ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of November 12, 2020

Attendance:

The Environmental Hearing Board Rules Committee met by WebEx video conference on Thursday, November 12, 2020, at 10:00 a.m. Chairman Howard Wein presided. The following members of the Rules Committee were in attendance: Brian Clark, Tom Duncan, Phil Hinerman, Jean Mosites, Diana Stares and Matt Wolford. Attending on behalf of the Environmental Hearing Board (Board) were Chief Judge Tom Renwand, Judge Bernie Labuskes, Judge Steve Beckman, Assistant Counsel Eric Delio, Board Secretary Christine Walker and Senior Counsel Maryanne Wesdock, who took the minutes.

Approval of Minutes of September 10, 2020 Meeting:

On the motion of Mr. Clark, seconded by Ms. Mosites, the minutes of the September 10, 2020 Rules Committee meeting were approved. Mr. Wein asked whether the Board was planning to post a WebEx protocol on its website similar to that issued by the Disciplinary Board, as discussed at the September meeting. Ms. Walker stated that she would like to review the Disciplinary Board's protocol. Ms. Wesdock will report on the proposal at the January meeting.

Rules Package 106-13:

Ms. Wesdock reported that the rules package has been approved by the Office of General Counsel and the Office of the Attorney General. The next step is for the rules package to be submitted to the Senate and House environmental committees, the Independent Regulatory Review Commission (IRRC) and the Legislative Reference Bureau. Because the legislative session is scheduled to end on or before November 30, 2020, there is not enough time to submit the rules

package for a full review before the end of the session. Therefore, the rules package will be submitted at the beginning of the next legislative session in late January or early February 2021.

"Completion" of Discovery:

Ms. Wesdock advised the Committee that she has received several inquiries regarding the provision in Board Prehearing Order No. 1 (PHO1) stating that discovery must be "completed" by a certain date. There is confusion among the bar and pro se appellants as to whether "completion" means that discovery must be served by that date or that all responses must be received by that date. In other words, may a party serve discovery up to the end of the discovery period, or must discovery be served no later than 30 days prior to the end of the discovery period so that the responding party has sufficient time to respond prior to the close of discovery?

Ms. Wesdock explained that there is Board case law from the early 1990s stating that discovery may be served up to the last day of discovery.[1] However, more recently some judges have issued individual orders requiring discovery to be served no later than 30 days before the end of the discovery period. Neither the Board's rules nor PHO1 address the issue. Because it is a procedural matter, Ms. Wesdock felt that it was an appropriate topic for discussion by the Rules Committee.

Ms. Mosites stated that in her experience in civil practice, discovery may be served up to the last day of the discovery period. Mr. Wolford reported the same. Mr. Wolford felt that it makes sense to provide clarification in the Board's rules. Judge Renwand suggested that it could also be clarified in the Board's PHO1.

Judge Renwand provided some background: The case law of the early 1990s was decided at a time when the discovery period before the Board was only 60 days. The discovery period has

[1] See, e.g., *Academy of Model Aeronautics v. DER*, 1990 EHB 34; *Pagnotti v. DER*, 1992 EHB 1307.

now been expanded to 180 days. In his opinion, he felt that the longer discovery period provides parties with enough time to serve and respond to all discovery within the confines of the discovery period. Mr. Wolford suggested revising PHO1 so that instead of simply saying that discovery must be "completed" by a certain date, it specifies the date by which all discovery must be served and the date by which all discovery must be answered. Judge Renwand agreed and suggested that the language could also state that all discovery must be served so as to allow answers by a certain date.

Mr. Wein felt that discovery served on the last day of the discovery period can pose problems; he would prefer a rule that requires service of discovery 30 days prior to the end of the discovery period. Mr. Hinerman agreed that discovery served on the last day of the discovery period can be problematic. He noted that in practice before the Philadelphia Court of Common Pleas discovery may be served until the last day of the discovery period. However, if the responses are insufficient, the serving party has run out of time to compel a more complete response since most of the judges will not entertain a motion to compel filed after the conclusion of the discovery period. Judge Renwand pointed out that the Board routinely extends the discovery period and hears motions to compel filed after the close of discovery. Ms. Wesdock suggested that PHO1 could specify the dates by which discovery must be served and answered and the date by which motions to compel must be served, and those dates can be extended.

