

ENVIRONMENTAL HEARING BOARD RULES COMMITTEE MINUTES

Meeting of March 14, 2013

Attendance:

The Environmental Hearing Board Rules Committee met on March 14, 2013 at approximately 10:30 a.m. In attendance were the following Committee members: Jim Bohan, Brian Clark, Gail Conner, David Raphael and by phone, Committee Chairman Howard Wein and Representative Kate Harper. Attending on behalf of the Environmental Hearing Board were the following: Chairman and Chief Judge Tom Renwand, Judge Michelle Coleman, Judge Bernie Labuskes, Judge Rick Mather, Board Secretary Vince Gustitus, Board Counsel Kris Gazsi, Board Counsel Maryanne Wesdock, and by phone, Judge Steve Beckman.

Recognition of Departing Committee Members:

The Committee and the Board recognized two former members of the Rules Committee: Tom Scott and Joe Manko. Both men were recognized for their service to the Committee. Mr. Clark noted that Mr. Scott had served on the Committee since its inception.¹ In recognition of Mr. Scott's long-standing service, the Committee recommended that a letter signed by

¹ The only other original member of the Committee is Mr. Clark.

Judge Renwand and Mr. Wein should be sent to Mr. Scott to thank him for his many years of service. Ms. Wesdock agreed to prepare a draft letter for review by Mr. Wein and Judge Renwand.

Welcome to New Committee Members:

The Committee and the Board welcomed two new members to the Rules Committee: Gail Conner, who replaces Mr. Scott, and Matt Wolford, who replaces Mr. Manko. Ms. Conner is a member of the Department of Environmental Protection's Citizens Advisory Council and practices law in Newtown Square, Chester County. Mr. Wolford is the Past Chair of the Pennsylvania Bar Association Environmental and Energy Law Section and practices law in Erie.

Recognition of Assistant Counsel Kris Gazsi:

The Committee and the Board expressed their appreciation to Environmental Hearing Board Assistant Counsel, Kris Gazsi, for his work on behalf of the Rules Committee. Mr. Gazsi will be leaving the Board on March 29, 2013 to begin a new position as Associate Counsel to the Local Government Commission of the State Legislature. Mr. Gazsi had been an active participant in Rules Committee meetings and had worked on a number of assignments for the Committee. The Committee and the Board wished him well in his new endeavor.

Minutes of January 10, 2013 Rules Committee Meeting:

Mr. Bohan noted corrections to the minutes of the January 10, 2013 meeting as follows:

- 1) On page 11 of the minutes (page 8 of Mr. Bohan's copy), in the sentence beginning, "Additionally..." strike the phrase "storage of metadata" and replace it with "Department mailboxes are stored on servers maintained by [the Office of Administration.]"
- 2) On the same page, in the next sentence beginning, "This presents a challenge..." strike "Departmental information that is stored by the Office of Administration is commingled with that of other agencies" and replace it with "Department mailboxes are commingled with those of other agencies..."

With those changes, the minutes were approved on the motion of Mr. Clark, seconded by Mr. Raphael.

Status of Rules Package 106-10:

Ms. Wesdock reported that the EHB's proposed rules package 106-10 was sent to the Office of General Counsel (OGC), Governor's Policy Office and Office of the Budget on February 21, 2013.

Note: Subsequent to the March 14, 2013 Rules Committee meeting, the rules package was approved by the Governor's Policy Office, OGC and the Attorney General's Office. The proposed rules appeared in the May 11, 2013 issue of the Pennsylvania Bulletin. Comments on the rules package will be addressed at the next Rules Committee meeting.

Enhancements to the Board's Electronic Filing System:

At the January 10, 2013 Rules Committee meeting, Mr. Bohan provided feedback from Department of Environmental Protection attorneys regarding the Board's electronic filing system. Ms. Wesdock and Mr. Gazsi spoke with representatives of LT Court Tech, the company that developed and maintains the Board's website and electronic filing system, to see if the changes could be made and to get an estimate of the cost. The feedback included recommendations for improving the electronic filing system as follows:

- 1) The confirmation page that is displayed when a document is efiled contains only the confirmation number and no information to identify the case in which the document was filed. Mr. Bohan stated it would be helpful to have the following information: case name, docket number, date and time of the filing, name of the registered user on whose behalf the document is being filed and the

name of the document (e.g., notice of appeal). LT Court Tech can make this change at a cost of approximately \$1,170.

