

ILLINOIS POLLUTION CONTROL BOARD
March 18, 1999

DAVID MULVAIN,)
)
Complainant,)
)
v.) PCB 98-114
) (Enforcement - Citizens, Water)
VILLAGE OF DURAND,)
)
Respondent.)

ORDER OF THE BOARD (by G.T. Girard):

On February 1, 1999, complainant David Mulvain (Mulvain) filed a motion for summary judgment (Mot.). Pursuant to a schedule set by hearing officer order, the Village of Durand (Durand) filed a response (Res.) on February 26, 1999 and complainant filed a reply which was received by the Board on March 12, 1999. Mulvain is seeking summary judgment based on a formal complaint filed with the Board on March 9, 1998.

In that complaint, Mulvain alleged that the sewer system in Durand, Winnebago County, Illinois is allowing excess infiltration into the sewer system and backup of sewage into basements. The complaint alleged that the sewer system is in violation of the Environmental Protection Act (Act) and the Board's regulations. The complaint further alleged that the Illinois Environmental Protection Agency (Agency) improperly issued a permit (1997-1A-4892) to Rockford Blacktop Construction, Inc. (Rockford Blacktop) which will result in additional overload to the sewer system. On May 21, 1998, the Board dismissed Rockford Blacktop and the Agency from this proceeding.

The Board will partially grant the motion for summary judgment for the reasons discussed below. The Board finds that Durand violated Sections 12(a) and 12(f) of the Act and Board regulations at 35 Ill. Adm. Code 306.303 and 306.304 prior to completion of sewer repairs in 1997. The Board directs that this matter proceed to hearing to determine if violations continued after the sewer system was repaired in 1997 and to determine the appropriate remedy for the violations.

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from

doubt.” *Id.*, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must “present a factual basis which would arguably entitle [it] to a judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994). Therefore, the Board must construe the pleadings, depositions, and affidavits strictly against the complainant when ruling on the pending motion for summary judgment.

LEGAL FRAMEWORK

Mulvain alleges that Durand violated Section 12 (a) and (f) of the Act and Sections 306.303 and 306.304. Sections 12 (a) and (f) provide, in pertinent part:

No person shall:

- a. Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

- f. Cause, threaten or allow the discharge of any contaminants into the waters of the States . . . including, but not limited to waters to any sewage works . . . in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES permit program.

Section 306.303 provides:

Excess infiltration into sewers shall be eliminated, and the maximum practicable flow shall be conveyed to treatment facilities.

Section 306.304 provides:

Overflows from sanitary sewers are expressly prohibited.

ARGUMENTS

Mulvain argues that there is no genuine issue as to any material fact and he is therefore entitled to judgment. Mulvain asserts that Durand violated the Act in allowing excess infiltration into the sewer system and by allowing sewage backup into basements. Mot. at 2.¹ The specific allegations in the complaint discuss backups in 1975, 1993, 1995, 4 backups in 1996, and two more in 1997. The complaint also alleges that a backup occurred “into the basement of a home on a remaining portion of the Mulvain street sewer line” on January 30, 1998. Mulvain is seeking

¹ In the motion for summary judgment, Mulvain also maintains that “complainant has alleged that the plant discharges effluent in excess of its permit amounts on a regular basis.” A review of the complaint filed does not reveal an allegation of permit violations.

a finding for summary judgment in his favor; however, he states that “for the purposes of this Motion, he seeks only a determination that violations have occurred.” Mot. at 3; Reply at 2.

Mulvain maintains that an Illinois Environmental Protection Agency (Agency) compliance report attached to the motion for summary judgment supports a finding of violation on the excess infiltration allegation. The report which is dated December 2, 1998, states:

There is no known overflow or pumping from manholes or bypassing from lift stations. However, in the past, there was some basement backup, particularly in 1996 due to heavy rainfall. The Village [Durand] is aware of the severe I/I [infiltration and inflow] problem, particularly on North Street and has had Frinks TV some of the sewers periodically. The Village [Durand] has budgeted money for I/I work and sewer replacement which will begin in Spring 1999. Mot. Attachment at 6.

Mulvain also attached as Exhibit B, an affidavit of Michael Sweet, Superintendent of Public Works for Durand. The affidavit indicates that Sweet observed “a bottle neck in the system causing sewage backups in basements.” Exhibit B at 1. Based on the Agency’s report and the affidavit of Michael Sweet, Mulvain argues he has “demonstrated his entitlement to relief and that there are no material issues of fact in dispute.” Mot. at 3.

Durand admits that there have been sewer backups although Durand maintains that no backups occurred after repairs were made in 1997. Res. at 2. Durand also admits that excessive infiltration has occurred; however Durand asserts that there have been no backups since the sewer repairs were made. Res. at 2. Durand also maintains that the affidavit of Michael Sweet supports the denial of backups after completion of the sewer repairs. *Id.*

Durand’s remaining arguments center on the appropriateness of the remedy sought by Mulvain. Durand argues that the remedy sought, placing Durand on “critical review” pursuant to Section 306.403, is too harsh a remedy considering the progress made by Durand.

DISCUSSION

There is no dispute that sewer backups and excess infiltration problems occurred prior to the completion of the sewer repairs in 1997. Durand admits that there have been sewer backups into basements. Durand also admits that there was excessive infiltration in the system. The affidavit of Michael Sweet and the Agency’s compliance report also support those facts. However, Mulvain has asserted that violations also occurred in 1998 and Durand denies that violations occurred after the sewer repairs. Therefore, the facts show that sewer backups and excess infiltration occurred prior to sewer repairs in 1997; however, there are unresolved issues concerning the material facts as to whether or not sewer backups or infiltration continued after the system was repaired.

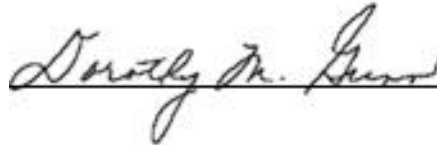
The Board finds that partial summary judgment is appropriate and finds that Durand has violated Sections 12(a) and (f) of the Act and Board regulations at 35 Ill. Adm. Code 306.303 and 306.304 prior to the completion of sewer repairs in 1997. However, because issues of

material fact exist concerning the ongoing nature of violations, the Board sends this matter to hearing. The purpose of the hearing will be to hear factual evidence on possible violations after completion of sewer repairs and to hear evidence regarding the appropriate remedy in this matter.

In making determinations regarding remedy, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act. People v. Berniece Kershaw and Darwin Dale Kershaw d/b/a Kershaw Mobile Home Park (April 20, 1994), (hereinafter Kershaw) PCB 92-164; IEPA v. Allen Barry, individually and d/b/a Allen Barry Livestock (May 10, 1990), (hereinafter Barry) PCB 88-71. The Board must take into account factors outlined in Section 33(c) of the Act in determining the unreasonableness of the alleged pollution. Wells Manufacturing Company v. Pollution Control Board, 73 Ill. 2d 226, 383 N.E.2d 148 (1978). The Board is expressly authorized by statute to consider the factors in Section 42(h) of the Act in determining an appropriate civil penalty. In addition, the Board must bear in mind that no formula exist, and all facts and circumstances must be reviewed. Kershaw at 14; Barry at 62-63. The Board directs the parties to address these factors at hearing in order to assist the Board in determining the appropriate remedy.

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 18th day of March 1999 by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board