

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

Minutes of March 15, 2012 Meeting

Attendance:

The Environmental Hearing Board Rules Committee met on March 15, 2012 at 10:15 a.m. Chairman Howard Wein presided. Committee members in attendance were: Jim Bohan, Brian Clark, Rep. Kate Harper, Phil Hinerman, David Raphael and Maxine Woelfling. Attending from the Board were: Chief Judge Tom Renwand, Judge Rick Mather, Board Secretary Vince Gustitus and Board Counsel Kris Gazsi and Maryanne Wesdock.

Minutes of January 12, 2012:

On the motion of Mr. Clark, seconded by Mr. Raphael, the minutes were unanimously approved.

Mandatory Electronic Filing:

The Committee expressed its thanks to Mr. Bohan for his hard work in preparing the drafts and final version of the mandatory electronic filing rule. Mr. Bohan agreed to be on the Environmental Hearing Board Roundtable panel at the Environmental Law Forum. He will present a summary of the draft mandatory electronic filing rule.

Rep. Harper raised a question about the definition of “electronic filing.” The definition says the document must be “transmitted” but does not say it has to be “received.” She wanted to know if this choice of words was intentional. Mr. Bohan responded that he took the language from the Model Rule. He also noted that the Board’s

efiling administrator (LT Court Tech) would generate a “receipt” as soon as the document was submitted, even if the Board had not yet “accepted” the document.

The definition of “filing attorney” has been deleted and replaced with “registered user” since non-attorneys will be participating in efilings.

Judge Renwand provided an update on the issue of confidential documents. Currently, confidential documents must be filed conventionally since filing them electronically makes them accessible to the public. Judge Renwand spoke with a staff person in the Federal court system. The Federal efilings system has the ability to restrict access to efiled documents so they can be seen only by the judge and court personnel and the parties, but not by the public. Mr. Gustitus talked with LT Court Tech about making this enhancement to the Board’s efilings system. LT Court Tech is able to make this change and they are preparing an estimate of the cost.¹

In subsection (a) (5) of 1021.32 of the draft (dealing with a registered user’s password), Mr. Wein read this provision as requiring parties to list their password. The Committee did not agree with this interpretation. Therefore, no revision was required.

Ms. Woelfling questioned subsection (a) (7) of 1021.32, which states, “No registered user or other person may knowingly permit or cause to permit a registered user’s password to be used by anyone other than an authorized agent of the registered user.” She questioned whether this was the correct place to deal with unauthorized usage of a password since the Crimes Code has penalties for unauthorized usage. She suggested rephrasing the language. The Committee agreed that the words “to permit” should be deleted. Therefore, the subsection will now read: “No registered user or other

¹ The cost of making all of the enhancements to the efilings system that have been recommended by the Rules Committee will be approximately \$40,000.

person may knowingly permit or cause a registered user's password to be used by anyone other than an authorized agent of the registered user.”

Mr. Wein questioned why documents must be retained in hard copy for one year in subsection (a) (8) of 1021.32. Mr. Bohan responded that this requirement came from the Federal court standing order.

It was noted that some cites to (e) (5) needed to be changed to (e) (4).

In subsection (a) (12) of 1021.32, Mr. Wein felt that the transaction receipt should include not just the date but also the time the document is received.

Subsection (a) (14) of 1021.32 allows parties to file excerpts of documents. It was suggested that language should be included allowing a responding party to request the entire document. Mr. Hinerman suggested the following: “Registered users who file excerpts of documents as exhibits or attachments under this rule do so without prejudice to their right to timely file additional excerpts or the complete document, *and shall provide the responding party with the full document upon request.*”

Ms. Woelfling suggested moving subsections (a) (15) and (16) to (c) (1) and (2).

Mr. Gazsi related his discussion with LT Court Tech addressing the problem of how to search pdf documents on the Board's website. The current search feature does not allow a search of documents uploaded in pdf. The problem will be corrected with regard to newly filed documents. However, it will not correct documents that are currently on the Board's website. Correcting the problem for older documents will require a great deal of manpower. It was suggested that this might be a future project for an intern.

Ms. Woelfling suggested that subsection (a) (17) of 1021.32 should be moved to Rule 1021.33. The committee agreed, and felt that it should be moved after subsection (b) of 1021.33. The first sentence of (17) will be dropped as being duplicative.

One of the subsections contains the Board's fax number. A question was raised as to whether it should be included in the event it would change in the future. Judge Mather informed the group that the Legislative Reference Bureau will make the correction if the number changes.

