

BWC Board of Directors

**GOVERNANCE COMMITTEE**

**THURSDAY, January 22, 2009, 9:00 A.M.**

**William Green Building**

30 West Spring Street, 2nd Floor (Mezzanine)

Columbus, OH 43215

Members Present: Alison Falls, Chair  
Larry Price, Vice Chair  
James Hummel  
Bill Lhota  
Thomas Pitts

Member Absent: None

Other Directors Present: David Caldwell  
Ken Haffey  
James Harris  
Robert Smith

Counsel Present: John Williams, Assistant Attorney General

**CALL TO ORDER**

Ms. Falls called the meeting to order at 9:00 a.m. and the roll call was taken.

**MINUTES OF NOVEMBER 20, 2008**

Mr. Lhota moved that the minutes of November 20, 2008, be approved. Mr. Hummel seconded and the minutes were approved by unanimous roll call vote.

**AGENDA CHANGES**

Ms. Falls requested that she add a discussion item on consistency in motion formats and in roll call procedures.

## **NEW BUSINESS/ACTION ITEMS**

### **RULE APPROVAL PROCESS**

Donald Berno, Board Liaison, and Tom Sico, Assistant General Counsel, reported on the Ohio Administrative Code Rule approval process. Mr. Sico reported that BWC has 80 pages of rules, except for the safety rules, but has fewer than the Ohio Lottery Commission (99) or the Ohio Department of Jobs and Family Services (1000s). Mr. Sico discussed rule types and presented charts on rule making. The Administrator has the rule-making authority, and Workers' Compensation Board has the responsibility of advice and consent to the Administrator. There are four categories of rules for presentation to the Workers' Compensation Board: rules subject to the five-year rule review; rules required by recent legislation and case law; rules to implement management decisions; and rules to follow changes in federal programs. Most rules require approval through the Joint Commission on Agency Rule Review (JCARR). However, rate rules are exempt under Ohio Revised Code §111.15 and become effective on filing by BWC.

As described in the Legal Division report, "The Rule-Making Process," rules and changes originate in BWC operational departments. Public input is required through prescribed hearings, but BWC solicits input earlier through stakeholder groups and workgroups. Mr. Sico cautioned that JCARR can only recommend disapproval of a rule by the General Assembly. Because an agency cannot re-submit a rejected rule during the same term as the General Assembly, an agency will usually withdraw the rule if it senses that JCARR will reject the recommended changes.

Mr. Hummel asked how long had there been a requirement of a five-year review. Mr. Sico replied that it had been required by the General Assembly since 1995. Mr. Hummel asked how BWC decided which rules to review. Mr. Sico replied that, initially, the legislation required review of one-fifth of an agency's rules for five years. Now, agencies review their rules five years after their last review. Mr. Hummel asked if BWC had any approval issues. Mr. Sico replied that nine of ten rules are submitted without any problems. An example of a problematic one was the controversy in the provider fee schedule because rehabilitation providers argued that the rules were based on the wrong section of the Ohio Revised Code. BWC withdrew the rule and refiled it without rehabilitation ICD codes on reimbursements. For the other providers, the rule is effective on February 15, 2009, instead of January 1, 2009 as originally intended.

Mr. Lhota asked if withdrawal of a rule leads to litigation. Marsha Ryan, BWC Administrator, replied that removal of rehabilitation providers from the rule decreased the likelihood of litigation.

Ms. Falls asked what was the impact of withdrawal and refiling on the requirement of Workers' Compensation Board to advise and consent to rules and should the Workers' Compensation Board approve the revised rule. Robert Coury, Chief, Medical Services and Compliance, asked the Legal Division to review the need for the Workers' Compensation Board to offer advice and consent on rules revised after initial approval of the Workers' Compensation Board. Mr. Price, Mr. Pitts, and Ms. Falls each supported what staff did in withdrawal and submission. Mr. Sico replied that BWC did notify Workers' Compensation Board of its actions and affirmed that Legal will examine the process.

