

## **ENVIRONMENTAL HEARING BOARD RULES COMMITTEE**

### **Minutes of Meeting of May 13, 2021**

#### **Attendance:**

The Environmental Hearing Board Rules Committee met by teleconference on May 13, 2021 at 10:00 a.m. Committee Chairman Howard Wein presided. In attendance were Committee members Brian Clark, Tom Duncan, Phil Hinerman, Jean Mosites, Diana Stares and Matt Wolford. Attending from the Board were Chairman and Chief Judge Tom Renwand, Assistant Counsel Eric Delio, Board Secretary Christine Walker and Senior Counsel Maryanne Wesdock, who took the minutes.

#### **Minutes of March 11, 2021 Meeting:**

On the motion of Ms. Mosites, seconded by Mr. Clark, the minutes of the March 11, 2021 meeting were approved.

#### **Holding Meetings by Video or Teleconference:**

The Committee discussed whether to hold future meetings by teleconference or by video on WebEx. Ms. Walker advised the group that WebEx participants can either appear by video or simply call in to the meeting. The Board can sunshine the meetings by advising members of the public to contact Ms. Walker if they wish to participate.

Mr. Delio explained the two types of WebEx conferences:

- 1) WebEx Event – requires an individual email invitation
- 2) WebEx Meeting – includes a link in the email invitation

A discussion was held regarding the possibility of broadcasting Rules Committee meetings on the Board's YouTube channel.

The consensus of the Committee was to hold future meetings by WebEx. For meetings held by teleconference, Mr. Clark explained the procedure for providing the access code so that it is automatically entered after dialing the number.

**Rules Package 106-13:**

Ms. Wesdock advised the Committee that EHB Proposed Rulemaking 106-13 was published in the *Pennsylvania Bulletin* on April 17, 2021. There is a 30-day public comment period, followed by a 20-day comment period by the legislative committees and a 10-day comment period by the Independent Regulatory Review Commission (IRRC.)

**Correction of Typographical Error in Rule 1021.94a(g)(2):**

Ms. Wesdock reported that the correction of typographical errors in Rule 1021.94a(g)(2) can only be made by going through the rulemaking process since the error occurred at the Board's end and not the Legislative Reference Bureau's. The correction will be part of the next rules package.

**Reopening Record After Supersedeas Hearing:**

Mr. Duncan drafted a proposed revision to Rule 1021.61(d) (supersedeas) allowing for the reopening of the record after a supersedeas hearing at the Board's discretion. He included a reference to Rule 1021.133 (reopening of the record) based on Ms. Mosites' suggestion at the March 11 meeting.

Ms. Stares felt that the language was less likely to be seen in Rule 1021.61(d). Mr. Hinerman suggested placing it in Rule 1021.133 entitled "Reopening of the Record Prior to Adjudication." Although that rule deals with reopening the record following a hearing on the merits, both Ms. Stares and Mr. Hinerman felt that the language of 1021.133 could be revised to encompass the reopening of the record after a supersedeas hearing. Mr. Clark agreed that placing

the language in 1021.133 was a cleaner approach. Mr. Duncan agreed with the change and noted that the title of Rule 1021.133 would also need to be revised.

Mr. Wein suggested placing a reference to 1021.133 in Rule 1021.61(d). The Committee agreed to a truncated version of Mr. Duncan's language in 1021.61(d) in addition to revising 1021.133.

Ms. Mosites pointed out that Rule 1021.133 contains a comment stating that the rule "sets a standard which is more stringent than the materiality test of *Spang & Co. v. DER*, 592 A.2d 815 (Pa. Cmwlth. 1991), but broader than the grounds justifying reconsideration..." She advised ensuring that the proposed revision to Rule 1021.133 was compatible with the comment. After reviewing the *Spang* decision, the Committee felt that the language of the comment was not inconsistent with the proposed change to Rule 1021.133.

On the motion of Mr. Duncan, seconded by Mr. Hinerman, the Committee voted unanimously to recommend the following revisions to Rules 1021.61 and 1021.133:<sup>1</sup>

§ 1021.61. General.

(d) At the discretion of the Board, if necessary to ensure prompt disposition, supersedeas hearings may be limited in time and format, with parties given a fixed amount of time to present their entire case, and with restricted rights of discovery, ~~or~~ of cross-examination, **or of reopening the record in accordance with § 1021.133.**

§ 1021.133. Reopening of record ~~prior to adjudication.~~

(a) After the conclusion of the hearing on the merits of the matter pending before the Board and before the Board issues an adjudication, **or after the conclusion of a hearing on a supersedeas and before the Board issues an order granting or denying a supersedeas,** the Board, upon its own motion or upon a petition filed by a party, may reopen the record as provided in this section.

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<sup>1</sup> Mr. Duncan provided a redlined version of the revisions following the meeting, and it was circulated to the Committee members.