Ms. Stares stated that the Department often receives extensive discovery requests. If those requests are received 30 days before the end of the discovery period, it does not provide the Department with sufficient time to answer them. She felt that any revision to the rules or PHO1 should include a provision that allows the parties to agree to a longer response time if needed. Mr. Wein pointed out that any such provision might present a conflict with the Board's desire to keep

cases moving forward. Ms. Stares expressed concern that if there is no provision for agreeing to a longer response time, parties could wait until 30 days before the end of discovery to serve voluminous discovery on the Department as a strategic move. Judge Renwand stated there is nothing to stop parties from doing that now. He noted that parties can always ask the Board for more time to respond to discovery requests.

Mr. Wolford raised another concern with requiring parties to serve discovery no later than 30 days before the end of the discovery period: He noted that, in an effort to keep costs down for his clients, he generally focuses on trying to resolve the case rather than engaging in discovery early in an appeal. If it becomes apparent that the case will not settle, there may not be enough time left in the discovery period to engage in discovery. He expressed a concern that parties will be forced to engage in discovery rather than focus on settling the case because their actions will be driven by the deadlines set forth in PHO1. Ms. Wesdock stated that those issues exist under the current set up; nothing changes by simply clarifying whether discovery must be served or answered by the end of the 180 day period.

Mr. Duncan agreed with the interpretation that discovery must be completed within the 180 day timeframe. He stated that he discussed the issue of whether discovery can be served on the last day of discovery with others in his firm and they expressed the same concern as that raised by Mr. Hinerman, i.e., that if discovery is served on the last day of the discovery period and the responses are insufficient, it may be more difficult to compel more sufficient answers. However, he agreed with Judge Renwand that the Board has entertained discovery motions after the completion of the discovery period. He felt that parties should not wait indefinitely to file a motion to compel and there should be a reasonable amount of time after the completion of the discovery period in which discovery motions may be filed.

Judge Labuskes agreed with Judge Renwand and Mr. Duncan that "completion" of discovery means that all discovery has been served and answered. He noted that it is a rare case where the deadlines set forth in PHO1 are followed. In nearly all cases, the deadlines are extended at the request of the parties. However, it is always helpful to have some deadlines. It is rare for the Board to push the parties until it looks like the case is not moving forward. Judge Beckman expressed agreement with Judge Labuskes.

Ms. Mosites stated that it is a better practice for parties to structure their discovery so as to allow a response within the stated discovery timeframe if they can do so. But she also recognized the concern raised by Mr. Wolford that it may be difficult to do so if the parties are focusing on settling the case. Mr. Wolford stated that he felt it was better to clarify what was meant by "completion" of discovery in PHO1, without the need for a rule change. Mr. Wein agreed, as did Judge Renwand who noted that a change to PHO1 could be implemented quickly. Mr. Wein suggested that the Board circulate the proposed revision to PHO1 to the Rules Committee to get input.

Mr. Delio stated that he agreed with Mr. Duncan's suggestion of clarifying that discovery must be completed within 180 days. He pointed out that Board Rule 1021.101(a) states, "All discovery shall be completed no later than 180 days from the date of the prehearing order." He did not believe that amending PHO1 to clarify that all discovery must be served and answered within the 180-day timeframe is in conflict with Rule 1021.101(a). He also noted that 1021.101(b) allows the Board to issue subsequent prehearing orders incorporating alternate dates. He felt that PHO1 could not extend the discovery period beyond 180 days without being in conflict with Board Rule 1021.101(a), but the Board could extend discovery with subsequent orders.

Mr. Wolford stated that if PHO1 says answers must be served by a certain date, it implies that a motion to compel may be filed after that date. Judge Renwand agreed. He also noted that the Board's rules provide that parties must confer regarding a discovery dispute before filing a motion to compel, which also implies that the motion may be filed sometime after the end of the discovery period. He cautioned, however, that parties should not wait months to file the motion.

