ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of May 14, 2020

Attendance:

The Environmental Hearing Board Rules Committee met by teleconference on May 14, 2020 at 10:30 a.m. due to Governor Wolf's COVID-19 Orders. Committee Chairman Howard Wein presided. The following Rules Committee members participated in the call: Vice-Chair Phil Hinerman, Brian Clark, Gail Conner, Tom Duncan, Jean Mosites, Diana Stares and Matt Wolford. Participating on behalf of the Environmental Hearing Board were the following: Chief Judge Tom Renwand; Judges Steve Beckman, Bernie Labuskes and Rick Mather; Assistant Counsel Eric Delio, Alisha Hilfinger and Chris Minott; Board Secretary Christine Walker; and Senior Counsel Maryanne Wesdock who took the minutes.

Approval of Minutes of Meeting of March 12, 2020:

On the motion of Mr. Clark, seconded by Ms. Mosites, the minutes of the March 12, 2020 Rules Committee meeting were approved.

Update on Rules Package 106-13:

Ms. Wesdock reported on the status of EHB Rules Package 106-13. The rules package has been approved by the Governor's Office of Policy and is still under review by the Office of General Counsel (OGC). Reviews by OGC are taking slightly longer than usual due to Governor Wolf's COVID-19 work-at-home order. After approval by OGC, the rules package will go to the Office of the Attorney General which has a 30-day review period. Ms. Wesdock agreed to advise the Rules Committee when she receives approval from OGC.

Proposed Revisions to EHB Rules on Attorney Fees and Costs:

Ms. Stares circulated proposed revisions to the Board's rules on attorney fees and costs, 25 Pa. Code §§ 1021.181-1021.191, based on discussions and suggestions made at the two previous Rules Committee meetings. She summarized the concerns raised by the Board and Rules Committee members as follows:

1) There needs to be more a detailed process for filing applications for attorney fees and costs so that all applicants are following the same procedure. She pointed out that the procedure will vary depending on how the case was resolved, i.e., the process varies depending on whether the matter was resolved by adjudication or at an earlier stage (e.g., by dispositive motion or settlement). She also noted that the Committee members had pointed out the value of holding a conference (either by phone or in person) to discuss case management issues associated with the application for attorney fees and costs, including whether briefs should be filed, whether discovery should be conducted and whether a hearing should be held.
2) The quality of fee applications needs to be improved. This includes ensuring that the correct person verifies the petition and signs the accompanying affidavit(s), that proper materials are provided in support of the application and that the applicant sufficiently identifies why he or she is entitled to fees and costs.

The Committee first examined the proposed changes to Section 1021.182 which sets forth the procedure for filing an application for costs and fees.

Mr. Hinerman raised a question with regard to the proposed change to subsection (b)(3) requiring consultants and expert witnesses to sign an affidavit "setting forth in detail all reasonable costs and fees." He did not believe this requirement would result in productive information. Ms. Stares explained that it would help the Board understand what portion of time was spent working

on issues on which the applicant prevailed and were covered by statutes allowing for fee recovery. She pointed to the *Friends of Lackawanna* case which involved multiple days of hearing but where the appellant prevailed on only a small portion of its case.

Mr. Hinerman surmised that if this requirement were in place, applicants would simply say they spent 99% of their time working on the issue(s) on which they prevailed. He felt it would be more helpful for applicants to set forth why they believe they have a legal right to the fees requested. Ms. Stares reiterated that the award is not simply based on the issues an applicant wins, but on what percentage those issues make up of the overall case. In her opinion, neither the Board nor the Department should have to sort out the percentage of time an applicant spent on issues where he or she prevailed; this should be done by the applicant.

Ms. Conner felt that it would be more productive for an applicant to simply focus on the issues he or she has won and determine what percentage of time was spent on them, rather than going through each issue of the case. She felt that the proposed revisions, as written, were daunting for solo practitioners.

