ENVIRONMENTAL HEARING BOARD RULES COMMITTEE

Minutes of Meeting of September 10, 2020

Attendance:

The Environmental Hearing Board Rules Committee met by WebEx videoconference on Thursday, September 10, 2020 at 10:30 a.m. Rules Committee Chairman Howard Wein presided. The following Rules Committee members participated in the meeting: Brian Clark, Tom Duncan, Phil Hinerman, Jean Mosites, Diana Stares and Matt Wolford. Attending on behalf of the Environmental Hearing Board were Chief Judge Tom Renwand, Assistant Counsel Eric Delio, Assistant Counsel Alisha Hilfinger, Board Secretary Christine Walker and Senior Counsel Maryanne Wesdock, who took the minutes.

Minutes of Meeting of May 14, 2020:

Mr. Wein noted a correction to the minutes of the meeting of May 14, 2020. In the discussion regarding holding hearings by videoconference, the reference to Microsoft "Team" was corrected to "Teams." With that correction, on the motion of Mr. Clark, seconded by Ms. Mosites, the minutes were approved.

Rules Package 106-13:

Ms. Wesdock reported on the status of EHB Rules Package 106-13. The Office of General Counsel (OGC) contacted the Board in early July 2020 with suggested revisions, comments and questions. The Board responded on July 20, 2020. Ms. Wesdock will take part in a phone call with the OGC attorney assigned to the Board on September 14, 2020 to further discuss the questions and comments.[1]

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[1] The rules package was approved by OGC and the Office of the Attorney General and will be submitted to the legislative committees, IRRC and the Legislative Reference Bureau at the beginning of the new legislative session in late January or early February 2021.

<u>Update on Holding Hearings by Video</u>:

Judge Renwand provided an update on the Board's scheduling of hearings while the Covid-19 restrictions are in place. Judge Coleman has two hearings scheduled: one in late September and the other in November. Judge Labuskes has a hearing scheduled in early October. All of the hearings are scheduled to be held by videoconference on WebEx. Mr. Delio reported that practice sessions have been scheduled in all of the cases.

Mr. Delio explained that the public will be able to view the hearings via livestreaming on YouTube. He opined that livestreaming may attract more members of the public than an in-person hearing since viewing the hearing on YouTube presents no geographic impediment. He also suggested that attorneys with upcoming hearings might want to view the proceedings to get a better understanding of how the process will work. Ms. Mosites asked whether those viewing on YouTube will see all of the presenters; Mr. Delio explained that those viewing the proceedings on YouTube will see the current speaker in a large box and other presenters in smaller boxes.

Board Secretary Christine Walker will act as host for the WebEx hearing and can handle the technical end of the proceeding. A question was raised regarding the handling of exhibits. Mr. Delio reported that the parties in Judge Labuskes' upcoming hearing are planning to distribute hard copies of exhibits ahead of time, rather than presenting them on screen. Exhibits will be viewed onscreen only for annotation purposes. He also reported that the attorneys are planning to be in the same room as their witnesses during the proceeding.

Ms. Wesdock stated that the Disciplinary Board has issued a protocol for holding hearings and oral arguments on WebEx, and the Board is hoping to incorporate some of the guidance into its protocol. The guidance includes instructions for use of WebEx.

Mr. Wein asked whether in-person hearings could be held in one of the local courtrooms. Judge Renwand noted that, although smaller counties are holding some in-person proceedings, the Allegheny County Court of Common Pleas has postponed in-person hearings until at least January 2021.

Judge Renwand was asked whether the Board plans to install plexiglass barriers in its courtrooms. He stated that the Board is looking into it. However, if the ventilation system in the courtroom is poor, plexiglass will provide little protection. He stated that it will be a while before the Board plans to hold in-person hearings; in making this determination, the Board will be guided by the most current science on the subject.

Limited Pro Se Representation for Partnerships and Corporations:

Mr. Delio reported that the Civil Procedural Rules Committee of the Pennsylvania Supreme Court is seeking comments on a proposed rule that would allow limited *pro se* representation for partnerships, corporations and similar entities. The proposal would allow *pro se* representation under certain circumstances in cases commenced before the minor judiciary, which would include the Philadelphia Municipal Court and Magisterial District Courts, and would allow the *pro se* representation to continue through an appeal to the court of common pleas. *Pro se* representation would terminate at the end of the common pleas matter, and the corporation or other entity would be required to obtain counsel for any proceedings before the appellate courts. Mr. Delio suggested that if the proposal is adopted as a rule, the EHB Rules Committee may want to consider whether the Board's rule on representation, 25 Pa. Code § 1021.21, should be revised to allow for similar representation.

