

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

MINUTES OF MEETING OF OCTOBER 23, 2014

Attendance:

The Environmental Hearing Board Rules Committee met on October 23, 2014 at 10:15 a.m. Rules Committee Chairman Howard Wein presided. The following Rules Committee members attended: In Harrisburg – Vice Chair Maxine Woelfling, Jim Bohan, Brian Clark and Dennis Whitaker; and by phone – Gail Conner, Phil Hinerman and Matt Wolford. Attending on behalf of the Board were the following: In Harrisburg – Judge Rick Mather, Eric Delio and Vince Gustitus; and by phone – Board Chairman and Chief Judge Tom Renwand, Judge Steve Beckman, Tim Estep, Christine Walker and Maryanne Wesdock, who took the minutes.

Minutes of May 8, 2014 Meeting:

The minutes of the May 8, 2014 meeting were amended to reflect the correct date. Additionally, Mr. Bohan suggested a change on page 3 in the third paragraph in the sentence reading, “Moreover, Mr. Bohan pointed out that a failure to set forth one’s objections in *numbered* paragraphs is not the same as an appeal having missing information, which is the focus of 1021.52(b)” (emphasis in

original). He suggested changing “an appeal having missing information” to “an appeal that is missing information.”

With those changes, Mr. Clark moved to approve the minutes, seconded by Ms. Woelfling. All were in favor.

Rules Package Update:

Ms. Wesdock provided an update on the Board’s recent rules package: With one exception, Rules Package 106-10 was published as final rulemaking in the August 9, 2014 issue of the *Pennsylvania Bulletin*. The publication included the adoption of mandatory electronic filing.

Due to a problem with the language submitted to IRRC in the proposed revisions to section 1021.94 (dispositive motions other than summary judgment motions), those revisions were held back and are expected to be approved at the IRRC hearing on November 6, 2014, which will be attended by Judge Mather. The revisions to 1021.94, as well as similar revisions to 1021.94a (summary judgment motions) that were approved by IRRC on June 19, 2014, are expected to be published before the end of the year.

IRRC’s proposed revision to 1021.51(f)(3)(vi):

At IRRC’s public hearing on June 19, 2014, one of the Commissioners noted that section 1021.51(f)(3)(vi) states that when an appellant has filed a notice of

appeal by facsimile, he or she must also serve the other parties to the case by facsimile. The Commissioner pointed out that a party to the case might not have a fax machine or a fax number that is readily available. He suggested that the Board allow other methods of service.

On the motion of Mr. Clark, seconded by Mr. Bohan, the Committee voted to approve the addition of the following language to section 1021.51(f)(3)(vi): “If a party’s fax number is not available or operational, the notice of appeal shall be served to that party by overnight delivery.”

Electronic Filing of Complaints:

Under the Board’s current rules at 1021.32(a)(1), a complaint may not be electronically filed. Neither the Committee nor the Board could recall the exact reason why complaints were excluded from electronic filing. Judge Renwand stated that there may have been a question as to how the Department would serve a complaint electronically since a defendant would not have entered its appearance. Unlike the filing of an appeal, there is a time period in which the defendant must respond to a complaint, and the clock starts ticking when the complaint is filed. If the complaint is filed electronically but the defendant cannot be served electronically, there is a risk that the defendant will not have the full amount of time to respond to the complaint. However, Judge Renwand related a

situation that occurred recently where the Department attempted to file a complaint electronically in a case where it had an email address allowing for electronic service on the defendant but was unable to do so because the complaint was held up by the Board's electronic filing provider. The complaint was held up because the Board's rules currently do not allow electronic filing of complaints.

Mr. Bohan raised two questions: 1) Is the electronic filing of a complaint legally prudent, and 2) does it create any IT issues?

Mr. Wein noted that it is easier to efile voluminous documents than to fax them. Ms. Woelfling commented that faxing is becoming outdated. Ms. Conner agreed, noting that most of her clients do not use faxing as a means of transmission. She also noted that efilings are more environmentally friendly.

Mr. Clark felt it would be helpful to check the minutes to see why the Committee originally elected to exclude complaints from electronic filing. He felt it would be helpful to circulate the minutes as soon as Ms. Wesdock is able to retrieve them so that the issue is fresh in everyone's minds. The consensus of the Committee was that if there is no compelling reason for excluding complaints from electronic filing, then section 1021.32(a)(1) (stating that a complaint must be faxed or conventionally filed) will be deleted.