Judge Labuskes said he believed the Committee should focus on making subsection (b)(2) simpler and clearer, rather than more complicated. He felt that several of the additions set forth in the proposed revisions were unnecessary. He did not agree with adding the reference to Section 1021.91 (General motions) to subsection (a). Since 1021.91 is a general rule on motions, it is necessary to look at the other rules depending on the type of motion that is filed (e.g., 1021.92 for procedural, 1021.93 for discovery, 1021.94 for dispositive etc.) He felt the most important problem to be addressed is that there is no procedure set forth for when or if people should file briefs. He felt that the language of Section 1021.91(g) should be incorporated into Section

1021.182(a), i.e. specifying that parties should not file a brief or supporting memorandum of law with their fee application.

Mr. Hinerman agreed with the addition to Section 1021.184 (c) requiring a conference within seven days of receipt of a fee application. The problem, however, is that this does not tell the applicant what needs to be filed prior to the conference.

Ms. Stares stated that the reason she felt that the fee application should be consistent with Section 1021.91 is because it requires a motion to be set forth in paragraphs. Often fee applications consist of a narrative with a number of documents attached, making it difficult for the Department to respond. Judge Labuskes recommended that instead of simply requiring compliance with 1021.91, the rule should spell out what is required – the fee application should be set forth in paragraphs and should not be accompanied by a supporting memorandum of law.

Judge Mather agreed with requiring the application to be set forth in paragraphs and prohibiting the filing of a supporting memorandum. He also agreed with the requirement of a conference. Judge Labuskes reiterated that there needs to be guidance to an applicant before the conference regarding what must be contained in the fee application.

The consensus of the Committee was to incorporate the language of Section 1021.91(g) prohibiting the filing of a memorandum of law. Judge Labuskes also felt that the language of Section 1021.91(e) was helpful. There was no dispute that the fee application should be verified by the applicant.

The discussion returned to Section 1021.182 (b)(2). The revised version of this subsection, as drafted by Ms. Stares, reads as follows:

> (b) A Fee Application shall be verified by the applicant, and shall set forth sufficient grounds to justify the award, including the following:
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> * * * * *
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> (2) A statement of the basis upon which the applicant claims to be entitled to costs and attorney fees, which shall identify all legal issues asserted and the relief sought in the underlying appeal, the statutory authority for each legal issue, and all legal issues on which the applicant contends it prevailed and the degree to which the relief sought in the appeal was granted.

Mr. Hinerman felt that this provision would not result in fee applications containing more substance. He felt that it would simply result in parties putting forth percentages.

Mr. Clark agreed with Mr. Hinerman. In his opinion, the Committee was tasked with streamlining the process, not making it more complicated. He felt that the fee application should be limited to the issues on which a party was successful. For example, in a case brought under several statutes, including the Clean Streams Law, the application should identify those entries that reflect work on Clean Streams Law issues where the applicant contends he or she prevailed. This will still require the Board to conduct an evaluation of what fees are warranted but will allow the applicant to focus up front on those issues on which he or she was successful.

Mr. Hinerman agreed with Mr. Clark. He felt it was important to get applicants to focus on the legal grounds on which they were asserting the right to costs and fees. In cases where it is not clear what percentage of the total amount of time was spent on issues involving statutes that allow fee recovery, such as the Clean Streams Law, he felt that it could be addressed at the hearing. Ms. Stares disagreed, noting that in most cases the Board does not hold a hearing on the issue of attorney fees and costs. Moreover, where the application does not break down the percentage of time spent on issues where attorney fees are recoverable, then it falls on the Department and

ultimately the Board to do so. Her proposed revisions are aimed at getting this work done up front, without the Board having to do it.

She felt the process, as revised, was not complicated. All a party needs to do is to pull out the issues from its post-hearing brief and then identify the statutes that gave rise to those particular issues and how much time was spent on those issues. If an applicant says it's too difficult to accomplish this in 30 days, the Board can give them 60 days. Mr. Wein stated that the question is "how much information is enough for the judges to make a determination?"

