

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

MINUTES OF MEETING OF MAY 11, 2017

Attendance:

The Environmental Hearing Board Rules Committee met on May 11, 2017 at 10:30 a.m. Rules Committee members in attendance were Committee Chairman Howard Wein (in Pittsburgh), Alexandra Chiaruttini (in Harrisburg), Jim Bohan (in Harrisburg), and Phil Hinerman (in Harrisburg), and participating by phone were Committee Vice-Chair Maxine Woelfling and Matt Wolford. Attending from the Environmental Hearing Board were the following: In Pittsburgh – Chief Judge Tom Renwand; in Erie – Judge Steve Beckman, Board Secretary Christine Walker, and Assistant Counsel Nikolina Smith; and in Harrisburg – Judge Richard Mather and Assistant Counsel Eric Delio and Mica Iddings, who took the minutes.

Approval of Minutes:

On the motion of Ms. Woelfling, seconded by Ms. Chiaruttini, the minutes of the March 9, 2017 meeting were approved.

Rules Package 106-12:

Judge Renwand reported on the progress of Rules Package 106-12. The rules package was delivered to the Independent Regulatory Review Commission (IRRC) and the House and Senate Environmental Committees. A hearing before IRRC is scheduled for mid-June. The last step in the process is approval by the Attorney General's Office.

Mediation:

Mr. Wein introduced the results of a survey questionnaire circulated to members of the PBA Environmental and Energy Law Section regarding the development of a mediation program

for Board appeals. Mr. Wein indicated that there had been a good response and that he wanted to share the results with the Rules Committee and Board Judges before submitting them to the PBA. Mr. Wein thanked Mr. Wolford for his help in developing the survey questions.

Mr. Hinerman reported on the results of the survey. Mr. Hinerman is the chair of the Mediation Joint Subcommittee,¹ which includes members of the Rules Committee, PBA Environmental and Energy Law Section and PBA Unauthorized Practice of Law Section. Rules Committee members on the Joint Subcommittee include Mr. Hinerman, Mr. Wein, Mr. Wolford and Ms. Chiaruttini. Mr. Hinerman said that 45 people responded to the survey, and out of those 45, 44 said they thought that a mediation program would be worthwhile. Forty of the respondents said they would be interested in serving as a mediator in the program.

Mr. Hinerman said that the survey has provided some insight into issues such as: how much mediators should be paid, if at all; what training should be required for mediators; and if mediators should have some degree of experience practicing environmental law. Mr. Hinerman said that most survey respondents supported some amount of training for mediators and that the mediators should possess some experience with environmental law. Mr. Wolford stated that existing environmental law experience is beneficial because it would reduce the time needed to spend educating and training mediators. The survey respondents were divided on how many years of environmental law experience should be required, with responses ranging from 5 years to more than 15 years. Ms. Chiaruttini inquired as to whether mediation training offered elsewhere would qualify. Mr. Wein responded that it is an issue being discussed in the Subcommittee.

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 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.

Judge Mather stated that the Board does not have the money to fund training for mediators, or to pay for mediators for their time spent in a mediation session. Judge Mather said that any mediation program would need to be revenue neutral in terms of the Board's budget. Mr. Hinerman said that some survey respondents indicated that they would be willing to pay for the training themselves, and others expressed interest in the Environmental Law Section paying for training. Mr. Hinerman also added that PBI is willing to tailor its existing mediator training program to the Board's needs at their regular program rate.

Ms. Woelfling asked how many parties in Board proceedings had availed themselves of mediation in the last five years. Mr. Wein stated that he recently had a successful mediation in a case before Judge Beckman. Judge Renwand responded that he has had around five cases where the parties have engaged in mediation and only one of those had been resolved through the mediation process. Both Mr. Wolford and Ms. Woelfling indicated that they had participated in mediations in environmental matters in federal district courts.

Judge Beckman expressed concern in a mediation program that could potentially extend significantly what is at times already a lengthy appeal process before the Board. He added that he would like the Subcommittee to address the timing and timeframe for mediation—when mediation would need to start, and when it would need to conclude. Judge Renwand echoed Judge Beckman's concerns. Mr. Hinerman reported that the Subcommittee was looking at an extra 30 days at the beginning of an appeal, with all relevant deadlines extended by that amount of time. Ms. Chiatuttini agreed that parties should opt-in to the mediation process close in time to the initiation of an appeal. Mr. Wein also agreed and stated that expenses for all parties will be minimized if mediation is begun early on.

A brief discussion was had on the Board's current rule on voluntary mediation, 25 Pa. Code § 1021.106. Ms. Woelfling stated that Rule 1021.106 currently provides that the Board may stay a matter for up to 120 days to allow for mediation services. Judge Renwand said that parties often ask for more time. He explained that parties often get hung up on the compilation of the report required by 1021.106(d), with motions frequently filed on what is to be included in the report, but he noted that a lengthy and detailed report is not necessary. Mr. Wein suggested that the Board communicate to the parties early on about the Board's expectations for a mediation report.

It was concluded that the PBA Subcommittee would continue to discuss the issues and report back to the Rules Committee on its progress.

Media in the Courtroom:

Mr. Wein provided background on the issue and the need for continuing discussions following the Board's presentation at this year's Environmental Law Forum, where several practitioners in the audience weighed in. Judge Renwand stated that he believed the Board needed to develop a rule to deal with the issue. He said that currently media requests to record Board proceedings frequently come in soon before the proceedings begin, which can be a distraction for both the parties to the matter and the Board.