It was suggested that the subsection dealing with the conventional filing of hard copies be revised as follows: "Only hard copies may be conventionally filed, unless the filer has secured prior approval from the Board to conventionally file documents in another format, *e.g., CD, DVD, flash drive or other digital storage media.*"

In 1021.33(b), the Committee agreed to change "The Board may serve documents..." to "The Board *shall* serve documents...." In 1021.34(a) the Committee agreed to insert the words "in the same manner" so that the language would read, "copies of each document filed with the Board shall be served upon every party to the proceeding on or before the day *in the same manner* that the document is filed with the Board." In 1021.35, "Eastern time" will be added to subsection (b) (1).

Section 1021.35(b) was revised to make it clear that it applied only to computing deadlines for responding to a document. In (b), the word "sole" was added before the word "purpose" so that it reads, "For the *sole* purpose of computing the deadlines under this chapter for responding to documents...." In (b) (2), "for the purpose of responding" was added so that it reads, "Otherwise, *for the purpose of responding*, documents served by facsimile shall be deemed served the next business day."

In 1021.36(a), “except as provided in subsection (b)” was added.

In 1021.51(b), Ms. Woelfling noted that the caption listed in the section was inconsistent with the Board’s notice of appeal form. The Committee agreed to strike everything in (b) after the appellant’s name, address and telephone number.

Rep. Harper left the meeting at this point in the discussion.

A discussion was held regarding 1021.51(f) and how a party can prepay a penalty if a bond or check cannot be submitted electronically. A suggestion was made to submit a photocopy of the bond or check. However, this would not satisfy the requirement for actually paying the amount within the 30 day appeal period. Judge Mather felt that if the penalty were not prepaid, it would generate a notice to perfect the appeal but would not affect the timeliness of the appeal. Mr. Bohan suggested the following language: “If a notice of appeal is accompanied by one or more sealed documents, the sealed documents must be conventionally filed.”

The second sentence of section 1021.51(l) was deleted.

With regard to section 1021.201, a question was raised as to whether the docket of appealed cases could be submitted to the Commonwealth Court electronically. Mr. Bohan explained that the Commonwealth Court is moving to efilings within the year, and this is one of the issues being addressed.

On the motion of Ms. Woelfling, seconded by Mr. Hinerman, the draft rule was approved with the revisions recommended at today’s meeting.

Ms. Wesdock agreed to send the draft rule to Matt Wolford, chair of the Pa Bar Association Environmental and Energy Law Section to post on its website and to Stacey

Thomas at PBI to post as material for the Environmental Hearing Board Roundtable. The draft will be entitled “Draft Proposed Rules on Mandatory Electronic Filing.”

Dispositive Motions:

Ms. Wesdock informed the group that the revision to subsection (b) of 1021.94, changing the language from “a response to a dispositive motion may be filed...” to “shall be filed...” had already been approved at a prior meeting.

Mr. Gazsi suggested adding a new subsection (e) to read as follows:

(e) When a dispositive motion is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the adverse party’s pleading or its notice of appeal, but the adverse party’s response must set forth specific issues of fact or law showing there is a genuine issue for hearing. If the adverse party fails to adequately respond, the dispositive motion may be granted against the adverse party.

On the motion of Mr. Clark, seconded by Mr. Hinerman, the revision was approved. The current subsection (e) will become subsection (f).

Section 1021.141 (Termination of Proceedings):

Mr. Hinerman related that in one of his cases where he was representing an appellant challenging a permit that had been granted to a municipality, the permit had expired rendering the appeal moot. All of the parties agreed the case was now moot. He wanted to terminate the appeal on the basis of mootness but it is not one of the options listed in section 1021.141. He explained that the parties did not want to enter into a consent order and adjudication. He felt that mootness should be added to 1021.141 as grounds for terminating an appeal.

Proposed Legislation for Creation of a Central ALJ Office:

The Committee agreed that the Environmental Hearing Board should be excluded from this proposed legislation. While it may be beneficial for some agencies it would not be good for the Environmental Hearing Board which hears specialized, complex cases. Judge Renwand agreed to reach out to OGC counsel Linda Barrett; John Gedid, who is pushing the legislation; and Senator Alloway, who is the sponsor of the bill. He will suggest that the Environmental Hearing Board be excluded when the bill is introduced.

Mr. Hinerman also agreed to get the PBA Environmental and Energy Law Section behind opposing the bill. Judge Renwand also suggested contacting Dennis Whitaker, who is an active member of the PBA Administrative Law Section. He noted that some members of the Administrative Law Section are in favor of the bill.

Other agencies that oppose the bill are the PUC and the SEC.

Mr. Wein will suggest to Matt Wolford that he should have former Section chairs present for any discussion of the proposed legislation so they can advocate against it.

Topics for Next Meeting:

The next meeting of the Rules Committee will be on May 10 at 10:30 a.m. Topics will include: suspense docket, Judge Mather's summary judgment issue, joinder

Adjournment:

On the motion of Ms. Woelfling, seconded by Mr. Bohan, the meeting was adjourned at 12:40 p.m.