Issuing hard copies of orders:

The Board no longer issues hard copies of orders in cases where all parties are registered for electronic filing and service. Now that the Board has adopted mandatory electronic filing and service, it would like to end the practice of issuing hard copies of orders to attorneys or *pro se* appellants who are not registered for electronic filing and who have not been excused from electronic filing and service. Ms. Wesdock explained that all such non-registered users will receive a notice before the Board ends its practice of mailing orders to them.

Mr. Bohan raised the question of whether this interfered with a party's due process rights. For example, if a party no longer receives hard copies of orders and is not registered for electronic filing, he will not receive copies of orders imposing sanctions on him.

Judge Mather stated that in one of his cases where an attorney refused to register for electronic filing, he issued a Rule to Show Cause as to why the appeal should not be dismissed for failure to register for electronic filing. Mr. Delio noted that the Board has cases in which both attorneys and *pro se* parties have ignored the mandatory e-filing requirement.¹

¹ At this point of the discussion, Mr. Hinerman had to leave the meeting.

Mr. Clark stated that with the Board's adoption of mandatory electronic filing, there should be some compelling language enforcing it. Mr. Clark also stated that there should be a reference to rule 1021.32(c) which explains the procedure for being excused from electronic filing.

On the motion of Mr. Bohan, seconded by Ms. Woelfling, the following revisions were approved:

1021.33(b) – “. . . . The Board will serve persons **[other than registered users] who have been excused from electronic filing under § 1021.32(c)(1)** by mail or in person.

1021.34(d) – “Documents filed electronically shall be served by hand, mail, other personal delivery or facsimile upon parties **[not represented by registered users, or for parties representing themselves, upon parties who are not registered users] who have been excused from electronic filing under 1021.32(c)(1).**”

Proposed revisions for clarification:²

Mr. Delio proposed revisions to clarify existing rules as follows:

1021.21(a) – Mr. Delio proposed the following revision: “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 **or**

² Mr. Whitaker joined the meeting at this point of the discussion.

complaint.” On the motion of Mr. Whitaker, seconded by Mr. Clark, this revision was approved.

1021.21(c) – Mr. Delio proposed the following revision to subsection (c) of 1021.21 in order to bring it into parity with subsection (b) (which deals with representation of corporations):

Groups of individuals acting in concert, whether formally or informally, shall be represented by an attorney admitted to practice law before the Supreme Court of Pennsylvania or by an attorney in good standing admitted to practice before the highest court of another state **[who has made a motion to appear specially in the case and agrees therein to abide by the Rules of the Board and the Rules of Professional Conduct] on a motion *pro hac vice* filed by the Pennsylvania attorney of record.**³

Mr. Bohan noted that subsection (c) did not address all possible parties that could be covered under this rule. He also raised the question of whether the subject of *pro hac vice* motions should be part of this subsection. Ms. Conner stated that she had other issues with subsection (c) concerning when “groups of individuals [are] acting in concert.”

Judge Renwand explained that the Board felt that some language was needed in the rules to notify attorneys that the Board was exempt from the IOLTA

³Sections 1021.21(a) and (d) of the Board’s Rules of Practice and Procedure, 25 Pa. Code §§ 1021.21(a) and (d), permit individuals to appear on their behalf in a Board proceeding. There was no proposal to eliminate this provision of the rules.

fee requirement. He explained that he had requested and received a legal opinion from the Office of General Counsel (OGC), and that OGC had confirmed that the Board is exempt.

Mr. Whitaker suggested that when the Board makes amendments to its rules based on specific sections of other courts' rules, it should not refer to a specific rule number; otherwise, the Board will need to amend its rules any time those rules are revised. Ms. Woelfling suggested that the issue be dealt with in a Comment instead of a rule. Ms. Wesdock agreed since a Comment can be added, deleted or revised without the need for rulemaking. Ms. Conner also agreed that a Comment would be useful because it provides information without the need to go through a rule change.

It was agreed that Ms. Wesdock will prepare a Comment to be discussed at the next Rules Committee meeting.

1021.32 (c)(3) – Mr. Delio noted that the requirements of the rule (dealing with registration for electronic filing) do not conform to the form that is provided on the Board's electronic filing site. Mr. Delio also noted that when an attorney or party registers for electronic filing, there is a box that can be checked for opting out of electronic service. Ms. Wesdock has asked LT Court Tech to remove this box, and the Board expects that this will be done in the near future.

