ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE

MINUTES OF MEETING OF JANUARY 16, 2020

Attendance:

The Environmental Hearing Board Rules Committee met on January 16, 2020 at 10:30 a.m. Participating in the meeting were the following members: Committee Chair Howard Wein, Committee Vice-chair Phil Hinerman, Jim Bohan, Brian Clark, Gail Conner and Matt Wolford. Participating in the meeting on behalf of the Environmental Hearing Board were the following: Chairman and Chief Judge Tom Renwand, Judge Bernie Labuskes, Judge Rick Mather, Judge Steve Beckman, Assistant Counsel Eric Delio and Chris Minott, Board Secretary Christine Walker, and Senior Assistant Counsel Maryanne Wesdock, who took the minutes. DEP Litigation Coordinator, Diana Stares, also participated in the meeting.

New Appointment to Rules Committee:

Mr. Bohan is stepping down from the Rules Committee effective January 31, 2020, and Ms. Stares will be joining the Committee effective February 1, 2020. Chairman Wein, the Committee members and EHB Judges thanked Mr. Bohan for his valuable service to the Committee and extended a warm welcome to Ms. Stares.

Approval of Minutes:

On the motion of Mr. Clark, seconded by Mr. Bohan, the minutes of the September 19, 2019 meeting were approved.

Rule 1021.141(b) – Termination of Proceedings:

Mr. Wein provided a recap as follows: At the March 14 meeting, Mr. Wolford raised a concern that when parties enter into a settlement agreement under Rule 1021.141(b), there is no

mechanism in the rule for ensuring that the Findings of the original Department action are superseded by the Findings agreed to in the settlement agreement of the parties. After further discussion at the September 19, 2019 meeting, a majority of the Committee approved a revision to 25 Pa. Code § 1021.141(b). Mr. Bohan voted against the proposed revision. The language of the proposed revision is as follows:

> **§ 1021.141. Termination of proceedings.**
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> (b) When a proceeding is sought to be terminated by the parties as a result of a settlement agreement, the form of the settlement agreement may be a consent order, a consent assessment of civil penalties, a permit modification, or any other basis for settling an action as permitted by law. ***Findings contained in a settlement agreement shall replace and supersede Findings set forth by the Department in the action that is the subject of the appeal.*** If the settlement includes any action of the Department which would have to be published if taken independently of the settlement, that action shall be published by the Department as required by law. Appealable actions of the Department contained in the settlement may be appealed to the Board by an aggrieved person not a party to the settlement in the manner provided by law. A party to the settlement may appeal only to the extent permitted by the terms of the agreement. After the parties have agreed upon a settlement they may do one of the following…

At a public meeting held on December 4, 2019, the judges voted (by a vote of 4-1) not to adopt the proposed revision to Rule 1021.141(b). Several of the judges expressed concern that the proposed language was substantive, rather than procedural. The judges remanded the issue to the Rules Committee for further discussion.

Mr. Wein requested input from the judges. He stated that the Committee planned to review the issue further to determine if the proposed revision was procedural or substantive. Judge Beckman stated that his concern was that if the parties cannot agree that the Findings of the settlement agreement supersede those of the original Department action, then the Board cannot

make that decision without holding a hearing. Mr. Wolford stated that it is not necessarily a matter of the parties not agreeing to the facts, but simply that the settlement agreement does not address the issue. In that situation the Findings of the original Department action may still be viable, but under the doctrine of administrative finality an appellant no longer has the ability to challenge them. Judge Beckman felt there were only two solutions: 1) either the parties themselves must resolve the issue as part of the settlement, or 2) the Board must hold a hearing to determine the facts. He felt that the language of the proposed revision forced the Board to choose a side without having any basis for doing so.

Mr. Hinerman suggested that the parties could stipulate to the facts. However, Mr. Wolford renewed his concern that this matter is not always addressed in the settlement agreement. He stated that it is common for attorneys to believe that the facts set forth in the settlement agreement supersede the facts set forth in the original action and, therefore, they do not address the issue in the settlement agreement.

