

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

MINUTES OF MEETING OF NOVEMBER 10, 2016

Attendance:

The Rules Committee met on November 10, 2016 at 10:30 am. Attending were the following committee members: Committee Chairman Howard Wein, Jim Bohan and Phil Hinerman, and by teleconference, Matt Wolford. Attending on behalf of the Environmental Hearing Board were the following: Judge Michelle Coleman and Assistant Counsel Mica Iddings, and by teleconference, Chief Judge Tom Renwand, Judge Steve Beckman, Board Secretary Christine Walker and Senior Counsel, Maryanne Wesdock, who took the minutes.

Introduction of New Assistant Counsel:

Mica Iddings introduced herself as the Board's newest Assistant Counsel. Mica will be working with Judge Mather. The Rules Committee gave her a warm welcome.

Rules Package 106-12:

Ms. Wesdock provided an update on the Board's final rulemaking package 106-12. The rulemaking was reviewed by the Office of General Counsel who requested further clarification in the Preamble and formatting changes in Annex A. The changes have been made and Ms. Iddings delivered the rules package to OGC, the Governor's Policy Office and the Budget Office on October 24, 2016.

Sample Forms for Discovery of Electronically Stored Information:

The Committee continued its discussion regarding discovery of electronically stored information (ESI). This topic had been developed over the course of several Rules Committee meetings, particularly the following meetings: November 5, 2015; January 6, 2016; and March 10, 2016. Ms. Wesdock circulated the minutes from the prior meetings. Mr. Bohan provided a brief summary of the task that he and Mr. Hinerman had been requested to undertake. They had been asked to propose sample ESI discovery agreements that could be provided as an example on the Board's website. Mr. Bohan and Mr. Hinerman presented two sample documents of varying levels of complexity. The judges will discuss the sample agreements and make a determination as to whether they are appropriate for placement on the Board's website.

Corporate Representation:

Mr. Wein provided a brief summary regarding the background of this topic. When reviewing the Board's proposed rules package 106-12, the Governor's Policy Office had requested that the Board consider whether to amend its rule requiring that all corporations be represented by counsel in Board proceedings. The Governor's Policy Office suggested that there may be times when small corporations should be permitted to appear *pro se*. The topic was raised with the Pa Bar Association's (PBA) Environmental and Energy Law Section and the Section's *Pro Bono* Committee, who reached out to the PBA Unauthorized Practice of Law Committee for guidance. Based on its discussions with the Unauthorized Practice of Law Committee, the Section raised concerns about allowing a corporation to appear *pro se* in a Board proceeding, and it suggested an alternative, i.e., that the Section's *Pro Bono* Committee would open its program to corporations under a certain financial threshold. Previously, the *pro bono* program was open

only to individual appellants. Section Chair Rick Friedman and *Pro Bono* Committee Co-Chair Emily Collins presented their proposal at the September 15, 2016 meeting.

During the discussion of the topic, Mr. Hinerman suggested offering a mediation program for corporate appellants in the early stages of an appeal before the EHB. It was suggested that a joint committee be formed to consider the topic, with representatives from the Rules Committee, EHB, PBA Section and *Pro Bono* Committee, and the PBA Unauthorized Practice of Law Committee.

Mr. Hinerman and Mr. Wolford volunteered for the committee. Ms. Wesdock reported that DEP Chief Counsel Alex Chiaruttini had also volunteered to participate on the committee. Mr. Hinerman will contact PBA Environmental and Energy Law Section Chair, Rick Friedman, to recruit volunteers from the Section. He will also reach out to the chair of the Unauthorized Practice of Law Committee.

The Rules Committee held a general discussion about mediation. Judge Coleman asked if there are any training programs in Pa for mediators. Mr. Wein named PennAccord as providing training. Mr. Wolford noted that DEP provided a mediation training program in the 1990s, but there were objections to the Department providing mediation in cases where it was a party.

Mr. Hinerman raised the question of whether the mediation program should be limited to corporations below a certain income level or whether it should be open to all corporations. Mr. Wolford related that he has worked on a number of cases where mediation would have been helpful.

Mr. Wein raised the question of whether mediation should be limited to the early stages of an EHB proceeding before it is on the litigation track. Mr. Wolford suggested contacting the PUC

to see how its process works. In PUC matters, corporations are permitted to represent themselves in “non-adversarial” matters. He suggested talking with PUC to learn how they determine what is considered to be adversarial. Judge Coleman suggested contacting Kim Hafner, who is a former EHB Assistant Counsel and who is now an attorney with the PUC.

Mr. Bohan raised a caution: At the September 15 meeting, Judge Labuskes pointed out that under the Board’s current rules, a corporation can file an appeal with the Board without being represented by counsel. A concern was raised that the Unauthorized Practice of Law Committee could view this as an issue. Mr. Bohan felt that we should keep the topic focused on what is required by a corporate appellant after the notice of appeal has been filed. Mr. Wolford agreed with Mr. Bohan, noting that too much scrutiny into the process could raise jurisdictional questions.

General Rule on Motions – Rule 1021.91:

Mr. Wein and Ms. Wesdock pointed out that the Board’s general rule on motions states that it applies to all motions except summary judgment motions. Mr. Wein raised the question of whether it should state that it applies to all motions except dispositive motions. He raised the possibility that the Board should have two sections in its rules covering motions: those applying to dispositive motions and those applying to non-dispositive motions. Mr. Bohan pointed out that the only difference between the rules applying to summary judgment motions and those applying to non-summary judgment motions is that the rule on summary judgment motions has different formatting requirements. He noted that there are requirements in the general rule on motions that are not in the summary judgment rule, such as a requirement that the motion be in

writing, but pointed out that those requirements were being followed even if not specifically stated in the rule.

Following a brief discussion, the consensus of the Rules Committee was that no changes were required to the general rule on motions.

Approval of September 15, 2016 Minutes:

Because there was not a quorum at the November 10 meeting, the minutes of the September 15 meeting could not be approved. Mr. Wein will circulate the minutes and ask for approval by email.

Next meeting:

The next meeting of the Rules Committee is scheduled for **Thursday, January 12, 2017 at 10:30 a.m.**