

ILLINOIS POLLUTION CONTROL BOARD
September 7, 2006

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):

This matter is before the Board on a number of motions filed by the People of the State of Illinois (People) and the Skokie Valley Asphalt Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick (respondents). The motions all relate to discovery on the issue of attorney fees and costs.

PROCEDURAL BACKGROUND

On September 2, 2004, the Board issued an order in this matter finding that the respondents violated the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2004)) and Board regulations. The Board ordered the respondents to pay a civil penalty of \$153,000, but withheld a decision regarding attorney fees and costs until the matter was fully addressed by the parties. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 1 (Sept. 2, 2004). On September 28, 2004, the respondents filed a motion to stay or extend the time to respond to the People's petition for attorney fees and costs. Also on September 28, 2004, the respondents filed a petition to review the Board order with the State of Illinois' Second District Appellate Court. *See Skokie Valley Asphalt v. PCB*, No. 04-0977 (2nd Dist. 2004).

On October 18, 2004, the Board issued an order finding that the Board no longer had jurisdiction of the case in light of the pending appeal and could not, therefore, rule on the petition seeking attorney fees and the accompanying issues. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 2 (Oct. 18, 2004). On November 18, 2004, the appellate court dismissed the respondents' petition for review.

On November 19, 2004, the People filed a motion to void the Board's October 21, 2004 order. On December 1, 2004, the respondents filed a response to the People's motion, a motion

to renew their motion to stay or extend time to respond to the petition for attorney fees and costs, as well as a motion to stay payment of penalty. On December 8, 2004, the People filed a response to the respondents' motions. On December 16, 2004, the Board issued an order giving respondents until January 13, 2005, to respond to the People's request for attorney fees and costs. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 3 (Dec. 16, 2004). In that order, the Board continued the stay of the \$153,000 civil penalty.

On April 7, 2005, the Board granted respondents' motions for extension of time and authorized respondents to conduct discovery on the attorney fee issue. The Board continued the stay of the \$153,000 civil penalty imposed in the Board's September 2, 2004 order. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 4 (Apr. 7, 2005).

On November 17, 2005, the Board issued an order that addressed a number of discovery motions, finding that in order to prevent prejudice, the People must be allowed to conduct discovery on the reasonableness of attorney fees and costs. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 3 (Nov. 17, 2005). The Board directed the hearing officer to establish a discovery schedule and rule on further discovery objections in a hearing officer order. *Id.* at 9.

On December 5, 2005, the respondents filed responses to the People's outstanding discovery requests, and a motion to quash the People's deposition notices to respondents regarding the People's fee petition.

On December 19, 2005, the respondents filed a response to the People's objections to respondents' request for admission of facts regarding attorney fees and expenses, a response to the People's answers and objections to respondents' interrogatories regarding attorney fees and expenses, and a response to the People's objections to respondents' first set of document requests regarding attorney fees and expenses.

On December 28, 2005, the People filed a motion for leave to file a reply to the respondents' responses to the People's discovery objections, a second motion for a protective order, and a response to respondents' motion to quash the deposition notices.

On January 9, 2006, the respondents filed objections and a motion to strike the People's motion for leave to file a reply to the respondents' response to the People's discovery objections, as well as a motion to strike and a response to the People's second motion for a protective order.

On January 19, 2006, the People filed a response to the respondents' motion to strike the People's second motion for a protective order.

On February 8, 2006, the hearing officer issued an order that denied respondents' motion to quash the People's deposition notices, granted, in part, the People's motion for a protective order, and directed the parties to make every effort to get through the discovery process on their own. *See* Hearing Officer Order (Feb. 8, 2006). In that order, the hearing officer found that the respondents' responses to the People's discovery requests were essentially non-responsive and violated the spirit of the Board's November 17, 2005 order. *Id.* at 1. The hearing officer

directed the respondents to relate the measures taken to resolve discovery problems with the People's attorneys prior to the filing of any motion regarding discovery disputes. *Id.* at 2.

