

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

MINUTES OF MEETING OF MARCH 10, 2016

Attendance:

The Environmental Hearing Board Rules Committee met by teleconference on March 10, 2016. Participating in the call were the following Rules Committee members: Chairman Howard Wein, Vice Chairman Maxine Woelfling, Jim Bohan, Brian Clark, Gail Conner, Phil Hinerman and Matt Wolford. Participating from the Board were the following: Chief Judge Tom Renwand, Judge Steve Beckman, Acting Board Secretary Christine Walker and EHB Assistant Counsel Eric Delio, John Dixon and Maryanne Wesdock, who took the minutes. Katherine Hetherington-Cunfer, Acting Director of the Department of Environmental Protection's Citizen Advisory Council, also participated in the meeting.

Minutes of January Meeting:

On the motion of Mr. Bohan, seconded by Ms. Woelfling, the minutes of the January 6, 2016 Rules Committee meeting, prepared by John Dixon, were approved without change.

Comments Received on Rules Package 106-12:

The Board received comments from Attorney Bill Cluck and the Independent Regulatory Review Commission (IRRC) on Rules Package 106-12.¹ Mr. Dixon is in the process of preparing a Comment Response document. Mr. Cluck's and IRRC's comments are attached as an appendix to the minutes and are discussed further below.

Mr. Cluck's comments:

Allowing corporations to proceed *pro se* in EHB appeals

¹ Mr. Cluck's comments were received past the 30 day comment period, but the Board and the Rules Committee considered them.

Mr. Cluck commented that he supports providing the Board with discretion on a case-by-case basis to allow a corporation to appear *pro se*. To aid in discussion of this topic, Mr. Dixon prepared a memo on corporate representation, which is attached as an appendix to the minutes. Mr. Wolford suggested adding a sentence at the end of the memo stating that there should be no material difference in how the Board views general corporations and limited liability corporations. Mr. Clark stated that the minutes should also reflect that this is the consensus of the Rules Committee.

Individuals acting in concert

Mr. Cluck supports the proposal to delete Rule 1021.21(c) which requires individuals acting in concert to be represented by counsel. The rule is being revised to make this requirement discretionary with the Board, rather than mandatory.²

Attaching copy of action to Notice of Appeal

Rule 1021.51(d) currently states that if an appellant has received written notification of an action of the Department he must attach a copy of “the action.” The rule is being amended to require the appellant to attach a copy of the “notification and any documents received with the notification.” Mr. Cluck recommended allowing third party appellants to provide a link to the *Pennsylvania Bulletin* notice since the document is often not available to the third party appellant. The Committee and Board agreed with Mr. Cluck’s suggestion.

Amendment of interlocutory orders

In his comments, Mr. Cluck noted that the rules package includes proposed revisions to the rules on dispositive motions to extend the time for responding when the Department files a

² Mr. Cluck asked what criteria will be used to make such a determination. This question was inadvertently omitted from the discussion at the Rules Committee meeting but will be addressed by the Board in its response to Mr. Cluck’s comments.

response in support of another party's dispositive motion. Mr. Cluck asked whether the Board would consider a similar extension in Rule 1021.153, which deals with the filing of requests to amend an interlocutory order to certify an issue for appeal. Because the Board needs sufficient time to act before expiration of the 30 day appeal deadline, the Committee felt that such an extension would not be appropriate in the case of Rule 1021.153.

IRRC's comments:

IOLTA fee

The rules package contains a proposal to add a comment to Rule 1021.21 on representation to advise attorneys that payment of the IOLTA fee under 204 Pa. Code § 81.505(a) is not required in matters before the Environmental Hearing Board. IRRC asked how the Board will enforce this provision and commented that in order for the provision to be binding and enforceable it must be part of the regulation and not a comment.

The Board explained that it had been advised by the Office of General Counsel that the IOLTA provision of 204 Pa. Code § 81.505(a) is not applicable to proceedings before the Board. Therefore, the Board's proposal to add a comment to Rule 1021.21 is simply advisory.

