ILLINOIS POLLUTION CONTROL BOARD
March 11, 1993

CITIZENS AGAINST REGIONAL LANDFILL, Petitioners, v. THE COUNTY BOARD OF WHITESIDE COUNTY and WASTE MANAGEMENT OF ILLINOIS, INC., Respondents.	)	PCB 92-156 (Landfill Siting)

ORDER OF THE BOARD (by B. Forcade):

In its January 21, 1993 order, the Board granted a motion for sanctions against Mr. Hudec, attorney for Citizen's Against Regional Landfill (CARL), for failing to follow the hearing officer's order and filing a brief not supported by evidence. The Board ordered Mr. Hudec to pay the amount of reasonable expenses incurred by Waste Management of Illinois, Inc. (WMII) in obtaining the order. WMII filed its statement of costs on January 29, 1993. On February 16, 1993, Mr. Hudec filed a "Memorandum in Opposition to the Bill of Costs filed by Waste Management of Illinois, Inc." WMII filed a "Motion for Leave to File Reply to Memorandum in Opposition to Bill of Cost" and "Response of Waste Management of Illinois, Inc. to Memorandum in Opposition to the Bill of Costs Filed by Waste Management of Illinois, Inc." WMII's motion for leave to file a reply is granted. On February 25, 1993, Mr. Hudec filed a motion for reconsideration of the sanctions. WMII filed its response to the motion for reconsideration on March 9, 1993.

The Board will first consider the motion for reconsideration and then examine the reasonableness of the bill submitted by WMII.

The motion for reconsideration requests the Board to reconsider the necessity of imposing sanctions in this matter. Mr. Hudec maintains that the unusual circumstances do not warrant sanctions. Mr. Hudec contends that he did not unreasonably refuse to follow the hearing officer's order but was acting in the best interest of his client to preserve the record for appeal. He notes that the transcript was received only days before the petitioner's brief was due. In addition, he notes that the letter from the hearing officer concerning which pages of the deposition were to be submitted to the Board was received only hours before the petitioner's brief was to be filed with the Board. Mr. Hudec contends that at the time that the petitioner's brief was filed with the Board, the issue of what constituted the record was not resolved. Mr. Hudec contends that his conduct was neither severe nor outlandish given the facts that existed at the

time the brief was submitted. Mr. Hudec argues that the imposition of sanctions under these circumstances will have a chilling effect on effective advocacy especially on the activities of citizen's groups and their attorneys in participating in the siting process.

WMII argues that by not raising the argument for reconsideration in the memorandum opposing the costs, petitioner has waived the argument that the imposition of sanctions is unwarranted. WMII contends that petitioner, in the memorandum, takes issue with the amount of the sanction and does not address the propriety of the sanction. WMII maintains that any objection to the propriety of the sanction should have been raised in the memorandum. WMII notes that it is inconsistent to first argue that the amount of the sanctions should be modified and then to later argue that the imposition of sanctions was improper.

WMII also argues that the motion for reconsideration presents no new evidence or error of fact or law overlooked by the Board and therefore should be denied. WMII contends that facts presented by petitioner were fully considered by the Board in the order of January 21, 1993. WMII further contends that sanctions were proper under the circumstances.

While the Board recognizes the inconsistency in the arguments presented by petitioner in the two filings, the Board does not find that the filing of the memorandum opposing the costs prohibited petitioner from filing a motion for reconsideration. The Board allowed 15 days from the filing of the billing statement for petitioner to file any objection to the billing statement. A motion for reconsideration shall be filed within 35 days of the adoption of the order. (35 Ill. Adm. Code 101.246(a).) The Board in its order did not provide a different time period in which petitioner could file a motion for reconsideration or suggest that the filing of an objection by petitioner affected petitioner's right to file a motion for reconsideration.

The intended purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the court's previous application of the existing law. (Korogluyan v. Chicago Title & Trust Co., (1st Dist. 1992), 213 Ill.App.3d 622, 572 N.E.2d 1154, 1158.) Petitioner has not presented any new evidence or changes in the law. Petitioner contends that the circumstances did not warrant the imposition of sanctions and requests the Board to reconsider the use of sanctions. While the Board notes that it fully considered the facts presented in the motion for reconsideration in the January 21, 1993 order, the Board will review the facts and reconsider its order due to the importance of the issues.