Mr. Duncan advised the group that a few years ago the PBA Environmental and Energy Law Section (Section) examined a similar question. The Section asked the Unauthorized Practice

of Law Committee (Unauthorized Practice Committee) for an opinion on whether corporations could be permitted *pro se* representation in limited circumstances in matters before the Environmental Hearing Board. The Committee concluded that it would constitute the unauthorized practice of law. Mr. Duncan felt that if the proposed rule change were adopted, it would present an exception to the opinion of the Unauthorized Practice Committee.

Mr. Hinerman stated that the Unauthorized Practice Committee is likely to weigh in on the proposed rule change. He also noted that current Board practice allows a partner to represent the interests of the partnership without requiring an attorney. Mr. Wein agreed and noted that non-Board case law had evolved to that view.

Mr. Wein expressed the opinion that the Environmental Hearing Board should be viewed at the same level as a court of common pleas, not as an entity subsidiary to it. Ms. Stares agreed. Because practice before the Board is complex, she felt that expanding the list of who may appear *pro se* would be a mistake. Even if the proposed rule change passes, she does not recommend expanding it to the Board. Mr. Wein agreed and noted that many of the Board's rules have had to be drafted in such a way as to accommodate *pro se* appellants. He agreed with Mr. Clark's often-quoted observation that in many cases 90% of the discussion is expended on addressing problems encountered by *pro se* appellants.

Mr. Duncan felt that allowing some limited representation by corporate parties might be worth considering. As Chair of the PBA Environmental and Energy Law Section's *Pro Bono* Committee, he frequently communicates with *pro se* appellants. He stated that even though the Section has eased the financial threshold to qualify for *pro bono* representation, there are many

parties who fall above the threshold yet cannot afford an attorney.[2] He felt that it would be worthwhile for the Rules Committee to consider this issue.

Mr. Wein felt it would be helpful for the EHB Rules Committee to review the comments submitted to the Civil Procedural Rules Committee when they are available.

Attorney's Fees and Costs:

The Rules Committee continued its discussion of proposed revisions to the Board's rules on attorney fees and costs, including the review and discussion of proposed revisions circulated by Ms. Stares prior to the May 14, 2020 meeting.[3] The Committee summarized the items on which agreement was reached at the May 14 meeting:

1) Applicants and respondents should not file a memorandum of law or brief unless directed to do so by the Board. The language of 25 Pa. Code §§ 1021.91(g) and (e) should be incorporated.
2) A comment should be added to Rule 182 that includes a reference to the Board's decision in *Friends of Lackawanna v. DEP*, 2018 EHB 401, or to the section of the Board's Practice and Procedure Manual where *Friends of Lackawanna* is discussed.
3) Language was agreed to for Rule 182(b)(2).[4]

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[2] For individuals to qualify for *pro bono* representation, the financial threshold was raised from 125% of the federal poverty level to 200% of the federal poverty level. For corporations to qualify for *pro bono* representation, they cannot be owned by more than three people, and each person must be below 300% of the federal poverty level.

[3] References to "Rule __" in this section are to the proposed rules circulated by Ms. Stares prior to the May 14, 2020 meeting.

[4] The language agreed to for Rule 182(b)(2) was 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."

4) A conference should be held following the filing of a fee petition.

Ms. Stares did not believe closure was reached on the question of whether an affidavit or verification should be submitted and who should sign it. Mr. Hinerman recommended that the rule simply say that the application must be verified. Ms. Stares stated that the Board has always required an affidavit. Judge Renwand stated that it did not matter to him whether an affidavit or a verification is filed with the petition, the more important question was who should sign it. Mr. Hinerman felt that the client should sign the document. Judge Renwand stated that the practice of having the client sign the affidavit or verification developed with the filing of complaints in actions before the court of common pleas, but he felt that the procedure was not comparable to an attorney fee petition filed with the Board. He felt that the attorney should verify that the work set forth in the bill was actually performed and is recoverable under applicable law.

