

**ENVIRONMENTAL HEARING BOARD
RULES COMMITTEE**

MINUTES OF MEETING OF NOVEMBER 9, 2017

Attendance:

The Environmental Hearing Board Rules Committee met on November 9, 2017 at 10:30 a.m. In attendance were the following members: Chairman Howard Wein and Jim Bohan, and participating by teleconference were Brian Clark, Gail Conner, Phil Hinerman and Matt Wolford. Attending on behalf of the Environmental Hearing Board were Judge Rick Mather and Assistant Counsel Mica Iddings and Eric Delio, and participating by teleconference were Chief Judge Tom Renwand, Judge Steve Beckman, Board Secretary Christine Walker, and Assistant Counsel Nikolina Smith and Maryanne Wesdock, who took the minutes. Lee Ann Murray attended on behalf of the DEP Citizens Advisory Council.

Minutes:

On the motion of Mr. Wolford, seconded by Ms. Conner, the minutes of the September 14, 2017 meeting were unanimously approved.

Rules Package 106-12:

Final rulemaking 106-12 was finalized and published in the Pennsylvania Bulletin on October 7, 2017. The updated rules have been posted on the Board's website and were circulated on the Pennsylvania Bar Association Environmental and Energy Law Section's listserv. The Pennsylvania Code will be updated in a few weeks.

Mediation:

Ms. Iddings reported on a Continuing Legal Education (CLE) program she attended on the PUC's mediation program. She reported that mediation is encouraged at the PUC, and the agency has two staff persons who are committed mediators. When a complaint is filed with the PUC, the

Chief Administrative Law Judge issues an Interim Order directing the parties to engage in a resolution conference. One of the staff mediators reaches out to the parties to see if they are interested in mediation. If so, the hearing schedule is put on hold. Because the cases can be on hold for quite some time, this may not be a step that the Board wishes to employ. Ms. Iddings reported that at this stage of the proceeding, the agency employs “facilitative mediation” which focuses on getting the parties to talk with each other, rather than a “judge-led settlement conference.”

Mr. Wein asked if parties involved in mediation are required to have an attorney. The answer is “no.” Ms. Iddings reported that the PUC finds mediation to be helpful for *pro se* parties, even if it is not ultimately successful in resolving the case, because it answers many of the *pro se* party’s questions.

Ms. Iddings also reported that the Office of Administrative Law Judges has a joint program with the Bureau of Human Services which provides pre-litigation mediation and allows for the resolution of issues before a complaint is filed.

Mr. Wein suggested that the Board allow a period of time at the beginning of an appeal when an unrepresented small corporation could seek to resolve the appeal without being required to obtain counsel. He felt that this time period was the window during which mediation could be beneficial. Judge Renwand raised the following question: Is taking part in mediation the practice of law? He noted that when a corporation is not represented by counsel at the beginning of an appeal, the Board generally does not *sua sponte* issue an order directing the corporation to get counsel. Rather, it is usually the Department of Environmental Protection or another party that raises the issue with the Board. Therefore, the Board’s decision to order a party to obtain counsel may be pushed by the actions of another party.

Judge Renwand also noted that a difference between the PUC's mediation program and the program proposed by Mr. Wein and Mr. Hinerman and the mediation committee is that the mediators in PUC cases are employed by the PUC, whereas the mediators in EHB cases would be private outside counsel.

The discussion turned to the issue of compensation for mediators in EHB cases. Because neither the EHB nor the DEP has funds in its budget for mediation, the cost would have to be borne by one of the other parties. Mr. Wein stated that he discussed the matter with Andy Hartzell, the Chairman of the Environmental and Energy Law Section, and asked whether the Section could seek authorization from PBA to apply for a foundation grant to pay for mediation. This issue will be discussed on Section Day, November 16, 2017. Mr. Hinerman will attend the Section Day meeting, as will Marty Siegel who is on the mediation committee. Mr. Wein has also reached out to some organizations about the possibility of obtaining a grant for the mediation program.

