

MINUTES
Meeting of January 8, 2004

Attendance:

The Rules Committee convened on Thursday, January 08, 2004, at approximately 10:15 a.m. Rules Committee Chairman Howard Wein presided with the following members in attendance: Maxine Woelfling, Brian Clark, Dennis Strain, Mike Bedrin and Tom Scott. Attending on behalf of the Board were EHB Chief Judge Mike Krancer, Judge Bernie Labuskes and Assistant Counsel Richard Morrison. Assistant Counsel MaryAnne Wesdock participated by telephone.

Approval of November 2003 Minutes:

Brian Clark moved to approve the minutes of the November 13 meeting. Maxine seconded. All were in favor.

Rule 1021.53 – Amendments to Appeals and Complaints:

The Committee continued its discussion from the last meeting regarding amending rule 1021.53 to allow for more liberal amendment of appeals. In particular, the Committee had considered the Board’s proposal to allow amendments of appeals “for good cause shown and as otherwise allowed by law” and to eliminate the three criteria for good cause set forth in 1021.53(b).¹

Mr. Strain noted it would be helpful to look at the case law developed under the existing rule, in particular *Pennsylvania Game Commission v. DER, Ganzer Sand & Gravel, Inc. and Hammermill Paper Co.*, 509 A.2d 877 (Pa. Cmwlth. 1986) (“Ganzer”). In that decision, the court reasoned that allowing a party to amend an appeal to include

¹ At the November 13, 2003 meeting the Committee had also considered the Board’s proposed amendment of 1021.53 to allow for amendment of complaints since there is currently no provision in the Board’s rules dealing with amendment of complaints.

new legal grounds was analogous to allowing an appeal nunc pro tunc. The court defined “good cause” for allowing an appeal nunc pro tunc as “fraud or breakdown in the [Board’s] operation.” *Id.* at 886. The court specifically held that an “allegation that the new grounds of appeal were learned of through discovery...does not normally constitute good cause in Board practice unless the party has already pleaded the requirement of discovery to elucidate the grounds of appeal in the original appeal filed timely within the thirty-day period. . . .” citing then-Board rule 21.51(e). *Id.*

Mr. Strain felt that if the Board’s intention was to make the standard for amending an appeal more liberal, it might be necessary to define that standard. Otherwise, the standard would revert back to that set forth in *Ganzer*, which was even narrower than the Board’s current rule. In addition, he felt it was important to define the standard for good cause in order to give litigants notice. He felt that if the Board wants “good cause” to mean something other than the *Ganzer* standard, it should be defined in the rules.

Judge Krancer pointed out that “good cause” in the case of a nunc pro tunc appeal, i.e. fraud or breakdown in the Board’s operation, could and should be different than “good cause” for amendment of an appeal, which should be a broader standard. He cited a number of areas in the law where “good cause” is defined differently. Mr. Clark also questioned whether it was necessary to have a definition of “good cause” since adding the phrase “and otherwise allowed by law” made the standard broader.

Mr. Strain felt it was not good rulemaking to eliminate a clear standard in favor of one that must be developed by case law. Judge Krancer disagreed, stating he thought it was an ambitious challenge for rulemaking to try to define the concept of “good cause.” He noted that the notion for changing the rule in the first place was because there is a

whole body of case law that has been developed on the issue of when amendment should be allowed.

Mr. Strain was concerned that the absence of a definition puts the burden on counsel to determine what constitutes “good cause.” Mr. Clark noted that the phrase “as otherwise authorized by law” provides counsel with an idea of what is needed.

Ms. Woelfling raised the question of whether the Commonwealth Court would adapt the *Ganzer* analysis to 1021.53 if revised as suggested. A discussion regarding *Ganzer* ensued. Mr. Wein provided a history of the case. He noted that in *Ganzer* the appellant sought to add completely new grounds to its appeal. The grounds were so different it was like trying to file a new appeal. He felt it was unlikely to have this situation occur in most cases. Judge Krancer noted that if an appellant tried bringing in new grounds to an appeal, he might have difficulty demonstrating good cause.

