

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE
MINUTES OF MEETING OF MARCH 14, 2019**

Attendance:

The Environmental Hearing Board Rules Committee met on March 14, 2019 at 10:30 a.m. The following Rules Committee members participated in the meeting: Chairman Howard Wein, Jim Bohan, Brian Clark, Gail Conner and Matt Wolford. Participating on behalf of the Board were the following: Chairman and Chief Judge Tom Renwand, Judge Steve Beckman, Assistant Counsel Eric Delio and Nikolina Smith, Board Secretary Christine Walker and Senior Assistant Counsel, Maryanne Wesdock who took the minutes.

Approval of Minutes of November 16, 2018 and January 29, 2019 Meetings:

On the motion of Mr. Bohan, seconded by Ms. Conner, the minutes of the November 16, 2018 and January 29, 2019 meetings were unanimously approved.

Nunc Pro Tunc:

Ms. Wesdock circulated revisions to the Board's nunc pro tunc rule (25 Pa. Code § 1021.53a) drafted by Mr. Bohan and consented to by Rules Committee members and EHB judges attending the January 29, 2019 meeting. However, because there was not a quorum at the January 29, 2019 meeting, it was necessary to reserve voting on the changes until the March 14, 2019 meeting.

Prior to voting, Judge Beckman and Mr. Delio pointed out what they believed to be an inconsistency in the proposed rule revisions: The proposed revision to subsection (b) stated that "the Board will issue deadlines for filing a response and reply [to a dispositive motion seeking to dismiss an appeal as untimely] if the Board grants the petition [to appeal nunc pro tunc]." Judge Beckman and Mr. Delio felt that this language was unnecessary if read in conjunction with

proposed subsection (h) which stated, “If the petition to appeal nunc pro tunc is granted, the notice of appeal will be treated as though it were timely filed.” Judge Beckman pointed out that if the petition to appeal nunc pro tunc is granted and the notice of appeal is treated as though it were timely filed, there would be no need for the Board to receive responses or a reply to the motion to dismiss since the Board would have already addressed the untimeliness issue by granting the petition to appeal nunc pro tunc.

Mr. Bohan noted that the motion to dismiss could include other dispositive issues in addition to untimeliness, and, therefore, there may still be a need for the filing of responses and a reply. He recommended revising the language of subsection (b) as follows:

(b) A person seeking to appeal nunc pro tunc shall file a petition to appeal nunc pro tunc. 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.~~ **The Board will issue deadlines for filing a response and reply if the Board grants the petition and the dispositive motion addresses issues in addition to untimeliness.**

All were in favor of Mr. Bohan’s recommendation.

With the change set forth above, on the motion of Mr. Bohan, seconded by Ms. Conner, the proposed revisions to the Board’s rule on nunc pro tunc appeals, 25 Pa. Code § 1021.53a, were unanimously approved by the Rules Committee and recommended to the Board. The revisions will be included in the Board’s next rules package if the recommended language is approved by the Board. The full text of the proposed changes to § 1021.53a is included at the end of the minutes.

Discontinuance of Appeal:

Ms. Wesdock circulated an email from Mr. Wolford addressing an issue with the Board’s rule on termination of proceedings, 25 Pa. Code § 1021.141. Section 1021.141 (a) reads as follows:

(a) A proceeding before the Board may be terminated by one of the following:

- (1) Withdrawal of the appeal prior to adjudication.
- (2) Settlement agreement.
- (3) Consent adjudication.

Mr. Wolford explained why he believed that “discontinuance” should be one of the options for terminating an appeal before the Board. He expressed his belief that if an appeal is withdrawn, the findings of the Department’s order may become administratively final, but if an appeal is discontinued pursuant to a settlement agreement, it may be possible to preserve the issues if there is a problem with implementation of the agreement down the road. He stated that when he negotiates a Consent Order and Agreement with the Department, he requests that the Consent Order replace the Department order that initiated the action and also requests that the findings of the Consent Order replace the findings of the Department’s order. However, he stated that some Department attorneys may not be willing to agree to this. He also raised a concern that less experienced attorneys or attorneys less familiar with the process may not be aware of the related administrative finality issue when negotiating a Consent Order and Agreement with the Department.

Mr. Wolford gave as an example a case before the Board in which the parties had agreed that the appeal should be discontinued and the proposed order submitted to the Board used this language. The Board order terminating the case stated that the case was closed and “discontinued.” However, the docket entry stated that the appeal had been withdrawn. Mr. Wolford raised a concern that the docket entry could cause confusion and lead some to believe that the findings of the Department’s order were final. He also pointed to Pa. R.C.P. 229(a) which states that “A discontinuance shall be the exclusive method of voluntary termination of an action, in whole or in

part, by the plaintiff before commencement of the trial” and recommended that the Board’s rule on termination include discontinuance as a method of terminating an appeal.