Mr. Bohan voiced his concern that the Committee's proposal conflicts with the principles of contract law, i.e., a court should not rewrite the terms of a contract. He felt that the proposed revision to Board Rule 1021.141(b) had the effect of rewriting the terms of the settlement agreed to by the parties. Mr. Wolford expressed his concern that the parties may not realize that the issue has to be addressed in the settlement agreement. They may think that the facts of the settlement agreement supersede those set forth in the original agreement, only to find out that the original set of facts are raised in a subsequent civil penalty assessment. Mr. Wein suggested that a Homes of Distinction settlement may resolve the issue.

Ms. Stares expressed the opinion that this was not a matter that should be addressed in the Board's rules. She stated that there are times when parties are not able to reach closure on the facts

and that sometimes parties settle precisely because they are not able to reach an agreement on the facts. In such cases, she felt that the Board rule would not be appropriate. Mr. Wolford stated that his primary concern was for situations where the attorneys in a case do not realize that the matter should be addressed.

Mr. Wein thanked the judges and Committee members for their input and stated that the Committee would hold further discussion at the next meeting.

Rules Package 106-13:

Ms. Wesdock reported that she has nearly completed the preparation of the rules package and expects it to be sent to the Office of General Counsel for review at the end of January. There is no deadline by which the Office of General Counsel must review the rules package, but she expects that it will be addressed quickly.

Rules 1021.181 - 1021.184 – Applications for Attorney Fees and Costs:

Judge Labuskes asked the Rules Committee for input on whether the Board's rules on applications for attorney fees and costs should provide further detail. Of the last several fee applications he has received, each one has been handled differently by the parties. He expressed a concern that the Board's rules may not provide enough clarity on the process. He cited the following as examples:

1) Section 1021.182(b) states that the fee application must be "verified" but does not state whether it must be verified by the applicant or the attorney. Judge Labuskes stated that he has seen fee applications that contain verifications from the attorney regarding the number of hours spent on the case and the reasonableness of the rates, but he has never seen a verification from a party.

2) Similarly, Section 1021.182(b)(3) states that the fee application must contain an affidavit setting forth in detail all reasonable costs and fees but does not specify whether the affidavit must be signed by the attorney or the applicant.

3) Section 1021.183 states that a response to a fee application shall be filed within 30 days but provides no detail on what must be contained in the response.

4) Section 1021.184 states that a brief *may* be filed and the Board *may* allow discovery. Judge Labuskes stated that he does not mind addressing these matters on a case-by-case basis but raised the question of whether the rules should provide more structure.

Ms. Stares agreed with Judge Labuskes that the rules do not provide much detail and the lack of structure sometimes creates confusion. She felt that there are times when discovery is appropriate and necessary in the attorney fee application process, such as when the Board must make a determination on whether a party substantially contributed to a successful outcome. She suggested it would be helpful for the rules to spell out when discovery and a hearing is appropriate. Judge Labuskes pointed out that when the Board is deciding a fee petition under the catalyst theory the Commonwealth Court has made it clear that the Board must have a hearing. However, when the Board is deciding a fee petition under the *Kwalwasser* standards (i.e., there has been a final adjudication on the merits), such as the recent decision in *Gerhart v. DEP and Sunoco*, EHB Docket No. 2017-013-L (Opinion and Order on Appellants' Application for Costs and Fees issued January 7, 2020), discovery and a hearing may be unnecessary.

Mr. Delio presented an example of a case that exemplified the lack of clarity in the Board's rules. In *Friends of Lackawanna v. DEP and Keystone Sanitary Landfill*, EHB Docket No. 2015-063-L, the appellant filed a fee application with no supporting memorandum or brief. When the Department responded to the fee application, it included a brief. The Board then ordered additional

briefing by the parties. Mr. Delio felt that the rule should be specific as to whether briefs are required or should only be filed when the Board orders it. Judge Labuskes agreed with Mr. Delio and stated that under the current rule the Board sometimes ends up with multiple briefs and replies.