With the elimination of the last part of the sentence, Mr. Whitaker suggested the addition of the word “and” to the changes proposed by Mr. Delio. On the motion of Mr. Clark, seconded by Ms. Woelfling, the Committee voted to approve the following changes to section 1021.32(c)(3):

Electronic filing can be performed only by registered users. Individuals who are not registered users can become registered users by submitting a registration statement to the Board and receiving **[a password authorizing] authorization for** electronic filing and service **from the electronic filing provider.** The registration statement **[must be on] consists of an electronic** form prepared by the Board and **[include the user’s] accessed on its electronic filing website.** **The prospective registered user must provide a** name **[and],** mailing address, e-mail address, **telephone number, and** attorney identification number (if the registered user is an attorney). **[, a request for authorization to participate in electronic filing and electronic service, and consent to accept electronic service of documents permitted to be electronically filed.]**

1021.32(c)(11) – This rule states, “Each document filed electronically must indicate in the caption that it has been electronically filed.” Mr. Delio advised the Committee that parties rarely comply with this rule. Mr. Bohan explained the origin of this language – it is found in the electronic filing rules for the Eastern District, Middle District and Western District of Pennsylvania which were used as a model for the Board’s electronic filing rules. Ms. Woelfling pointed out that

with the adoption of mandatory electronic filing, such a notation in the caption is no longer necessary. Therefore, on the motion of Ms. Woelfling, seconded by Mr. Bohan, the Committee voted to delete this section of the rule.

Mr. Bohan pointed out that the elimination of subsection (c)(11) could affect the numbering of subsections that may be cross referenced in other rules. Mr. Whitaker suggested simply reserving subsection (c)(11). Judge Mather stated that he was unsure whether a subsection can be reserved, as opposed to an entire rule. Ms. Wesdock will inquire with the Legislative Reference Bureau as to whether subsection (c)(11) can be reserved. If not, then she will check whether its elimination affects the cross referencing of other sections.

1021.32(c)(14) – Mr. Delio suggested removing the last sentence of subsection (c)(14) and moving it to a new subsection. This sentence reads, “Filers may be required to file amended version of documents to meet the necessary filing requirements.” On the motion of Mr. Bohan, seconded by Mr. Clark, the Committee voted in favor of this proposal. If subsection (c)(11) is reserved, then a new subsection, (c)(17), would be created for this language. If (c)(11) is not reserved, then the subsections would be renumbered and the new language would be moved to subsection (c)(16).

1021.33(a) – Mr. Delio suggested the following revision to section 1021.33(a):

“Orders, notices and other documents entered or issued by the Board will be served upon the person designated in the notice of appearance or, if no notice of appearance has been entered, upon the person **[upon]** whom the notice of appeal or complaint was served **or upon the person who filed the notice of appeal.**”

Mr. Bohan proposed alternate language for section 1021.33(a):

The Board will serve the orders, notices and other documents it issues upon counsel designated in the entries of appearance. For any parties not represented by counsel, the Board will serve the person who filed the complaint or notice of appeal, or the person upon whom the notice of appeal or complaint was served.

Ms. Conner agreed with Mr. Bohan’s revision. Mr. Clark suggested that Mr. Bohan’s proposed language be circulated to the Committee prior to taking a vote. Ms. Wesdock will include the language on the agenda for the January 8, 2015 meeting so that a vote can be taken.

1021.39 (b) – The Board’s electronic docket does not include the time of filings. Therefore, Mr. Delio proposed eliminating that language from the first sentence of 1021.39(b). He suggested adding it to the second sentence of 1021.39(b), which discusses the transmission of a notice of electronic filing since

that notice does contain the time of filing. On the motion of Ms. Woelfling, seconded by Mr. Whitaker, the Committee voted to approve Mr. Delio's revisions as follows:

The docket will register the date of all filings **[as well as the time of the filing if the filing is made electronically]**. When a document is filed electronically, the electronic filing provider will transmit a notice of the electronic filing to all registered users in the proceeding, **which includes the date and time of the filing**.

1021.141(c) – On the motion of Mr. Clark, seconded by Ms. Woelfling, the Committee voted to approve the following revision to the last sentence of 1021.141(c):

Any appeal from a consent adjudication shall **[lie to] be with** the Commonwealth Court, and shall, when taken by an aggrieved person not a party to the action, be taken within 30 days of the date of the Board's action.

1021.201(a) – Mr. Delio proposed the following revision:

Unless the parties file a stipulation with the Board **or the Board receives an order from Commonwealth Court** providing otherwise, within **[20] 40** days of the filing of the petition for review, the Board shall certify the record in accordance with Pa.R.A.P. 1951 (relating to record below in proceedings on petition for review) and the record shall consist of. . . .

