

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES**

Meeting of July 8, 2010

Attendance:

The Environmental Hearing Board Rules Committee met by conference call on July 8, 2010 at 10:15 a.m. Committee Chairman Howard Wein presided. Rules Committee members participating in the call were: Representative Kate Harper, Susan Shinkman, Brian Clark, Jim Bohan, Joe Manko and Tom Scott. EHB Chairman and Chief Judge Tom Renwand, Judge Rick Mather and Senior Counsel Maryanne Wesdock participated from the Board. Ms. Wesdock took the minutes.

Approval of Minutes:

On the motion of Mr. Clark, seconded by Representative Harper, the minutes of the March 11, 2010 meeting were approved.

Budget:

Judge Renwand followed up on his report at the previous meeting regarding the Board's budgetary issues for Fiscal Year 2010-2011. At the March 11 meeting, Judge Renwand had reported the Board was concerned about the operating budget. He informed the Rules Committee that he was now concerned about the entire budget. When he spoke to the Rules Committee in March, the budget that had been proposed by the Governor's Office was \$1,810,000. This was not sufficient to meet the Board's current operating and personnel costs. The Board's budget in the prior fiscal year was \$1.7 million and did not include funding for the Board's fifth judge position which had been vacant and which was filled in October 2009. In addition, the Board incurred a new

operating expense beginning in January 2010 when the Pittsburgh State Office Building was sold and all agencies were transferred to new locations. The Board had no input into the move or its new location. Whereas the Board had paid no rent in the Pittsburgh State Office Building; in Piatt Place it now incurs a yearly rental cost of approximately \$90,000 plus furniture rental of approximately \$2,000. The rent is set to increase each year. Therefore, in order to pay its increased operating and personnel expenses, the Board required a budget of approximately \$2 million, as opposed to the budget of \$1,810,000 proposed by the Governor's Office.

In July, the Board learned that its budget had been cut even further. The budget passed by the General Assembly allotted the Board only \$1,578,000. This is a 7.6% cut from last year and, according to Judge Renwand, "tremendously less than what the Board needs." The budget did not include funding for the Board Secretary position, nor did it include rent for the Pittsburgh office. It also does not allow the Board to operate at its current level and will require draconian cuts. Judge Renwand explained that the Board is already operating below its full complement. When he joined the Board in 1995, there were 24 employees. Today there are 12 full time employees.

Judge Renwand advised the committee that he will be having discussions with representatives from the Governor's Office and the Budget Office. Representative Harper recommended that when he talks to the Governor's Office and Budget Office he should include the facts that he laid out to the Rules Committee, particularly the fact that the Board's staff has already been cut in half. Judge Renwand noted that the Board is being hit at a particularly critical time given the large number of Marcellus shale drilling

permits that are going to be issued and the increased DEP personnel who are being hired to enforce them.

Mr. Clark asked whether this might be an appropriate time for the Board to consider imposing a filing fee. Judge Renwand stated that the Board had discussed the matter and had decided against it. Because a filing fee would require legislative action and would not generate enough income to offset the deficit, it was not something the Board wanted to consider at this time.

Judge Renwand stated that he was concerned whether the Board would have enough money to be able to hold hearings. Representative Harper suggested that perhaps the industry could provide funding for hearings. Judge Renwand stated that the Board needs to receive a percentage of any tax that is imposed on Marcellus shale extraction. He stated that the Board needs an additional \$400,000 to 500,000 in order to operate efficiently.

Representative Harper stated that the Administration will have substantial input into how the tax bill looks. Mr. Clark suggested reaching out to the four caucuses over the summer and fall. Mr. Wein noted that many different entities have an interest in seeing the Board fully funded, including industry, environmental groups and the Department. Mr. Clark agreed that the Board would have bipartisan support.

Judge Renwand pointed out that because the permitting of Marcellus shale drilling and any enforcement issues related to it would be a matter of first impression before the Board, those cases are likely to require a great deal of hearing time.

Mr. Manko recommended that instead of competing with DEP for a share of the Marcellus shale money, the Board should join forces with the Department and lobby as a

team. Judge Renwand agreed that the budget shortfall at the Board also impacts DEP because if the Board has to close its Norristown or Pittsburgh offices, this will place a tremendous burden on DEP.

Representative Harper suggested that Judge Renwand join with Secretary Hanger in talking to the chairs of the House and Senate environmental committees. Mr. Manko also recommended speaking with State Senator Ted Erickson. Mr. Clark recommended talking to the senior staff members of the House and Senate Appropriations Committees. He also suggested that it might be helpful to have members of the Rules Committee attend the meetings. Judge Renwand thanked everyone for their suggestions and noted that Judge Mather has also been very helpful in holding discussions with members of the Administration.

