

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

MINUTES OF MEETING OF SEPTEMBER 15, 2016

Attendance:

The Environmental Hearing Board Rules Committee met on September 15, 2016 at 10:30 a.m. The following Rules Committee members participated in the meeting: Committee Chair Howard Wein, Vice-chair Maxine Woelfling, Jim Bohan, Gail Conner and Phil Hinerman. Also participating in the meeting were: Katie Hetherington-Cunfer (DEP External Affairs Director), Attorney Rick Friedman (Chair of Pa Bar Association Environmental and Energy Law Section) and Attorney Emily Collins (Co-chair of the Section's *Pro Bono* Committee). Attending on the behalf of the Board were: EHB Chairman and Chief Judge Tom Renwand, Judge Bernie Labuskes, Judge Rick Mather, Board Secretary Christine Walker and Senior Attorney Maryanne Wesdock, who took the minutes. Assistant Counsel Eric Delio attended the second half of the meeting.

Minutes of March 10, 2016 Meeting:

On the motion of Ms. Conner, seconded by Ms. Woelfling, the minutes of the March 10, 2016 meeting were approved with one correction: In the discussion of *pro se* corporate representation, the reference to "minority business council" was corrected to "National Minority Supplier Business Council (NMSDC)."

Rules Package 106-12:

Ms. Wesdock reported that the rules package had been delivered to the Office of General Counsel and Governor's Office of Policy at the end of July for their review and approval.

Pro Se Corporate Representation:

Mr. Wein provided a summary of the history of this topic. The Governor's Office of Policy, after reviewing rules package 106-12, 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. Discussion of this topic took place at two of the Board's prior Rules Committee meetings. Additionally, the Board presented the issue at the Environmental Law Forum in April. Judge Mather also raised the issue at a meeting of the Pennsylvania Bar Association Environmental and Energy Law Section (Section) council, and Rick Friedman, Chair of the Section, as well as Emily Collins, Co-chair of the Section's *Pro Bono* Committee, were asked to participate in the September 15 Rules Committee meeting.

Mr. Friedman reported that the Section raised the issue with the Unauthorized Practice of Law Committee of the Pa Bar Association, which voiced concerns about permitting a corporation to appear without representation of counsel. Therefore, the Environmental and Energy Law Section's *Pro Bono* Committee proposed an alternative option, which is for the *pro bono* program to be expanded to cover corporate entities. The Section's *pro bono* program currently covers only individuals. At the September 2016 meeting of the Section's Council, the Section passed a resolution authorizing a *Pro Bono* Committee Pilot Program to facilitate *pro bono* representation of certain limited owner corporations. Ms. Collins reported that the *Pro Bono* Committee would like to propose a one-year trial period for providing *pro bono* representation, when requested, to businesses that meet the following guidelines: Eligibility is limited to small corporations 1) owned by no more than three individuals 2) whose individual and separate income is less than 300% of the poverty level. The Committee arrived at the figure of 300% of the poverty level by researching the criteria followed by other *pro bono* programs in the Commonwealth of Pennsylvania. Mr. Friedman stated that the Committee would also look at

whether nonprofit organizations should be included in the Section's *pro bono* program, although he noted they might qualify for other low or no cost representation.

Ms. Conner, whose firm has a Board position on the Eastern Minority Supplier Business Council which includes Pennsylvania, Delaware and South Jersey, noted that according to the 2016 federal poverty level guidelines, 300% of the federal poverty level is \$35,000. She feels this limit is too low. She stated that since 2008, access to capital has been difficult for small businesses, especially in the African American community. She supports allowing small corporations to represent themselves, similar to partnerships.

Mr. Wein asked Ms. Conner whether she has polled other small businesses to determine if the rule requiring attorney representation has had an impact on them. She replied no.

Mr. Hinerman stated that there is a debate in the legal community over the question of whether a small incorporated business should get the protections of being incorporated but not be subject to all of the restrictions that go along with incorporation. Ms. Conner felt that the rule on representation should distinguish between an S corporation and a C corporation.