### **Holding Hearings by WebEx:**

Judge Renwand reported that the Board has received no word from the Governor's Office regarding when agencies may begin to conduct in-person hearings. He stated that the Board is continuing to schedule hearings by WebEx and that they are going well. The Board has received feedback from attorneys who have participated in WebEx hearings, and the feedback has been positive. In fact, some attorneys have asked if the Board would consider holding hearings by WebEx even after the Covid restrictions have been lifted. Judge Renwand has discussed this matter with the other judges, and while the Board intends to return to in-person hearings when it is safe to do so, it is amenable to allowing testimony by video when it makes sense to do so (e.g., for logistical reasons, to avoid travel by certain witnesses, etc). Judge Renwand stated that the Board may consider holding hybrid hearings (i.e., some testimony is live, while other testimony is by video) when the parties request it. He further stated that the Board will not return to in-person hearings until the Board has received authorization from the Governor's Office and it can be done safely. He also reminded parties that in-person hearings will likely require all participants – the Board, witnesses, attorneys, and members of the public – to wear masks. He felt that it might be preferable to be able to view a witness's testimony by video rather than to have a witness testify in person while wearing a mask.

Mr. Clark asked whether parties have been conducting depositions virtually or in-person. Judge Renwand responded that both types of depositions have been conducted in matters before the Board. Mr. Clark also inquired as to the reasons attorneys have given for wanting to continue holding hearings by video post-Covid. Ms. Wesdock stated that the reasons have been logistical (e.g., it is easier to schedule hearings when attorneys and witnesses do not have to travel, especially Department witnesses traveling from Harrisburg to other Board locations for a hearing). Judge

Renwand agreed, and noted that sometimes a witness may have to travel for several hours for testimony that does not take very long.

Mr. Clark asked how attorneys are able to confer with co-counsel or their expert when the hearing is being conducted by video. Ms. Mosites reported that she has done approximately a dozen depositions by Zoom and there is a breakout room that can be used for conferring. Mr. Delio reported on a mediation that Judge Labuskes conducted by WebEx in which the judge met with parties individually in a breakout room. However, he noted that with WebEx the Board controls the breakout rooms, not the parties.

Mr. Duncan reported on a hearing he had before the Board on WebEx. He stated that the hearing went well. He felt that communicating electronically was easier than passing handwritten notes to co-counsel during live hearings. He also felt it was easier to manage exhibits by WebEx than in person.

Mr. Wein asked whether the Board would consider conducting a poll among attorneys who have tried a case before the Board on WebEx to get their thoughts on how the hearing went and whether they had suggestions for improving it. Mr. Clark agreed with this suggestion. He felt that it would be beneficial to hear from attorneys who have done a virtual hearing. He suggested posting the results of the survey on the Board's website. Mr. Hinerman suggested that one of the survey questions should be how many Board hearings the attorney has done by video.

Ms. Wesdock reported that the protocol for conducting a WebEx hearing has been updated on the Board's website.

**Amending the Internal Operating Procedures for Single Judge Opinions:**

Judge Renwand will report on this topic at the July meeting.<sup>2</sup>

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<sup>2</sup> This issue involves amending the Board's Internal Operating Procedures to require full Board review of supersedeas opinions and opinions denying summary judgment.

### **Timing of Expert Discovery:**

The Committee continued the discussion of an issue raised by Mr. Hinerman at the March 11, 2021 meeting: Mr. Hinerman proposed delaying the exchange of expert reports and/or answers to expert interrogatories until after the conclusion of nonexpert discovery. In his experience, experts benefit by having access to the facts gleaned through discovery before they are required to prepare their expert report. He explained that in one of his cases it became clear during discovery that his opponent did not intend to contest the opinions that the expert would assert. Had this not been revealed in discovery, Mr. Hinerman's client would have retained an expert to prepare a report at a cost of at least \$10,000.

Ms. Mosites pointed out that PHO1 allows parties to file a proposed joint case management order with an alternative discovery schedule. Mr. Hinerman agreed but stated that the proposed case management order depends on all parties agreeing to the alternative schedule. He recommended revising PHO1 to allow parties to produce expert reports 30 days after the conclusion of discovery. Ms. Mosites stated she had no opposition to this proposal.

Mr. Hinerman stated that the procedure in state court is the same procedure that he is proposing for the Board. However, Ms. Stares felt that an action in state court is different than a proceeding before an administrative tribunal in which the tribunal is called upon to review the action of a state agency. She felt that each type of action requires different procedures. Mr. Hinerman further stated that Pennsylvania rules do not allow expert depositions without a court order, unlike the federal rules.

Judge Renwand expressed the following concern: If a party does not produce its expert reports until after fact discovery has concluded, the other side may not become aware of facts relied upon by the expert until it receives the expert report, at which point it would be too late to

conduct discovery. An expert could end up relying on facts the other side knows nothing about because they did not come out in discovery. Ms. Stares agreed with Judge Renwand that under Mr. Hinerman's proposal, a party may not learn that it needs an expert until after receiving the other side's expert report, at which point it's too late. Judge Renwand stated that if parties wish to propose a schedule allowing for fact discovery, followed by the filing of expert reports and an additional period of limited fact discovery, he had no objection. However, he did not agree that the Board's PHO1 should be changed to make that process the norm. Mr. Hinerman stated that the purpose of expert reports is to provide opinions, not facts. Mr. Duncan suggested that, rather than allowing a second period of fact discovery, the parties may simply agree to file rebuttals to the expert reports.

