

ILLINOIS POLLUTION CONTROL BOARD
June 17, 1998

COUNTY OF DUPAGE,)
)
 Complainant,)
)
 v.) AC 97-13
) (Administrative Citation)
 M. SALEEM CHOUDHRY,)
)
 Respondent.)

KEVIN D. MACK, DUPAGE COUNTY ASSISTANT STATE'S ATTORNEY, APPEARED ON BEHALF OF COMPLAINANT;

HARRY A. SCHROEDER, OF THE LAW OFFICE OF HARRY A. SCHROEDER, P.C., APPEARED ON BEHALF OF RESPONDENT.

INTERIM OPINION AND ORDER OF THE BOARD (by J. Theodore Meyer):

This matter comes before the Board upon the August 29, 1996, filing of an administrative citation by complainant, the County of DuPage (County), pursuant to Section 31.1 of the Environmental Protection Act (Act) (415 ILCS 5/31.1 (1996)). Service of the administrative citation was made upon respondent, M. Saleem Choudhry (Choudhry) on August 29, 1996. The administrative citation alleges that on June 28, 1996, and July 10, 1996, Choudhry violated various sections of the Act (415 ILCS 5 (1996)). Hearing was held on April 1, 1998, before Hearing Officer John Burds;¹ Choudhry did not attend. After reviewing the record, including the transcript of the hearing held in this matter, the Board defaults Choudhry. Pursuant to Section 42(b)(4) of the Act (415 ILCS 5/42(b)(4) (1996)), the Board finds that Choudhry has violated the Act as alleged in the administrative citation. In this interim order, the Board orders the County and the Clerk of the Board to file a statement of hearing costs, to which Choudhry is given leave to reply. After it receives these pleadings, the Board will issue a final order, assessing the penalty amount and any appropriate costs.

PROCEDURAL MATTERS

The County issued Choudhry an administrative citation for alleged violations at the property located at 639 86th Place, Downers Grove, DuPage County, Illinois. The administrative citation alleges that Choudhry violated Sections 21(a), 21(d), 21(p)(1), and 21(p)(4) of the Act (415 ILCS 5/21(a), 21(d), 21(p)(1), 21(p)(4) (1996)) as well as Sections 807.201 and 807.202 of the Board's Solid Waste Regulations (35 Ill. Adm. Code 807.201, 807.202). At hearing, however, the County indicated that it was only pursuing the following

¹ The hearing transcript will be referred to as "Tr. at ___."

two violations: Section 21(p)(1) of the Act by causing or allowing litter and Section 21(p)(4) of the Act by causing or allowing the deposition of waste in standing or flowing waters.

On March 13, 1997, the parties filed a proposed stipulation and settlement agreement in which Choudhry neither admitted nor denied any violations of the Act, but agreed to pay a civil penalty of \$1,000. On March 20, 1997, the Board accepted the proposal; however, the Board noted that Section 31.1(d) of the Act does not allow recognition of settlement agreements in administrative citation proceedings wherein a respondent neither admits nor denies the violations. Consequently, the Board found that Choudhry violated the Act and imposed the penalty as agreed to by the parties. On April 25, 1997, Choudhry filed a motion for reconsideration, objecting to the Board's finding that Choudhry violated the Act, alleging the parties' stipulation provided for withdrawal of the petition for review with no admission of fault, and asking that the Board either dismiss the administrative citation or reinstate the petition for review. In its June 5, 1997, order, the Board again noted that Section 31(d) of the Act only allows imposition of the statutory penalty after a finding of violation. The Board therefore ordered that the petition for review be reinstated and that this matter proceed to hearing.

SERVICE OF SUBPOENA AND DEFAULT

At hearing, Kevin Mack, counsel for the County, objected to the appearance of Naseem Choudhry (brother of Choudhry), in lieu of respondent, Choudhry. Tr. at 6. Mr. Mack noted that he had served a timely subpoena to Choudhry ordering his appearance at hearing. Tr. at 6. Harry Schroeder, counsel for Choudhry, objected to the subpoena, asserting it was not personally served upon Choudhry, but instead, that it was sent to counsel by mail. Tr. at 10. Hearing Officer Burds took notice of the parties' objections and advised Mr. Schroeder that, as a party to the proceeding, Mr. Choudhry should be present at hearing. The hearing proceeded and the parties presented their arguments.

Section 101.100(a), entitled "Applicability" provides:

This Part governs the practices and procedures of the Pollution Control Board, and contains the rules which are applicable to all proceedings conducted by the Board. This Part should be read in conjunction with 35 Ill. Adm. Code 102 through 120, which contains rules applicable to specific proceedings before the Board. The provisions of this Part apply to 35 Ill. Adm. Code 102 through 120; however, in the event of a conflict between the rules of this Part and subsequent Parts, the more specific requirement of the subsequent Part applies. 35 Ill. Adm. Code 101.100(a).

