

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE MINUTES**

Meeting of May 11, 2000

Attendance

A meeting of the Environmental Hearing Board Rules Committee was held on Thursday, May 11, 2000 at 9:30 a.m. with Chair Howard Wein presiding. The following members of the Committee were also in attendance: Mike Bedrin, Brian Clark, Rick Grimaldi, Bob Jackson, Tom Scott, Dennis Strain and Maxine Woelfling. Representing the Environmental Hearing Board were Chairman George J. Miller, Michelle Coleman and Michael Krancer.

Review of Members' Terms of Appointment

Some members' terms on the Rules Committee have expired. Those members whose terms have expired and who are interested in remaining on the Rules Committee should seek renewal of their appointment. Steps have also been taken toward filling an expected vacancy on the Committee.

Withdrawal of Appearance

The Committee discussed a memorandum prepared by George Miller and Mary Anne Wesdock regarding a proposed rule on withdrawal of counsel. The Committee considered the language of a proposed draft of such a rule, as follows:

- (a) An attorney's appearance for a party may not be withdrawn without leave of the Board unless another attorney has entered or simultaneously enters an appearance for the party and the change of attorneys does not delay any stage of the litigation.
- (b) In ruling on a motion for withdrawal of appearance, the Board will consider the following factors: the reasons why withdrawal is requested; any prejudice withdrawal may cause to the litigants; delay in resolution of the case which

would result from withdrawal; and the effect of withdrawal on the efficient administration of justice.

Howard Wein noted that the Board's rules require that unincorporated associations must be represented by counsel. Howard questioned whether the proposed rule would present a problem in a case where an unincorporated association fails to pay its legal fees and the attorney wishes to withdraw as counsel. Chairman Miller responded that it depends on the association. If the group consists of three individuals, the Board would probably conclude they could act on their own. However, if the group consists of 250 members, he would be inclined to require them to be represented by counsel.

Dennis Strain questioned whether the proposed rule would discourage *pro bono* representation. George Miller and Rick Grimaldi pointed out that the rule does not require more than what is required by other courts. Further, if an attorney wishes to withdraw and no counsel has replaced him, he must simply seek leave of the Board to withdraw and can set forth his reasons for wishing to withdraw in a motion.

Dennis Strain noted that although other courts have a similar rule in place, a person is admitted to practice before that court, and there is no equivalent requirement for practice before an administrative agency.

Tom Scott recommended adding language regarding a contact person, as follows:

- (c) In the event withdrawal of counsel will result in an unrepresented party before the Board, counsel seeking to withdraw shall provide the Board with a single contact person for future service of all proceedings.

Maxine Woelfling questioned how the Board would interpret "delay at any stage of the litigation" contained in section (a) of the proposed rule. George Miller stated that this phrase was not to be interpreted in a rigid manner and was not intended to prevent someone from withdrawing in fairly normal course.

Dennis Strain questioned whether subsection (c) should refer to “ongoing proceedings” as opposed to simply “proceedings.” The consensus of the Committee was that (c) should simply refer to “proceedings.” However, the last line was changed from “of all proceedings” to “in all proceedings.”

The Committee agreed that the title of the rule should read “Withdrawal of Appearance” and that this rule should appear at § 1021.24 immediately following the Board’s current rule on “Notice of Appearance.”

Tom Scott moved to recommend adoption of the rule as amended. Brian Clark seconded. The motion passed unanimously.

Amendment of § 1021.35 and § 1021.171

The Committee reviewed a memorandum prepared by Assistant Counsel Jim Bohan regarding proposed amendments to Board rules 1021.35 and 1021.171 to correct errors in those rules.

Existing rule 1021.35 requires multiple copies of a motion to be filed, but does not require multiple copies of supporting memoranda, responses or replies. It also fails to require multiple copies of notices of appeal and complaints. The proposed amendment would correct this to require that an original and two copies of all such documents be filed with the Board.

Howard Wein noted that some judges, for example Judge Renwand in Pittsburgh, request that courtesy copies be filed with the judge to whom the case is assigned. A question was raised as to whether this should be addressed in the rule. The Committee determined this should not be addressed in the rule since the judges differ on requiring courtesy copies.

Howard Wein suggested that the Explanation following the proposed rule be revised to refer to “an original and two copies” rather than “3 copies,” in the event this becomes a part of the commentary to the rule if adopted. The Committee agreed.

The Committee voted to amend 25 Pa. Code § 1021.35 as follows:

§ 1021.35 Number of copies

(a) Unless otherwise ordered by the Board, the following number of copies shall be filed with the Board:

(1) [Dispositive motions and post-hearing briefs – three copies.] One original and two copies of:

- (i) notices of appeal;
- (ii) complaints;
- (iii) answers;
- (iv) post-hearing briefs; and,
- (v) dispositive motions and related memoranda, responses and replies.

