

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE
MINUTES OF MEETING OF NOVEMBER 16, 2018**

Attendance:

The Environmental Hearing Board Rules Committee met on November 16, 2018 at 10:30 a.m. The following Committee members participated in the meeting: Chairman Howard Wein, Jim Bohan, Alex Chiaruttini, Brian Clark, Gail Conner and Phil Hinerman. Representing the Board were the following: Chief Judge and Chairman Tom Renwand, Judge Steve Beckman, Board Secretary Christine Walker and Assistant Counsel Eric Delio, Nikolina Smith and Maryanne Wesdock. Ms. Wesdock took the minutes.

Approval of minutes:

Mr. Hinerman moved for the approval of the September 18, 2018 meeting minutes. Mr. Clark seconded. All were in favor.

Nunc Pro Tunc:

The group continued its discussion from the prior meeting regarding proposed revisions to the Board's rule on nunc pro tunc appeals. Mr. Bohan circulated proposed revisions generated from the discussion at the September 18, 2018 meeting, as follows (revisions to the current rule shown in bold):

§ 1021.53a. Nunc pro tunc appeals.

(a) The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.

(b) A person seeking to appeal nunc pro tunc may file a petition to appeal nunc pro tunc when the person files a notice of appeal in accordance with § 1021.51. A person may also

file a petition to appeal nunc pro tunc in conjunction with a response to a dispositive motion to dismiss an appeal as untimely filed under §§ 1021.94 and 1021.94a. The petition to appeal nunc pro tunc and any response to it is subject to the requirements in this section, and the response to the dispositive motion is subject to the respective requirements in §§ 1021.94 and 1021.94a.

(c) The petition to appeal nunc pro tunc shall comply with the requirements set forth for “motions” at [§ 1021.91](#), and, in addition, shall include the following:

(1) The specific facts that the potential appellant would attempt to prove at hearing to show that nunc pro tunc relief is warranted.

(2) The specific facts that the potential appellant would attempt to prove showing that it acted promptly in seeking nunc pro tunc relief.

(3) Copies of all documents and a list of all witnesses that the potential appellant relies upon in support of the petition to appeal nunc pro tunc.

(4) Any legal authority and theories the potential appellant relies upon in seeking nunc pro tunc relief.

(5) A sworn affidavit of the person or persons having knowledge of the facts that the facts are verified as true and correct, or an unsworn written statement of such person or persons, that the facts are verified as true and correct subject to the penalties for Unsworn Falsification to Authorities, pursuant to 18 Pa.C.S.A. § 4904 of the Crimes Code.

(6) If the petition to appeal nunc pro tunc is not supported by an affidavit or verification as set forth in (5), above, an explanation of why the affidavit or verification was not included.

(d) Responses to petitions to appeal nunc pro tunc shall comply with the requirements set forth for “responses” at [§ 1021.91](#). Unless otherwise ordered by the Board, the response shall be filed within 15 days of the date of service of the petition.

(e) A memorandum of law in support of the petition or response may be filed with the petition or response.

(f) The potential appellant may not file a reply unless the Board orders otherwise.

(g) The Board may schedule a hearing on whether nunc pro tunc relief is appropriate.

(h) If the petition to appeal nunc pro tunc is granted, the notice of appeal will be treated as though it were timely filed.

(i) If the petition to appeal nunc pro tunc is denied, the notice of appeal will be dismissed as untimely.

Mr. Wein suggested adding the word "sworn" before affidavit in subsection (6) in order to parallel the language in subsection (5).

Mr. Bohan suggested revising subsection (b) because (1) the language could be interpreted as allowing the filing of a petition to appeal nunc pro tunc only at the time one files a notice of appeal or a response to a dispositive motion to dismiss the appeal; and (2) the language did not address what should happen to a dispositive motion when an appellant responds with a petition to appeal nunc pro tunc. He proposed substituting the following language: "A person seeking to appeal nunc pro tunc shall file a petition to appeal nunc pro tunc. If the petition is filed after opposing counsel has filed a motion to dismiss the appeal as untimely, the time for filing a response shall start to run if and when the Board grants the petition to appeal nunc pro tunc." Judge Renwand and Beckman questioned whether the revision was necessary since the Board would hold off on ruling on a motion to dismiss while reviewing a pending petition to appeal nunc pro tunc. Mr. Wein added that if the petition to appeal nunc pro tunc were granted, the motion to dismiss would likely be denied as moot. Mr. Bohan disagreed, noting that a motion to dismiss may be based on other grounds in addition to timeliness.