In light of withdrawal of the rehabilitation provider portion, Mr. Lhota asked about the BWC authority for BWC to pay these providers. Mr. Coury replied that BWC would follow the status quo of paying fees in accordance with BWC policy. BWC may be open to suit, but there is no threat of one.

Mr. Pitts asked if the JCARR position was to do a carve-out of rehabilitation providers. Mr. Coury replied that JCARR did not direct withdrawal, but the position of rehabilitation providers' association and feedback from JCARR convinced BWC to withdraw.

Ms. Falls requested that "The Rule-Making Process" be revised to add which committee consider which types of rules and the documentation of the rules approval process.

## **RULE REVIEW CALENDAR**

Mr. Berno reported on the new process for conducting the five year review. BWC has created a rules review and process team consisting of four attorneys, Peggy Concilla, Workers' Compensation Council Liaison, and himself. James Barnes, Chief Counsel, and Mr. Sico also attend. Craig Mayton, Legal Counsel, is the committee head. The team has met three times and created a spread-sheet on presenting rules to the Workers' Compensation Board for approval. Mr. Berno then described highlights of the spreadsheet.

Mr. Berno then reviewed a process chart for rules. Currently, BWC staff review the rules, seek stakeholder input, and then distribute them to the Workers' Compensation Board. Then the rules have a first and second reading on consecutive months before committees before submission to the Workers' Compensation Board. BWC proposes adding "volunteer" directors to the staff review and the stakeholder stages to add board perspective to rules before distribution. Also, BWC proposes adding additional meetings of the Governance Committee to process the back-log of rule reviews from prior years.

Mr. Price asked about the process for waiving the second reading and approving the final rule at the first reading. Mr. Berno stated it should probably be a provision in the Governing Guidelines. A waiver can be made by simple majority or by unanimous consent. Mr. Smith suggested a flexible procedure, whereas Mr. Price suggested a consistent one. Mr. Lhota asked if the additional meeting shall be a public one and Mr. Berno replied the meeting would be public.

Ms. Falls reported that there is a large back-log of rules scheduled for the five-year rule review in 2008, so there will be a need for a two to three hour meeting in March to catch-up.

Mr. Harris stated that he believed it was important that the Workers' Compensation Board should make a great effort to review rules and remove the back-log as an issue. Mr. Price cautioned that review of these rules could be perceived to be mundane and tedious; however, it is the duty of the Workers' Compensation Board to advise and consent to the rules.

Mr. Barnes stated that if the Workers' Compensation Board were to follow the proposed schedule, that it would almost complete the rules review by May. Ms. Falls replied that because of other items on the Governance agenda in April and May, there is the need for additional meetings so the five year rules review could be completed in a timely fashion.

Mr. Lhota asked if the presence of one director rendered the staff review into a public meeting. Assistant Attorney General John Williams replied that the presence of one director or two directors did not create a public meeting. However, three directors would be a quorum. Mr. Barnes also cautioned against telephone contacts between directors because that may create the perception of avoiding the open meetings law. Mr. Williams advised that the report to the directors should be in a public meeting.

Ms. Falls asked if the rule review should be presented to the Workers' Compensation Board by staff, with comments by the volunteer director as the director felt appropriate. Mr. Hummel, Mr. Caldwell, and Mr. Smith supported that proposal.

Mr. Lhota recommended that the volunteer director should not generally be asked to review more than one set of rules. Mr. Price supported that proposal. Mr. Harris added that the director should attend the stakeholders' sessions solely as an observer.

Ms. Falls solicited volunteers for various sets of rules. Mr. Caldwell volunteered to work on safety rules concerning metal casting and steel making. Mr. Pitts volunteered for rules on injured workers and rehabilitation.

Ms. Falls asked to what extent BWC should incorporate regulations of the Occupational Safety and Healthy Administration (OSHA) and other federal programs. Mr. Caldwell reported that this issue had been the subject of many past debates. OSHA mandates that the employer has a general duty of maintaining a safe workplace. This is distinct from the notion of a specific safety requirement.