Ms. Mosites noted that the language of 1021.182(b)(2) does not say that an applicant must estimate its percentage of success. She agreed with Mr. Hinerman that an applicant should articulate its legal grounds and the costs and fees associated with those legal grounds. Ms. Stares stated that she was agreeable to that approach.

Judge Labuskes stated that he likes the original version of 1021.182(b)(2). He does not want the process to end up being a fight over the pleadings. He would rather get to the merits and the substance of the application. He does not want to engage in a battle of whether the fee application complies with the rules. Mr. Duncan agreed. He felt that the Board had not identified a reason for changing Section 1021.182(b)(2). The only issue with (b)(2) was the Department's concern that it makes it difficult to respond to an application. He believes the proposed revisions will result in procedural fights, and he recommends keeping that section of the rules as it is currently written.

Mr. Wein stated that he did not believe having more specificity in the rules would lead to fights over the pleadings. Ms. Wesdock stated that the Board had raised the issue with the Rules Committee, asking it to develop a more detailed and specific procedure for filing and responding

to fee applications. She felt that Ms. Stares had done exactly what the Board had asked, and the Board was now saying it didn't want more detail in the rules.

Judge Beckman recommended referencing the *Friends of Lackawanna* case in the comments to Section 1021.182 as guidance on filing a fee application. Judge Renwand said he would like to see more transparency in the fee application process. He also does not want to see fee applications turn into mini-litigation battles. Mr, Wein and Ms. Stares agreed with Judge Beckman's proposal.

Ms. Stares explained that she was not trying to complicate the matter but felt that this information needed to be addressed up front. Otherwise, the parties will need to engage in a great deal of discovery and time spent at an evidentiary hearing in order to obtain the information. She felt that the Department and the Board should not have to ferret out how much time an applicant has devoted to issues on which fees are recoverable; the applicant's lawyer has that information, and that's why she believes the burden should be on the applicant. In the last several cases, the Board has had to devote a lot of effort to sorting out the information and her revisions are intended to remove the burden from the Board. She also pointed out that in some cases an applicant's fee award may be reduced precisely because the Board is not able to determine how much time was devoted to issues where fees are recoverable. Had the applicant provided the appropriate information, its award might have been higher.

During this discussion, there was general agreement that certain elements of Rule 1021.91 and 1021.92 should be incorporated, as discussed above, and additionally, that the words "which shall identify all legal issues asserted and the relief sought in the underlying appeal, the statutory authority for each legal issue, and" be deleted from Ms. Stares' proposal. It would then state as follows:

> A statement of the basis upon which the applicant claims to be entitled to costs and attorney fees, which identifies all legal issues upon which the applicant contends it prevailed and the degree to which the relief sought in the appeal was granted. The application shall set forth in numbered paragraphs the facts in support of the motion and the amount of fees and costs requested. The application may not be accompanied by a supporting memorandum of law unless otherwise ordered by the Board.

Mr. Wein stated that he agreed that the revisions proposed by Ms. Stares as modified above provided an applicant with an opportunity to present its best case to the Board.

The discussion next turned to the issue of affidavits. Mr. Hinerman felt that affidavits should be signed by the applicant, not the applicant's attorney or consultant since it is the applicant who is filing the claim. He felt it is unnecessary and unproductive to incur the expense of asking a consultant to review his bills simply to acknowledge that they are fair and accurate. Ms. Stares reminded the group that the current rule does not say who should sign the affidavit. In fact, this was the subject of debate at the last Rules Committee meeting and no consensus was reached. Judge Renwand questioned how the applicant could sign an affidavit stating the fees were spent on a particular issue since he or she would not know how the fees were generated. Mr. Hinerman expressed his opinion that the client would not pay the bill if he or she didn't believe it was reasonable. Judge Renwand expressed frustration that the bills generally submitted with fee petitions contain very little detail. For example, a bill might simply have a listing of "8 hours for legal research" without any indication of what was being researched or whether it had to do with an issue on which the applicant achieved success. The same is true of the expert witness bills provided with fee applications. He felt that if the burden were on the attorney or consultant to sign the affidavit, the bills would be more detailed. Ms. Stares agreed with Judge Renwand that the legal and expert fees submitted with a fee application are generally not sufficiently detailed.

