

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE
MINUTES OF MEETING OF MAY 14, 2015**

Attendance:

The Environmental Hearing Board Rules Committee met on May 14, 2015 at 10:15 a.m. The following Rules Committee members attended: In Harrisburg – Vice Chair Maxine Woelfling, Jim Bohan, Richard Morrison, Phil Hinerman, Brian Clark and Lisa Long; and by phone – Committee Chairman Howard Wein, Gail Conner and Matt Wolford. Board Counsel Maryanne Wesdock presided over the meeting until Mr. Wein joined the call. A warm welcome was extended to Lisa Long who was recently appointed to the Rules Committee by Speaker of the House Mike Turzai. Guests included Attorney Bill Cluck who attended by phone. Attending on behalf of the Board were the following: In Harrisburg – Chief Judge Tom Renwand, Judge Rick Mather, Maryanne Wesdock, Eric Delio, Vince Gustitus and John Dixon, who took the minutes.

Approval of Minutes of January 8, 2015 and March 12, 2015:

The minutes from the January 8, 2015 Rules Committee meeting were approved on the motion of Mr. Clark, seconded by Mr. Bohan. The March 12th minutes were amended to reflect an error that occurred during the discussion on

filing deadlines that fall on a Saturday, Sunday or Legal Holiday. During this discussion at the March 12th meeting, the Committee inadvertently referenced the Board's rule 1021.31, which regards *signing* documents. The Committee was actually intending to resolve the filing deadline issue by revising rule 1021.32, which concerns *filing*. That section of the minutes was updated to reflect the Committee's intent. The minutes also incorrectly stated the corresponding section in the General Rules of Admin. Pract. & Proc. as 1 Pa. Code § 1021. 31, rather than 1 Pa. Code § 31.12. With those corrections, the March 12, 2015 Rules Committee meeting minutes were approved on the motion of Mr. Clark, seconded by Mr. Bohan

Registering for e-filing during non-business hours

Ms. Wesdock started the discussion by explaining an issue with the Board's electronic filing system. When an attorney or pro se appellant registers to use e-filing during non-business hours, the registration may not be accepted until the next business day during business hours. This is because the electronic filing system is set up so that an LT CourtTech employee must manually accept new user registrations. If the attorney or pro se appellant attempts to register for e-filing after business hours, it follows that an LT CourtTech employee may not be present to accept the new user registration. However, once an appellant is

registered for e-filing, the appellant can file documents at any time of day and an LT CourtTech employee does not have to manually approve such filings. The Board has addressed this issue by putting a notice on the Board's website which states as follows:

"You cannot Efile until you receive this confirmation/welcome email. Please note that if you register for Efiling after business hours, you may not be able to Efile until the next business day. Please note that if you need to file a notice of appeal on the day that you register and you have not yet received your approval, you must either fax or hand deliver your notice of appeal to the Board. The Board's fax # is 717-783-4738." <http://ehb.courtapps.com/efile/userRegistration.php>

When asked if LT CourtTech could revise the e-filing system to account for this issue, Mr. Gustitus noted that a change to our e-filing system would cost about \$14,000.00. Ms. Woelfling asked why the Board set up the e-filing registration so that an LT CourtTech employee must manually accept new registrations. Ms. Wesdock explained that the Board never asked LT CourtTech to design the registration system this way. Judge Mather noted that the e-filing registration issue has recently occurred in three related appeals.

Ms. Wesdock questioned whether the Board rules should be changed to reflect this e-filing registration issue. Mr. Bohan noted that a comment in the rules is a better idea. Rather than altering the rules, the Committee agreed that a comment should be added to the rules to address e-filing registration after

business hours. Ms. Wesdock noted that if LT CourtTech corrects this issue, the comment could easily be removed from the rules.

Judge Mather also noted that in a recent appeal, there was a misunderstanding that if someone in an organization registered for e-filing, everyone in the organization was therefore registered for e-filing. This is not how e-filing registration works. In the recent appeal, the attorney thought she could rely on a prior organization registration when in fact the attorney was required to register herself.

With the exception of these occasional issues, Mr. Wolford noted that the Board's e-filing system works very well.

Filing Deadline that falls on a Saturday, Sunday or legal holiday

At the March Rules Committee meeting, Mr. Wein suggested that 25 Pa. Code § 1021.32 (filing) should be revised to clearly state that when a filing deadline falls on a Saturday, Sunday or legal holiday, the filing is not due until the next business day. This rule is currently set forth in the General Rules of Administrative Practice and Procedure at 1 Pa. Code § 31.12 but not in the Board's rules. Mr. Wein suggested that going through the Board rules and determining where the words "day" or "days" appear. This change was approved at the March 13, 2015 meeting but the language was not voted on. Ms. Woelfling

disagreed with changing each reference to “day” or “days” in the Board rules to “business day” because it creates more opportunity for mistakes. Mr. Wein agreed with Ms. Woelfling’s assessment.

Mr. Dixon drafted a rule to address computation of time. He explained that this draft was based on the General Rules of Administrative Practice and Procedure. The original proposed rule presented to the Committee read as follows:

TIME

§ 1021.13. Computation of Time.

Except as otherwise provided by law, in computing a period of time prescribed or allowed by the rules of the Board or another provision of law, time shall be computed to exclude the first business day of the act, event or default. Time shall be computed to include the last business day unless the act, event or default falls on a Saturday, Sunday or a legal holiday in this Commonwealth, in which event the day shall be omitted from the computation and the period shall run until the end of the next business day which is neither a Saturday, Sunday nor a holiday. A part-day holiday shall not be considered a holiday. Intermediate Saturdays, Sundays and holidays shall be included in the computation.

