

ILLINOIS POLLUTION CONTROL BOARD
March 20, 2003

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 96-98
) (Enforcement - Water)
SKOKIE VALLEY ASPHALT, CO., INC.,)
EDWIN L. FREDERICK, JR., individually)
and as owner and president of SKOKIE)
VALLEY ASPHALT CO., INC., and)
RICHARD J. FREDERICK, individually and)
as owner and vice president of SKOKIE)
VALLEY ASPHALT CO., INC.,)
)
Respondents.)

ORDER OF THE BOARD (by T.E. Johnson):

In this water enforcement action, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a motion to deem facts admitted and for summary judgment as to respondents Edwin L. Frederick, Jr. and Richard J. Frederick (collectively the Fredericks). The immediate dispute centers solely on the timely filing of pleadings. The Board denies the People's motion and directs this case to proceed to hearing.

PROCEDURAL HISTORY

On July 26, 2002, the People filed a second amended complaint. That complaint added Edwin Frederick and Richard Frederick as respondents. Furthermore, the second amended complaint alleged that the Fredericks violated Sections 12(a) and (f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), (f) (2000)), as well as Sections 302.203, 304.105, 304.106, 305.102(b), 309.102(a), and 309.104(a) of the Board's regulations. Moreover, the complaint alleged that the Fredericks falsified discharge monitoring reports, submitted a late application for a National Pollutant Discharge Elimination System (NPDES) permit, failed to comply with sampling and reporting requirements in their NPDES permits, discharged oil into a drainage ditch, and violated NPDES permit effluent limits.

The Fredericks filed an untimely motion to strike the People's second amended complaint on September 25, 2002. On October 1, 2002, the People filed their response to the Fredericks' motion together with a motion for leave to file a second amended complaint. On October 17, 2002, the Board denied the motion to strike as moot and accepted the People's second amended complaint. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 3 (Oct. 17, 2002). The final sentence of that order read, "The respondents may file an answer as provided in Section

103.204(d) of the Board's rules using October 17, 2002 as the date the complaint was received." People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 3 (Oct. 17, 2002).

The respondents hand-delivered their answer to the second amended complaint on December 20, 2002. On that same day, the People filed the instant motion to deem facts admitted and for summary judgment.

THE BOARD'S PROCEDURAL RULES

The Board's enforcement rules in subpart B of part 103 of chapter 35 of the Illinois Administrative Code provide, in part:

Except as provided in subsection (e) of this Section, the respondent may file an answer within 60 days after receipt of the complaint if respondent wants to deny any allegations in the complaint. All material allegations of the complaint will be taken as admitted if no answer is filed or if not specifically denied by the answer, unless respondent asserts a lack of knowledge sufficient to form a belief. 35 Ill. Adm. Code 103.204(d).

Subsection (e) indicates that the 60-day period to file an answer will be stayed if a respondent timely files a motion to strike the pleading. 35 Ill. Adm. Code 101.506.

Subsection (f) provides:

Any party serving a complaint upon another party must include the following language in the notice: "Failure to file an answer to this complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as if admitted for purposes of this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the Clerk's Office or an attorney." 35 Ill. Adm. Code 103.204(f).

The Board's general rules for computation of time of service provides in pertinent part: "In the case of service by U.S. Mail, service is presumed complete four days after mailing." 35 Ill. Adm. Code 101.300(c). The Board's general rules also provide that the date of the Board decision for purposes of appeal, is the date of the party's certified mail receipt of the Board decision. 35 Ill. Adm. Code 101.300(d)(2).

Finally, Section 101.522 provides:

The Board or hearing officer, for good cause shown on a motion after notice to the opposite party, may extend the time for filing any document or doing any act, which is required by these rules to be done within a limited period, either before or after the expiration of time. 35 Ill. Adm. Code 101.522.

DISCUSSION

The People contend that the factual allegations in the second amended against the Fredericks must be deemed true because the Fredericks failed to timely file their answer. According to the People, the Fredericks' answer was due December 16, 2002. But the Fredericks did not file their answer until December 20, 2002.

Section 103.204(d) of the Board's procedural rules plainly states that a respondent may file an answer within 60 days after receipt of the complaint. In this instance, the respondent initially received the complaint in late July of 2002. Instead of filing an answer to the complaint, the Fredericks filed a motion to strike the complaint. That motion was resolved in the Board's October 17, 2002 order. *See People v. Skokie Valley Asphalt, Co.*, PCB 96-98, slip op. at 3 (Oct. 17, 2002). The final sentence of that order generously held that for purposes of filing an answer to the second amended complaint according to Section 103.204(d), the respondents should use October 17, 2002 as the date the complaint was received. *People v. Skokie Valley Asphalt, Co.*, PCB 96-98, slip op. at 3 (Oct. 17, 2002). Consequently, the Fredericks had until December 16, 2002, to timely file an answer.

The Fredericks argue that Section 101.300(c) of the Board's procedural rules provided them with an additional four-day buffer to timely file their answer. The Fredericks' argument is meritless. Section 101.300(c), the service mailbox rule, provides that service of a document by U.S. mail is presumed complete four days after mailing. 35 Ill. Adm. Code 101.300(c). The Board's service mailbox rule does not transform the October 17, 2002 complaint receipt date into October 21, 2002. Consequently, the December 16, 2002 deadline date remains firm. Although the Fredericks may have received the October 17, 2002 order on October 21, 2002, Section 101.300(c) does not alter the explicit language of the order, which provides that October 17, 2002, is the complaint receipt date. The service mailbox rule would only affect the deadline date for filing an appeal of the Board's order or for filing a motion for reconsideration. *See also* 35 Ill. Adm. Code 101.300(d)(2).

Next, the Fredericks note that the People failed to include mandatory language in their second amended complaint. The Board's rules state that a complaint must include the following language:

“Failure to file an answer to this complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as if admitted for purposes of this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the Clerk's Office or an attorney.” 35 Ill. Adm. Code 103.204(f).

The Fredericks contend that People's failure to include this language should be sufficient grounds to strike the second amended complaint. However, no request to strike the complaint has been filed. Instead, the Fredericks request that the People be barred from being granted summary judgment after filing a “non-conforming and misleading complaint.” Response at 3. The Board finds that the Fredericks' attorney should know from his practice experience that the failure to answer a complaint may have severe consequences. Nevertheless, the People's failure to include this language is inexcusable.

Although the Fredericks' answer is late, the Board accepts the answer and denies the People's motion to deem facts admitted and for summary judgment. Section 101.522 of the Board's procedural rules provides that the Board, for good cause shown on a motion after notice to the opposite party, may extend the time for filing any document. *See* 35 Ill. Adm. Code 101.522. The Board construes the Fredericks' response to the People's motion as the necessary motion for extension of time to file their answer. There has been no showing of bad faith on behalf of the Fredericks in failing to file their answer by December 16, 2002. Thus, the Board finds that, in the interests of justice, the deadline for filing an answer is extended to December 20, 2002.

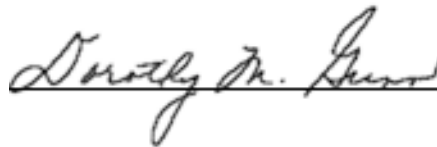
CONCLUSION

Neither party in this matter has succeeded in adhering to the letter of the Board's procedural rules. The parties must abide by the terms of the Board's procedural rules. Failure to do so will have severe consequences.

The People's motion to deem facts admitted and for summary judgment is denied. The Fredericks' answer is accepted into the record. The hearing officer is hereby directed to proceed expeditiously to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 20, 2003, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board