Mr. Clark noted that the current version of the attorney fee rules was adopted in June 2002. It was his recollection that the Committee discussed whether to provide more structure in the rules but ultimately decided to recommend a more general rule so that the Board could determine, after a conference call with the parties, whether briefs, discovery and/or a hearing were necessary based on the particular facts of each case. He suggested it would be helpful to review the Rules Committee minutes leading up to the adoption of the rule to see why the Committee took the approach it did in drafting the rule in a more general manner. Mr. Wein agreed that a conference call between the Board and the parties may be necessary to determine what is needed on a case-by-case basis.

Ms. Stares pointed out that the Department reviews each fee application to determine whether it will challenge the fee request or agree to it. If the Department decides that it will not challenge the fee application there may be no need for the filing of a brief by the applicant. However, she feels that the fee applications should be more detailed in order to assist in that initial determination. She also felt that the filing of briefs should only be ordered after the Department's initial response to the fee application.

Mr. Wein asked Ms. Stares whether she feels the fee applications should contain more detail regarding the factual basis for the claim or the legal basis. She stated that she would like to see more factual information, which she said is often sketchy. She noted that Judge Beckman addressed this issue in his concurring and dissenting opinion in *Friends of Lackawanna*, *supra*, 2018 EHB 401, 423. Judge Beckman agreed with the suggestion to schedule the filing of briefs

after the fee application and initial response have been filed. In his opinion, the determination of fees becomes difficult when the appellant has achieved partial success. In many cases, the billing statements submitted in support of the fee petition are very general, e.g., saying "research for summary judgment motion." When there are several issues on appeal and the appellant has achieved success on only one or a limited number of issues, it can be difficult to parse out what portion of the attorney fees and costs is related to the claim on which success has been achieved. Judge Beckman felt that the fee application should contain enough information that the Board can make a reasoned decision.

Judge Renwand agreed that the documentation provided in support of a fee application can at times be cursory. However, he stated, in fairness to the attorneys they were not thinking of the detail needed in a fee application when they were preparing their bills. He stated that he would like to see more structure in the rules; however, he felt that the rules should leave enough flexibility to the Board so as not to result in extensive litigation on the fee application itself.

In summary, Mr. Wein stated that the comments seemed to reflect a consensus that there should be more structure with regard to the early steps of the attorney fee application process but more flexibility after that. Mr. Clark agreed and recommended that the Committee look at the history of the current rules, while also taking into account the input of the judges based on their current experience.

Judge Labuskes suggested looking at the federal and state rules on attorney fee petitions. Ms. Stares related that she had recently taken a CLE course that addressed the handling of fee petitions by federal magistrates. She stated that fee petitions filed at the federal level can be quite numerous because of the number of federal statutes that allow for the reimbursement of costs and

attorney fees. She offered to look at the materials and report her findings to the Committee at the next meeting. Ms. Wesdock offered to look at the state rules.

Mr. Wein suggested that the Board rules should be revised to require a conference between the judge and attorneys early on in the process. Judge Labuskes agreed. Mr. Wein felt that requiring a conference also sends a message to the parties that they should prepare a comprehensive fee petition since it will be discussed at the conference. Mr. Clark added that a conference would be helpful in sorting out the issues and streamlining the process.

Mr. Delio noted that in the *Gerhart* case, the expert witness submitted a letter that itemized his work, but it was not verified nor in the form of an affidavit. Mr. Clark stated that the best way to ensure that the Board receives all the information it needs to make a decision is to discourage the submission of block-billing in support of fee petitions and to require more specific billing. Judge Beckman agreed but raised a concern that it might be difficult to articulate that requirement in a rule. He noted that the topic has been addressed in Board opinions. Mr. Hinerman cautioned that, in drafting such a rule, the Committee should be cognizant of terms that may have several meanings or that have been defined by the courts. Mr. Wein suggested that the rule should limit a fee petition to only those fees and costs related to the issues upon which a party has prevailed.

Next Meeting:

The next meeting of the Rules Committee is on March 12, 2020 at 10:30 a.m.

Adjournment:

On the motion of Ms. Stares, seconded by Mr. Bohan, the meeting was adjourned.