The Committee voted on the following proposed revisions to 1021.53:

§ 1021.53. Amendments to appeals and complaints; nunc pro tunc appeals.

(a) An appeal and complaint may be amended as of right within 20 days after the filing thereof.

(b) After the 20-day period for amendment as of right, the Board, upon motion by the appellant or complainant, may grant leave for further amendment of the appeal or complaint for good cause shown and as otherwise allowed by law. [This leave may be granted if appellant establishes that the requested amendment satisfies one of the following conditions:

(1) It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Departmental employees.

(2) It is based upon facts, identified in the motion, that were discovered during preparation of appellant's case, that the appellant, exercising due diligence, could not have previously discovered.

(3) It includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor.]

(c) [An appellant may not request leave to amend a notice of appeal after the Board has decided any dispositive motions or the case has been assigned for hearing, whichever is later.]

* * * * *

Mr. Clark moved to recommend adoption of the aforesaid revisions to rule 1021.53. Ms. Woelfling seconded. Voting in favor of the revisions were Messrs. Wein, Clark and Scott and Ms. Woelfling. Opposing the recommendation were Messrs. Strain and Bedrin.

Subsection (e) to Rule 1021.53:

Based on the prior discussion, the Committee also considered whether it was necessary to amend the last sentence of rule 1021.51(e), which states in relevant part as follows:

(e)...An objection not raised by the appeal or an amendment thereto under 1021.53...shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection. *For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.* (Emphasis added)

Mr. Strain suggested eliminating the second sentence and ending the first sentence after "deemed waived." Mr. Scott stated that he read this subsection as providing an appellant with one last opportunity to raise an objection even up to and during the hearing if a new piece of information is discovered. He gave as an example the situation of

where a witness for the Department has been maintaining “x” throughout the case but then on cross-examination admits it was “y.” He saw this subsection as contemplating that an objection may be raised even if it is not covered by the rules dealing with amendments to appeals.

A discussion ensued as to whether subsection (e) should remain as part of rule 1021.51, be moved to rule 1021.53 or be placed in a separate rule. Judge Labuskes and Mr. Clark voiced their opinion that there was no need for a separate rule.

The Committee discussed whether to eliminate the last sentence of (e). Mr. Scott pointed out that this sentence was not in (e) when *Ganzer* was decided and to delete it at this stage might cause it to be read as narrowing the grounds for allowing an amendment to an appeal. Judge Krancer suggested adding a comment to the rule stating that the deletion of this sentence was not intended to narrow the grounds for amending an appeal.

Mr. Scott disagreed with the recommendation to delete the last sentence. He pointed to how narrowly the Commonwealth Court had interpreted 1021.51(e) without the last sentence. To remove this sentence might be read as eliminating “after discovered evidence” as constituting good cause.

Ms. Woelfling suggested that the Committee look at the wording of 1021.51 and 1021.53 as it was at the time *Ganzer* was decided. Ms. Wesdock said she would obtain a copy of those rules for the next meeting.

Expert Testimony:

The Committee considered revisions to rules 1021.102 (Discovery) and 1021.104 (Pre-hearing memorandum) proposed by the Department. The revisions were proposed in response to the Board’s recent adjudication in *Borough of Edinboro v. DEP* (issued

November 14, 2003), in which the Board held that any party, including the Department, who wishes to present expert testimony of one of its employees, must abide by the Board's rules at 1021.101 and 1021.104 to identify the expert, answer expert interrogatories and/or provide expert reports, or summarize the expert's testimony in its pre-hearing memorandum, even if it would not be required to produce an expert report under Pa. R.C.P. 4003.5,

The Department proposed the following amendments to 1021.102 and 1021.104:

§ 1021.102. Discovery.

(a) Except as otherwise provided in this chapter or by order of the Board, discovery in proceedings before the Board shall be governed by the Pa.R.C.P. When the term "court" is used in the Pa.R.C.P., "Board" is to be understood; when the terms "prothonotary" or "clerk of court" are used in the Pa.R.C.P., "Secretary to the Board" is to be understood.