After reviewing the circumstances, the Board affirms its previous determination that sanctions are warranted. The Board finds that at the time that Mr. Hudec filed the petitioner's brief it had not been determined exactly which portions of the deposition transcript would be submitted to the Board. Yet, at that time it was evident from the hearing officer's ruling at the hearing that only portions of the transcript would be submitted to the Board and not the entire transcript. In addition, the hearing officer indicated at hearing which portions would be submitted. Despite the hearing officer's refusal to submit the entire transcript, Mr. Hudec submitted a complete transcript to the Board and referenced the transcript extensively in the petitioner's brief. When submitting the transcript to the Board, Mr. Hudec made no indication that the handling of the transcript was unresolved but instead stated that the transcript was being submitted "pursuant to the hearing examiners [sic] directive of December 21, 1992." (See letter of January 4, 1993.) The hearing officer denied giving any such directive. (See letter from Hearing Officer dated January 6, 1993.)

The Board finds that receipt of the December 18, 1992 hearing transcript only days before petitioner's brief was due or the fact that the exact pages from the deposition transcript to be submitted to the Board were not determined at the time the brief was prepared does not justify the filing of a brief referencing material not in the record. The hearing and deposition took place on December 18, 1992. Transcripts from the hearing and deposition were received by the parties and the hearing officer on or about December 30, 1992. The transcripts were received in less than two weeks from the date of hearing. A tight briefing schedule was required in this matter due to the approaching decision deadline. Given the time constraints of cases with decision deadlines, it may sometimes be necessary to require the submission of briefs without the benefit of transcripts. While the petitioner maintains that the entire deposition transcript should have been submitted to the Board, the hearing officer clearly refused to submit the complete transcript from the deposition. (Tr. at 136.) The Board views petitioner's brief and the submission of the complete transcript to the Board as an attempt by Mr. Hudec to circumvent the hearing officer's ruling and deceive the Board.

Amount of Sanctions

The bill submitted by WMII claims costs of $3,652.50. The bill claims that a total of 19.5 hours was expended in obtaining the Board's order granting the motion to strike. The bill includes the hours spent in telephone conferences, reviewing petitioner's brief, research, preparing and reviewing the motion to strike and the reply. The billing statement includes the date that the services were performed, the attorney who provided the services, listing of the services, the hours, the hourly rate and

the total. The total presented in the statement is based on the hours spent and the hourly rate for the two attorneys who performed the various services.

Mr. Hudec argues that the statement submitted by WMII is unreasonable and lacks sufficient detail to determine specific times and purpose of the stated task. Mr. Hudec contends that the fees are unreasonable considering the attorney's experience and the nature of the motion involved. Mr. Hudec maintains that time for preparing the reply to the motion to strike should be disregarded because a reply brief is not allowed except as permitted by the Board. He further argues that the reply only reiterated the issues already addressed in the motion to strike. Mr. Hudec requests that the Board either deny costs or award an amount equal to two hours of attorney time.

WMII contends that preparing the motion to strike involved several steps; including review of petitioner's brief, review of hearing officer's ruling and correspondences, research on citation to non-record material and research on the imposition of sanctions. WMII argues that while the appropriateness of the fees is an important factor, it is not the only consideration. WMII contends that the fees are both reasonable and appropriate given the nature and magnitude of the conduct by petitioner's attorney. WMII contends that the amount of the sanction is necessary to prevent abuse of the Board's process.

In support of its arguments, WMII attached a copy of an article from the Sterling Daily Gazette to its reply. The Board notes that this article has not been entered as evidence in this matter and therefore has not been subject to cross examination. The Board will not consider the information presented in this article in determining the amount of sanctions.

The party seeking the fees bears the burden of presenting sufficient evidence to render a decision as to the reasonableness of the fees. (Kaiser v. MEPC American Properties, Inc. (1st Dist. 1987), 164 Ill.App.3d 978, 518 N.E.2d 424.) The determination of the reasonableness of fees is left to the sound discretion of the trial court. (Id.) It is necessary for a party seeking attorney fees to provide specific evidence regarding the number of hours expended and the hourly rate. (Black v. Iovino (1st Dist. 1991), 219 Ill.App.3d 378, 580 N.E.2d 139.)

WMII's statement breaks the hours down by days and attorney. The statement does not provide an hourly breakdown for each service. The billing statement also does not provide any detail as to the service provided, such as subject matter of telephone conferences, extent of research, review or analysis. While a more specific breakdown would have been beneficial to the Board in determining the reasonableness of the hours and fees, the Board does not find that the statement lacks sufficient

information to review the reasonableness of the time expended.