- 2) The electronic filing transaction receipt that a registered user receives displays only the date of filing, not the time. Since the transaction receipt serves as proof of filing and because the time of filing may determine the date of filing for purposes of timeliness or calculation of response time, it was recommended that the transaction receipt include the time of the filing. LT Court Tech can make this change at a cost of approximately \$1,560.
- 3) Some users of the electronic docket on the Board's website are having difficulty opening documents. This is because the format for opening documents has changed. Whereas previously one would click on a hyperlink to the document, there is now an icon displayed. One must hover over the icon, which then causes a box to appear. One clicks on the box, not the icon, to open the document. The change was made by LT Court Tech in order to allow the filing of multiple documents. Because of the extra steps involved in opening a document, Mr. Gazsi agreed to talk to LT Court Tech to see if the procedure could be simplified. LT Court Tech can revise the procedure to allow users the ability to both

hover over or click on the icon. The cost to make this change is approximately \$1,170. In the interim, the Board's website will provide instructions on using the electronic docket which were drafted by Mr. Bohan.

- 4) The Board is also looking at additional improvements which were not discussed in detail at the Rules Committee meeting.

The next step is for the Board to approve the changes and determine when LT Court Tech can complete the work.

Issues Involving Pro Se Appeals:

Judge Mather reported on an upcoming hearing in a *pro se* appeal. In order to avoid having the appellant ask and answer his own questions, Judge Mather has suggested that the appellant submit written questions and answers for his direct examination. Cross examination of the appellant will take place at the hearing.

Mr. Raphael reported on a case in which he was involved when he was in private practice. The case was a non-jury trial and involved a *pro se* plaintiff. In that case, the *pro se* plaintiff gave a statement similar to an offer of proof, and opposing counsel were able to object to any portion of the statement.

Mr. Bohan agreed that the direct examination of *pro se* appellants can be difficult since they often end up giving a narrative or ask questions of themselves.

Mr. Clark stated that he felt it made sense to have a *pro se* appellant file his written direct testimony in advance like an expert report, in order to avoid testimony at the hearing that becomes a “stream of consciousness” narrative. Judge Renwand thought Mr. Clark’s suggestion made sense for two reasons: First, opposing counsel may be uncomfortable with an appellant taking the stand and not being sure what he is going to say, and, second, it is easier for a *pro se* appellant to organize his thoughts in advance rather than on the stand.

Judge Coleman reported on one of her cases involving a *pro se* appellant. In her case, the appellant did not file a prehearing memorandum, and the Department asked for sanctions. However, because the appellant had submitted a detailed six page letter setting forth his case, Judge Coleman requested the appellant to resubmit the letter as his prehearing memorandum.

Judge Labuskes often uses the Board’s rules on expedited proceedings to get a *pro se* case to trial quickly, without the need for lengthy discovery. Judge Renwand noted that, in most *pro se* cases, the appellant is unfamiliar with the discovery process and other pretrial procedures, and because he

misses a pretrial deadline his case is often thrown out without the merits ever being considered. With the streamlined process that Judge Labuskes has employed, the appellant is able to get to a hearing and make his statement on the witness stand. In most cases, the statement is short; the appellant just wants to have his day in court.

Judge Labuskes stated he would not be in favor of a rule that says *pro se* appellants should be treated differently. He felt that the Board's rules on expedited hearings are sufficient to deal with the *pro se* issues raised at the meeting. It was pointed out that the rules on expedited hearings also provide for written testimony at 25 Pa. Code § 1021.96d(b).

Judge Mather stated that he was in accord with Judge Labuskes' recommendation of no new rules at this time, based on the discussion. He will wait to see what his experience is with his first *pro se* hearing and raise the issue in the future if he feels there is a need to address the matter further.

Sections 1021.51 and 1021.52 of the Board's Rules:

Judge Beckman reported on one of his cases in which a *pro se* appellant had failed to perfect her appeal by failing to serve a copy of the notice of appeal on the Department's Office of Chief Counsel and the permittee as required by 25 Pa. Code § 1021.51(g)(2) and (3). She did not do so even after being ordered by the Board. (The appellant did serve a

copy of the notice of appeal on the program person at the Department as required by subsection (g)(1) of the rule.)

