

ILLINOIS POLLUTION CONTROL BOARD

June 15, 2006

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 06-33
)	(Enforcement - Land)
J&S COMPANIES, INC., a Missouri)	
corporation, and FIRST CHOICE)	
CONSTRUCTION, INC., an Illinois)	
corporation,)	
)	
Respondents.)	

ORDER OF THE BOARD (by N.J. Melas):

On April 24, 2006, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a motion for summary judgment in favor of the People against respondent J&S Companies, Inc. (J&S) (Mot.).

On April 25, 2006, the People filed a request for the admission of fact directed towards respondent First Choice Construction (First Choice) (Req.). On May 24, 2006, First Choice filed an answer to request for admission of fact, accompanied by a "general objection and motion to strike" the requests to admit. For the reasons below, this order discusses all of the parties' filings and grants the People's motion for summary judgment as to J&S.

Because the People did not move for summary judgment with respect to First Choice, nor analyze the Section 33(c) or 42(h) factors of the Environmental Protection Act (Act) in requesting a civil penalty, the Board orders the parties to address those issues in briefs or at hearing.

BACKGROUND

On September 1, 2005, the People filed a two-count complaint against J&S Companies, Inc., and First Choice Construction, Inc. *See* 415 ILCS 5/31(c)(1) (2004). The People allege that the respondents violated Sections 21(a), (d)(1) and (2), (e), and (p)(1) and (7) of the Act (415 ILCS 5/21(a), (d)(1), (2), and (e), (p)(1) and (7) (2004)). The People further alleged that the respondents violated these provisions by improperly disposing of construction and demolition debris from a demolition site and by causing or allowing the open dumping of general construction or demolition debris in a manner resulting in litter.

On September 15, 2005, the Board accepted the complaint for hearing. *See* 35 Ill. Adm. Code 103.212(c). The Board noted that the respondents must answer the complaint within 60 days after receiving the complaint, and directed the hearing officer to proceed to hearing. The

People filed a motion to deem the facts alleged in the complaint, as those facts apply to First Choice, admitted on April 25, 2006, and a motion for summary judgment against J&S on the violations on April 24, 2006. Neither respondent filed an answer to the complaint. J&S did not respond to any of the motions and, therefore, waives any objection to the Board granting them. 35 Ill. Adm. Code 101.500(d). First Choice filed an answer to the People's request for admission of fact and motion to strike the People's request on May 24, 2006.

THE BOARD'S PROCEDURAL RULES

Section 103.204(d) of the Board's procedural rules for enforcement actions provides 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) of Section 103.204 states that the 60-day period to file an answer will be stayed if a respondent timely files a motion attacking the sufficiency of the complaint under Section 101.506 of the Board rules. 35 Ill. Adm. Code 103.202(e); *see also* 35 Ill. Adm. Code 101.506

Section 103.204(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).

Section 101.516(b) of the Board's procedural rules for enforcement actions provides:

If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment. 35 Ill. Adm. Code 101.516(b).

Section 101.618(d) of the Board's procedural rules provides that "[a] party may serve a written request for admission of the truth of specific statements of fact on any other party." 35 Ill. Adm. Code 101.618(d). All answers to requests to admit must be served on the party requesting admission within 28 days of service. 35 Ill. Adm. Code 101.618(a). The Board's

rules also require all requests to admit facts to contain the following language in the first paragraph of the request:

Failure to respond to the following requests to admit within 28 days may have severe consequences. Failure to respond to the following requests will result in all the facts requested being deemed admitted as true for this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding or an attorney. 35 Ill. Adm. Code 101.618(c).