Mr. Manko asked for a report on the budget status in the upcoming weeks in order to determine if there is a need for a call to action by the Rules Committee. Mr. Wein suggested scheduling a special conference call to discuss it.

Mandatory Electronic Filing:

Ms. Wesdock provided an update to the Committee. She stated that during the past few months problems had been encountered by several attorneys at DEP and at least one member of the private bar when they attempted to e-file. The problem with DEP attorneys had to be corrected by DEP's IT consultants. The problem encountered by the private practitioner was being addressed by the consultant that manages the Board's e-filing system (LT Court Tech) Because of those recent problems, the Board did not want to move forward at this time with mandatory e-filing, but wanted to first make sure that all glitches had been worked out.

At the previous Rules Committee meeting, Chairman Howard Wein asked the Board's intern to prepare a draft of proposed guidelines for mandatory e-filing. Unfortunately, the intern's time at the Board ended at the start of the summer and he was not able to work on this project. It will be assigned to a future intern.

Mr. Bohan asked whether the Board would incur any cost in imposing mandatory e-filing. Ms. Wesdock stated that if such changes were covered by the Board's current contract with LT Court Tech, no expense would be incurred. However, if the changes are determined to be outside the current contract, there would be a cost associated with it. If the latter, the Board would not be able to adopt mandatory e-filing at this time, due to lack of funds available for it.

Rule 1021.21. Representation:

Ms. Wesdock reported on an issue raised by Judge Krancer concerning Board Rule 1021.21 on "Representation." The rule reads in relevant part as follows:

§ 1021.21. Representation.

- (a) Parties, except individuals appearing on their own behalf, shall be represented by an attorney at all stages of the proceedings subsequent to the filing of the notice of appeal.
- (b) Corporations shall be represented by an attorney of record. . . .
- (c) Groups of individuals acting in concert, whether formally or informally, shall be represented by an attorney. . . .

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The rule specifically mentions corporations and groups of individuals acting in concert, but does not mention sole proprietorships or partnerships. Should the rule be revised to state that those types of business entities are required to be represented by counsel?

Judge Mather expressed the viewpoint that whereas the rule may have been intended to require partnerships to have counsel because they are a legally recognized entity, it's not clear that the requirement should apply to sole proprietorships. If individuals aren't required to have counsel, then a question arises as to whether sole proprietorships should be required to have counsel. Mr. Bohan noted that it would be very difficult to enforce the rule against sole proprietorships, particularly in the solid waste area where the lines are often blurred and where people sometimes collect junk as a hobby.

Mr. Hinerman stated that the rule may not even apply to partnerships. He cited a recent Commonwealth Court decision that held that a partner can represent the partnership. The case is *Appeal of NIC Land Co.* (July 1, 2010) and is included with these materials.

It was agreed that Mr. Hinerman would circulate the *NIC Land* case and this issue would be tabled until the next meeting.¹

Costs Act:

Judge Mather noted that the Costs Act has expired and, therefore, the Board's regulations dealing with "Attorney Fees and Costs Authorized by the Costs Act" (25 Pa.

¹ Mr. Hinerman emailed a copy of the decision to Ms. Wesdock on July 8, 2010, and she forwarded it to the Committee members.

Code §§ 1021.171 – 1021.174) should be removed. He recommended that it be done through the process of omission of proposed rulemaking.

Mr. Wein asked whether the Costs Act could be reinstated in which case it might not make sense to delete the rules entirely. Judge Mather explained that the Costs Act had expired in 2007, and it would require legislation to create a new Costs Act.

Judge Mather noted that the rules could not be temporarily suspended and, therefore, they would have to remain on the books until the rulemaking to omit them was finalized. Mr. Bohan suggested that it was good housekeeping to delete the rules but they would cause no problem by remaining on the books until that time. Mr. Bohan also noted that it would be necessary to revise Rule 1021.181 and the title to that section since both reference “fees and costs authorized by statute other than the Costs Act.” Subsequent to the meeting, Mr. Bohan also advised Ms. Wesdock that “Costs Act” is a defined term in Rule 1021.2 and, therefore, a revision to that section of the rules would also be necessary.

On the motion of Mr. Bohan, seconded by Mr. Manko, the Committee voted unanimously to recommend deletion of Rules 1021.171-1021.174 and revision to Rules 1021.2 and 1021.181 (and the heading to that section).

Adjournment:

Mr. Manko moved to adjourn the meeting, seconded by Mr. Bohan. The next meeting of the Rules Committee is scheduled for Thursday, September 16, at 10:15 a.m.²

² Although the meeting would generally take place on the second Thursday of the month, it is being moved from the 9th of September to the 16th due to Rosh Hoshanna falling on the 9th.