(b) An expert providing only factual testimony is not required to answer expert interrogatories or submit an expert report. Discovery of experts providing opinion testimony is governed by Pa.R.C.P. 4003.5 (Discovery of Expert Testimony. Trial Preparation Material), whether or not the opinion was acquired or developed in anticipation of litigation. An expert who has been deposed may substitute the deposition for an expert report.

(c) ~~(b)~~ Copies of requests for discovery or responses to requests are not to be filed with the Board unless they are necessary for the resolution of a discovery dispute or disposition of a motion pending before the Board.

(d) ~~(e)~~ If a person or party is to be deposed by oral examination more than 100 miles from his or its residence or principal place of business, the Board may, upon motion, order the payment of reasonable expenses, including attorney's fees, as the Board deems proper.

(e) ~~(d)~~ Discovery disputes shall be resolved pursuant to a motion filed in accordance with § 1021.93 (relating to discovery motions), except that to facilitate the prompt completion of discovery, the Board may hear argument on discovery disputes by telephone conference call at the time the dispute arises and may issue oral rulings which will be later memorialized in written orders.

(f) ~~(e)~~ Subsections (a)—(e) ~~(d)~~ supersede 1 Pa. Code § § 35.145--35.152 (relating to depositions).

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§ 1021.104. Prehearing memorandum.

- (a) A prehearing memorandum shall contain the following:
- (1) A statement of the facts in dispute and the facts upon which the parties agree.
 - (2) A statement of the legal issues in dispute, including citations to statutes, regulations and caselaw supporting the party's position.
 - (3) A description of scientific tests upon which the party will rely and a statement indicating whether an opposing party will object to their use.
 - (4) A list of expert witnesses whose qualifications will not be challenged and which may be entered into the record as an unchallenged exhibit.
 - (5) For each expert witness a party intends to call at the hearing, answers to expert interrogatories and a copy of any expert report provided under § 1021.101(a)(2) (relating to prehearing procedure). In the absence of answers to the expert interrogatories or an expert report, a summary of the testimony of each expert witness. This applies to witnesses providing expert factual testimony or expert opinion testimony.
 - (6) The proposed order of witnesses.
 - (7) A list of the exhibits the party seeks to introduce into evidence and a statement indicating whether the opposing party will object to their introduction.
 - (8) Signed copies of any stipulations reached by the parties.
- (b) The Board may impose sanctions on a party which does not comply with the requirements of subsection (a). These sanctions may include the preclusion of testimony or documentary evidence and the cancellation of the hearing.
- (c) The requirements of this section apply only to a party's case-in-chief.

Mr. Strain explained that the purposes of the proposed amendments were as follows:

1. Clarifying that only witnesses providing expert opinion testimony are required to answer expert interrogatories or submit expert reports.
2. Bringing all witnesses providing expert opinion testimony within the protection of Rule 4003.5.
3. Allowing depositions to substitute for expert reports.
4. Clarifying that the “summary of the testimony of each expert witness” under Rule 104, includes expert factual testimony.

Mr. Scott voiced the concern that it would be difficult to develop a meaningful distinction between what is expert opinion and what is expert fact. He noted that it is common for experts to dispute the facts.

Mr. Strain said the Department's concern was that it is not clear who must file an expert report. For example must a permit reviewer file an expert report? If he does, is then not subject to deposition?

Judge Labuskes stated he felt it would be difficult to clarify who must file an expert report by rule. Judge Krancer agreed, stating one must make that judgment as he proceeds with the case.

Mr. Wein asked if the Board's rules supersede Pa. R.C.P. 4003.5. Judge Labuskes stated that the Board's rules supplement 4003.5, and in some cases, such as the timing of when something must be filed, supersede it.

Mr. Strain questioned whether a Department expert witness who has been deposed must also file an expert report. Judge Labuskes felt that a deposition could not be substituted for an expert report unless the parties agreed to it.

The Committee decided to defer any action on the proposed rules at this time.

Next Meeting:

The next meeting of the Rules Committee is **Thursday, March 11, 2004 at 10:00 a.m.**