Mr. Wein summarized the three circumstances in which an untimely appeal could be addressed:

1) A would-be appellant files a petition to appeal nunc pro tunc, and no motion has been filed by DEP or a permittee.

2) Either the DEP or permittee files a motion to dismiss the appeal as untimely, the appellant files a response, and the moving party files a reply. In this case, no nunc pro tunc petition is filed by the appellant.

3) Either the DEP or permittee files a motion to dismiss the appeal as untimely, and after the motion has been filed, the appellant files a petition to appeal nunc pro tunc.

Mr. Bohan pointed out that subsection (b), as currently drafted, does not contemplate the situation outlined at number (1) in Mr. Wein's scenario above. Ms. Wesdock suggested dividing subsection (b) into two sentences, one dealing with the filing of a petition to appeal nunc pro tunc and the other dealing with the filing of a motion to dismiss. Mr. Bohan and Ms. Wesdock stated that if a motion to dismiss is filed and the appellant files both a response and a petition to appeal nunc pro tunc, the filing of the DEP/permittee's reply should be stayed until the Board has ruled on the petition. Mr. Bohan suggested adding the word "shall" to the first sentence of subsection (b) and revising the second sentence to read as follows: "If a petition to appeal nunc pro tunc is filed after opposing counsel has filed a motion to dismiss an appeal as untimely, the opposing party's time for filing a reply to the response to the motion to dismiss shall start to run if and when the Board grants the petition to appeal nunc pro tunc." Mr. Hinerman agreed with Mr. Bohan's language but suggested deleting the words "opposing counsel has filed."

Mr. Wein expressed the opinion that the only issue that should be dealt with in the nunc pro tunc rule should be the issue of nunc pro tunc appeals and timeliness. He felt that if the DEP or permittee sought to dismiss an appeal on other grounds in addition to untimeliness, they should do so in a separate motion.

A discussion ensued as to whether the proposed nunc pro tunc rule should provide a stay for the filing of a reply whenever the appellant responds to a motion to dismiss by filing both a response and a petition to appeal nunc pro tunc. Mr. Bohan agreed that a practical way of addressing the issue would be for the Board to issue an immediate order staying the filing of a reply; however, his preference was for the stay to be set forth in the rule. Judge Renwand stated

that the DEP or permittee could file a motion for a stay to file their reply until the Board ruled on the nunc pro tunc petition, rather than incorporating the stay into the rule. Ms. Wesdock expressed the view that the rule should contain language clarifying that the filing of a reply is stayed unless the Board orders otherwise. Several Committee members expressed agreement with this suggestion. Mr. Bohan suggested the following language: "The time for filing a reply is stayed unless and until the Board grants the petition to appeal nunc pro tunc."

However, Judge Renwand expressed the viewpoint that an appellant should not be required to file a response to a motion to dismiss until the nunc pro tunc petition is ruled on. In particular, where the DEP's motion raises issues in addition to untimeliness, Judge Renwand felt it was unfair to require the appellant to respond to all of the issues while staying DEP and the permittee's reply. Mr. Bohan responded that the same argument could be made anytime DEP or the permittee files a motion to dismiss based on jurisdiction.

Judge Renwand and Ms. Wesdock noted that the discussion presumed that the appellant would respond to a motion to dismiss for untimeliness by filing a petition to appeal nunc pro tunc. However, in many cases, the appellant argues that the appeal is timely.

Mr. Wein suggested staying the filing of a response regarding any issues other than timeliness until the Board rules on the timeliness issue. Mr. Bohan stated he was not opposed to the concept, but would like to see specific language. Mr. Wein stated it was his opinion that a petitioner should not have to do any work until he knows if he is in or out of the case. He proposed this language: "If a petition nunc pro tunc is filed, everything is stayed other than a response to the petition nunc pro tunc."

