is a disincentive for his clients to participate in a settlement conference with the judge who will ultimately hear the case. Judge Renwand said he did not believe that trying to settle the case would bias the judge. He also noted that when he has held settlement conferences he is successful more than 50% of the time. Judge Renwand thought that mediation would be especially helpful in cases involving *pro se* parties because they often don't have an understanding of the law or the

process. Mr. Clark stated that mediation in cases involving citizen groups can level the playing field and possibly reduce the number of issues that are litigated. Mediation could help to narrow the case before the Board to the key, critical issues.

Returning to Judge Renwand's earlier suggestion of looking into grant money, Mr. Wein suggested the Heinz Foundation and Mr. Clark suggested the Pugh Foundation. Mr. Hinerman stated that the subcommittee needs to have a proposal developed before approaching a foundation for a grant. The subcommittee will hold its next conference call after receiving the results of the survey.

Media in the Courtroom:

Ms. Wesdock provided background on this issue. In some cases, the Board has received requests from the media to have cameras in the courtroom and/or audio recording. Most recently, the Board received a request to video and audio record an oral argument on an application for temporary supersedeas. The Board denied the request due to the objection of one of the parties. The Board would like the Rules Committee to consider whether a rule should be developed addressing the issue of media presence at Board proceedings.

Mr. Wein noted that the print media is permitted to attend Board hearings and publish articles about the case based on the reporter's notes. It was also noted that appellate oral arguments are broadcast on PCN (Pa Cable Network). Mr. Clark stated that he has been involved in oral arguments before the Commonwealth Court that were videotaped. Judge Renwand asked if the court had asked the attorneys' permission before allowing the recording and Mr. Clark replied that permission was not requested. Ms. Woelfling noted that since PCN broadcasts appellate proceedings, there is no recording of witnesses as there would be with an EHB proceeding. Mr. Clark also pointed out that the appellate proceeding is broadcast from start

to finish, which would not be done for an EHB proceeding. Judge Renwand stated that if the Board required its proceedings to be broadcast gavel-to-gavel, it would eliminate the commercial media.

Judge Renwand stated that he would like to know what the Commonwealth Court's procedure is for allowing the recording of oral arguments. Mr. Bohan noted that if a court issues an order covering the recording or broadcasting of a proceeding they have the inherent power to enforce it. Ms. Woelfling asked whether anyone had talked to the State Employees Retirement System (SERS) about the Sandusky pension forfeiture hearing which was broadcast. Judge Renwand responded that the Board had spoken with the Office of General Counsel about the proceeding.

Mr. Clark stated that if the media were allowed to broadcast EHB proceedings, corporate parties would need to have a public relations person available during the trial. Mr. Bohan expressed the opinion that if the reason for allowing the media to record an EHB proceeding is for increased transparency, that goal is not likely to occur since only small portions of the hearing would be broadcast and would likely be taken out of context. Mr. Wolford asked if a rule was relied on in the order issued by SERS in the Sandusky case, and Ms. Woelfling responded that it did not appear that the SERS order relied on a rule.

Mr. Bohan stated that he believes there is a general prohibition against using video equipment in Commonwealth buildings. While this would not apply to Piatt Place in Pittsburgh or the Renaissance Center in Erie, it would apply to the Board's courtrooms in Harrisburg and Norristown since they are located in Commonwealth buildings.

Mr. Delio provided more detail regarding the request from WHY Y to record the oral argument on the application for temporary supersedeas filed in the case of *Clean Air Council, et*

al. v. DEP and Sunoco Pipeline, L.P., EHB Docket No. 2017-009-L. In that case, the Board issued an order directing that any party objecting to WHY Y's request to record the oral argument should file a written objection to the request. Sunoco filed a written objection to the request to record the oral argument, and the Board issued an order denying the request. In ruling on WHY Y's request, the Board followed Supreme Court Rule 1910 which deals with broadcasting in the courtroom. However, as Mr. Delio pointed out, Rule 1910 appears to be designed for a trial, not an oral argument, since it requires the consent of parties and witnesses. Mr. Delio also pointed out that Rule 1910 does not specify the grounds on which a party may object to a recording, but seems to allow a party to object without providing a reason. Mr. Delio suggested allowing reporters to audio record a hearing for accuracy but limit the recording for their own usage and not for purposes of broadcasting it.

Judge Renwand suggested that the Board and/or Rules Committee begin by developing a protocol for handling media requests to record oral arguments before dealing with requests to record hearings. Mr. Wein agreed, since obtaining the permission of witnesses would not be an issue with oral arguments. Mr. Wolford referenced EHB Rule 1021.116 which deals with the conduct of hearings. He noted that there is no similar rule in 1 Pa. Code.

Judge Renwand noted that the Gaming Control Board broadcasts its meetings. Mr. Wolford raised the question of whether the presence of cameras in the courtroom would change how the hearing is conducted. Mr. Bohan agreed, and stated that the target audience might not be the judge but the broadcast viewers. Mr. Clark also agreed, stating that cameras in the courtroom might lead to more showcasing and a lack of decorum. He expressed a concern that some parties might want to try the case in the court of public opinion.

Judge Beckman expressed the opinion that the Board should allow some form of media coverage. He felt that it would be educational since many people are not familiar with how the process before the Board works. He agreed with the opinion expressed by Mr. Clark that the Board would need to ensure that proper decorum was followed in the courtroom. He felt that since the Board is likely to be increasingly faced with requests by the media to record proceedings, it would be better to deal with it in the Board's rules rather than on an *ad hoc* basis. Mr. Bohan asked whether the Board should deal with the issue in its Internal Operating Procedures since this is how it is handled by the Pa. Supreme Court. Also, dealing with it in the Internal Operating Procedures allows for more flexibility.

Mr. Wolford asked the judges what their preference is. He felt that if the judges would like to have a rule, that should be the task of the Rules Committee. Mr. Clark suggested developing a process first in the Internal Operating Procedures and, if it is successful, use the process to develop a rule. Judge Renwand agreed, noting that the Board's electronic filing program was first developed as a pilot program before being codified into the Board's rules. Mr. Wein offered the Rules Committee's assistance in developing an internal operating procedure dealing with media requests.

Environmental Law Award:

Mr. Wein reported that the recipient of the PBA Environmental and Energy Law Section's 2017 Environmental Law Award is Keith Welks. Mr. Welks is a former Chief Counsel of DEP and currently serves as Deputy Treasurer of the Commonwealth of Pennsylvania. Mr. Welks will be presented with the award at the Environmental Law Forum dinner on April 5, 2017.

Adjournment:

The meeting adjourned at approximately 12:00 p.m. The next meeting is scheduled for Thursday, May 11, 2017 at 10:30 a.m.