Protocol for Holding Remote Depositions:

Mr. Hinerman stated that he sees a lot of differences in how parties are handling remote depositions. He presented a sample protocol for holding depositions remotely and suggested that the Board may want to post the protocol, or parts of it, on its website as a sample for practitioners conducting depositions in Board cases.

Judge Labuskes expressed concern that by placing it on the Board's website it would be seen as an endorsement by the Board. Ms. Mosites expressed a similar concern. She felt that it might be helpful for practitioners to review the protocol to see if it could be customized to their particular case, but she was hesitant for the Board to post the protocol on its website because any document appearing on the Board's website gives it the Board's authoritative stamp of approval.

Ms. Wesdock suggested posting the protocol on the PBA Environmental and Energy Law Section (EELS) listserv. Mr. Hinerman expressed reservations about doing so because he did not believe many practitioners review EELS listserv postings or the EELS newsletter. Mr. Wein suggested having a section on the Board's website containing links to resources for practitioners. Judge Labuskes expressed concern with doing so because any such resources would be seen as an endorsement by the Board. He felt that the Board should not be involved with how parties conduct their depositions.

Ms. Wesdock stated that there is a section in the Board's Practice and Procedure Manual that lists resources for practitioners, such as PBI publications. She asked whether it might make sense to include a link to the protocol in that section. Judges Renwand and Labuskes did not agree with that suggestion because they still felt that it would appear that the Board was endorsing it.

Mr. Wein suggested having EELS Chair Bill Cluck post the protocol on the website and solicit other examples from Section members. Ms. Wesdock agreed, stating that Mr. Cluck has been very proactive in keeping Section members informed and providing a number of resources on the listserv. Mr. Wein suggested that he and Mr. Hinerman could speak with Mr. Cluck about it. Mr. Hinerman agreed.

Revisions to Board Rules on Attorney Fees and Costs:

The Rules Committee continued its discussion regarding proposed revisions to the Board's rules on attorney fees and costs. Mr. Wein prepared a draft of the proposed revisions to the rules based on comments made at the May and September Rules Committee meetings. The draft was circulated prior to the November meeting. The Committee members went through each of the sections:

1021.182(a)

The proposed language reads as follows:

> If statutorily authorized, a party may initiate a request for costs and fees by filing a Fee Application with the Board. The Fee Application shall conform to any requirements set forth in the statute under which costs and fees are being sought and § 1021.91 (motions).

Mr. Duncan stated that it was his recollection that the Committee had agreed not to reference the Board's rule on motions in 1021.182(a) based on Judge Labuskes' suggestion. Mr. Clark and Ms. Stares agreed. The consensus was to remove the reference to § 1021.91.

1021.182(b)(1)

The language reads as follows:

> A Fee Application shall be verified by the applicant and shall set forth sufficient grounds to justify the award, including the following:
>
> (1) A copy of the order of the Board in the proceedings in which the applicant seeks costs and attorney fees.

There was no change to 1021.182(b)(1).

1021.182(b)(2)

The proposed language reads as follows:

> (2) 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.

Ms. Mosites explained that the changes to 1021.182(b)(2) were the following: 1) the addition of the last two sentences, which replaced the reference to the motions rule in subsection (a), and 2) clarification of the first sentence. All were in agreement.

1021.182(b)(3)

The proposed language reads as follows:

> (3) An affidavit, or affidavits, signed by each of the applicant's lawyers and each consultant or expert witness whose costs and fees the applicant seeks to recover, setting forth in detail all reasonable costs and fees incurred for or in connection with issues in which the party prevailed.

All were in agreement.

1021.182(b)(4)

The language reads as follows:

> (4) Where attorney fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area and the experience, reputation and ability of the individual or individuals performing the services.

There was no change to 1021.182(b)(4).

1021.182(b)(5)

The proposed language reads as follows:

> (5) The name of each party from whom costs and fees are sought.

All were in agreement.

1021.182(c)

The language reads as follows:

> An applicant shall file an application with the Board within 30 days of the date of a final order of the Board. An applicant shall serve a copy of the application upon the other parties to the proceeding.

There was no change to 1021.182(c).