Mr. Wein spoke with Stacey Thomas at the Pennsylvania Bar Institute (PBI) about developing a one-day mediation program. The mediation committee's proposal is that attorneys must go through the PBI training in order to get on the list of approved mediators for Board proceedings. The training would be held live in Mechanicsburg with a satellite broadcast to Pittsburgh and Philadelphia. Ms. Thomas will get back to Mr. Wein with a proposal, including the cost of the training. It was suggested that grant money could cover the cost of attending the training.

Mr. Hinerman is drafting proposed documents related to the mediation program, including an Information/Fact Sheet and a proposed Agreement between the parties and the mediator. Mr. Wein suggested that the Board's Prehearing Order No. 1 would also need to be revised to allow for a period of time at the beginning of the appeal for mediation.

Judge Mather asked if the committee was looking for formal action on the part of the Board to authorize the mediation proposal. Mr. Wein and Mr. Hinerman responded “yes” and Mr. Hinerman summarized the Board’s role as follows: When an appeal is filed, the Board would 1) explain the mediation process and advise the parties of mediation as an option, and 2) provide the parties with the list of approved mediators. Judge Mather pointed out the Board’s staffing issues due to budgetary cuts. Mr. Wein stated that perhaps the Section could alleviate some of the administrative burden by appointing a Section member to act as facilitator for the mediation program, much like the procedure currently in place for the pro bono program. The Board will determine whether there is any administrative burden likely to result from the proposed mediation program.

Mr. Wein asked Ms. Iddings to elaborate on the two types of mediation. Ms. Iddings explained that there is facilitative mediation and valuative mediation. With the former, the mediator digs into the underlying issues and assists the parties in feeling positive about the process. Valuative mediation is similar to a judge-led settlement conference. The mediator points out the weaknesses in a party’s case and discusses the case in the context of the legal framework in which the case has been brought. Mr. Wein asked Ms. Iddings to circulate information on this topic which she obtained at the CLE program.

Judge Renwand thanked Mr. Wein, Mr. Hinerman and Ms. Iddings for their hard work on this subject. Mr. Hinerman and Mr. Wein intend to have draft documents prepared for the January 11, 2018 Rules Committee meeting.

Nunc Pro Tunc Appeals:

Mr. Bohan pointed out that the EHB Rule on *nunc pro tunc* appeals (1021.53a) discusses what the Board considers in granting an appeal *nunc pro tunc* but provides no direction on what

documents should be filed by the parties. Nor do the Board's rules on motions provide guidance. For example, a petition to appeal *nunc pro tunc* would likely fall into the "miscellaneous" category, yet Rule 1021.95 on "miscellaneous motions" does not require a verification. It was agreed that a verification should be required for a petition for *nunc pro tunc* appeal.

Judge Mather noted that the most common way that *nunc pro tunc* appeals are addressed at the Board is when an appeal is filed past the 30-day deadline, and the Department files a motion to dismiss the appeal. However, occasionally appellants will file petitions seeking leave to file their appeal *nunc pro tunc*, and Board Rule 1021.53a provides no guidance on whether the Department of Environmental Protection may file a response or the timeframe for doing so. If the Board receives a petition to appeal *nunc pro tunc*, should the Board address it with no input from the other parties?

Judge Mather summarized the information that a proposed rule should contain: What does a prospective appellant need to file in order to seek leave to appeal *nunc pro tunc*? Does the petition require a verification? Does the petition require a memorandum of law?

Judge Beckman stated that he was in favor of a rule providing more guidance, but he raised the question of whether such a rule would encourage the filing of more petitions to appeal *nunc pro tunc* and whether the Board wants to send such a message.

Mr. Bohan agreed to consider the topic and draft a proposed rule if it makes sense to do so.

Adjournment:

On the motion of Mr. Bohan, seconded by Mr. Wolford, the meeting was adjourned at 11:55 a.m.

Next Meeting:

The next meeting of the Rules Committee is scheduled for January 11, 2018.