The Department lawyer in the case brought to the Board's attention 25 Pa. Code § 1021.52(b) which states as follows:

§ 1021.52. Timeliness of appeal

(b) The appellant shall, within 20 days of the mailing of a request from the Board, file missing information required by § 1021.51(c), (d) and (i) (relating to commencement, form and content) or suffer dismissal of the appeal.

The subsections referred to therein – 1021.51 (c), (d) and (i) – read as follows:

(c) The appeal shall set forth the name, address and telephone number of the appellant.

(d) If the appellant has received written notification of an action of the Department, a copy of the action shall be attached to the appeal.

(i) The service upon the recipient of a permit, license, approval or certification, as required by subsection (h)(1), shall subject the recipient to the jurisdiction of the Board, and the recipient shall be added as a party to the third-party appeal without the necessity of filing a petition for leave to intervene. . . .

Clearly, subsections (c) and (d) refer to information that is required to be submitted with the notice of appeal. However, subsection (i) does not.

After reviewing this subsection, it was the consensus of Judge Beckman and Ms. Wesdock that the reference to subsection (i) is incorrect and is probably a carryover from a previous version of this rule in which (i) contained different language. Ms. Wesdock noted that the rule has been revised in order to add new subsections, and the reference to (i) in 1021.52(b) was probably overlooked.

It was suggested that perhaps the correct subsection is 1021.51 (g), which requires appellants to serve a copy of a notice of appeal on the program office of the Department, the Office of Chief Counsel, and, where applicable, the permittee. However, Ms. Wesdock pointed out that (g) does not require the appellant to supply any information to the Board, as stated in 1021.52(b). Therefore, she suggested that perhaps the correct subsection is 1021.51(k), which reads as follows:

(k) Appellant shall provide satisfactory proof that service has been made as required by this section.

Judge Labuskes pointed out that it could also be subsection 1021.51(e) which reads as follows:

(e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. . . .

Mr. Wein asked whether the correction could be added to the current rules package, 106-10. Judge Mather explained that there is no easy way to

add it at this stage of the process unless the error was the fault of the Legislative Reference Bureau (LRB). If it was the fault of the LRB, they will automatically correct it. However, if it was an oversight on the part of the Board, it cannot be changed without going through the rulemaking process. Judge Mather noted that the State Library has on file old pages from the Pa. Code. He volunteered to take a look at previous versions of the rule to see where the change occurred. Ms. Wesdock also noted that she had asked Ms. Woelfling if she remembered when the change occurred, and Ms. Woelfling had suggested looking at old editions of the Pa. Bulletin containing the Board's past rulemaking.

Judge Beckman noted that in the interim, the Board can dismiss appeals where an appellant fails to perfect on the basis that the appellant failed to comply with a Board order. However, he felt it was important to fix the error in the long run.

Mr. Clark suggested that if there are any other administrative changes such as this one, it might be a good idea for the Board to do a "clean up" rules package.

Judge Labuskes asked why 1021.52(b) couldn't simply say, "The appellant shall, within 20 days of the mailing of a request from the Board, file missing information required by § 1021.51" rather than citing specific

subsections of 1021.51. Mr. Bohan noted that § 1021.51 had been revised substantially in the current rules package. He raised a concern that by simply citing to “1021.51” as opposed to specific subsections, the Committee might be adding more to § 1021.52(b)’s coverage than was intended.

The Committee felt that a closer look should be given to §§ 1021.51 and 1021.52 (as revised by the proposed revisions of Rules Package 106-10) before taking a vote on any revision to § 1021.52(b). Ms. Wesdock will review the sections in detail and report back to the Committee at the next meeting.

Content of Prehearing Memorandum (25 Pa. Code § 1021.104):

Judge Renwand stated that he likes to have exhibits to prehearing memoranda electronically filed. Under the current rules, exhibits are to be filed in hard copy. LT Court Tech has increased the megabyte limit of documents that may be electronically filed so the Board now has the capability of accepting larger-sized documents electronically. The problem, however, is that not all filers have the ability to scan and electronically file large documents (“large” referring to size of document, not pages).

Mr. Raphael stated that he had no problem with allowing the electronic filing of exhibits as long as it was not mandatory. He noted that mining cases may have some very large files (e.g., mining maps).

Mr. Bohan explained that by using a lower resolution, one can scan and email larger size documents. Mr. Wein agreed, noting that he has had to do this with some pdf files sent to clients. The problem, however, is that the lower resolution may cause the document to be difficult to read. Judge Renwand noted that he has received some efilings that were difficult to read. Mr. Bohan suggested that the Board may want to put tips on the website for reducing the file size of documents in order to allow them to be more easily efiled.