1021.182(d)

The proposed language reads as follows:

> The Board may deny a Fee Application sua sponte or require a Fee Applicant to amend its Fee Application within a specified time frame if the applicant fails to provide all the information required by this section in sufficient detail to enable the Board to fully evaluate the request for relief.

All were in agreement.

Proposed Comments to 1021.182

Proposed Comment 1 reads as follows:

> (1) The Board encourages all fee applicants seeking to recover attorney fees to provide independent evidence establishing the reputation and ability of the lawyer, as required by § 1021.182(b)(4).

> The Board also encourages fee applicants to review the case law cited in Section XVI.B (Attorney Fees and Costs) of the Environmental Hearing Board Practice and Procedural Manual, available on the Board's website.

Proposed Comment 2 reads as follows:

> (2) For the purpose of establishing the number of hours an attorney or consultant/expert witness worked, as required by § 1021.182(b)(4), the Board strongly encourages the submission of records identifying discrete tasks and time for each task and recommends against "block billing."

Mr. Duncan noted that the reference to the Practice and Procedure Manual in Comment 1 included a reference to the section of the Manual. He recommended simply referring to the name of the section since the Practice and Procedure Manual is ever-changing and a future revision could lead to a change in the section number. Judge Labuskes stated that he was not in favor of the comment advising applicants to look to the Board's case law because parties should always refer to the Board's case law.

Ms. Mosites noted that if the word "independent" has meaning in Comment 1, it should be placed in the rule itself. Mr. Duncan stated that the question of whether to include the first sentence in Comment 1 or place it in the rule itself depended on whether the Board was going to require independent evidence or simply encourage it. Judge Beckman stated that what he usually receives is an affidavit from the attorney saying that his or her fee is reasonable, which is not helpful. Judge Labuskes stated that the Board does not see many disputes over the rates set forth in fee applications. Ms. Wesdock noted that IRRC will allow comments if they are advisory, but if the comment mandates certain action then it should be in the rule. Ms. Stares agreed that IRRC might have a problem with Comment 1. The consensus of the Committee was to delete Comment 1.

With regard to Comment 2, Mr. Hinerman recommended replacing "the Board strongly encourages the submission of records identifying discrete tasks and time for each task and recommends against 'block billing,'" with "the Board encourages attorneys and experts/consultants to avoid grouping multiple tasks into a single time entry."

Mr. Clark felt that it was important to include Comment 2 with the rule. He recommended that the Board provide a strong argument for retaining it if it was questioned by IRRC. Ms. Wesdock felt that the comment could be approved by IRRC since it was advisory.

Revising Mr. Hinerman's language slightly, Mr. Wein suggested the following: "For purposes of establishing the number of hours an attorney or expert has worked, as required by § 1021.182(b)(4), the Board encourages avoiding grouping multiple tasks into a single time entry." Ms. Stares also felt it was important to include the language "strongly encouraging the submission of records" that avoid grouping multiple tasks together. Mr. Wein proposed the following: "For purposes of establishing the number of hours an attorney or expert has worked, as required by § 1021.182(b)(4), the Board encourages the submission of records that avoid grouping multiple tasks into a single time entry."

Ms. Mosites pointed out that by the time a party seeks attorney fees, the records have been long-established. She asked whether the comment was asking parties to create new records. Mr. Hinerman felt that the comment puts the burden on the attorney to talk to the expert about his or her billing because consultants do not list tasks individually. He stated that it is routine for experts to do block billing. By the time a party seeks attorney fees and expert fees, the consultant has already submitted his or her bill. Mr. Hinerman recommended deleting "strongly encourages" and simply say "encourage." Mr. Wein agreed.

Ms. Wesdock stated that EELS Chair Bill Cluck had asked if the Board could publish the proposed revisions to the attorney fee rules as guidance since it generally takes two years before revisions are adopted as final rulemaking. Mr. Wein suggested placing the proposed revisions in the Board's Practice and Procedure Manual. Ms. Mosites asked how often the Practice and Procedure Manual is revised, and Ms. Wesdock explained that the Manual can be revised as often as necessary since it is now on the Board's website rather than published in hard copy. Judges Renwand, Labuskes and Beckman agreed with the proposed revisions being published in the Practice and Procedure Manual.