Mr. Bohan set forth some of the challenges that go along with allowing a corporation to represent itself. He pointed out that a corporate officer would be required to act as both a witness and as attorney for the corporation. Judge Renwand noted that the same is true for individual *pro se* appellants. Mr. Bohan pointed out, however, that with a corporation, the individual acting as attorney is advocating on behalf of an entity other than himself.

Mr. Hinerman offered the following proposal: When an appeal is filed by a small business entity, the Board could allow a period of time at the beginning of the appeal where parties can engage in mediation without the business being represented by an attorney. He suggested that a member of the Pennsylvania environmental bar could serve as mediator. Judge

Renwand noted that the Office of General Counsel operates a mediation program that is free of charge. However, he noted that the lawyers provided through OGC would not be environmental attorneys. Ms. Conner described a program in New York that allows mediation in cases involving a civil penalty whereby the business can settle for a lower penalty amount. Mr. Hinerman suggested that there could be a training program for mediation in cases before the Environmental Hearing Board, and attorneys could volunteer for it. He suggested that the Pennsylvania Bar Institute (PBI) offer a course on mediation whereby attorneys could get certified as mediators. In Mr. Hinerman's view, the reason that attorneys hesitate to participate in the Section's *pro bono* program is because handling a case before the Environmental Hearing Board takes a great deal of time, whereas serving as a mediator involves much less of a time commitment.

Judge Labuskes asked how Mr. Hinerman's proposal would differ from the Board's existing rule on mediation at 25 Pa. Code section 1021.106. Mr. Hinerman stated that the mediation program he was proposing would focus on small businesses. Ms. Wesdock asked whether the Board should consider amending the rule on representation at 25 Pa. Code section 1021.21 in order to allow corporations a period of time at the beginning of an appeal before they would be required to secure counsel. Judge Mather felt that a rule change stating that corporations did not need to be represented by an attorney, even for a period of time at the beginning of an appeal, could be seen as allowing the unauthorized practice of law. He recommended that before the Board consider a rule change, the Board should see whether allowing a corporate party a period of time to resolve the issues before getting into litigation resolves the issue. Judge Labuskes stated that he would not be in favor of a rule that specifies who can appear without an attorney. His preference is to eliminate the rule. He feels that the

Board's rule on representation is superfluous since there are other rules that cover the subject of representation. Mr. Wein suggested addressing the small business mediation program in the Board's Internal Operating Procedures.

Judge Labuskes noted that Rule 1021.21 does not require corporations to have an attorney to file a notice of appeal. Therefore, in effect, there is a period of time where the parties can try to resolve the appeal without the corporation having an attorney. Judge Renwand stated that the Board could have a conference with the parties to see if the issues can be resolved before ordering a corporation to obtain counsel.

Mr. Hinerman proposed that Mr. Wein appoint a joint committee with members from the EHB Rules Committee, the Environmental and Energy Law Section and the Unauthorized Practice of Law Committee to address the issue and report back to the Rules Committee. Ms. Wesdock will extend an invitation to the Rules Committee, and Mr. Friedman and Ms. Collins will reach out to the Environmental and Energy Law Section and the Unauthorized Practice of Law Committee. Mr. Bohan will discuss the matter with the DEP Chief Counsel. The joint committee should also include at least one representative from the *Pro Bono* Committee.

Judge Mather noted that in matters before the Public Utility Commission, a party does not need a lawyer until the case becomes an adversarial proceeding. He stated that if mediation is viewed as non-adversarial, it is possible that the early stage of a corporate appeal before the Environmental Hearing Board can fit within the PUC framework.

Next Meeting:

The next meeting of the Rules Committee is scheduled for **Thursday, November 10, 2016 at 10:30 a.m.** One issue to be addressed is to examine the general rule on motions (1021.91) and determine whether subsection (a) should be revised to state that it applies to all

motions “other than dispositive motions.” The rule currently reads that it applies to all motions “other than summary judgment motions.”