Judge Renwand stated he was opposed to changing the current procedure for discovery.

#### **Procedural Motions and Proposed Orders:**

The Board's rule on procedural motions, 1021.92, requires that parties include a proposed order only with motions for continuance and motions for extension. Mr. Duncan recommended amending subsection (e) of the rule to require a proposed order with all procedural motions. Mr. Clark agreed and stated he did not recall why the Rules Committee did not require a proposed order with all procedural motions when drafting the current rule.

Mr. Delio recommended that any revision to Rule 1021.92 should maintain the current language regarding requests submitted by motion or letter (i.e., a proposed order should accompany a procedural request whether in the form of a motion or letter).

On the motion of Mr. Duncan, seconded by Mr. Clark, the Committee unanimously recommended the following revision to 25 Pa. Code § 1021.92(e):

1021.92. Procedural Motions

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(e) ~~Requests for extensions or continuances~~ **All requests**, whether in letter or motion, shall be accompanied by a proposed order.

**ESI Plan:**

Mr. Duncan suggested amending paragraph 12 of the Board's Prehearing Order No. 1 (PHO1) to allow parties the ability to opt out of negotiating and developing a plan for the discovery of electronically stored information (ESI Plan) where all parties agree such a plan is not necessary. He explained that in cases that involve a low to moderate amount of electronic discovery, it can be cost prohibitive and burdensome to develop an ESI Plan. Where there is a limited number of email chains and custodians, parties generally do not need an ESI Plan. Revising the language of paragraph 12 to allow parties to opt out of developing an ESI Plan would allow them to do so without being in violation of PHO1.

Mr. Hinerman suggested changing the word "shall" to "may" in paragraph 12. However, Mr. Duncan felt that changing the language to "may" would give a single party the right to veto an ESI Plan. He felt that an ESI Plan should be required unless all parties agree to opt out. Judge Renwand agreed with Mr. Duncan's proposal, as did Mr. Delio. Mr. Delio pointed out that it is the rare case where the Board receives an ESI Plan, and he recognized that such a plan may not be necessary for cases involving a low to moderate amount of electronic discovery. He stated that the current language of PHO1 appears to require parties to develop an ESI Plan or forego all electronic discovery, even if very limited. Under the current language, if parties fail to develop an ESI Plan in theory they could not discover even a single email. Mr. Duncan agreed and said, in practice, parties are engaging in electronic discovery in many instances without an ESI Plan. His proposal would allow parties the option of not spending time and resources developing a plan that may not be necessary.



Ms. Mosites posed a question to Ms. Stares regarding the Department's handling of discovery requests for ESI. Following the meeting, Ms. Mosites stated that it was her understanding that the Department sometimes does not produce emails without a formal ESI plan, which differs from how private parties handle smaller discovery matters that do not require a formal ESI plan. This topic will be placed on the agenda for the July meeting.

There was general consensus with Mr. Duncan's recommendation for revising paragraph 12 of PHO1. However, Mr. Wolford stated that it was not the place of the Rules Committee to tell the Board what should be contained in its orders. Mr. Duncan agreed but said that he was simply advising the Board on how paragraph 12 of PHO1 was being effectuated in practice and, as such, a revision might make sense. Mr. Wolford agreed.

On the motion of Mr. Wolford, seconded by Ms. Mosites, the Committee unanimously recommended revising paragraph 12 of PHO1 as follows:

12. *Report to Board.* Not later than 14 days after the conference under Paragraph 11, the parties shall submit to the Board for its consideration a proposed plan for conducting electronic discovery along with a proposed order, **unless all parties agree that a proposed plan for conducting electronic discovery is not necessary.**

**Next Meeting:**

The next meeting of the Rules Committee will be July 8, 2021 at 10:00 a.m. The following tabled topics will be included on the agenda for the July meeting:

- 1) Report on amending Internal Operating Procedures to require full Board review of single judge opinions on supersedeas and denial of motions for summary judgment.
- 2) Ensuring that all interested parties receive notice of the filing of an appeal.
- 3) Ensuring that all necessary parties are included in the appeal (i.e., resolving the *Schneiderwind* problem).

4) Discovery of ESI – whether Department practice differs from private practice.

**November Meeting:**

The November meeting falls on November 11, 2021, Veterans' Day, a state holiday. Therefore, the meeting will be moved to November 18, 2021 at 10:00 a.m.<sup>3</sup> Ms. Mosites stated that she will need to leave the meeting at noon due to another commitment.

**Adjournment:**

On the motion of Mr. Wolford, seconded by Ms. Mosites, the meeting was adjourned at 12:14 p.m.

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<sup>3</sup> The meeting date was subsequently changed to November 10, 2021 at 10:00 a.m. since November 18, 2021 is PBA Section Day.