In conclusion, the consensus of the Committee was to leave the language of 1021.182(b)(4) as is and include a short comment to the rule.

1021.183

The language reads as follows:

> A response to a Fee Application shall be filed within 30 days of service, unless a longer period of time is ordered by the Board following a Fees Conference pursuant to § 1021.184(c). The factual bases for the Response shall be supported by affidavits signed by the parties from whom the fees are sought or others with relevant knowledge. The form of the Response shall be consistent with § 1021.91 (motions).

Mr. Wein asked whether the rule should require a paragraph-by-paragraph response. Mr. Duncan noted that this requirement is contained in Rule 1021.91(b). Mr. Wein suggested adding the following sentence to Rule 1021.183: "A response to a fee application shall set forth in correspondingly numbered paragraphs…" paralleling the language of 1021.91(b). He also suggested adding the second sentence of 1021.91(b) stating that matters to which no response is filed are deemed admitted. The Committee agreed with his suggestions.

1021.184

The proposed language reads as follows:

> **§ 1021.184. Disposition of Fee Application.**
>
> (a) Each party to the Fee Application proceeding has the right to file a brief in accordance with a schedule established by the Board.
>
> (b) Each party to the Fee Application proceeding has the right to conduct discovery and participate in an evidentiary hearing to resolve any factual issues raised by the Fee Application and Response.
>
> (c) Within seven days of the Board's receipt of a Fee Application, the Board will hold a Fees Conference with all parties to the appeal to determine the process and deadlines for responses, briefing, discovery and evidentiary hearings, including the extension of the thirty-day deadline for filing Responses, a briefing schedule, conduct of discovery and holding an evidentiary hearing. Following the Fees Conference, the Board will issue a Fees Conference Order establishing case management procedures for these and any other issues that the Board may address.
>
> (d) The Fee Applicant has the burden of proving its entitlement to a costs/fee recovery.
>
> (e) The Fee Application process will be stayed if one of the parties files an appeal from the Board's final order in the underlying appeal.

Mr. Wein suggested placing subsection (c) before (a) and (b). Mr. Duncan questioned whether subsections (a) and (b) were needed since those issues will be decided during the fee conference with the judge. Ms. Stares agreed with placing subsection (c) before (a) and (b). She felt that subsections (a) and (b) were necessary to ensure that parties had an opportunity to file a brief and conduct discovery. She stated that the Department would not conduct discovery unless it felt it was necessary to obtain additional information. Mr. Duncan pointed out the inconsistencies between Rules 1021.182(b)(2) and 1021.184. As proposed, Rule 1021.182(b) states "The application may not be accompanied by a supporting memorandum of law unless

otherwise ordered by the Board," whereas Rule 1021.184(a), as proposed, states "Each party to the Fee Application proceeding has the right to file a brief in accordance with a schedule established by the Board."

Mr. Wein provided some background: He explained that the issue of whether a brief or memorandum of law should accompany a fee petition was a matter discussed early in the process of revising the attorney fee rules, and the Committee agreed that shortly after the fee application was filed the Board would hold a conference to discuss this and other matters. Judge Labuskes felt that subsections (a) and (b) could be problematic. He expressed concern that if an applicant files a poor fee application, subsection (a) prevents the Board from dismissing the application sua sponte since subsection (a) provides the applicant with the right to file a brief. His concern with subsection (b) is that an evidentiary hearing is never necessary unless fees are being awarded under the catalyst theory. He felt that subsections (a) and (b) appeared to create "rights" that could be problematic. Mr. Wein suggested that perhaps subsection (c) implied the rights were created after the conference. Ms. Mosites suggested revising the first sentence of (c) as follows: "Within seven days of the Board's receipt of a Fee Application, the Board will hold a Fee Conference with all parties to the appeal to determine the process and deadlines for responses, briefing, discovery and evidentiary hearings, if any." Judge Labuskes agreed with the language proposed by Ms. Mosites.

