ILLINIOS POLLUTION CONTROL BOARD
October 3, 2002

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complaintant,	)	
v.	)	AC 02-17
	)	(IEPA No. 424-01-AC)
CHARLES GOODWIN,	)	(Administrative Citation)
Respondent.	)	

ORDER OF THE BOARD (by M.E. Tristano):

The Illinois Environmental Protection Agency (Agency) timely filed a motion for reconsideration (Mot. for Rec.) on August 23, 2002, asking the Board to reconsider the Board's July 11, 2002 opinion and order. The Board concluded that the respondent's inaction to remedy the disposal of litter that was previously dumped on the site qualified as allowing the open dumping of waste that resulted in litter as prohibited by Section 21(p)(1) of the Act. But, in addition, the Board concluded that the Agency improperly issued the administrative citation finding a lack of effective communication between the inspectors of the air and land bureaus, and lack of effective communication between them and the respondent. As a result, the Board ruled that the administrative citation was improperly issued due to the unique circumstances of apparently contradictory directions from two bureaus of the Agency. The Board dismissed the administrative citation.

Pursuant to the Board's procedural rules, motions for reconsideration must be filed within 35 days of adoption of a final Board order. 35 Ill. Adm. Code 101.520(a). Section 101.902 of the Board's procedural rules sets forth the factors the board will consider when ruling upon a motion for reconsideration. Those factors include "new evidence, or a change in the law, to conclude that the Board's decision was in error." 35 Ill. Adm. Code 101.902

In its motion, the Agency argues that the Board (1) "overlooked testimony by an … Agency inspector in the record," and (2) "erred in its application of existing law." Mot. at 2.

The Board denies the Agency's motion for reconsideration. For the reasons below, the Board upholds its July 11, 2002 order dismissing the administrative citation.

DISCUSSION

In ruling on a motion for reconsideration, the Board is to consider "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." Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156, slip op. at 2 (Mar. 11,1993), citing Koroglyun v. Chicago Title

& Trust Co., 213 Ill. App. 3d 622,572 N.E2d 1154, 1158 (1st Dist. 1992). The Agency does not present any new evidence or claim that the law has changed since July 11, 2002. Furthermore, the Board finds nothing in the respondent's motion that persuades the Board that its opinion was in error, or that facts were overlooked.

Evidence Concerning Ineffective Communication

The Agency argues that there was no ineffective communication between the Agency's inspectors and the respondent to warrant a finding that the administrative citation was improperly issued. The Agency contends that Mr. Goodwin was uneducated and confused about the administrative citation process and that the more reliable testimony was from the Agency witness: Ms. Mier, the land inspector. The Agency states that the record contains two different versions of what was conveyed to Mr. Goodwin by the Agency's Mr. Grimmett, the air inspector: Mr. Goodwin's version and Ms. Mier's version. The Agency believes that Ms. Mier's testimony is more credible than that of Mr. Goodwin. On that basis, the Agency argues that the Board should find there were no circumstances that would give rise to a finding that the administrative citation was improperly issued. Motion at 4-5.

As the Board noted in its opinion, the hearing officer found that both witnesses were credible. (slip op. at 2). Contrary to the Agency's contention, the Board did not ignore Ms. Mier's testimony. But, the Board was persuaded by the totality of the evidence, including both witnesses' testimony and the documentary evidence, that respondent was confused by apparently contradictory communications from the different representatives of Agency's air and land bureaus.

Application of Prior Precedent

The Agency also argues that if the Board were to take the "most charitable view" of Mr. Goodwin's testimony (Motion at 5), there was still no communication from the Agency to Mr. Goodwin that would warrant a finding that the administrative citation was improperly issued. The Agency contends that the Board inappropriately applied its own prior precedents: IEPA v. Jack Wright, AC 89-227 (Aug. 30, 1990).

The Agency argues that this case is distinguishable from Wright, because the Agency representative did not contradict or refute the testimony of Jack Wright. In this case, the Agency states, there is a dispute between what occurred between Mr. Grimmett and Mr. Goodwin. The Agency also points to the Notices of Corrective Action issued November 15, 2002 and December 11, 2001 that postdate the communication from Mr. Grimmett as evidence of the Agency's official position that Mr. Goodwin was not relieved of any obligation to pursue cleanup and demolition.

Under these circumstances, the Agency argues, the most applicable prior precedent is the Board's holding in IEPA v. Southern Pacific Railroad, AC 90-59 (Mar. 28, 1991). In Southern Pacific, the recipient of the administrative citation asserted that it deferred clean up efforts, on the advice of an Agency representative, pending the outcome of a pre-enforcement conference. (After the administrative citation was issued it became clear that the pre-enforcement conference

had been scheduled concerning another of the respondent's sites). The Board specifically declined to apply the Wright holding in that case, made a finding of violation, and imposed the statutory penalty. The Agency argues that the Board should also do so here. Motion at 6-7.

The Agency's arguments do not persuade the Board that the Wright case was wrongly applied here, or that the result in Southern Pacific is controlling. In Southern Pacific, the Board distinguished Jack Wright by stating that:

> Respondent specifically stated at hearing that the Agency told him that if he cleaned up the site there would be no problem with the Agency. The testimony was not refuted. In this case, the Railway does not assert that the Agency has made such representations. The transcript at hearing implies that the administrative warning notice was not filed as a part of the record. Therefore, the Board cannot clearly ascertain that the Agency had led the Railway (sic) to believe that clean up would result in no fine." IEPA v. Southern Pacific Railroad, AC 90-59 (Mar. 28, 1991) (slip op. at 5).

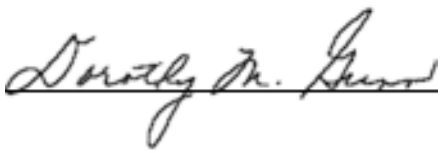
In short, based on the record in Southern Pacific, the Board stated that it could not find that the Agency had made statements that confused the corporate respondent or which it had relied upon to its detriment. In the present case, the record amply demonstrates that the respondent individual was in fact confused by statements made by inspectors representing two different Agency bureaus. Under these unique circumstances, the Board found that the Agency improperly issued the administrative citation due to lack of effective communication between the inspectors of the air and land bureaus, and lack of effective communication between them and Mr. Goodwin. This holding is fully consistent with both the Jack Wright and Southern Pacific precedents.

CONCLUSION

For the above reasons, the Board denies the complainant's motion to reconsider. The arguments raised by the Agency present the Board with no new evidence, change in law, or any other reason to conclude that the Board's July 11, 2002 opinion and order was in error.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 3, 2002, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board