In determining the reasonableness of attorney's fees the following factors may be considered:

> the novelty, importance and difficulty of the questions raised; the attorney's degree of responsibility; the time and labor required; the skill and standing of the attorneys; the benefits resulting to the client; the usual and customary charge in the community; and the financial position of the parties. (In re Marriage of Hirsch (1985), 135 Ill.App.3d 945, 482 N.E.2d 625.)

Vendredi v. Vendredi (1st Dist. 1992), 230 Ill.App.3d 161, 598 N.E. 2d 961.

Mr. Hudec contends that the fees are unreasonable considering the issues involved and the skill of the attorneys. The record does not contain sufficient information for the Board to fully consider the remaining factors without considerable speculation by the Board. Therefore, the Board will review the reasonableness of the fees considering the factors raised by Mr. Hudec.

Based on the information submitted, the Board finds the fees to be reasonable based on the novelty, importance and difficulty of the questions raised. Mr. Hudec contends that the question at issue was the alleged improper submission of a deposition and striking those portions of the brief related to that submission. Mr. Hudec argues that this issue is straightforward and did not require the depth and preparation represented in the billing statement. The Board finds that Mr. Hudec has oversimplified the question at issue. The Board finds the circumstances under which the brief was filed complicated the issue. While the issue may be straightforward, it is unusual for the issue to arise in most cases and therefore research into the issue is necessary. Other issues raised in the motion to strike included sanctions, procedural rules, alleged prior violations of procedural rules by petitioner and modification of the briefing schedule. In addition, the Board notes that the motion to strike was submitted as an emergency motion.

Petitioner's brief, filed on January 4, 1993, was comprised of 28 pages of text plus attached exhibits A through O. The motion to strike was 10 pages in length plus one exhibit. WMII claims 13.25 hours were required to review and analyze petitioner's brief and related materials and to research and prepare the motion to strike. Given the amount of material and the issues involved, the Board does not find this to be an unreasonable amount of time.

WMII further claims that 6.25 hours were expended in

reviewing and analyzing petitioner's response and preparing WMII's reply. Mr. Hudec contends that these costs should not be included in the amount of sanctions because a reply brief is only allowed at the discretion of the Board. Mr. Hudec argues that because the filing of a reply is discretionary and extraordinary it does not constitute a reasonable expense. In addition, petitioner contends that the reply simply reiterates the issues already addressed in the motion to strike.

On January 21, 1993, the Board granted WMII's motion for leave to file a reply. WMII's reply brief was seven pages long plus Exhibits A through F. The reply does not address any new issues but it expands on issues presented in the motion to strike and responds to the petitioner's response to the motion to strike.

The Board does not find that the costs related to the preparation of a reply are unreasonable because a reply brief is discretionary and extraordinary. The fact that an action is discretionary or extraordinary does not equate to unreasonableness. The particular facts of a proceeding determine when a reply to a response is necessary. The Board finds that, given the facts of this proceeding and allegations contained in petitioner's response, a reply was appropriate.

However, the Board finds the time allotted for the reply to be unreasonable. The reply should require considerably less time than the motion to strike, considering that the issues have already been addressed in the motion to strike. The Board also notes that there was less material to review in preparing the reply and that the reply was several pages shorter than the motion to strike. Comparing the time required for the motion to strike (9.75 hours plus 3 hours of research on sanctions) with the time for the reply (6.25 hours) does not reveal the type of difference that would be expected considering the above factors. Therefore, the Board will reduce the time for preparing the reply brief by 3 hours, to 3.25 hours. This is one third of the time required to prepare the motion to strike not including the research on the issue of sanctions. This change will reduce the amount of sanctions to be paid by $570.00.

Considering the unproportionate amount of hours allocated to the reply, the Board questions the reasonableness of the other hours presented in the billing statement. Because the billing statement presented by WMII did not provide a specific description of the services provided or the hours for each service, the Board is unable to determine the content or length of the telephone conferences listed in the billing statement. While the Board has determined that the billing statement is sufficiently specific for the Board to review the reasonableness of the hours expended, the billing statement does not provide specific detail for the Board to determine the nature and extent

of the services provided. Even though the Board has found that the overall hours presented are reasonable, the Board finds it appropriate to adjust the hours specified in the statement because the Board is unable to determine the exact relationship between the services listed and the motion to strike.

The Board finds that some of the hours included in the statement would have been required regardless of the fact that petitioner's brief referenced material not in evidence. If petitioner had submitted a proper brief, respondent would have reviewed and analyzed that brief. In imposing costs as a sanction, it was the Board's intention to deter such behavior in the future and to compensate WMII for the additional time and expense incurred due to the improper brief filed by petitioner.