Mr. Hinerman questioned the purpose of requiring an expert to certify that his bill is accurate. Judge Renwand said that if the applicant expects to recover his or her expert fees, they should be provided with sufficient detail. Mr. Hinerman stated that if the purpose is to have the expert set forth how much time was devoted to issues related to the Clean Streams Law (or other statutes allowing the recovery of fees), the expert is not going to understand that distinction because it's a legal distinction. Judge Renwand stated that he is not asking for the expert to distinguish between work spent on Clean Streams Law-related matters versus matters not related to the Clean Streams Law; he simply wants more detail provided in the bill. Mr. Hinerman felt that many experts will not know how to list expenses in that manner. Judge Renwand felt that the consultant should sign the affidavit but said that if the attorney assists in the preparation of the consultant's expenses, the attorney can sign the affidavit.

Ms. Mosites stated that she felt the rule, as written, is very broad and appears to ask for a list of all expenses incurred in the proceeding, as opposed to those fees related to the legal basis for the petition. Mr. Hinerman stated that he felt that much of the information being asked for would come out in the conference. Ms. Stares reiterated that this information should be submitted before the fee conference. She felt that current cases could be grandfathered, but going forward it should be made clear to experts that their bills need to be more detailed. Mr. Hinerman felt that this information could be sorted out in discovery. However, Ms. Stares stated that most attorney fee cases do not involve discovery.

Judge Labuskes stated that he would be amenable to revising Section 1021.182(b)(3) to state that the affidavit must be signed by the applicant's attorney. Judge Renwand agreed. Mr. Delio discussed a fee case in which there was a fight over the pleadings. He believes there is ambiguity in the current rule because it does not state who must sign the verification or the

affidavit. He felt that a simple solution setting forth who must sign each document would be helpful. He agreed that the proposed revisions requiring the applicant to sign the verification and the attorney to sign the affidavit solved the problem.

Judge Labuskes noted that most attorney fee petitions are filed by citizen groups and they are not represented in this discussion at the Rules Committee. He felt that making the rules more difficult works to the disadvantage of the typical fee petition applicant. Ms. Stares agreed that citizen groups should be represented in the conversation. However, she stated that it was her understanding that the Board had tasked the Rules Committee with developing revisions to the attorney fee rules that provided more guidance to applicants and that requested more substantive information from applicants. Mr. Wein agreed with Ms. Stares' understanding of what was requested of the Rules Committee. Ms. Stares stated that she did not believe it was unfair to citizen groups to ask them to provide more detailed information in order to assist them in their fee petition. She felt that they were in the best position to provide the information if they were simply given the appropriate guidance up front, rather than asking the Board to sort it out later. She also felt that when taxpayer money is being used to pay the attorney fees there should be adequate controls on it.

Mr. Duncan followed up on Judge Beckman's suggestion to cite to the *Friends of Lackawanna* case and other potentially helpful cases in a comment to the rules as a way of providing guidance to fee petitioners. Mr. Duncan suggested citing to the Board's Practice and Procedure Manual which contains the most up-to-date case law on the subject. If the case law changes it is much easier to update the Practice and Procedure Manual than to update a comment to the rules. There was general agreement with Mr. Duncan's suggestion.

The discussion circled back to how much information an applicant should be required to provide in his or her fee application. Mr. Delio noted that an applicant who does not file a detailed application does so at his or her own peril. He felt that the rules should set forth guidance on what applicants should provide in a fee application without being overly burdensome. He recognized that it is a difficult balance.

Judge Labuskes stated he had other issues regarding the proposed revisions. It was agreed that the discussion of the proposed revisions to Section 1021.182 would continue at the next meeting since Judge Labuskes wanted the Rules Committee's input regarding COVID-19 procedures for the Board. The Rules Committee will continue its discussion of Section 1021.182 at the July meeting, beginning with proposed revisions to subsection (b)(3).