Mr. Hinerman expressed concern over having the attorney verify that the fees and costs are reasonable and recoverable; if the Board finds that the fees are not reasonable or recoverable, does that mean that the attorney has violated his oath? Judge Renwand stated that the attorney is simply verifying that the work was actually done and is recoverable. Mr. Hinerman questioned how a verification stating "I billed reasonably" helps the Board. Judge Renwand responded that the verification should state, "I billed x number of hours and they are recoverable under the applicable statute." Judge Renwand stated that he would like guidance from the attorney on what is recoverable, rather than the Board having to sort through the billing. He felt that the rules should make the process simple and should make the applicant responsible for clarifying what fees are recoverable. He felt that this requirement would make petitions more specific.

Judge Renwand stated that if a client were deposed about the billing, she would not be able to provide any insight. Mr. Hinerman raised a concern that it could lead to discovery being directed

to attorneys. Mr. Wein recommended that one way to avoid this problem was to have the affidavit or verification state, "This is based on my opinion."

Mr. Wein asked whether the Board has seen petitions that were not consistent with an applicable statute. Mr. Delio responded that he has seen petitions filed in actions involving the Sewage Facilities Act where the applicant has tried to recover attorney fees and costs under the Clean Streams Law. In some cases, it appears that there is no basis for filing the fee petition but the attorney believes it may be worth attempting it.

Mr. Delio stated that the Board's concern is that there is ambiguity in the rule – should an affidavit or verification be filed, and who should sign it? Mr. Clark asked who has signed the affidavit or verification historically. Mr. Delio responded that in most cases, the attorney signs the affidavit and the client signs the verification. Mr. Clark recommended that the affidavit state, "This is the work I performed and I attest to the accuracy of the billing." Judge Renwand agreed with Mr. Clark's recommendation and said he would check with the other judges.

Mr. Hinerman raised a concern that if the affidavit states a legal opinion the attorney could be committing an ethical violation. Ms. Mosites recommended that the affidavit state, "I billed $x for these issues." She felt that it provides more substance than simply saying, "I billed $x" but does not contain a legal opinion. Mr. Hinerman agreed with Ms. Mosites' recommendation. Mr. Wein felt that the rule should specifically state what language should be set forth in the affidavit. Mr. Duncan agreed; he felt that this would avoid the Department being put in the position of having to argue that the affidavit was not sufficiently supported. Ms. Stares agreed; she felt that the affidavit was simply a verification from the lawyer.

Ms. Mosites raised a concern with the language in Rule 182(b)(3) reading "in connection with the party's participation in the proceeding." She recommended narrowing it to "in connection with the issues on which the party prevailed." Ms. Stares was in agreement.

Mr. Wein stated that there still remained the question of who should be the affiant. Ms. Mosites stated that she did not believe the attorney should sign an affidavit for the expert witness' bill; she felt it should be signed by the expert witness. Ms. Stares agreed. Mr. Hinerman expressed a concern that if the expert witness is required to sign an affidavit regarding his billing, he is going to bill for it. Ms. Stares stated that she understood Mr. Hinerman's concern but the rule states that the expert fees must be verified, and if the expert does not verify the bill then the lawyer needs to do it. Mr. Hinerman stated that he had no problem with the lawyer verifying the expert witness' bill.

The discussion returned to the question of whether an affidavit should be required, or a verification. Mr. Delio stated that he had no strong feelings either way. He also had no preference on who should sign it. He simply wants the rule to be clear in order to avoid unnecessary fights over it. Judge Renwand stated that he had no preference either. Mr. Wein suggested that these issues could be addressed in the conference. Ms. Stares disagreed, stating that any issues over billing should be addressed in an evidentiary hearing. Her understanding of the conference is to get the parties together to discuss how to proceed, not to argue over evidentiary issues. In her opinion, substantive issues should not be resolved at the conference, but in an evidentiary hearing. Judge Renwand raised the following question: If substantive issues can be resolved at the conference, doesn't it make more sense to do so and thereby avoid having to go through discovery, the filing of briefs and the expense of an evidentiary hearing? Ms. Stares stated that she does not believe the conference should be used for persuasion; she believes that is the role of an evidentiary

hearing. Mr. Delio agreed with Ms. Stares; in his experience, the Board has only scheduled an evidentiary hearing in catalyst cases where there has been no adjudication. He felt the conference should be used for discussing issues such as whether and when the parties should file briefs. Mr. Wein recommended revising Rule 184(c) to add "the process by which" after "determine." This clarifies that the conference is intended to address procedural, and not substantive, issues.