The Board will subtract 1.5 hours from the total hours specified in the billing statement. The Board considers this reduction to be appropriate to reflect those services that would have been provided in any event if a proper brief had been filed and for failure to provide a specific billing statement showing the nature of the services.

The Board notes that this order is being issued after the decision deadline in this matter and after the Board had issued its final opinion and order. WMII had waived the decision deadline for this case to February 28, 1993. The Board issued a final opinion and order on February 25, 1993 affirming Whiteside County's approval of the landfill. The Board did not address the issue of sanctions or the motion for reconsideration in its final opinion and order. The February 25, 1993 opinion and order disposed of all matters except the issue of sanctions. The Board views the issue relating to sanctions as a collateral issue. The sanctions imposed against Mr. Hudec were for actions before the Board and are not directly related to the merits of the case.

The Board also notes that the motion for reconsideration was received the same day that the final opinion and order was issued. Requiring the Board to dispose of all matters by the decision deadline would prohibit the Board from considering any motion filed near the deadline because there would be insufficient time for a response from the opposing party. This would restrict the Board's ability to respond to any action that occurs near the deadline.

The determination of whether a prevailing party is entitled to attorney's fees and, if so, the calculations of those fees are determinations independent of the underlying judgment. (Servio v. Paul Roberts Auto Sales Inc. (1st Dist. 1991), 211 Ill.App.3d 751, 570 N.E.2d 662.) The federal courts generally interpret attorney fee claims allowed by statute as collateral and not affecting the finality or appealability of the judgment in the principal action. (Id.) Where the court grants attorney fees but

leaves the calculation for a later date, "the fact that attorney fees have not been awarded does not prevent the underlying judgment from becoming final; the attorney's fee proceeding is regarded as collateral. (citations omitted)" (Szabo v. U.S. Marine Corp. (7th Cir. 1987), 819 F.2d 714 at 717.) When an attorney fee award order is ancillary to an appealable order, the courts have allowed it to be appealed on "the principle that a 'court of appeals may, in the interest of orderly judicial administration, review matters beyond that which supplies appellate jurisdiction.'" Bittner v. Sadoff & Rudoy Industries (7th Cir. 1984) 728 F.2d 820, 826, quoting Scarlett v. Seaboard Coast Line R.R. (5th Cir. 1982), 676 F.2d 1043. At worst an appeal of such an order would only prohibit the court from reviewing the issue of attorney's fees because the attorney's fees phase is treated as a separate proceeding when deciding jurisdiction of an appeal of an order dealing with the merits phase. (Szabo at 717.) In Servio, the court found that a motion on attorney fees, which was granted but left the amount to be determined at a later date, did not need to be resolved because it was collateral and did not affect the appealability of the final judgment.

In Holmes v. J.R. McDermott & Co., Inc. (5th Cir. 1982), 682 F.2d 1143 the court used the following standard:

> When attorney's fees are similar to costs . . . or collateral to an action . . . a lack of determination as to the amount does not preclude the issuance of a final appealable judgment on the merits. When, however attorney's fees are an integral part of the merits of the case and the scope of relief, they cannot be characterized as costs or as collateral and their determination is part of any final appealable judgment.

Section 40.1 of the Environmental Protection Act (415 ILCS 5/40 (1992))[1] states that "if there is no final action by the Board within 120 days, petitioner may deem the site location approved." "For purposes of judicial review, Board action becomes final upon adoption of the Board's final order in a proceeding, or upon subsequent Board action if any motion for reconsideration is filed." (35 Ill. Adm. Code 101.302.) Therefore, the Board concludes that the opinion and order of February 25, 1993 is a final and appealable order.

In sum, the Board finds that it is appropriate to reduce the amount of sanctions. The Board has reduced the time allotted for the reply by 3 hours and reduced the overall billing by 1.5 hours. This results in a total reduction of 4.5 hours.

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[1] The Environmental Protection Act was previously codified at Ill.Rev.Stat. ch. 111 1/2 par. 1001 et seq.

Multiplying 4.5 hours by the hourly rate of $190.00 results in $855.00. The bill submitted by WMII requested $3552.50 in sanctions. Reducing the amount requested by WMII by $855.00 provides a total of $2697.50.

Mr. Hudec is ordered to pay the amount of $2697.50 to WMII within 30 days of the date of this order.

IT IS SO ORDERED.

J. Theodore Meyer abstained

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Castenada v. Illinois Human Rights Commission (1989), 132 Ill. 2d 304, 547 N.E.2d 437.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 11th day of March, 1993, by a vote of 5-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board