



**JAMES KLEISSLER AND RYAN D.
TALBOTT**

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and PENNSYLVANIA
GENERAL ENERGY CORPORATION,
Permittee**

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EHB Docket No. 2001-295-L

Issued: July 9, 2002

**OPINION AND ORDER
ON MOTION IN LIMINE**

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Board refuses a request to preclude the use of an expert report that was filed after the applicable deadline. Preclusion would be too severe under the circumstances.

OPINION

The parties in this appeal were required by Board order to serve their expert reports and responses to expert interrogatories on or before May 13, 2002. On May 13, the Department of Environmental Protection (the “Department”) submitted a “scope of work” that was prepared by one of its proposed experts. The “scope of work” does not set forth any conclusions. It simply states that an aquatic biology investigation will be conducted and describes some of the protocols that will be followed in performing the investigation. The “scope of work” cannot fairly be characterized as an expert report.

On May 17, 2002, the Department responded to expert interrogatories by, among other



things, identifying its proposed expert. The Department acknowledged that its expert report was incomplete, and it indicated that the full report would be served on or before June 6. The Department did not request an extension to file its expert discovery responses from this Board. There is no indication that it sought the other parties' concurrence in a late filing. It did not request an extension of any other prehearing deadlines as a result of its decision to file a late report.

The Department did not serve its expert report until June 20. The Permittee, Pennsylvania General Energy Corporation ("PGE"), immediately filed what it captioned a motion in limine.¹ PGE argues that it was prejudiced by the Department's service of the expert report two working days before the deadline for filing dispositive motions. It asserts that it had prepared its rather extensive summary judgment materials based upon the assumption that the Department did not intend to produce an expert report. It has asked this Board to preclude the introduction into evidence or any other use of the late expert report. It has also requested an opportunity to present oral argument in support of its motion.

In opposition to the motion in limine, the Department offered that it provided a "scope of work" and identified its expert by the deadline. It explained that a report would be forthcoming in its responses to interrogatories. It telephoned PGE on June 18 to describe the conclusions set forth in the forthcoming report. It noted that PGE could have objected to the late filing earlier or sought an extension of the dispositive motion deadline. PGE's experts and the Department's expert "were in the field conducting their field work at some of the same times." (Response ¶ 12.) The Department argues that PGE could not have been prejudiced in the preparation of its dispositive motion in light of these disclosures. Certainly, PGE should not have assumed that

¹ In that the motion relates to a violation of the discovery rules, the motion might more appropriately have been captioned as a motion for sanctions.



there would be no expert report.

The third-party appellants, James Kleissler and Ryan Talbot, have weighed in in support of one of their opponents in the case--the Department. Among other things, they suggest that parties on the same side of the case should not be able to claim prejudice as a result of each other's discovery abuses. They add that they would be severely prejudiced if the Board excluded the report because they do not have any experts of their own and they intend to rely heavily on the Department's expert. They argue that the sanction sought by PGE is too severe. Finally, they maintain that the true reason for PGE's motion is PGE's unhappiness with the conclusions in the report, not any prejudice suffered in preparing its motion for summary judgment.

We note that the parties telephoned the Board several weeks ago seeking clarification on whether Department employees must submit expert reports. There apparently has been some confusion regarding this issue of late but we fail to see why. If a Departmental employee is intended to be tendered as an expert witness, the rules of discovery regarding experts apply to that employee. We advised the parties accordingly. No party, however, has referenced that communication in connection with the motion in limine. Thus, it does not appear that any confusion that may have existed gave rise to the Department's late service of the report.

The Board has an independent interest in maintaining the integrity of the litigation process and respect for the Board by enforcing compliance with its orders and its rules. If a party's violations of those orders and rules interferes with the Board's ability to conduct orderly, efficient, and effective proceedings, it may be in the interest of the Board itself to impose sanctions. *Petchulis v. DEP*, 2001 EHB 673, 678.