COVID-19 Procedures and Holding Hearings Remotely:

Mr. Hinerman advised the group that the Philadelphia Court of Common Pleas was enlisting the help of private practitioners to handle various matters. For example, there are 3,000 discovery motions currently pending before the court. Mr. Hinerman suggested that members of the Rules Committee and the Section who had expressed interest in becoming mediators might be interested in offering their services.

Judge Labuskes reported that Judge Renwand had set up an internal working group at the Board whose mission is to make recommendations on how to handle hearings during the COVID-19 crisis. The Board needs to develop a policy and measures for implementing it. Judge Labuskes suggested that members of the Rules Committee might be interested in being a part of the committee. Mr. Wein, Ms. Mosites and Ms. Stares volunteered to be on the committee. Mr. Wein will get input from the IT staff at his firm. Judge Labuskes will schedule a conference call with the group.

Mr. Duncan reported on a remote hearing that his firm had with the Delaware River Basin Commission. Each attendee participated from his or her office. Judge Mather asked if Zoom was used. The Office of Administration has advised state agencies that they are not permitted to use Zoom for conferences due to security reasons, but he was aware that some county courts were using it. Ms. Mosites stated that the Commonwealth Court held an original jurisdiction hearing that was livestreamed on YouTube.

Judge Renwand reported that the Board has two upcoming hearings that will be held remotely. Judge Beckman has a supersedeas hearing scheduled at the end of May, and Judge Renwand has a merits hearing scheduled in early June. Both hearings will be done by telephone. Judge Renwand reported on the April 28 order issued by the Pennsylvania Supreme Court authorizing courts to hold hearings remotely either by videoconference or telephone. Judge Beckman reported that the appellant in his case is pro se and did not have the technology to do the hearing by video. Judge Renwand reported that it will likely be a while before the Board can hold in person hearings since they cannot be conducted safely in the Board's courtrooms at this time.

Mr. Hinerman discussed a standard waiver form used in a deposition in California. He will circulate it to the group. Mr. Wein stated that his son-in-law has had remote hearings in workers' compensation cases and he will ask for his input.

Judge Renwand noted that the Board's court reporter in western Pa. has been involved in remote hearings and she stated that there have been glitches with the video hearings, but the telephone hearings have gone smoothly. Ms. Walker reported that both can be done at the same time – i.e., parties can participate by video and be on the phone at the same time in case problems arise with the video portion. Mr. Wolford reported on his experience giving a final exam by tele-proctor. He said no system is perfect; you simply need to find one that is good enough for your

purposes. Mr. Wein has used Zoom and Microsoft Teams. As noted earlier, the Office of Administration will not allow state agencies to conduct conferences or hearings with Zoom due to security concerns. Mr. Duncan reported that with the DRBC hearing, the opposing party created a short video that spliced together highlights. Mr. Wein did not think this would be an issue with Board hearings since any video would be under the control of the court reporter and/or the Board.

Ms. Mosites offered to speak with the IT staff at her firm to get ideas. She also noted that some programs would have financial implications. Ms. Walker stated that the Office of Administration was encouraging agencies to use Skype since most Commonwealth employees have access to it. She reported that Cisco Web-Ex was another option; the only problem with Cisco Web-Ex is that fewer people have access to it. Non-Commonwealth employees can simply download the Skype app and sign in as a guest. Ms. Conner stated that she knows that Skype meets a strict cyber-security protocol; she does not know if Web-Ex meets it.

Mr. Wein asked whether Zoom could be used for Rules Committee meetings and Board hearings since they are public meetings. Ms. Walker advised that this would not be permitted by the Office of Administration due to the risk of hacking and the potential for inappropriate behavior during the meeting or hearing.

Next meeting:

The next meeting is scheduled for July 9, 2020 and will likely be held via teleconference or videoconference due to the Governor's COVID-19 Orders.[1]

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[1] The July 9 meeting was cancelled and the next meeting of the Rules Committee will be held on September 10, 2020 at 10:30 a.m.