

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

MINUTES OF MEETING OF SEPTEMBER 14, 2017

Attendance:

The Environmental Hearing Board Rules Committee met on September 14, 2017 at 10:30 a.m. Rules Committee members in attendance were Committee Chairman Howard Wein, Phil Hinerman, Brian Clark, Jim Bohan, Alexandra Chiaruttini,¹ and participating by phone were Committee Vice-Chair Maxine Woelfling and Gail Conner. Attending from the Environmental Hearing Board were the following: In Pittsburgh – Chief Judge Tom Renwand and 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 – Judge Richard Mather and Assistant Counsel Eric Delio and Mica Iddings. Lee Ann Murray, the Executive Director of the DEP Citizens Advisory Council, also joined the meeting in Harrisburg. Ms. Murray was welcomed by the Board and the Rules Committee members.

Approval of Minutes:

On the motion of Mr. Bohan, seconded by Ms. Woelfling, the minutes of the May 11, 2017 meeting were approved.

Status of Rules Package 106-12:

Ms. Wesdock reported on the status of Rules Package 106-12. The rules package was mailed to the Office of the Attorney General on August 21. The Attorney General's Office has 30 days to approve the rulemaking. A decision is expected on or before September 22, 2017. Ms. Wesdock will notify the Committee when the rulemaking receives approval by the Attorney

¹ Ms. Chiaruttini joined the meeting after the vote on the correction to Section 1021.34(a).

General's Office and will notify the PBA Environmental and Energy Law Section as to the expected date of publication in the *Pennsylvania Bulletin*.

Correction of Error in Rule 1021.34(a):

At the May 11, 2017 meeting, Mr. Delio pointed out that Rule 1021.34(a) incorrectly references subsection (h) of Rule 1021.51. The reference should simply be to "1021.51." Ms. Wesdock contacted the Legislative Reference Bureau to see if the error could be corrected without going through the rulemaking process. She was advised by the Legislative Reference Bureau that the correction must be done through rulemaking.

On the motion of Mr. Bohan, seconded by Mr. Clark, the Committee voted to amend Section 1021.34(a) of the Board's rules to reference "Section 1021.51" instead of "Section 1021.51(h)." This amendment will be added to the next rules package.

Issuance of Orders Following a Prehearing Conference:

At the May 11, 2017 meeting, Mr. Bohan suggested that the Board give consideration to issuing orders after prehearing conferences in order to memorialize what was agreed upon or decided during the conference. The judges agreed to consider the suggestion and report back to the Rules Committee. Judge Beckman reported that the Board did not believe there was a need for a formal process but agreed with Mr. Bohan that certain cases could benefit from the issuance of an order following a prehearing conference. Judge Renwand stated that at the end of a prehearing conference he generally summarizes what was discussed during the conference. Often an order is issued following the conference, particularly if the parties have requested the extension of a deadline. The judges agreed that a party can always request the issuance of an order following a prehearing conference.

Mr. Bohan discussed a case where such an order would have been beneficial. The case involved a *pro se* appellant and there was confusion on the part of the appellant as to who had the burden of proof. Mr. Bohan did not feel that a formal rule was necessary to require the issuance of orders following prehearing conferences, but simply wanted to raise awareness as to the benefits of issuing such an order. The judges agreed that they would keep Mr. Bohan's suggestion in mind in the future. Judge Renwand also suggested that a party who wishes to have a prehearing conference memorialized can file a motion with a proposed order setting forth what was decided during the conference.

Mediation:

Mr. Wein and Mr. Hinerman presented the Draft Report of the PBA EELS/EHB Mediation Committee ("report"), consisting of members of the Rules Committee, the PBA Environmental and Energy Law Section and the PBA Unauthorized Practice of Law Committee. A copy of the report is included at the end of the minutes. The report compiles the results of a survey of members of the Environmental and Energy Law Section on the topic of mediation in EHB cases. Section members were surveyed on such topics as whether it would be worthwhile for the Board to offer a mediation program, what the mediation fee should be, and how much experience should be required of mediators. 45 attorneys responded to the survey.

Mr. Hinerman explained the next steps in the process: 1) Establish guidelines for the mediation; 2) determine who is qualified to serve; and 3) provide training. As to the latter, Mr. Hinerman reported that PBI (Pennsylvania Bar Institute) can provide the training. The Mediation Committee has been discussing whether the Environmental and Energy Law Section should subsidize all or a portion of the training.

Mr. Wein reported that the Mediation Committee recommends that in order to qualify as a mediator for the program, a person should have a minimum of 10 years of experience in the field of environmental law. Ms. Conner questioned the 10-year requirement. She noted that 10 years' experience is more than is required for a judge on the Board. She expressed the opinion that some environmental lawyers who attend law school later in life may have less than 10 years' legal experience but due to their technical knowledge may make good mediators. Mr. Wein felt that 10 years was a reasonable requirement due to the various nuances and complexity involved in the practice of environmental law.

The Mediation Committee members asked the judges for their viewpoint. Judge Mather felt that it should be up to the parties to select the level of experience they wished to have in a mediator and that 5 years' experience should be the minimum requirement. Judge Renwand agreed that a requirement of 5 years of experience is fine.

Mr. Clark pointed out that someone might first work as an engineer and then attend law school. That person could have enough cumulative experience and knowledge to qualify as a good mediator. He felt that the minimum amount of legal experience should be 5 years. Mr. Hinerman stated that the Mediation Committee could accept an experience requirement of less than 10 years. Ms. Conner suggested starting with a 5-year requirement, which could be revisited if the Committee felt that it was getting people who were not appropriate as mediators. She felt that having a 5-year requirement opened the door to people with both a technical and legal background.