On February 23, 2006, the respondents filed an appeal of the February 8, 2006 hearing officer order. Mot. to App. On March 10, 2006, the hearing officer issued an order staying discovery pending the Board's ruling on the respondents' appeal. Also on March 10, 2006, the People filed a motion to deny the respondents' appeal. Mot. to Deny.

On March 20, 2006, the respondents filed a motion to appeal the order (Mot. to App. 2), in an effort to correct some perceived filing deficiencies. On March 30, 2006, the People filed a response to the March 20, 2006 motion (Appeal Resp.), along with a motion for a final order. Mot. for Order.

On April 11, 2006, the respondents filed a motion to strike the People's motion (Mot. to Strike) for final order. On April 12, 2006, the People filed a response to the motion to strike the motion for final order. Strike Resp.

MOTIONS

In an attempt to simplify the many pleadings in this matter, the Board will address each motion, along with all related pleadings, individually.

Respondents' Motions to Appeal the February 8, 2006 Hearing Officer Order

Respondents

The respondents filed two motions to appeal the hearing officer order of February 8, 2006. The second motion essentially argues that the first was properly filed, and, in the alternative, moves the Board to file the second motion to appeal if the first were not correctly filed. Mot. to App. 2 at 2-3. In the first motion, respondents assert that the Board order of November 17, 2005, was limited to the issues regarding the reasonableness of the People's attorney fees and costs. Mot. to App. at 3. The respondents argue that the People have made no attempt to act professionally and with civility to modify its discovery request to comply with the Board's requirement to limit discovery to the issues regarding the reasonableness of the People's attorney fees and costs. *Id.* The respondents contend that they prepared their answers to discovery with full respect of the Board's order of November 17, 2005, stating that discovery must be limited to the issues regarding the reasonableness of the People's attorney fees and costs. *Id.* at 4.

The respondents argue that the burden is on the People to prove that the information sought would be admissible or lead to admissible information. Mot. to App. at 5. The respondents assert that the hearing officer fails to rule as to whether or not the information sought appears reasonably calculated to lead to the admissible evidence, but instead rules because the respondents failed to supply case law they should not have to provide. *Id.* Further, the respondents argue, the hearing officer dismisses the respondents' motion without explanation. *Id.*

The respondents contend that it is well established that the attorney-client relationship makes it ethically improper for an attorney to testify in most matters in which he is counsel. Mot. to App. at 6. The respondents argue that both of its attorneys would need to withdraw if the hearing officer's ruling of February 8, 2005, is allowed to stand. *Id.*

The respondents contend that neither the People nor the hearing officer has presented an argument that the testimony of the attorneys is necessary in this matter, and that the courts have found the practice of deposing opposing counsel is disruptive of the adversarial process and lowers the standards of the legal profession. Mot. to App. at 7. The respondents argue that the hearing officer should have inquired as to the People's motives and required the People to establish a legitimate basis for the request and demonstrate that the deposition will not otherwise prove overly disruptive or burdensome. *Id.* The respondents argue that in the matter before the Board, the attorneys' representations would be endangered and neither the People nor the hearing officer have shown that only the attorneys for the respondents can provide the necessary information. *Id.* at 8.

People

The People assert that during the entire course of the relevant procedural history, respondents' counsel has refused to attempt to informally resolve any discovery dispute despite four written invitations to do so by the People's counsel. Mot. to Deny at 7. The People contend that the record clearly establishes that the People initiated four written Rule 201(k) conferences with the respondents, and that the respondents refused to respond to any of these letters and did not initiate any of their own Rule 201(k) conferences. *Id.* at 10. The People contend that the respondents have not yet identified a single hour of attorney time or a single cost requested by the People in the verified petition that was improperly requested. *Id.*

The People argue that the respondents violated procedural rule Section 101.518 (35 Ill. Adm. Code 101.510) for taking an interlocutory appeal of a hearing officer order and that their appeal should be denied. Mot. to Deny at 8. The People assert that the appeal also fails to present sufficient cause to overturn the order and should be denied for that reason as well. *Id.* at 9.