A number of Committee members suggested eliminating (a) and (b) and revising the first sentence of (c) with the language drafted by Ms. Mosites. Ms. Stares agreed with the language proposed by Ms. Mosites and recognized the problems enunciated by Judge Labuskes with respect to subsections (a) and (b), but she preferred maintaining (a) and (b) so that the question of whether to allow a brief or evidentiary hearing was not entirely within the discretion of the Board. Judge Labuskes stated that the case law from the Commonwealth Court essentially requires an

evidentiary hearing in catalyst cases, and in cases where an adjudication has been issued, parties generally do not want a hearing, including the Department. Ms. Stares agreed and said it was acceptable to eliminate subsections (a) and (b).

At this point, Mr. Clark and Mr. Wolford had to leave the meeting and gave the Committee their proxy to approve the proposed revisions.

1021.184(d) and (e) and 1021.191

There were no further changes to these sections.

Summary

Mr. Delio noted that subsection (c) of 1021.184 would become (a) and subsections (d) and (e) would become (b) and (c). Therefore, the reference in Rule 1021.183 to 1021.184(c) needs to be changed to 1021.184(a). Any other references to subsections that have been moved will also need to be changed.

On the motion of Mr. Hinerman, seconded by Mr. Duncan, the rule changes were approved unanimously (including the proxies of Mr. Clark and Mr. Wolford). The text of the proposed rules, as revised, is included at the end of the minutes as Appendix A.[2]

Mr. Wein will circulate a clean copy of the rule changes, as well as a redlined version of the current rules showing the changes. Ms. Wesdock will place the rule changes in the Practice and Procedure Manual.

Adjournment:

On the motion of Ms. Mosites, seconded by Ms. Stares, the meeting was adjourned at 12:06 p.m.

[2] Following the meeting, Mr. Duncan provided minor non-substantive corrections to the rules. The edited version of the rules is contained in Appendix B.

APPENDIX A

Revised rules on attorney costs and fees as approved at EHB Rules Committee meeting of November 12, 2020

ATTORNEY COSTS AND FEES AUTHORIZED BY STATUTE

§ 1021.181. Scope.

This subchapter applies to requests for costs and attorney fees when authorized by statute. When a statute provides procedures inconsistent with these procedures, the statutory procedures will be followed.

§ 1021.182. Application for costs and fees.

(a) If statutorily authorized, a party may initiate a request for costs and fees by filing a Fee Application with the Board. The Fee Application shall conform to any requirements set forth in the statute under which costs and fees are being sought and § 1021.181 – 191.

(b) A Fee Application shall be verified by the applicant, and shall set forth sufficient grounds to justify the award, including the following:

(1) A copy of the order of the Board in the proceedings in which the applicant seeks costs and attorney fees.

(2) 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.

(3) An affidavit, or affidavits, signed by each of the applicant's lawyers and each consultant or expert witness whose costs and fees the applicant seeks to recover, setting forth in detail all reasonable costs and fees incurred for or in connection with issues in which the party prevailed.

(4) Where attorney fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area and the experience, reputation and ability of the individual or individuals performing the services.

(5) The name of each party from whom costs and fees are sought.

(c) An applicant shall file an application with the Board within 30 days of the date of a final order of the Board. An applicant shall serve a copy of the application upon the other parties to the proceeding.

(d) The Board may deny a Fee Application sua sponte or require a Fee Applicant to amend its Fee Application within a specified time frame if the applicant fails to provide all the information required by this section in sufficient detail to enable the Board to fully evaluate the request for relief.

Comment

For the purpose of establishing the number of hours an attorney or consultant/expert witness worked, as required by § 1021.182(b)(4), the Board encourages the submission of records that avoid grouping multiple tasks into a single time entry.

§ 1021.183. Response to Fee Application.

A response to a Fee Application shall be filed within 30 days of service, unless a longer period of time is ordered by the Board following a Fees Conference pursuant to §1021.184(a). The factual bases for the Response shall be supported by affidavits signed by the parties from whom the fees are sought or others with relevant knowledge. A response to an application shall set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the application. Material facts set forth in an application that are not denied may be deemed admitted for the purposes of deciding the application.

§ 1021.184. Disposition of Fee Application.

(a) Within seven days of the Board's receipt of a Fee Application, the Board will hold a Fees Conference with all parties to the appeal to determine the process and deadlines for responses, briefing, discovery and evidentiary hearings, if any. Following the Fees Conference, the Board will issue a Fees Conference Order establishing case management procedures for these and any other issues that the Board may address.