STATUTORY BACKGROUND

Section 21(a) of the Act is a prohibition against the open dumping of waste. 415 ILCS 5/21(a) (2004). Sections 21(d)(1) and (2) prohibit waste storage, waste treatment, or waste disposal without a permit granted by the Agency, or in violation of the Board regulations and standards, respectively. 415 ILCS 5/21(d)(1), (2) (2004). Section 21(e) of the Act prohibits disposing, treating, or storing any waste, or transporting waste for disposal at a site or facility that does not meet the requirements of the Act and Board standards and regulations. 415 ILCS 5/21(e) (2004). Sections 21(p)(1) and (7) prohibit the open dumping of any waste in a manner that results in litter or the deposition of general construction or demolition debris. 415 ILCS 5/21(p)(1), (7) (2004).

After the Board finds a violation, the Board considers all facts and circumstances involved in the enforcement order including, but not limited to, the factors set forth in Section 33(c) of the Act to devise an appropriate remedy for the violation. *See* 415 ILCS 5/33(c) (2004). Section 33(c) of the Act provides in part:

In making its orders and determinations, the Board shall take into consideration:

- (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- (ii) the social and economic value of the pollution source;
- (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
- (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
- (v) any subsequent compliance. 415 ILCS 5/33(c) (2004).

The maximum civil penalties the Board may assess are established by Section 42(a) of the Act, which provides in part:

[A]ny person that violates any provision of this Act or any regulation adopted by the Board . . . shall be liable to a civil penalty not to exceed \$50,000 for the violation and an additional civil penalty of not to exceed \$10,000 for each day during which the violation continues 415 ILCS 5/42(a) (2004).

In determining the appropriate civil penalty, the Board may consider any mitigating and aggravating factors of record including those set forth in Section 42(h) of the Act:

1. the duration and gravity of the violation;
2. the presence or absence of due diligence on the part of the violator in attempting to comply with requirements of the Act and regulations thereunder or to secure relief therefrom as provided by this Act;
3. any economic benefits accrued by the violator because of delay in compliance with requirements;
4. the amount of monetary penalty which will serve to deter further violations by the violator and other persons similarly subject to the Act; and
5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator. 415 ILCS 5/42(h) (2004).

SECTION 21(d)(2) ALLEGATIONS STRICKEN

As a preliminary matter, the Board clarifies an allegation in the complaint that relates to both pending motions. The People allege, among others, a violation of Section 21(d) of the Act, without specifying any particular subsection. 415 ILCS 5/21(d) (2004). The inspection report submitted in support of the People's motion for summary judgment indicates apparent violations of Section 21(d)(1) and (2). The allegations in the complaint were apparently intended to support a finding of both violations.

A prerequisite for a violation of Section 21(d)(2) is a violation of a Board regulation. Because the People did not allege any violations of the Board's regulations in this complaint, the Board cannot find that either of the respondents could have violated Section 21(d)(2). Accordingly, the Board will only consider subsection (d)(1), not subsection (d)(2), as an alleged violation of Section 21 of the Act.

REQUEST FOR ADMISSION OF FACT DIRECTED TOWARDS FIRST CHOICE

The People argue that the Board must deem factual allegations in the complaint admitted pursuant to Supreme Court Rule 216. However, as stated in the Board's March 2, 2006 order in this matter, "Supreme Court Rules [Ill. S. Ct. Rules] do not expressly apply to proceedings before the Board." 35 Ill. Adm. Code 101.100(b). Rather, the Board's procedural rules say only

that “the Board may look to the Supreme Court Rules when the Board’s procedural rules are silent.” *Id.*

The Board’s rules are not silent on the admission of facts in a Board proceeding. As set forth above, Section 103.204(d) provides that if a respondent does not file an answer, all material allegations of the complaint will be taken as admitted. 35 Ill. Adm. Code 103.204(d). Further, Section 101.618 of the Board’s procedural rules provides that any party may serve a written request for the admission of truth of facts on any other party. 35 Ill. Adm. Code 101.618(d). If no response is filed within 28 days after service of the request, each of the facts in the request is admitted. 35 Ill. Adm. Code 101.618(f).