The change of the timeframe from 20 days to 40 days is consistent with the language of Pa. R.A.P. 1951. A question was raised: What if Pa. R.A.P. 1951 is amended to include a different timeframe? After discussion, the Committee voted to approve the following language, on the motion of Mr. Whitaker, seconded by Ms. Woelfling:

Unless the parties file a stipulation with the Board **or the Commonwealth Court requires [providing] otherwise, [within 20 days of the filing of the petition for review,]** the Board shall certify the record in accordance with **[Pa.R.A.P. 1951 (relating to record below in proceedings on petition for review)] the applicable rules of appellate procedure. [and t]**The record shall consist of. . . .

1021.51(f)(3)(iii) – This section deals with the facsimile filing of notices of appeal. Subsection (f)(3)(iii) states that if the notice of appeal is more than 10 pages long “the facsimile filed must consist of the certificate of service and the first five pages and last five pages of each document except exhibits.” Mr. Delio suggested replacing “each document” with “the notice of appeal” since this subsection applies only to notices of appeal.

On the motion of Ms. Conner, seconded by Mr. Bohan, this revision was approved.⁴

42 Pa. C.S. § 702(b) – Applications to amend interlocutory orders for appeal:

Mr. Delio advised the Committee that the Board receives inconsistent filings pursuant to 42 Pa. C.S. § 702(b), which deals with interlocutory appeals by permission. A memo prepared by Mr. Delio addressing this issue was circulated to the Committee prior to the meeting. Additionally, Mr. Delio and Ms. Wesdock provided examples of three such filings: In *Waste Management of Pa, Inc. et al. v. DEP & Clearfield Co.*, 2013-033-L, the filing mirrored the requirements of Pa. R.A.P. 1312; in *Rausch Creek Land, L.P. v. DEP & Porter Assoc's*, 2011-137-L, the filing was in the form of a motion with numbered paragraphs but did not include a memorandum of law; and in *Clean Air Council v. DEP and MarkWest Liberty*, 2011-072-R, the filing was in the form of a brief.

Ms. Woelfling explained that the format selected for the document filed in *Waste Management* was based on the following: 1) it followed the format of the document that would be filed with the Commonwealth Court and 2) it was believed to be the format most helpful to the Board. Ms. Woelfling expressed the

⁴ The Board is also considering changing this rule to allow the faxing of the first and last five pages of a notice of appeal when it is more than 20 pages long, instead of the current 10 page limit. The Board's fax machines have improved since the days when this rule was first adopted.

opinion that a filing made under 42 Pa. C.S. § 702(b) is more appropriately a petition than a motion.

Mr. Whitaker and Mr. Wolford felt that a rule was not necessary since the parties should simply file what is required by the Rules of Appellate Procedure. Mr. Wolford raised a concern that if the Board creates a rule to address this issue it may end up creating substantive changes it did not intend. Mr. Bohan noted that under the Board's current rules at § 1021.1(c) the General Rules of Administrative Practice and Procedure (GRAPP) apply. So if the Board wants to require something other than what is set forth in GRAPP it needs a rule. Mr. Delio also pointed out that whereas the Board's rules provide for only a ten day period, the Rules of Appellate Procedure allow for 30 days.

Mr. Bohan asked the following question: How helpful is the filing to the Board in determining whether the request should be granted? Judge Beckman felt that it is very helpful to have the request outlined in moderate detail.

With regard to the question of whether the filing should be in the form of a motion, petition or application, Mr. Delio pointed to Pa. R.A.P. 1311(b) which refers to an "application for amendment of interlocutory order." Mr. Whitaker stated that it was called an "application" because motions are not provided for in the rules, whereas applications are not provided for in the Board's rules.

However, Ms. Woelfling pointed out that the Board's rules do provide for filings other than motions, e.g. applications for attorney's fees and petitions for supersedeas. Mr. Bohan pointed out that if the filing is treated as a "motion" there is the requirement of setting forth numbered paragraphs.

Mr. Wein suggested that the Board should discuss the matter internally and report back to the Rules Committee at the next meeting.

Next Meeting:

The next meeting of the Rules Committee will be on January 8, 2015 at 10:30 a.m.

Adjournment:

On the motion of Mr. Bohan, seconded by Mr. Clark, the meeting was adjourned at 12:15 p.m.