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Original: 2121

Hon. William T. Phillipy, IV
Secretary to the Pennsylvania Environmental Hearing Board
2nd Floor, Rachel Carson State Office Building
Harrisburg, PA 17105-8457

Re: Proposed Rulemaking

Dear Mr. Phillipy:

I am writing to provide comment on the Proposed Rulemaking which appeared in the June 3, 2000 Pennsylvania Bulletin.

Pro Bono Representation.

1. I question why the pro bono program is limited to pro se litigants. Organizations may not be able to afford lawyers either, and may qualify for pro bono representation under any reasonable financial test. Because organizations are required by rule to be represented by counsel, their need for adequate representation is even more acute than is the need of some pro se litigants.

2. Does a candidate for pro bono representation need to be a party before a referral can be made? As drafted, the Secretary would not be authorized to refer a non-party to a lawyer referral service. If a legitimate inquiry is made of the Secretary by an individual asking "how do I appeal this action, I can't afford a lawyer?", shouldn't the Secretary be allowed to refer the inquirer to a qualified attorney referral service?

3. Is it sufficient that the party merely "claim not to be able to afford a lawyer?" When referral is made to the Bar Association, the applicant must submit information demonstrating that it meets certain economic qualifications. What qualifications will be applied if the referral is made to a Board prepared list of attorneys? In that case shouldn't there at least be a requirement of "demonstrated need?"

4. Subsection (a)(3) should be revised as follows: ". . . who have volunteered to accept such assignments." Since the list is prepared in advance of any specific

request, it is inappropriate to state that the attorneys on the list have volunteered to "take on the assignment."

5. The idea of referring the party to a specific attorney from a list puts the Secretary in an awkward position. It would be better for the Board to refer a party to a referral service, such as the Pennsylvania Bar Association or the County Bar Association. Those organizations will not only screen the applicant for financial eligibility, but will also work with the applicant to find an attorney willing to accept the particular assignment. If the Board is intent on preparing its own list, I would strongly urge that the rule require the Secretary to provide the full list to the applicant, rather than to have the Secretary provide only one name. As happens so often, an attorney or law firm willing to undertake pro bono representation generally, finds itself unable to accept a particular assignment because of conflicts of interest. If the Secretary has to wait for each attorney on the list to clear conflicts before making a referral, the process will be delayed and the Secretary will find himself embroiled in activities best left to the litigant and counsel to resolve. I therefore suggest that (a)(3) either be deleted or that it be reworded to read: "The list of attorneys registered with the Board as pro bono counsel under section (b) hereof, in which case the party shall be responsible for arranging with one of the attorneys on the list to undertake its representation."

6. If the Board is to prepare a list of referral attorneys, the rule should provide for periodic purging, such as the Bar Association referral services do. One is normally put on such lists for a period of one or two years and then a new list is prepared (or the attorney is asked whether she wants to continue).

7. The language of (b) is awkward. I suggest: "The Secretary is authorized, but not required, to prepare an annual list of qualified attorneys willing to undertake pro bono representation of parties appearing before the Board. . . ."

Substitution of Parties

1. The word "election" is ambiguous since it can mean "choice" as well as election to public office. I assume the latter is the intended meaning and therefore suggest the phrase "election to office" be substituted.

2. The last sentence of subsection (b) is confusing. What does it mean that both the original appellant and the substituted appellant must "meet the conditions of 1021.53?" Does this mean that they must both discover facts through discovery under 1021(b)(1)? What if there were no depositions prior to the substitution and therefore the original appellant could not meet that "condition?" I think the limited intent of this sentence was probably focused on a substituted party claiming under 1021.53(b)(2) that it could not have "discovered facts" prior to becoming a party. I therefore suggest that the reference in the last sentence of this regulation be to 1021.53(b)(2) only, and not to all of 1021.53.

Hearing Examiners

1. I suggest that the word "appoint" in the first line of 1021.99(a) be replaced with the word "assign." Under the Hearing Board Act, the qualifications of Hearing Examiners are very specifically spelled out. They must meet specific experience qualifications, must be civil service employees (35 P.S. 7513(f)), and can hold no other employment (35 P.S. 7513(b)). While the Board was obviously informed of these requirements in proposing a rule to specify the duties of hearing examiners, the use of the word "appoint," to an outsider, suggests that part-time, non-qualified persons could be chosen for a particular assignment.

2. The use of the phrase "dispose of procedural matters" in subsection (4) is too broad. I assume that the phrase was not intended to encompass deciding dispositive motions, albeit such motions may be based upon a procedural flaw in the appeal. The vagueness created by the language suggests it be clarified or deleted. I think the scope of the duties would be clearer if this phrase was merely deleted from the subsection.

Thank you for the opportunity to provide comment on the proposed rulemaking. I laud the Board for its initiatives, especially in the pro bono area.

Sincerely,

John W. Carroll