Mr. Pitts reported that the Ohio law requires specific safety rules and never a general requirement of a safe workplace. If BWC were to use OSHA regulations, then Ohio would be relying on federal officials to write a standard. Mr. Price stated that BWC should not be redundant with OSHA. Mr. Caldwell added that OSHA duplicates some safety rules, but not all. Mr. Haffey stated that the presentation to the Workers' Compensation Board at the Ohio Center of Occupational Safety and Health (OCOSH) made it very clear that blanket absorption of OSHA rules was unworkable.

Ms. Falls asked about the application of the governor's executive order to reduce the number of agency rules. Mr. Pitts replied that the enabling law for safety rules was in the Ohio Constitution, which created a higher hurdle to changing the Ohio Revised Code. Mr. Harris reported that since 1975 he was a strong proponent of adopting OSHA rules for Ohio safety rules. However, he understood from the beginning that the only reason for the Ohio safety rules was to provide for a safety award. Mr. Hummel responded that as an employer he is neutral because his companies must use OSHA. Ms. Falls asked who is exempt from OSHA. Mr. Berno replied that any public employer would be exempt.

## **DISCUSSION ITEMS**

### **CALENDAR**

Ms. Falls stated that the next step will be to meet with Mr. Price and Mr. Berno and revise committee calendars for review at the February meeting. Mr. Price asked if departments will be able to lump together all "no change" rules for approval. Mr. Berno stated BWC will do that in the executive summaries for rule changes.

Mr. Lhota asked when the February meeting would begin. Ms. Falls replied it should begin at 8:00 am.

## **ADMINISTRATOR REPORT ON LEADERSHIP DEVELOPMENT ACTIVITIES**

Ms. Ryan reported on a leadership development seminar conducted for senior staff on January 7 and 8 in the William Green Building. BWC agency goals include approval of the fiscal year 2010 and 2011 budgets, aligning agency goals, and enhancement of leadership of the senior team. The State of Ohio has few tools for enhancement because of salary freezes and the absence of salary bonuses. The seminar was conducted by Paul Otte, former president of Franklin University, and covered leadership actions and theory. Ms. Ryan reported that the seminar was very valuable. Mr. Haffey, Mr. Harris, and Mr. Smith each supported the seminar as a necessary and important management activity.

Mr. Lhota asked if Ms. Ryan had shared the seminar with other agencies to attain the additional recognition that BWC got with Kaizen. Ms. Ryan reported she had not shared because of the reduction in dollars for all agencies, which result in less training.

Ms. Falls asked for a list of those who had attended the seminar. She also asked what the key openings at BWC were. Ms. Ryan replied that BWC needs to hire a new chief of Communication to replace Keary McCarthy and a superintendent of Safety and Hygiene. She has elected not to retain a chief of staff.

## **PROCEDURAL CONSISTENCY**

Mr. Berno reported that after research in Robert's Rules of Order and other sources, there is no one way to conduct a roll call vote. The Ohio pension boards use Robert's Rules on adjournment by voice vote. Another method is that if there is a motion to adjourn and a second, the chair can adjourn if she has a sense that the majority agrees. If the chair hears an objection, the chair can still adjourn. Mr. Price reported that if there is an objection, then the chair can still adjourn because the majority rules.

Ms. Falls reported that it makes sense to follow the lead of Mr. Lhota in chairing the Workers' Compensation Board. Adjournment is taken after a motion, second, and roll call vote.

Mr. Lhota stated he thought there should be a roll call vote to adopt the meeting agenda. Ms. Falls requested that this be included in future agendas.

Ms. Falls asked what consistent procedures should be used in presenting motions to the Workers' Compensation Board. Mr. Price replied that the motion should include language that the committee has approved and recommended a motion, not just the committee chair. Mr. Lhota asked what if the committee chair voted

against the motion he is presenting. Mr. Price replied the chair must recommend the motion, but retains his right to vote against it at the Workers' Compensation Board meeting.

Ms. Falls requested these changes be incorporated in the Governance Guidelines.

### **ADJOURNMENT**

There was a motion by Mr. Pitts and second by Mr. Lhota to adjourn. The motion was approved by unanimous roll call vote.

Prepared by: Larry Rhodebeck, Staff Counsel  
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January 29, 2009