Reference to Board's electronic filing website

IRRC commented that since the proposed revision to Rule 1021.32(c)(3) contains a reference to the Board's electronic filing website, information regarding where parties can find the electronic filing site should be included in the final form regulation. Ms. Wesdock explained that the problem with including the website/electronic filing site address in the body of the rule is that if the address changes it will take nearly a year to revise the rule, and during the intervening period the rule will contain an incorrect address. Mr. Wein suggested placing the address in a comment to the rule since a comment can be changed without going through rulemaking.

Mr. Bohan asked how long it takes to revise a comment and expressed a concern that even though a comment revision takes less time than rulemaking, there would still be some period of time during which the comment would contain an incorrect website/e-filing address. Mr. Wein asked Ms. Wesdock to contact the Legislative Reference Bureau to determine the length of time necessary to revise a comment.

Changes to Rules 1021.51 and 1021.101

IRRC asked for more clarification on the proposed changes to these rules. The Board will provide more clarification when it responds to IRRC.

Amendment of Interlocutory Orders

In Rule 1021.153(d), IRRC suggested changing “Unless the Board acts” to “If the Board does not act.” The Rules Committee and the Board agreed with the proposed change.

Composition of certified record on appeal to the Commonwealth Court

IRRC requested that the Board provide a more specific citation to the Rules of Appellate Procedure in the Preamble. The Rules Committee and Board agreed with this recommendation.

Mr. Wein requested that Mr. Dixon send a copy of the Comment Response documents to the Rules Committee members.

Corporate Representation:

Upon review of the Board’s rules package, the Governor’s Office of Policy asked the Board to consider an amendment to its rules that would allow small corporations the ability to represent themselves in proceedings before the Board. As noted earlier, Mr. Dixon prepared a memorandum addressing corporate representation, which is attached as an appendix to the minutes. He noted that Pennsylvania has recognized a few exceptions to the rule that corporations must be represented by counsel. For example, in *Harkness v. Unemployment*

Compensation Bd. of Review, 920 A.2d 162, 169 (Pa. 2007) (plurality opinion), the Supreme Court of Pennsylvania carved out an exception for proceedings before the Unemployment Compensation Board of Review. That case held that non-attorney representatives may represent an employer in an unemployment compensation hearing before a referee. However, in unemployment compensation hearings, the rules of evidence are not mandatory and there is no prehearing discovery.

Additionally, the Office of Open Records (OOR) recently applied the reasoning in *Harkness* to an appeal under Pennsylvania's Right to Know Law. In *Spatz v. City of Reading and PA NewsMedia Assoc.*, OOR Dkt. No. AP 2013-0210, the OOR explained that it is a quasi-judicial tribunal, not a court of law, and as a quasi-judicial tribunal, it was not bound by the rule that a corporation must be represented by counsel. The OOR relied on Section 1102(b) of the Right to Know Law which states that the OOR may adopt procedures relating to appeals under this chapter. 65 P.S. § 67.1102(b).

Mr. Dixon further pointed out that, in addition to unemployment compensation proceedings and proceedings before the OOR, some small claims courts allow corporate officers to represent corporations in proceedings before magisterial district justices.

Mr. Hinerman noted that some appeals that the Environmental Hearing Board handles are comparable to matters before the Unemployment Compensation Board of Review. He felt that Mr. Dixon's memo provided support for either approach – i.e., allowing corporations to proceed *pro se* or requiring them to be represented by counsel. He suggested allowing corporations to proceed *pro se* in civil penalty cases involving less than \$10,000. Judge Renwand raised a concern over whether it was fair to allow businesses to pick and choose which aspects of being a corporation they wished to follow. For example, a corporation might like the limited liability

that incorporating provides to them but not like the requirement of being represented by counsel. Mr. Hinerman suggested allowing corporations an opportunity to demonstrate that they cannot afford an attorney. Ms. Woelfling stated it would be similar to a hearing on inability to prepay a civil penalty, which places a tremendous burden on the Department. Judge Renwand felt that such a hearing could cause the case to evolve into ancillary issues and make it even more complex.

Ms. Conner provided the perspective of a small business. She stated that the decision to incorporate involves an evaluation of many factors, not simply the question of liability. When deciding whether to incorporate, a business is generally not thinking about how incorporation will affect its ability to represent itself in a legal or quasi-judicial proceeding. She felt it was unfair to lump small corporations into the same category as large corporations since there is a world of difference between the two.