Judge Beckman expressed his opinion that since the Board does not have a separate rule dealing with jurisdictional motions, he did not think the Board needed a separate rule dealing with timeliness.

Ms. Wesdock summarized the two approaches advocated by the Committee members and Judges:

1) If a motion to dismiss is filed for untimeliness and the appellant files a petition to appeal nunc pro tunc, one or more parties can ask for a stay on further filings until the issue of nunc pro tunc is addressed by the Board, or

2) The nunc pro tunc rule grants an automatic stay until the Board rules on the nunc pro tunc petition.

Mr. Bohan suggested that the language provide that the time for filing the response and reply be stayed unless and until the Board issues a deadline for filing a response and reply. He offered to draft language to this effect. Ms. Chiaruttini agreed and suggested that the Board and Rules Committee members reflect on it and discuss it at the next meeting. Mr. Wein asked Mr. Bohan to circulate the new language to the Committee members.¹ Mr. Wein also suggested adding the following: "until the issue of untimeliness is decided."

Vice Chair:

Mr. Hinerman was unanimously elected Vice Chair of the Rules Committee.

2019 Meetings:

Ms. Wesdock will circulate a list of the meetings scheduled in 2019. Committee members should notify her of any conflicts with the dates.

Adjournment:

¹ Mr. Bohan circulated the proposed language on November 29, 2018. A copy of the revised language is attached at the end of the minutes.

On the motion of Mr. Bohan, seconded by Ms. Chiaruttini, the meeting was adjourned at 11:52 a.m.

Revisions to subsection (b) of the proposed nunc pro tunc rule circulated by Mr. Bohan on November 29, 2018:

§ 1021.53a. Nunc pro tunc appeals.

(a) The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.

(b) A person seeking to appeal nunc pro tunc ~~may~~ shall file a petition to appeal nunc pro tunc ~~when the person files a notice of appeal in accordance with § 1021.51. A person may also file a petition to appeal nunc pro tunc in conjunction with a response to a dispositive motion to dismiss an appeal as untimely filed under §§ 1021.94 and 1021.94a. The petition to appeal nunc pro tunc and any response to it is subject to the requirement in this section, and the response to the dispositive motion is subject to the respective requirement in §1021.94 and 1021.94a. If filed after a dispositive motion that seeks to dismiss an appeal as untimely, the filing of the petition stays the deadlines for filing a response or reply concerning the motion; the Board will issue deadlines for filing a response and reply if the Board grants the petition.~~

(c) The petition to appeal nunc pro tunc shall comply with the requirements set forth for “motions” at § 1021.91, and, in addition, shall include the following:

(1) The specific facts that the potential appellant would attempt to prove at hearing to show that nunc pro tunc relief is warranted.

(2) The specific facts that the potential appellant would attempt to prove showing that it acted promptly in seeking nunc pro tunc relief.

(3) Copies of all documents and a list of all witnesses that the potential appellant relies upon in support of the petition to appeal nunc pro tunc.

(4) Any legal authority and theories the potential appellant relies upon in seeking nunc pro tunc relief.

(5) A sworn affidavit of the person or persons having knowledge of the facts that the facts are verified as true and correct, or an unsworn written statement of such person or persons, that the facts are verified as true and correct subject to the penalties for Unsworn Falsification to Authorities, pursuant to 18 Pa.C.S.A. § 4904 of the Crimes Code.

(6) If the petition to appeal nunc pro tunc is not supported by an affidavit or verification as set forth in (5), above, an explanation of why the affidavit or verification was omitted.

(d) Responses to petitions to appeal nunc pro tunc shall comply with the requirements set forth for “responses” at § 1021.91. Unless otherwise ordered by the Board, the response shall be filed within 15 days of the date of service of the petition.

(e) A memorandum of law in support of the petition or response may be filed with the petition or response.

(f) The potential appellant may not file a reply unless the Board orders otherwise.

(g) The Board may schedule a hearing on whether nunc pro tunc relief is appropriate.

(h) If the petition to appeal nunc pro tunc is granted, the notice of appeal will be treated as though it were timely filed.

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