Perhaps more fundamentally, however, the rules are designed to ensure that no one litigant obtains an unfair advantage. If a party's disregard for proper procedure gives it such an

unfair advantage, sanctions may be required to even out the playing field. The sanctions are not designed to punish the wrongdoer; they are aimed at relieving the unfair disadvantage (i.e. prejudice) suffered by the innocent party. Thus, in most cases, our analysis begins with a determination of whether there has been a violation, but it ends with an assessment of the harm caused to the innocent party. Whether sanctions must be imposed and the severity of the sanctions will in large measure depend upon what measures are necessary to alleviate the unfair disadvantage created by the transgressor's misconduct. *See generally, Township of Paradise v. DEP*, 2001 EHB 1005, 1007 (sanction must be appropriate given the magnitude of the violation); *ERSI v. DEP*, 2001 EHB 824, 829 (listing factors to consider when imposing sanctions for discovery violations).

In the final analysis, we cannot lose sight of the fact that our basic objective is to arrive at a proper resolution of the appeal *on its merits*. *ERSI*, 2001 EHB at 830. A sanction that is too severe can be just as detrimental to that objective as allowing violations to go unsanctioned. Ultimately, the ideal sanction will ensure fair treatment of the litigants and not in any way interfere with the most accurate, fully informed resolution of the case.²

There is no question here that the Department violated the rules. If it intended to file a late report, it should have sought an extension from the Board, preferably after having obtained the concurrence of the other parties. It should have been particularly sensitive to the expert discovery deadline given the imminent summary judgment deadline and the generally tight litigation schedule in this appeal. The question, then, becomes: What should we do about it?

² The sanction of precluding evidence will rarely be imposed where there has been no violation of a direct Board order. *Township of Paradise*, 2001 EHB at 1007 and 1009; *DEP v. Land Tech Engineering, Inc.*, 2000 EHB 1133, 1140. In addition, preclusion of expert testimony is a particularly severe sanction. *Land Tech*, 2000 EHB at 1140.

The sanction requested by PGE is too severe under the circumstances.³ It would deprive the Board of access to potentially important information regarding the effect of the project upon water quality. This is a central issue in the case. In order to justify such a significant adverse impact upon the Board's search for the correct result on the merits, PGE would need to show that it has suffered serious prejudice that cannot be alleviated any other way. *See Township of Paradise v. DEP*, 2001 EHB 1005, 1008 (evidence will not be precluded where less severe mechanisms are available to redress the discovery grievance). PGE has failed to make that showing here.

We are finding it difficult to accept PGE's averment that it prepared its summary judgment motion based upon the assumption that the Department would not be submitting *any* expert report. If nothing else, we are satisfied that the Department at least gave adequate notice that a report would eventually be forthcoming.

There is no indication that PGE will be hampered in its preparation for the hearing in November. *Township of Paradise*, 2001 EHB at 1008 (no sanction where discovery can be supplemented without undue delay in the scheduling of a hearing). To the extent that PGE needs to revise its own expert reports in response to the Department's late submittal, it may do so. The Board would also be receptive to any request by PGE to conduct additional discovery necessitated by the Department's conduct.

PGE's primary claim of prejudice relates to its motion for summary judgment, which has now been filed. PGE has not specified what sections might need to be changed as a result of the late report. Nevertheless, in light of the Department's conduct, we would be receptive to any

³ PGE has, in part, asked the Board to preclude the report from being introduced into evidence. Expert reports are simply a discovery tool. They are a substitute for detailed, signed answers to expert interrogatories. Pa.R.C.P. 4003.5; *Land Tech Engineering*, 2000 EHB at 1138. At the hearing on the merits, they are hearsay, although they



request by PGE to supplement its motion in the immediate future if it believes that such changes are necessary.

In our view, these measures will be sufficient to return the parties to where they should have been had the Department complied with the rules. Exclusion of all of the Department's expert's work would simply go too far.⁴ Accordingly, we issue the order that follows.

may be admitted by agreement of the parties if the Board consents or if an exception to the hearsay rule applies. We express no opinion here on the general admissibility of the Department's expert report.

⁴ PGE's request for oral argument is denied.



For Appellant:
James Kleissler
P.O. Box 137
Fisher, PA 16225

and

Ryan D. Talbott
HC 1, Box 70
Marienville, PA 16239

For Permittee:
Kevin J. Garber, Esquire
BABST, CALLAND, CLEMENTS & ZOMNIR, PC
Two Gateway Center, 8th Floor
Pittsburgh, PA 15222

and

Jon P. Marti, Esquire
HARPER & MARTI
701 National City Bank Building
Warren, PA 16365

kb