First Choice did not file an answer to the complaint, nor has First Choice filed a motion staying the 60-day period. First Choice did, however, timely file an answer and move to strike the request to admit. In its motion, First Choice contends that because the People failed to include the language required by Section 101.618(c), the Board should strike the discovery request. 35 Ill. Adm. Code 101.618(c).

Board Discussion

The Board agrees that the People’s request to admit is improperly drafted. Section 101.618 of the Board’s rules specifically applies to requests to admit filed before the Board. The People’s request does not include a citation to Section 101.618 or the following required language: “Failure to respond to the following requests to admit within 28 days may have severe consequences. Failure to respond to the following requests will result in all the facts requested being deemed admitted as true for this proceeding.” 35 Ill. Adm. Code 101.618(c). The purpose of the language is to warn the opposing party that there are severe consequences of not responding to the request. Based on the April 25 filing date, however, First Choice’s answer was timely filed. Consequently, First Choice was not prejudiced by the People’s omission and the Board denies the motion to strike.

The Board nonetheless takes the facts contained in the complaint as admitted against First Choice. Both the complaint and the Board’s order accepting it for hearing explained the consequences of failing to answer the complaint. 35 Ill. Adm. Code 103.204(f). First Choice received the complaint but never filed an answer within 60 days of receiving the complaint or a motion challenging the complaint, which may have stayed the 60-day period for filing an answer. 35 Ill. Adm. Code 103.204(d); 101.506. The Board, therefore, considers First Choice to have admitted the allegations in the complaint (35 Ill. Adm. Code 103.204(d)).

All but one of the facts contained in the request to admit are found in the complaint. Not set forth in the complaint, but included in the request to admit is the allegation that the construction and demolition debris disposed at the disposal site consisted of brick, metal, plaster, paper, wood, pipe insulation, wire, and rebar. In its answer, First Choice admits that the debris delivered to the site may have contained the above-listed items, but that the amounts were less than five % of the total volume delivered. Accordingly, the Board deems admitted the facts contained in the complaint alleged against First Choice. 35 Ill. Adm. Code 103.204(d).

MOTION
FOR SUMMARY JUDGMENT AGAINST J&S

Standard of Review

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 693 N.E.2d 358 (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.” *Dowd*, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment is a drastic means of disposing of litigation, and therefore it should only be granted when the movant’s right to the relief is clear and free from doubt.” *Dowd*, 181, Ill. 2d at 483, 693 N.E.2d at 370, citing *Purtill v. Hess*, 111 Ill. 2d 229, 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 (2nd Dist. 1994).

The People’s Arguments

The People move for summary judgment against J&S. The People first argue that because J&S never responded to a request for admission of fact served by the People and filed with the Board on December 2, 2005, the Board must deem factual allegations in the complaint admitted pursuant to Supreme Court Rule 216 and Section 101.618 of the Board’s procedural rules. Mot. at 3; citing 35 Ill. Adm. Code 101.618.

As to summary judgment, the People contend that because the Board must deem all the material allegations of the People’s complaint against J&S admitted, there remain no general issues of material fact for review. Mot. for S.J. at 4. The People contend that, accordingly, the Board should grant the motion for summary judgment on both counts of the complaint. The People further ask the Board to order J&S to cease and desist from further violations of the Act and Board regulations. *Id.* The People seek a civil penalty of \$25,000 for the violations of the Act. *Id.*

Board Discussion

The Board grants the People’s motion for summary judgment as to both counts of the complaint.

Both the complaint and the Board’s order accepting it for hearing explained the consequences of failing to answer the complaint. 35 Ill. Adm. Code 103.204(f). J&S did not file an answer to the complaint, nor has J&S filed a motion staying the 60-day period. Further, as discussed above, the Board’s rules are not silent on the admission of facts in a Board proceeding. Section 103.204(d) provides that if a respondent does not file an answer, all material allegations of the complaint will be taken as admitted. 35 Ill. Adm. Code 103.204(d).