Mr. Gazsi explained a problem that occurs when time-stamped documents are scanned and efiled; however, this problem was addressed by LT Court Tech.

Representation of groups of individuals (25 Pa. Code § 1021.21(c)):

Ms. Wesdock discussed reasons for considering an amendment to Rule 1021.21(c), regarding the requirement that groups of individuals must be represented by counsel. She proposed that subsection (c) be amended to require parties to obtain counsel at the discretion of the Board. She explained that the Board has had cases where Rule 1021.21(c) ties the

Board's hands in dismissing cases where appellants do not have counsel without giving the parties an opportunity to first see if the case can be settled. As soon as the Board orders the appellants to obtain counsel, the Department ends communications with the individuals. If the appellants had each submitted their own notices of appeal, they would not be required to obtain counsel, even if the cases are consolidated into one. However, if the appellants all sign one notice of appeal, they are required to get counsel. This differential treatment does not seem to make sense, at least in the very early stage of an appeal.

Mr. Raphael noted that where there is a collective group of individuals who have filed an appeal, there is value in having one person as a point person. When that person is not an attorney, he/she cannot speak for or bind the other individuals.

Ms. Conner stated that she has frequently been involved in *pro bono* cases and she has always found there to be a point person. She offered a number of reasons as to why the Board should have more flexibility in determining whether to order appellants to obtain counsel. Mr. Clark pointed out that if one of the appellants is acting as point person, he/she risks crossing into the area of unauthorized practice of law. He suggested delaying the requirement for groups of appellants to obtain counsel. Ms.

Wesdock agreed that this would solve the problem that the Board is facing. Mr. Raphael suggested that the requirement could kick in once the discovery period has ended.

Judge Labuskes stated he was in agreement with the suggestion of amending 1021.21(c) but proposed an alternative which he felt would avoid the problem of unauthorized practice of law. He proposed deleting subsection (c), which requires groups of individuals to be represented by counsel, and simply use (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.*

25 Pa. Code § 1021.21(d) (emphasis added; brackets added to show proposed deletion). Judge Beckman agreed that subsection (d) gives the Board more flexibility. He said he would like the flexibility of not having to order appellants to retain counsel right out of the starting gate.

Judge Mather stated that he prefers keeping the word “shall,” as appears in subsection (c) but allowing for some delay in ordering counsel at the start of a case. He felt this was the best protection against allowing the unauthorized practice of law. Judge Renwand raised a concern that by using “shall,” it forces the Board to dismiss the case if appellants do not have

counsel. Judge Mather suggested that the Board may need to take a more active role at the beginning of a case in order to ensure that the case is not dismissed too early under subsection (c).

Mr. Clark raised the point that by delaying the requirement of obtaining counsel and allowing appellants to get organized, it may allow for an expedited hearing. Mr. Wein agreed. He also noted that in some cases one meeting with the Department may resolve the case and by delaying the order to retain counsel, it allows this to occur.

Judge Labuskes suggested stating that the Board has the authority to require the appellants to designate a contact person, which would address the concern raised earlier in the discussion by Mr. Raphael. However, Mr. Raphael pointed out that there is no professional obligation for a non-attorney to inform the other appellants of actions in the case, unlike the obligation of an attorney to inform his clients. Mr. Bohan pointed out that requiring a spokesperson could have a preclusive effect.

Judge Coleman stated she was okay with having a requirement for individuals to obtain counsel.

It was agreed that Ms. Wesdock should prepare a draft amendment to the rule which the Committee will vote on at the next meeting.

Judge Labuskes also pointed out that subsection (b), requiring corporations to be represented by counsel, is very specific in stating that counsel must be “an attorney in good standing,” whereas subsection (a) requiring parties other than individuals to be represented by counsel simply states that parties must be represented by “an attorney.” He felt the two sections should be consistent. Ms. Wesdock will also address this issue in the draft amendment she prepares.

Next Meeting:

The next meeting would normally be scheduled for May 9, 2013. However, Judge Renwand and Mr. Clark are in a hearing on that date. Ms. Wesdock will circulate an email asking for alternate dates. (It was agreed after the meeting that the May meeting would be canceled and the parties will convene by conference call on July 25, 2013 at 10:00 a.m. to address comments on the rules package and any other issues on the agenda at that time.)

Adjournment:

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