(b) The Fee Applicant has the burden of proving its entitlement to a costs/fee recovery.

(c) The Fee Application process will be stayed if one of the parties files an appeal from the Board's final order in the underlying appeal.

ATTORNEY COSTS AND FEES UNDER MORE THAN ONE STATUTE

§ 1021.191. Application for counsel fees under more than one statute.

An applicant seeking to recover costs and fees under more than one statute shall file a single Fee Application which sets forth, in separate counts, the basis upon which costs and fees are claimed under each statute. The Fee Application shall comport with the requirements at § 1021.182.

Appendix B

Revised rules on attorney costs and fees
as approved at EHB Rules Committee meeting of November 12, 2020
as edited by Mr. Duncan

ATTORNEY COSTS AND FEES AUTHORIZED BY STATUTE

§ 1021.181. Scope.

This subchapter applies to requests for costs and attorney fees when authorized by statute. When a statute provides procedures inconsistent with these procedures, the statutory procedures will be followed.

§ 1021.182. Application for costs and fees.

(a) If statutorily authorized, a party may initiate a request for costs and fees by filing a Fee Application with the Board. The Fee Application shall conform to any requirements set forth in the statute under which costs and fees are being sought and §§ 1021.181 – 1021.191.

(b) A Fee Application shall be verified by the applicant, and shall set forth sufficient grounds to justify the award, including the following:

(1) A copy of the order of the Board in the proceedings in which the applicant seeks costs and attorney fees.

(2) 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 Fee Application shall set forth in numbered paragraphs the facts in support of the Fee Application and the amount of fees and costs requested. The Fee Application may not be accompanied by a supporting memorandum of law unless otherwise ordered by the Board.

(3) An affidavit, or affidavits, signed by each of the applicant's lawyers and each consultant or expert witness whose costs and fees the applicant seeks to recover, setting forth in detail all reasonable costs and fees incurred for or in connection with issues in which the party prevailed.

(4) Where attorney fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area, and the experience, reputation, and ability of the individual or individuals performing the services.

(5) The name of each party from whom costs and fees are sought.

(c) An applicant shall file a Fee Application with the Board within 30 days of the date of a final order of the Board. An applicant shall serve a copy of the Fee Application upon the other parties to the proceeding.

(d) The Board may deny a Fee Application sua sponte or require an applicant to amend its Fee Application within a specified time frame if the applicant fails to provide all the information required by this section in sufficient detail to enable the Board to fully evaluate the request for relief.

Comment: For the purpose of establishing the number of hours an attorney or consultant/expert witness worked under § 1021.182(b)(4), the Board encourages the submission of records that avoid grouping multiple tasks into a single time entry.

§ 1021.183. Response to Fee Application.

A response to a Fee Application shall be filed within 30 days of service, unless a longer period of time is ordered by the Board following a Fees Conference pursuant to §1021.184(a). The factual bases for the response shall be supported by affidavits signed by the parties from whom the fees are sought or others with relevant knowledge. A response to a Fee Application shall set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the Fee Application. Material facts set forth in a Fee Application that are not denied may be deemed admitted for the purposes of deciding the Fee Application.

§ 1021.184. Disposition of Fee Application.

(a) Within seven days of the Board's receipt of a Fee Application, the Board will hold a Fees Conference with all parties to the appeal to determine the process and deadlines for responses, briefing, discovery, and evidentiary hearings, if any. Following the Fees Conference, the Board will issue a Fees Conference Order establishing case management procedures for these and any other issues that the Board may address.

(b) The applicant has the burden of proving its entitlement to the recovery of costs and fees.

(c) The Fee Application process will be stayed if one of the parties files an appeal from the Board's final order in the underlying appeal.

ATTORNEY COSTS AND FEES UNDER MORE THAN ONE STATUTE

§ 1021.191. Application for counsel fees under more than one statute.

An applicant seeking to recover costs and fees under more than one statute shall file a single Fee Application which sets forth, in separate counts, the basis upon which costs and fees are claimed under each statute. The Fee Application shall comport with the requirements at § 1021.182.