

ILLINOIS POLLUTION CONTROL BOARD
July 22, 2004

DANIEL J. BEERS,)
)
 Complainant,)
)
 v.) PCB 04-204
) (Citizens Enforcement - Noise)
 DAVE CALHOUN (LET IT SHINE CAR)
 WASH),)
)
 Respondent.)

ORDER OF THE BOARD (by A.S. Moore):

On May 20, 2004, Daniel J. Beers filed a complaint against Dave Calhoun. The complaint concerns alleged noise pollution from Calhoun's "Let It Shine Car Wash" at 2115 Cherry Lane, Pekin, Tazewell County. Calhoun has moved to dismiss the complaint as frivolous. For the reasons below, the Board denies the motion to dismiss and accepts the complaint for hearing.

In this order, the Board first describes Beers' complaint and Calhoun's motion to dismiss. Next, in ruling on the motion and deciding whether to accept the complaint for hearing, the Board discusses whether the complaint is duplicative or frivolous. Lastly, the Board gives Calhoun 60 days to file an answer and directs the parties to hearing.

COMPLAINT AND MOTION TO DISMISS

Under the Environmental Protection Act (Act) (415 ILCS 5 (2002)), any person may bring an action before the Board to enforce Illinois' environmental requirements. *See* 415 ILCS 5/3.315, 31(d)(1) (2002); 35 Ill. Adm. Code 103. In this case, Beers alleges that Calhoun violated Sections 23 and 24 of the Act (415 ILCS 5/23, 24 (2002)) and Section 900.102 of the Board's noise regulations (35 Ill. Adm. Code 900.102) by causing or allowing noise pollution from "blow driers" and "beeper alarms" at the car wash. Complaint at 3. According to the complaint, the "pollution started in the fall of 2003 and occurs dozens of times daily – 24 hours a day/7 days a week." *Id.* Beers states that he can "hear the pollution from every room in [his] house" and that because of the noise, he cannot enjoy his yard and his sleep is interrupted daily. *Id.* at 4. Beers asks the Board to order Calhoun to "stop the pollution." *Id.*

Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. *See* 35 Ill. Adm. Code 103.212(b). Calhoun has done so here. On June 23, 2004, Calhoun filed a motion to dismiss Beers' complaint as frivolous. Motion at 1. Calhoun argues that the complaint fails to state a cause of action because it does not allege (1) a violation of the Board's Part 901 (35 Ill. Adm. Code 901)

numeric sound emission standards or (2) the land classifications under Part 901 for the car wash or residence. *Id.* at 2. Beers did not respond to the motion to dismiss.

DISCUSSION

Motion to Dismiss

When ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all inferences from them in favor of the non-movant. Dismissal is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief. *See People v. Peabody Coal Co.*, PCB 99-134, slip. op. at 1-2 (June 20, 2002); *People v. Stein Steel Mills Co.*, PCB 02-1, slip op. at 1 (Nov. 15, 2001), citing *Import Sales, Inc. v. Continental Bearings Corp.*, 217 Ill. App. 3d 893, 577 N.E.2d 1205 (1st Dist. 1991).

Among other things, Beers alleges that Calhoun violated Section 24 of the Act and Section 900.102 of the Board's noise regulations. Section 24 provides that no person shall:

[E]mit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the Board under this Act. 415 ILCS 5/24 (2002).

Section 900.102 of the Board's regulations states in relevant part that no person shall cause or allow the emission of sound beyond the boundaries of his property "so as to cause noise pollution in Illinois . . ." 35 Ill. Adm. Code 900.102. "Noise pollution" is defined as "the emission of sound that unreasonably interferes with the enjoyment of life or with any lawful business or activity." 35 Ill. Adm. Code 900.101. These provisions constitute a prohibition against "nuisance noise." *Zivoli v. Prospect Dive and Sport Shop, Ltd.*, PCB 89-205 (Mar. 14, 1991).

The Board finds that Beers has adequately pled a "nuisance noise" violation. A "nuisance noise" violation is different from a numeric noise violation, to which Calhoun refers in his motion to dismiss. A citizen complainant may bring an enforcement action before the Board for noise pollution based on unreasonable interference, and is not required to plead a numeric noise violation. A complaint is frivolous if it "fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 101.202. Because Beers states a cause of action upon which the Board can grant relief, the Board denies Calhoun's motion to dismiss on this ground.

Duplicative or Frivolous

Section 31(d)(1) of the Act provides that "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2002); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.*

Beers' complaint does allege a violation of Section 23 of the Act (415 ILCS 5/23 (2002)). Because Section 23 sets forth the General Assembly's findings on excessive noise and states the purpose of the Act's Title VI on noise, Section 23 cannot be violated. The Board accordingly strikes from the complaint the alleged violation of Section 23 of the Act as frivolous. No evidence before the Board indicates that Beers' complaint is otherwise frivolous or duplicative. The Board accepts for hearing the complaint as modified by this order. *See* 415 ILCS 5/31(d)(1) (2002); 35 Ill. Adm. Code 103.212(a).

Answer

Under the Board's procedural rules, a respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if a respondent fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider the respondent to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d).

In this case, however, Beers' complaint failed to include the required notice to Calhoun of the consequences of failing to timely file an answer. Section 103.204(f) of the Board procedural rules 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 further notes that Calhoun's filing of the motion to dismiss stayed the 60-day period for filing an answer to the complaint, which stay ends today with the Board's ruling on the motion. *See* 35 Ill. Adm. Code 103.204(e). Under these circumstances, Calhoun has 60 days from his receipt of this order to file an answer to Beers' complaint.

Hearing

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

Initially, if the Board finds that a respondent's sound emissions have interfered with the enjoyment of life, the Board then considers the factors set forth in Section 33(c) of the Act (415 ILCS 5/33(c) (2002)) to decide whether the interference is unreasonable, so as to constitute a

nuisance noise violation, which is alleged by Beers. Additionally, if a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2002). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed compliance is to be determined by the "lowest cost alternative for achieving compliance." The amended Section 42(h) also requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship."

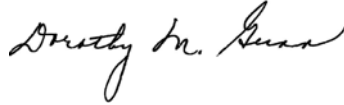
Under these amendments, the Board may also order a penalty lower than a respondent's economic benefit from delayed compliance if the respondent agrees to perform a "supplemental environmental project" (SEP). A SEP is defined in Section 42(h)(7) as an "environmentally beneficial project" that a respondent "agrees to undertake in settlement of an enforcement action . . . but which the respondent is not otherwise legally required to perform." SEPs are also added as a new Section 42(h) factor (Section 42(h)(7)), as is whether a respondent has "voluntary self-disclosed . . . the non-compliance to the [Illinois Environmental Protection] Agency" (Section 42(h)(6)). A new Section 42(i) lists nine criteria for establishing voluntary self-disclosure of non-compliance. A respondent establishing these criteria is entitled to a "reduction in the portion of the penalty that is not based on the economic benefit of non-compliance."

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the

Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 22, 2004, by a vote of 5-0.

A handwritten signature in cursive script, appearing to read "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board