

ILLINOIS POLLUTION CONTROL BOARD  
October 16, 1992

|                        |   |            |
|------------------------|---|------------|
| MARSCO MFG. CO.,       | ) |            |
|                        | ) |            |
| Petitioner,            | ) |            |
|                        | ) |            |
| v.                     | ) | PCB 91-235 |
|                        | ) | (Variance) |
|                        | ) |            |
| ILLINOIS ENVIRONMENTAL | ) |            |
| PROTECTION AGENCY,     | ) |            |
|                        | ) |            |
| Respondent.            | ) |            |

ORDER OF THE BOARD (by J. Anderson):

On October 14, 1992, Marsco Manufacturing Company (Marsco) filed 1) a second amended petition for variance that changed the time frame of the requested relief and contained an open waiver of the decision deadline, 2) an appeal of an October 9, 1992 hearing officer order, and 3) a status report. The Illinois Environmental Protection Agency (Agency) has not yet responded to any of Marsco's filings.

In its appeal of the hearing officer's order, Marsco requests that the Board vacate the hearing officer's October 9, 1992 order denying Marsco's October 2, 1992 request to cancel the October 20, 1992 hearing in this matter and direct the hearing officer to reschedule a hearing on Marsco's second amended petition.

In support of its request, Marsco cites to its status report and argues that the Agency has not yet reviewed its second amended petition or filed a recommendation on the first amended petition. In its status report, Marsco states that it submitted a draft settlement agreement to the Illinois Attorney General's Office (AG's Office) on August 13, 1992, to resolve the alleged violations in this case. Marsco adds that, although the AG's Office and Agency are currently reviewing the agreement, it does not know when such review will be completed. Finally, Marsco states that it expects that the parties will reach agreement by the end of the year and that Marsco will dismiss its variance petition as a condition of settlement.

Although the Agency's response time has not yet expired, the Board will rule on Marsco's appeal in order to prevent undue delay. 35 Ill. Adm. Code 101.241(b). A review of the record indicates that, in addition to Marsco's October 2, 1992 request to cancel hearing, Marsco also moved to cancel hearing on February 18, 1992. The reason that Marsco gave for each of its requests was as follows:

0136-0375

Marsco, the Agency and the Attorney General's Office are currently negotiating the resolution of this matter and anticipate arriving at an agreement in the near future.

The hearing officer, in his October 9, 1992 order, stated that he was denying Marsco's October 2, 1992 request to cancel hearing because Marsco failed to provide additional facts or an affidavit to support its request as required by 35 Ill. Adm. Code 103.143(a) and that, as a result, it was impossible to determine whether the parties had made any progress in the ongoing negotiations since Marsco's February 18, 1992 request for continuance.

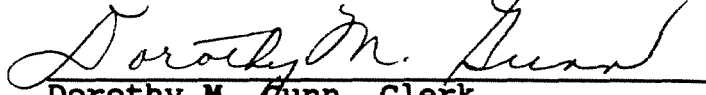
The Board will not overrule the hearing officer in this instance. As the hearing officer correctly noted in his order, 35 Ill. Adm. Code 103.143(a) requires a movant to support its request for continuance with an affidavit. Marsco failed to support its October 2, 1992 request for continuance with an affidavit. Marsco also has failed to support its appeal of the hearing officer's ruling with an affidavit. In addition, the Board notes that Marsco supports its current request for cancellation with a different reason (i.e., the lack of an Agency recommendation) than was presented to the hearing officer. The Board will not overturn a hearing officer ruling based on facts that were never presented to the hearing officer.

Accordingly, for the foregoing reasons, the Board hereby denies Marsco's request to vacate the hearing officer's order. Because the October 20, 1992 hearing will go forward, the Board need not order any more status reports or take any action on Marsco's amended petition. The Board anticipates that the parties will be prepared to address the merits of the case at hearing.

IT IS SO ORDERED.

Board Member R. Flemal dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 16<sup>th</sup> day of October, 1992, by a vote of 6-1.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

0136-0376