Ms. Chiaruttini noted that it is important to be mindful of the distinction between simply recording a proceeding and recording for the purposes of later broadcasting that proceeding. She inquired as to how the judges felt about media in the courtroom. Judge Mather stated that he believed audio recording would be less intrusive than video recording. He expressed a concern of video recording potentially affecting a witness to the point that it would impact the witness's testimony. Judge Mather also noted a concern of parties being more preoccupied with their

appearance on camera than with presenting their case to the Board and the presiding judge. Judge Beckman stated that he was generally in favor of allowing media to record in accordance with reasonable restrictions and subject to the presiding judge's discretion. He noted that the Board's courtrooms are public spaces and that under the Right to Know Law all records are presumed to be public. Judge Renwand stated that he was in favor of a reasonable rule for recording oral argument, but that he still needed to be convinced that recording witnesses at hearings is a good idea. He also noted, in response to concerns expressed over the use of recordings divorced from appropriate context, that inaccurate articles written by reporters sitting in on hearings already happen now.

Judge Beckman stated that he was wary of any rule that would allow any party to have a unilateral veto for whether recording and broadcasting was allowed in a Board proceeding. Mr. Wolford said that he did not have a problem with a one-party veto, and noted that parties should not be required to appear on television as a consequence of exercising their due process rights. Ms. Chiaruttini said that the Department is not as concerned with its lawyers being recorded during an oral argument, but contended that the recording of witnesses should be a concern for all parties. She also expressed concern for Department employees being involuntarily subjected to recording. Mr. Bohan said he was concerned over potential distortions of the process, and noted that the distinction between ordinary citizens and the media is continuing to blur. Ms. Chiaruttini concurred with the lack of a bright line distinguishing media and non-media.

Judge Beckman posited that any rule should start from the premise of allowing recording and then imposing reasonable restrictions and safeguards on that recording that would address some of the concerns being voiced. Mr. Hinerman said that he was not as opposed to audio

recording as video recording. Mr. Wein noted that audio recording is generally not as intimidating as video recording.

It was decided that the judges would discuss the boundaries of a rule internally and report back to the Rules Committee. Some of the issues flagged by the Rules Committee to be considered are: video vs. audio recording; the types of proceedings where recording will be allowed (i.e. oral argument, supersedeas hearing, hearing on the merits, judicial conference); whether parties can object to recording and what weight that objection will be afforded. Mr. Wolford suggested that the Board in the interim follow Rule 1910 of the Rules of Judicial Administration. Judge Mather suggested that the Board check with the Office of General Counsel to see if other agencies or tribunals have developed any policies on media recording since the last time the Board checked.

Correction of Error in Rule 1021.34(a):

Mr. Delio explained that he noticed that Rule 1021.34(a) incorrectly references 1021.51(h) when directing parties how to serve notices of appeal. Rule 1021.51(h) provides a definition of “recipient of the action” as that term is used with respect to third-party notices of appeal. Mr. Delio suggested that Rule 1021.34(a) be amended to reference either 1021.51 generally, or 1021.51(f), which discusses filing notices of appeal conventionally, electronically, or by fax, but also indicates how an appeal needs to be served under those various means of filing. Mr. Bohan thought it would be cleaner to reference Rule 1021.51 on its own, which was generally agreed upon. Judge Mather suggested that perhaps the incorrect cross-reference could be changed with the Legislative Reference Bureau without undertaking the full rulemaking process. Judge Mather and Mr. Delio will investigate whether this can be done and report back at the next meeting.

Issuance of Orders Following Pre-Hearing Conferences:

Mr. Bohan introduced the topic by explaining how a Department attorney had suggested that the Board issue an Order following its prehearing conferences because at times parties have differing interpretations on any obligations that follow from the conference. Mr. Bohan explained that he was not advocating a rule change, but only flagging it as an issue for the Board consider. He noted that the practice is generally followed by other courts. Ms. Chiartuttini stated that it would not be necessary after every prehearing conference call, only where the judge has made some decision affecting the parties or the proceeding. The Board agreed to take the suggestion under advisement.

Pro Hac Vice Rule:

Mr. Delio explained that he and Ms. Iddings frequently get phone calls from counsel with questions regarding the admission of counsel pro hac vice in matters before the Board. Ms. Wesdock requested that Mr. Delio and Ms. Iddings compile a list of questions they receive, which were then circulated to the Rules Committee in advance of the meeting. Mr. Delio explained that in Pennsylvania courts, pro hac vice is governed by Rule 1012.1 of the Rules of Civil Procedure, the IOLTA regulations at 204 Pa. Code §§ 81.501 – 81.506, and Rule 301 of the Bar Admission Rules. Mr. Delio noted that the only reference in the Board’s Rules to pro hac vice is in Rule 1021.21(b), which only indicates that corporations can be represented by out of state attorneys. Mr. Delio suggested that the Board’s rule on representation be amended to eliminate the reference in 1021.21(b) and add a new subsection that provided:

- “Parties 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 in accordance with the relevant Rules of Civil Procedure, Bar Admission Rules, and IOLTA regulations.”

Mr. Delio noted that Rules Package 106-12 contains a comment to Rule 1021.21 indicating that payment of the IOLTA fee under 204 Pa. Code § 81.505(a) is not required as a condition to pro hac vice admission in Board proceedings.

Judge Renwand suggested that the Board adopt a rule that is less stringent than Rule 1012.1 of the Rules of Civil Procedure. For instance, he proposed relaxing the requirement that a sponsoring attorney must sign all pleadings. Mr. Wein agreed that a simpler, less restrictive process for pro hac vice admission was beneficial.

It was decided that the Board would discuss internally the contours of a rule and present language to the Rules Committee at the next meeting.

Adjournment:

The meeting adjourned at approximately 12:20 p.m. The next meeting is scheduled for Thursday, July 13, 2017 at 10:30 a.m.