Judge Renwand noted that the Environmental Hearing Board's process is very different from that of the Office of Open Records. The Board's process involves robust discovery and a protracted prehearing process. Mr. Bohan agreed that the two agencies that allow *pro se* representation by corporations – i.e., the Unemployment Compensation Board of Review and the Office of Open Records – involve very different types of hearings than does the Environmental Hearing Board. He noted that the Office of Open Records does not have a formal hearing; everything is done on paper.

Ms. Conner argued that the organizational structure of a small S corporation is no different than that of a partnership or sole proprietorship, both of which are allowed to represent themselves in Environmental Hearing Board proceedings. Ms. Wesdock recommended talking

to the *Pro Bono* Committee of the Pa Bar Association's Environmental and Energy Law Section to see if they would consider extending *pro bono* coverage to small corporations.

Mr. Bohan stated that it is much more difficult for the Department to proceed in matters with appellants who are not represented by counsel. He felt that if a business chooses to accept the benefits of being a corporation, it should be willing to accept the downsides too. Mr. Hinerman recommended that the Board consider it on a case-by-case basis. Judge Beckman stated he would agree to it in small civil penalty cases. He asked whether it should be limited to only small corporations or should it be available to all corporations in certain types of cases. Judge Renwand stated that he was not concerned about the size of the entity. He felt that large corporations would always be represented by counsel. He felt it was more important to be able to draw a clear line on the types of cases. Judge Beckman agreed that he favored a bright line in civil penalty cases. For example, he suggested limiting it to a \$5,000 penalty case, but raised a concern as to whether the Board would then begin seeing an increase in civil penalty cases slightly above the \$5,000 limit.

Mr. Bohan asked whether the procedural requirements for *pro se* corporations would be as formal as for other types of cases. Judge Renwand acknowledged that when a *pro se* case goes to hearing, the process usually ends up being less formal than for cases where all parties are represented by an attorney. Ms. Wesdock suggested that the Board might want to require an in person conference in cases involving a *pro se* corporation. Mr. Wein stated that this could create issues if, during the course of the conference, the Board determines that the corporation should be represented by an attorney. Judge Beckman stated that his preference would be to create a fast track procedure for civil penalty cases involving less than a certain dollar amount. He questioned how much discovery was done on a small civil penalty case. And, such a case

usually involves no more than a half day of hearing. Mr. Bohan asked whether the Board would distinguish between civil penalty complaints and assessments when determining whether a corporation should be permitted to proceed *pro se*. Judge Renwand felt there would be no distinction.

Judge Beckman suggested getting feedback at the Environmental Law Forum and putting the topic on the agenda for the May Rules Committee meeting. Ms. Conner also agreed to talk to the National Minority Supplier Business Council (NMSDC) and report their feedback at the May meeting.

Discovery of Electronically Stored Information:

At the January Rules Committee meeting, Mr. Bohan and Mr. Hinerman agreed to work on the language of a disclaimer. Mr. Bohan reported that they had reached an agreement on the content of the language but not on what should be posted on the Board's website. Mr. Hinerman raised the question of whether actual examples of ESI discovery agreements should be posted on the website or whether the website should simply provide a framework. Mr. Bohan expressed what he believed to be the consensus of the Rules Committee at the January meeting, which is that the Committee approved posting examples of documents that have been used, but not necessarily a model. Judge Renwand said that he agreed with posting examples.

Mr. Hinerman suggested that he and Mr. Bohan circulate the examples of ESI agreements for the next Rules Committee meeting. Mr. Wein also suggested adding this issue to the Board's program at the Environmental Law Forum.

Problems with Pro Se Efiling:

Ms. Wesdock explained that under the current efilng system, as set up by LT Court Tech, *pro se* appellants cannot electronically file notices of appeal. They also cannot efile in

more than one appeal. LT Court Tech estimates the cost to fix the problem at \$20,000. Ms. Wesdock stated that the Board was looking at various options and would add this topic to the agenda for the May Rules Committee meeting.

Adjournment:

On the motion of Mr. Bohan, seconded by Ms. Woelfling, the meeting was adjourned.

Next Meeting:

The next meeting will be May 12, 2016 at 10:30 a.m.