

ILLINOIS POLLUTION CONTROL BOARD  
January 10, 1991

ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Complainant, )  
 )  
v. ) PCB 90-161  
 ) (Enforcement)  
 )  
COLUMBIA QUARRY COMPANY, )  
 )  
Respondent. )

ORDER OF THE BOARD (by J.D. Dumelle):

This matter comes before the Board by virtue of Columbia Quarry Company's ("Columbia") motion filed on November 26, 1990. Pursuant to 35 Ill. Adm. Code 101.280, Columbia requests that the case at bar be dismissed or in the alternative, that the Illinois Environmental Protection Agency ("Agency") be precluded from presenting any witnesses or documentation in support of their complaint due to the Agency's failure to adhere to the discovery deadline.

In support thereof, Columbia asserts that the instant complaint was filed by the Attorney General's office on or about August 15, 1990 and that the company filed a timely answer on September 5, 1990. In addition to its answer, Columbia also filed a discovery request on September 5, 1990. Due to that request, on September 11, 1990 the hearing officer issued a scheduling order setting the discovery cutoff date as October 12, 1990 and a hearing date of November 2, 1990. By Columbia's motion of October 1, 1990, the company requested and was subsequently granted a continuance of the hearing date to December 21, 1990 with a new discovery deadline set for November 2, 1990. Due to the fact that the discovery requested by Columbia had not been produced by November 12, 1990 the company sought a second continuance of the hearing date.

With this in mind, Columbia alleges that the complainant has unreasonably refused to comply with the discovery orders in addition to the provisions contained within 35 Ill. Adm. Code Sec. 101.261. Columbia asserts that the complainant's failure to adhere to the discovery cutoff dates has been so severe as to unreasonably hinder and prevent the company from adequately preparing its defense in this matter.

In response, the Attorney General's office, representing the Agency in this matter, admits that the discovery was late. At the same time, however, the complainant has filed an affidavit stating that the Attorney General's Office forwarded the

discovery request to the Agency's attorney on September 7, 1990. The affidavit further states that there was no indication on the part of Columbia that the discovery material requested was urgent until November 9, 1990 - after the settlement negotiations broke down. On November 20, 1990 the Assistant Attorney General sent Columbia's first discovery request. At this juncture, it was approximately seven weeks overdue.

In assessing the chronological sequence of events in this case, the Board finds that the sluggish pace on the part of the Agency is, at best, less than ideal. Yet it does not rise to the level of dismissing the case, nor does it warrant the preclusion of evidence. Had counsel for Columbia initiated a motion to compel or otherwise objected to the lack of information forthcoming pursuant to the scheduling order, the Board might well feel differently. However, Columbia made no protest until after it became clear that a settlement could not be reached.

In fact, it was Columbia who filed a motion for continuance of the hearing date on October 1, 1990 almost two full weeks prior to the discovery deadline of October 12, 1990. The second continuance was also filed by Columbia three days after settlement negotiations stalled, but eleven days after the November 1, 1990 discovery deadline imposed by the hearing officer. In short, Columbia had a number of options to pursue in regards to the late discovery, but it merely sought to continue the matter. Moreover, Columbia has failed to demonstrate how the delay in obtaining the discovery material did hinder or otherwise interfere with its defense preparation.

Finally the Board's Procedural Rules, Sec. 101.280 states that:

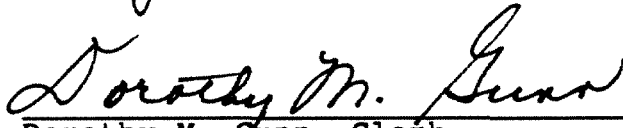
If a party or any person unreasonably refuses to comply with any provision...or fails to comply with any order entered...by the hearing officer...the Board will order sanctions.

35 Ill. Adm. Code, Sec. 101.280(a)

Here Columbia has failed to demonstrate that the complainant has unreasonably refused or failed to comply with the hearing officer's order, but only that complainant was late in doing so. On the contrary, the affidavit of the Assistant Attorney General handling the case asserts that he sent the discovery request to the Agency on September 7, 1990 - the day he received it. In short, the delay here does not rise to the level of dismissal, nor does it warrant the preclusion of the evidence contained within the first discovery request. Accordingly, Columbia's motion is denied.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 10<sup>th</sup> day of January, 1991 by a vote of 7-0.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board