Mr. Wein and Ms. Woelfling relayed the Board's history of having a non-lawyer as a judge on the Board. Mr. Wein expressed the viewpoint that a mediator with a great deal of technical experience but minimal legal experience may not fully understand the legal aspect of

the role of mediator. Mr. Clark and Mr. Wein emphasized the importance of mediation training. Mr. Clark stated that, based on his experience, mediations are not productive when the mediator is not well trained. He and Attorney Jack Ubinger attended mediation training through PennAccord that he found to be very helpful, and he offered to touch base with Mr. Ubinger to see if he had materials from the program.

Judge Renwand stated that he believes mediation can be beneficial for some parties and thanked the Mediation Committee for its hard work. He agreed that the project was a worthwhile endeavor, and he acknowledged that it was important to have the support of the environmental bar for the project. He noted that the Board has had a mediation rule for quite some time but rarely receives requests from parties saying they wish to engage in mediation. He believes that the Committee has set up a good framework for a mediation program but said he has a few questions. For example, since the Department of Environmental Protection will be unable to pay mediation fees in the current budget climate, what happens if the case involves a *pro se* appellant and the Department? Additionally, he wants to check with the Office of General Counsel to make sure that it is acceptable for the program to be tied into training by PBI. He asked whether the training would qualify for CLE credit and Mr. Hinerman stated that it would. Mr. Wein added that the training would include at least one hour of ethics credit.

Judge Beckman raised a question regarding the following proposal in the Committee's report: "Parties would not be required to use the services of an attorney in this initial mediation process." (Report, p. 2, no. 6) He raised the question of whether this statement conflicts with the Board's rule that corporations must be represented by counsel (Rule 1021.21(b)). Mr. Wein explained that this proposal would only be in effect at the very beginning of the appeal to give

parties time to see if they can settle the case. The proposal came out of the discussion about allowing small corporations to proceed *pro se*.

Judge Beckman asked how the mediation proposal was viewed by the Department. Ms. Chiaruttini stated that she is a member of the Mediation Committee and was involved in discussions concerning the drafting of the proposal. She stated that the Department is supportive of the mediation program but acknowledges that it does not have the resources to pay for mediation. There was discussion within the Department as to whether it would be appropriate for Department lawyers to act as mediators and it was decided that it would not be appropriate. Mr. Hinerman stated that not requiring the Department to pay its share for mediation might be an impediment to some private parties accepting mediation, but he feels that the program should proceed and deal with the issue if it occurs.

Mr. Wein expressed the opinion that the program should not be limited to small corporations. Mr. Clark agreed that regardless of the size of the entity, mediation might be helpful in fleshing out and narrowing issues, especially in complex cases. He noted that he had worked on the drafting of the Environmental Hearing Board Act and there had been pressure not to include mediation in the Act. He felt that one of the benefits of mediation in EHB cases is that the report submitted by the mediator would set forth the issues resolved through mediation and those that remain to be litigated.

Judge Mather pointed out that whereas the Environmental and Energy Law Section's *pro bono* program is a program of the Section, the mediation program would be handled by the Board. He noted that the Board has had a reduction in staff, and the housekeeping involved with running the mediation program might be burdensome. Mr. Wein suggested that the Environmental and Energy Law Section could assist the Board administratively.

Judge Renwand questioned the following proposal: “At the commencement of an appeal, the Board would offer a 30 day extension on all deadlines in the Pre-Hearing Order No. 1 to parties who indicate to the EHB that they wish to consider mediation.” (Report, p. 2, no. 1) He felt that 30 days was too lengthy. Ms. Chiaruttini felt that 30 days was necessary to determine if all parties were interested in pursuing mediation. Mr. Hinerman felt that 30 days might not be long enough since it would take time for the parties to find and agree upon a mediator. Judge Renwand expressed a concern that parties might file a “mediation notice” in all cases simply to get the extra 30-day extension. If the case goes to mediation, the parties are then given 120 days in which to mediate the case. He was concerned that if the case is not resolved within the 120-day period, parties would request additional time which would further delay the case.

A discussion ensued regarding what should be contained in the mediator’s report to the Board. Ms. Chiaruttini suggested that the Board could issue an order stating what it would like to see in the report. Mr. Wein suggested that the parties and mediator could agree on what information goes to the Board.

The consensus of the Board was that the Mediation Committee should continue to move forward in developing the program. Judge Mather suggested discussing the program at the Environmental Law Forum. Mr. Wein stated that the Committee was hoping to have training in place by the time of the Forum.

Ms. Conner suggested discussing funding for the mediation program at a future Rules Committee meeting. Mr. Wein stated that he would be willing to assist in the writing of a foundation grant.

Ms. Woelfling asked if the Committee were planning to compile a list of *pro bono* mediators. Mr. Hinerman said that the program would not include *pro bono* mediators since

such a program would require the Board to decide who qualifies for *pro bono* mediation. Judge Renwand raised his earlier question regarding what happens in a case involving only the Department and a *pro se* appellant where neither party can pay for mediation. Ms. Chiaruttini pointed out that mediation is not a right and may not be an option in all cases. She also suggested that in cases where only one party is paying for the mediation, the terms of payment should be kept confidential from the mediator. The Board and Rules Committee were in agreement with her suggestion.

Next Meeting:

The next meeting of the Rules Committee is scheduled for Thursday, November 9, 2017, at 10:30 a.m. The topics of “media in the courtroom” and “*pro hac vice*” were tabled until the November 9 meeting.

Adjournment:

On the motion of Mr. Clark, seconded by Ms. Woelfling, the meeting adjourned at approximately 12:05 pm.