Mr. Clark agreed that this is an issue that needs to be examined. Both he and Mr. Wolford have been in settlement discussions with Department lawyers who have stated that the settlement agreement may not provide for discontinuance of an appeal because this language is not provided for in the Board’s rules. Mr. Clark offered to work with Mr. Wolford on drafting proposed revisions to the rules to address these concerns.¹

Mr. Wein suggested that § 1021.141(a)(1) use the language “withdrawal or discontinuance.” This would resolve the issue of attorneys citing to the Board’s rules as not providing for termination of an appeal by discontinuance. Mr. Wolford stated that subsection (a)(2) might also be applicable to the discussion since it deals with settlement agreements. Judge Beckman pointed out that when parties settle a case pursuant to subsection (a)(2) they are not required to file the settlement agreement with the Board. Mr. Wolford, however, stated that when he withdraws (discontinues) a case by virtue of a settlement, he likes to explain so in his praecipe to withdraw (or discontinue).

Mr. Bohan raised a concern that what Mr. Wolford was seeking was not a “discontinuance” as that term is used in Pa. R.C.P. 229, but the avoidance of administrative finality. He also pointed out that the Board’s rules are supplemented by the General Rules of Administrative Practice and Procedure (GRAPP), not the Pa. Rules of Civil Procedure, so Pa. R.C.P. 229 was irrelevant in this context. Additionally, he felt that even if non-DEP attorneys had encountered DEP attorneys who insisted on references to the “withdrawal” of an appeal even where an appeal was resolved with a settlement agreement, that does not necessarily show that there is a problem with the language in

¹ Mr. Clark had to leave the meeting at this point in the discussion.

§ 1021.141(a), since the language in § 1021.141(a) already lists terminating an appeal by a settlement agreement as an alternative to terminating an appeal by a withdrawal.

Ms. Wesdock noted that several years ago the Rules Committee addressed the question of whether withdrawal of an appeal meant withdrawal with or without prejudice. The Committee came to the consensus that the rule should be interpreted to mean withdrawal without prejudice unless otherwise specified.

Mr. Wolford stated that he was not trying to overturn administrative finality since he understood that once a case is withdrawn, even without prejudice, the case is over; however, if an issue were to arise down the road, it could be challenged. In his opinion, this would be a new action, not a continuance of the old action.

Ms. Wesdock suggested revising (a)(2) to read “**discontinuance through a** settlement agreement.”

Judge Beckman stated that he looked at internal memoranda circulated by the Board in 2015 that contained standard language for terminating cases. The language was developed in order to ensure consistency among judges with regard to termination orders and docket entries. However, he and Judge Renwand acknowledged that the Board has not consistently applied the language, and it was suggested that the administrative staff person who handles the Board’s docket entries had not been instructed to use the 2015 language.

Mr. Wolford stated that he agreed with Judge Beckman that consistency in orders and docket entries would be helpful. However, he felt that it would not necessarily address the issue that two sets of findings – i.e., the findings in the Department’s original order and the findings in the parties’ negotiated settlement agreement – could create confusion.

Mr. Wein stated that there should be a mechanism by which a recipient of the Department's order does not have to agree to the findings of the order. Mr. Bohan responded that there is a tool for accomplishing this – either through a Consent Adjudication or by the Department withdrawing the order.

Mr. Bohan agreed with Judge Beckman's recommendation for consistency with Board orders and docket entries, but expressed his opinion that the language should not say "discontinued." He stated that he did not think the choice of "withdrawal of appeal" or "discontinuance of appeal" made a difference legally, but felt that it could confuse practitioners.

Ms. Smith looked at some of the Board's most recent orders terminating an appeal. The language states that the "docket is closed and discontinued."

Mr. Wein suggested drafting a comment to the rule in order to clarify the three options set forth in Section 1021.141(a). He stated that, if a comment is approved, he would like to have it included in the next rules package. Mr. Wein also suggested that the Board could address the language through its internal operating procedures.

A question arose as to whether GRAPP references the Pa Rules of Civil Procedure, and Mr. Bohan confirmed that it does not.

Judge Beckman stated that when a proposed order is attached to a motion or praecipe to withdraw, the Board usually adopts the language of the proposed order, which has resulted in the inconsistency with termination language. He felt that the Board should discuss this issue internally. Judge Renwand suggested that Judge Beckman circulate the 2015 memorandum to the judges and assistant counsel. In the meantime, Mr. Wein and Mr. Wolford will discuss possible language for a comment to Section 1021.141. They will send it to the Board and to Mr. Bohan for comment prior to the next Rules Committee meeting.

Next Rules Committee Meeting:

Mr. Wein will be in trial on May 9, when the next Rules Committee meeting is scheduled. Ms. Wesdock will circulate alternate dates for the meeting.

Rules Recommended for Adoption:

Ms. Wesdock circulated a document containing the rule changes approved by the Rules Committee and proposed for the next rules package. She will add the new nunc pro tunc language approved at today's meeting.

Adjournment:

On the motion of Mr. Bohan, seconded by Mr. Wolford, the meeting was adjourned.

Proposed Revisions to Rule 1021.53a, as approved at the meeting of March 14, 2019, are shown in bold:

(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 shall file a petition to appeal nunc pro tunc. 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 and the dispositive motion addresses issues in addition to untimeliness.

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

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