Mr. Hinerman felt there was a conflict between subsection (b) of Rule 184, stating that the parties have a right to conduct discovery, and subsection (c) of Rule 184, stating that one purpose of the conference is to discuss whether there will be discovery. Ms. Stares stated her opinion that parties do have a right to conduct discovery and one purpose of the conference is to discuss the timeline for conducting discovery. She also stated that it was her belief that the parties have a right to an evidentiary hearing if they believe it is necessary. Ms. Wesdock suggested revising subsection (c) to replace "whether discovery will be conducted" with "the timeline for conducting discovery." However, Mr. Delio stated that in some cases the parties do not want discovery. Ms. Mosites pointed out that the word "whether" appears four times in Rule 184(c). She suggested deleting "whether" and adding "to determine the process and deadlines to address discovery and an evidentiary hearing…" Mr. Duncan suggested adding a provision clarifying that nothing in the rule prevents the judge from discussing other issues at the conference. Ms. Stares agreed and suggested adding "any other relevant issues" to the language proposed by Ms. Mosites. Ms. Mosites suggested substituting the following language: "any other issues the Board would like to address." Subsection (c) also refers to "each authorized step," and Ms. Mosites suggested deleting the word "authorized."

There was general agreement with the proposed language of Rule 182(d).

The proposed language of Note (Comment) 2 to Rule 182 would state that the Board discourages block billing. Mr. Hinerman disagreed with this proposal, stating that 90% of firms use block billing. He recommended deleting the word "discourage" and substituting the following language: ". . .the Board encourages the submission of records showing discrete tasks and time spent on the task." Mr. Clark felt that the word "discourage" should not be eliminated. He also felt that Note (Comment) 1 should state, "The Board *strongly* encourages all fee applicants. . ." He agreed to the Board allowing minor pieces of block billing but felt it was important to discourage it as a general practice in support of a fee application. Mr. Hinerman felt that block billing should not be prohibited since there are disagreements over what constitutes block billing.

Ms. Wesdock stated that, in the past, when the Board has tried to include substantive language in a comment, there is often pushback from the Independent Regulatory Review Commission (IRRC). It prefers that such language be included in the rule itself. To avoid a problem with IRRC, Mr. Clark suggested including a detailed explanation in the rules package as to why the Rules Committee recommended the comments. Ms. Stares stated that the language of Note (Comment) 1 could be included in Rule 182(b)(4). A discussion ensued on whether a fee application should contain evidence to support that an attorney's fees are reasonable. It was agreed that this evidence is not needed in every case, but only if it is likely to be questioned. Mr. Wein suggested keeping Note (Comment) 1 to see if it is acceptable to IRRC.

Mr. Clark noted that the title for Rule 191 reads "Fees and Costs" yet the text of the rule reverses the words to "costs and fees." He recommended that the title and text be consistent. Mr. Delio noted that Rule 182 uses the phrase "costs and fees."

Mr. Wein asked whether the Committee agreed with the use of the word "right" in Rule 182(a) and (b), i.e., a "right" to discovery and a "right" to an evidentiary hearing. Ms. Stares felt that parties do have a due process right to discovery and an evidentiary hearing on a fee application.

There was general agreement with regard to subsections (d) and (e) of Rule 184.

In Rule 182(a), Mr. Wein suggested changing "If statutorily allowed" to "If statutorily authorized." Ms. Stares and Mr. Wolford expressed agreement.

When Ms. Wesdock circulates a draft of the minutes, she will also circulate a new draft of the proposed rule changes agreed to at the May 14 and September 10 meetings.

Next Meeting:

The next meeting of the Rules Committee will be on November 12, 2020 at 10:30 a.m.

Adjournment:

On the motion of Mr. Clark, seconded by Mr. Hinerman, the meeting adjourned at 12:35 p.m.