Part 101 does not specifically address whether a party to a proceeding must appear at hearing. We note that Section 101.260, entitled "Subpoenas," outlines various requirements for properly preparing and issuing a subpoena to a witness for hearing or deposition. See 35 Ill. Adm. Code 101.260. While Section 101.260 requires the party requesting the subpoena to

complete and serve the subpoena upon the witness, it does not directly address whether this Section applies to parties to proceedings.

While Section 101.260 establishes procedures for service of a subpoena on a witness, Section 103.220 specifically addresses appearance by a party at an enforcement hearing. Part 103 of the Board's regulations, 35 Ill. Adm. Code 103, entitled "Enforcement Proceedings" sets forth various procedural rules in enforcement-related matters. Specifically, Section 103.220, entitled "Default," provides as follows:

Failure of a party to appear on the date set for hearing or failure to proceed as ordered by the Board shall constitute default. The Board shall thereafter enter such order as appropriate, as limited by the pleadings and based upon the evidence introduced at the hearing. 35 Ill. Adm. Code 103.220.

An administrative citation under Section 31.1 of the Act (415 ILCS 5/31.1 (1996)) is an enforcement proceeding. Notably, Section 31.1 is codified in Title VIII, entitled "Enforcement." As a party to this administrative citation enforcement proceeding, Choudhry was required to appear at hearing. His failure to appear, as set forth in Section 103.220 of the Board's regulations, constitutes a default. Therefore, Choudhry is in default and any arguments presented by his counsel at hearing will not be considered by the Board in assessing liability.

The Board notes that the parties raised the issue whether the County's service of the subpoena was properly perfected on Choudhry. The Board notes that the issue of proper service of the subpoena is irrelevant as Section 103.220 expressly requires appearance of all parties at enforcement hearings. As an administrative citation proceeding is an enforcement matter, Choudhry's appearance was required at hearing regardless of whether a subpoena was served on him personally or served on his attorney.

EVIDENCE AND ANALYSIS

At hearing, Darlene Jensen, environmental enforcement officer with the Illinois Environmental Protection Agency (Agency), testified on behalf of the County. Specifically, Ms. Jensen testified that the June 28, 1996, and July 10, 1996, investigations at Choudhry's property revealed construction and demolition waste material in a pond and on Choudhry's property. Tr. at 23-27, 33-35. In support of its allegations, the County introduced into evidence several photographs depicting the aforementioned debris on Choudhry's property at the time of the Agency's inspections. See Plaintiff's Exhibits 1A through 1D; People's Exhibits 2A through 2C. The County therefore asserts that Choudhry committed the following violations: causing or allowing litter in violation of Section 21(p)(1) of the Act and causing or allowing the deposition of waste in standing or flowing waters in violation of Section 21(p)(4) of the Act. Tr. at 14-15.

As a result of our previous finding that Choudhry had defaulted by his failure to personally appear at hearing, any defense proffered by Choudhry's counsel at hearing has not

been considered by the Board. Therefore, the Board finds that Choudhry has violated Sections 21(p)(1) and (p)(4) of the Act. The Board also finds that the Board and the County are entitled to their hearing costs under Section 42(b)(4) of the Act, but no information on those costs is included in the record. Therefore, the Clerk of the Board and the County are ordered to file with the Board a statement of hearing costs, supported by affidavit, with service on Choudhry within 21 days, on or before July 8, 1998.

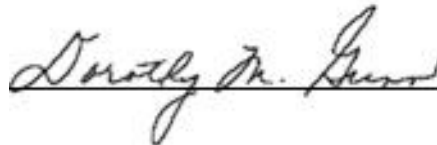
This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1. The Board finds that M. Saleem Choudhry violated Sections 21(p)(1) and 21(p)(4) of the Act, 415 ILCS 5/21(p)(1), (p)(4) (1996).
2. The County of DuPage must file a statement of hearing costs, supported by affidavit, with the Board and with service on M. Saleem Choudhry, within 21 days of this order, on or before July 8, 1998. Within the same 21 days, the Clerk of the Board must file a statement of the Board's hearing costs, supported by affidavit and with service on M. Saleem Choudhry.
3. M. Saleem Choudhry is given leave to file a reply to the filings ordered in paragraph 2 of this order within 14 days after receipt of that information, or on or before July 22, 1998.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above interim opinion and order was adopted on the 17th day of June 1998 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board