Mr. Clark questioned what a “part day holiday” is, and, therefore, the Committee decided to strike that language from the rule. Mr. Delio noted there was a problem referring to “business day” in the first sentence of the original language because the first actionable day is often publication in the Pa Bulletin which is a Saturday. Mr. Delio also suggested changing the words “act, event or default” to tailor them more towards what the Board actually does and instead

say “action, event or filing.” This change was also made in the second sentence. Mr. Delio suggested removing the words “action, event or filing” from the second sentence and instead using a collective pronoun such as “it.” Mr. Delio also suggested organizing the rule so that there is a subsection (a) that contains the language and subsection (b) which states that section (a) supersedes PA Code Section 31.12 (relating to computation of time). Mr. Bohan recommending changing the word “intermediate” in the last sentence to “intervening.”

Mr. Cluck questioned if this rule applied to third parties. Judge Mather said the rule is neutral as to whom it applies. The chair asked for a motion, made by Ms. Woelfling and seconded by Mr. Clark. After edits by the Committee, the rule on computation of time read as follows:

TIME

§ 1021.13. Computation of Time.

(a) Except as otherwise provided by law, in computing a period of time prescribed or allowed by the rules of the Board or another provision of law, time shall be computed to exclude the first day of the action, event or filing. Time shall be computed to include the last day unless it falls on a Saturday, Sunday or legal holiday in which event the day shall be omitted from the computation and the period shall run until the end of the next business day. Intervening Saturdays, Sundays and legal holidays shall be included in the computation.

(b) Subsection (a) supersedes 1 Pa. Code sect. 31.12 (relating to computation of time)

Electronic Discovery

Ms. Wesdock started the discussion by explaining that over the last several years, the Committee has considered whether to adopt rules pertaining to electronic discovery. It was decided at a previous Rules Committee Meeting that it made more sense to deal with electronic discovery in a pre-hearing order, rather than amending the rules.

Mr. Cluck questioned why electronic discovery should be treated differently than other forms of discovery. Mr. Hinerman noted that there are many Commonwealth servers and it takes a great deal of time figuring out what servers to discover. Mr. Delio noted that the PA rules of discovery added a comment which merely acknowledges that e-discovery exists. According to Mr. Delio, the Board PHO-1 does not ask for anything much different than what is required under federal rules which require the parties to convene and discuss discovery. District courts also treat the issue similarly to the Board in that they require a discovery plan. The purpose is to trigger preservation and limit future e-discovery disputes so that the parties are on the same page.

Mr. Bohan explained that the analysis for e-discovery is different because of the inherent difference between electronically stored

information and other types of information. One difference is volume – there is a tremendous amount of stored information for each person. Another difference is duplicability – there are duplicates of many electronically stored files. Also, dispersion and searchability are major differences between electronically stored information and other forms of discoverable information. Mr. Bohan explained that electronic files are often altered and if a party is attempting to discover audio or video files, searchability of those files is much more difficult than text files.

Mr. Bohan concluded his explanation on the differences between electronically stored information and other forms of information by explaining the high cost of e-discovery. Electronic discovery is very expensive and resource exhaustive, particularly for the Department. The market price is \$18,000 to \$30,000 per gigabyte of electronically stored information. Mr. Hinerman further explained that because the state system is a little older, it is necessary to give electronic discovery special treatment. He agreed with the format currently set forth in the Board's pre hearing order.

Mr. Cluck opined that the electronic discovery language in the Board's Pre Hearing Order -1 (PHO-1) should be optional. The PHO-1 says

the parties *shall* submit a proposed plan to the Board. Mr. Cluck noted that the PHO-1 can often make discovery overly complicated by requiring an electronic discovery plan and that sometimes, electronic discovery plans are unnecessary and may be cost prohibitive.

Chief Judge Renwand explained that the reason for the rule is to protect people like Mr. Cluck's client because at the time the language was drafted, the Department did not have vast electronic storage capabilities. Mr. Bohan noted that the advantage to PHO-1 is to determine areas where it is unlikely to have discoverable electronic information so the parties are not over-preserving information. According to Mr. Bohan, the Board's PHO-1 helps the parties identify what information they really need.

Judge Mather prefers not changing PHO-1 to make the electronic discovery plan optional. If the parties cannot work out an electronic discovery plan, the parties should contact the Board's assistant counsel to set up a conference call to discuss the discovery issue. Judge Mather further stated that PHO-1 simply mandates that parties discuss certain things. Judge Mather has not seen or experienced the problems that Mr. Cluck is having with electronic discovery plans. Judge Renwand agreed that in a vast majority of cases, it has not been a problem.

Post Hearing Briefs

Next, the Board proposed adding a new subsection to 25 Pa. Code § 1021.131 requiring a table of contents for post hearing briefs and post hearing reply briefs that are more than 25 pages in length.

Ms. Wesdock stated that this rule could be especially important for post hearing briefs since they often cover numerous issues. Judge Mather agrees that it is a good idea to have a table of contents and it makes for easier reading, but expressed concern that a table of contents creates an additional administrative burden, particularly for Pro Se Appellants. Ms. Woelfling stated that requiring a table of authorities could be very burdensome for a pro se, but a table of contents is very reasonable. The Committee also suggested requiring a table of contents for briefs in support of a motion for summary judgment that exceed 25 pages. Ms. Wesdock indicated that the Board will draft language requiring a table of contents which will be circulated before the next Rules Committee meeting.

Next Meeting:

The next meeting of the Rules Committee will be on July 9th, 2015 at 10:30 a.m.¹

Adjournment:

On the motion of Ms. Long, seconded by Ms. Conner, the meeting was adjourned at 12:30 p.m.

¹ The July 9, 2015 meeting was cancelled.