Although J&S has not appeared or responded in this proceeding, the Board also finds that the request for admission of fact directed towards J&S is improperly drafted. The document is undated, but filed with the Board on December 2, 2005. The request for admission of fact does not contain language required by the Board's procedural rules. 35 Ill. Adm. Code 101.618(c). Nonetheless, J&S's failure to respond is indicative of J&S's apparent indifference to date in this matter. The Board, therefore, deems admitted the allegations related to J&S in the complaint. Accordingly, there appears to be no genuine issues of material fact.

J&S also has not responded to the People's motion for summary judgment. The Board finds that the allegations deemed admitted pursuant to 35 Ill. Adm. Code 103.204(d) are sufficient to prove that the People are entitled to a judgment as a matter of law under 35 Ill. Adm. Code 101.516(b). Below the Board discusses how the admitted facts support each of the remaining alleged violations of the Act.

Count I

In count I, the People contend that J&S violated Section 21(a), (d)(1), (e) and (p)(1) of the Act (415 ILCS 5/21(a), (d)(1), (e) and (p)(1) (2004)) by improperly disposing of construction and demolition debris from a demolition site and by causing or allowing the open dumping of waste in a manner resulting in litter. The People state J&S violated these same provisions when, during 2003, J&S demolished the Lansdowne Junior High School in East St. Louis, St. Clair County. Compl. at 3. The People contend that J&S hired First Choice Construction, Inc., to haul the construction and demolition debris from the school demolition site. *Id.* First Choice hauled approximately 92 truckloads of construction and demolition debris from the school demolition site to 7401 Bunkum Road in East St. Louis. The People contend that the property where the debris was taken was not permitted by the Agency as a sanitary landfill. For these reasons, the People assert that J&S violated Section 21(a) of the Act by causing or allowing the open dumping of waste.

The People contend that the respondents conducted a waste storage or waste disposal operation without a permit granted by the Agency beginning on February 6, 2003 in violation of Section 21(d)(1) of the Act. Compl. at 4. Also in count I, the People claim that in 2003, the respondents disposed or stored waste at a site that did not meet the requirements of the Act or Board regulations in violation of Section 21(e) of the Act. *Id.* The People further assert that by causing or allowing the open dumping of waste during that same time period in a manner that resulted in litter, the respondents violated Section 21(p)(1) of the Act.

Count II

In count II, the People claim that during 2003, the respondents caused or allowed the open dumping of general construction or demolition debris at the dump site in violation of Section 21(p)(7) of the Act. 415 ILCS 5/21(p)(7) (2004).

REMEDY

The parties have not yet analyzed the 33(c) or 42(h) factors regarding an appropriate remedy, including civil penalty, if any, in this proceeding. If a complainant proves an alleged violation, the Board must consider 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) (2004). 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.

Accordingly, the Board directs the hearing officer to advise the parties that in briefs or at hearing, each party should: (1) discuss whether to impose a remedy, if any, including a civil penalty, for the violations and support its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) propose a civil penalty, if any, including a specific dollar amount, and support its position with facts and arguments that address any or all of the Section 42(h) factors.

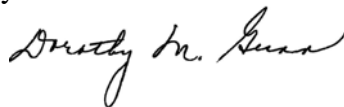
CONCLUSION

Accordingly, the Board deems the facts in the complaint admitted against First Choice. The Board also grants the People's motion for summary judgment in favor of the People and against J&S on Sections 21(a), (d)(1), (e), (p)(1), and (7) of the Act as alleged in the People's two-count complaint. 415 ILCS 5/21(a), (d)(1), (e), (p)(1), and (7) (2004). The Board further directs the parties to address the violations alleged against First Choice and on the issue of remedy as to both parties in briefs or at hearing.

IT IS SO ORDERED.

Board Member T.E. Johnson dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 15, 2006, by a vote of 3-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