(2) [Prehearing memoranda, petitions for supersedeas and non-dispositive motions, other than motions for stays, extensions and continuances of procedural deadlines – two copies.] One original and one copy of :

- (i) petitions for supersedeas and any related responses;
- (ii) pre-hearing memoranda; and
- (iii) non-dispositive motions and petitions (other than motions for stays, extensions and continuances of procedural deadlines), and related memoranda, responses and replies.

(3) One original of other documents.

(b) One copy of [briefs and other] all documents submitted to the Board shall be served on the other parties to the proceeding.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 33.37 (relating to number of copies).

Maxine Woelfling moved to recommend amending § 1021.35 as set forth above. Mike Bedrin seconded. The amendment passed unanimously.

The Committee then reviewed the proposed amendment to 25 Pa. Code § 1021.171, dealing with certification of records on appeal to the Commonwealth Court. The rule, in its current form, incorrectly states that the Board shall certify the record in accordance with *Pa.R.C.P.* 1951. The correct citation is to *Pa.R.A.P.* 1951. Maxine Woelfling moved to amend the rule to correct this error. Mike Bedrin seconded. The motion passed unanimously.

Lobbying Disclosure Act

The Committee discussed the Lobbying Disclosure Act, Act of October 15, 1998, P.L. 729, 65 Pa.C.S. §§ 1301 – 1311, and considered a February 1, 2000 advisory opinion of the Ethics Commission, which addressed the application of the Act to the members of a medical care advisory committee.

The Rules Committee reviewed the provisions of the Lobbying Disclosure Act and determined that it is not applicable to the Committee's actions. Roger E. Grimaldi, Esq., of the Office of Chief Counsel, concurred in this assessment.

Reordering of Rules

Howard Wein provided the Committee with a table of contents for the rules of practice and procedure.

The Committee reviewed a letter from Bob Jackson dated May 1, 2000. Mr. Jackson reviewed the rules as they are currently ordered, taking into consideration the following factors: 1) user friendliness, particularly concerning newcomers and lawyers not frequently appearing before the Board; 2) the position of the Legislative Reference

Bureau regarding indexing; 3) the degree, if any, of confusion and likelihood of missing a rule under the present numbering system; and 4) what is yet to come in terms of electronics and other computer references. He concluded that the Board should not attempt to re-number the rules at this time, but recommended that the Board consider footnoting the rules for purposes of cross-referencing them.

The Committee also reviewed a memorandum from George Miller, who recommended that all rules pertaining to appeals and special actions be located in the same place. This would involve relocation of the rules relating to prepayment of penalties, hearings on inability to pay, supersedeas and temporary supersedeas. This would also involve renumbering the rules on special actions.

Tom Scott recommended that the Board eliminate the subchapter headings since they are not helpful. This might also allow for a complete table of contents at the beginning of the rules rather than a partial table of contents with each subchapter.

Bob Jackson made a motion to eliminate subchapters and to relocate the rules on supersedeas and prepayment of penalties to the appeal section consistent with George Miller's memorandum. Tom Scott seconded.

However, the motion was withdrawn so that the Committee could review whether other sections of the rules should be relocated. Maxine Woelfling stated that she felt the rules on transcript, discovery and subpoenas appeared to be out of place and should be moved. Maxine agreed to prepare a proposal for reorganization of the rules to be discussed at the next meeting.

George Miller and Mary Anne Wesdock will check with the Legislative Reference Bureau about the following issues: 1) Can the Board eliminate the subchapters

and have a complete table of contents at the beginning of its rules of practice and procedure? 2) If the rules are reorganized, can the Board include a conversion table at the end of the rules? Mary Anne Wesdock will also check with the Legislative Reference Bureau to see if the reorganization of the rules can be done as final rulemaking since it does not involve substantive changes.

Status of Current Rules Package

As of the date of this meeting, the current rules package (containing proposed rules on substitution of parties, *pro bono* counsel, and hearing examiners) had been submitted to the Governor's Policy Office. Rick Grimaldi offered to contact someone in that office to find out the status of the rules package. Following approval by the Policy Office, the next step is submission of the rules package to the legislative committees, IRRC and the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

As for the newly proposed rules approved by the Rules Committee at this meeting, George Miller recommended holding off on preparing a new rules package until such time as the Board has approved proposed rules on electronic filing.

Approval of Minutes

Dennis Strain made a motion to approve the minutes of the March 9, 2000 Rules Committee meeting. Maxine Woelfling seconded. All voted in favor.

Adjournment

Bob Jackson moved to adjourn the meeting. Mike Bedrin seconded. All were in favor. The meeting was adjourned at approximately 11:25 a.m.