The People argue that the case law and Supreme Court Rules cited by respondents concerning attorney testimony is irrelevant in a dispute over a fee petition. Mot. to Deny at 13. In addition, the People contend that the requested depositions are clearly relevant and that respondents made no relevancy objections. *Id.* The People argue that there is no privilege available as to attorney fees and costs when the very issue in dispute is the appropriate amount of such fees and costs. *Id.* The People further argue that even if such a privilege existed, the respondents waived it by making allegations regarding the amount of their own attorney fees and costs and by requesting and receiving the same information from the People. *Id.* at 14.

On March 30, 2006, the People filed a response to the respondents' second motion to appeal the hearing officer order. In that response, the People reiterated that the Board should deny the first motion for appeal, and argued that the respondents' attempt to comply with Section 101.518, is untimely as it occurred 40 days after the hearing officer order in question. Appeal

Resp. at 3. Thus, conclude the People, the Board should deny the motion for appeal on both procedural and substantive grounds, and should affirm the hearing officer order. *Id.* at 4.

Discussion

Initially, the Board accepts respondents' February 23, 2006 motion to appeal the February 8, 2006 hearing officer order. Section 101.518 of the Board's procedural rules provides that: "Interlocutory appeals from a ruling of the hearing officer may be taken to the Board. The Board may consider an interlocutory appeal upon the filing of a written motion." 35 Ill. Adm. Code 101.518.

The respondents' pleading entitled "Respondents' Appeal of Hearing Officer's Order of February 8, 2006" meets the requirements of Section 101.518 notwithstanding the People's argument that the pleading does not contain the word "motion." The pleading clearly specifies the reasons an appeal of the order is sought, and is taken to the Board in writing. The hyper-technical reading of Section 101.518 advocated by the People does not advance the resolution of this case or further the ends of administrative justice. Accordingly, the February 23, 2006 appeal is accepted and the Board need not address the respondents' second appeal of the order filed on March 20, 2006.

In her order, the hearing officer states that the respondents' discovery responses violate the spirit of the Board's order because respondents objected and provided no answer other than the most perfunctory to the requests. The hearing officer denied the respondents' motions to quash the People's deposition notices and to strike the People's motion for a protective order. The hearing officer order also granted the People's motion for protective order, and directed the respondents' attorneys to participate in a full and good faith conference with the People's attorneys regarding any further discovery dispute prior to seeking Board intervention.

After careful consideration, the Board affirms the hearing officer in part, but also reverses in part the February 8, 2006 hearing officer order. In reviewing the People's interrogatories at the base of the hearing officer order, the Board finds that the interrogatories in question seek information that is not reasonably calculated to the discovery of admissible evidence. Specifically, the respondents' objections concerning discovery regarding the daily accounting of all hours and also all costs (even those not billed to respondent) are appropriate. The Board notes that our November 17, 2005 order specifically allowed for the possibility that respondents might object to the discovery sought by the complainants. *See* November 17, 2005 order at 3.

The Board cannot see how the respondents' attorney fees and costs are relevant to the People's fee petition. Although the respondents have raised arguments concerning their attorney fees and costs, the Board finds those arguments irrelevant as well. The arrangement made by the respondents and their attorneys regarding representation does not impact the Board's decision on the appropriateness of the People's fee petition. In addition, deposing the respondents' attorneys is not appropriate, and the Board overrules the hearing officer and grants the motion to quash as to David O'Neill and Michael B. Jawgiel.

Finally, the Board upholds the hearing officer's direction that respondents' attorneys participate in a full and good faith conference with the People's attorneys regarding any further discovery dispute prior to seeking Board intervention; however, that admonition is no longer required as a detailed schedule designed to move this matter to ultimate resolution is set forth below.

People's Motion for Final Order

People

The People assert that despite the benefit of an entire year's worth of discovery on the \$100,575.00 in fees and the \$3,482.84 in costs sought in the People's fee petition, the respondents have failed to specifically identify a single hour of attorney time or a single cost that was excessive. Mot. for Order at 5. The People contend that the respondents will not identify any such excessive fee or cost because that would allow the Board to decide the dispute and result in a final order. *Id.*

The People argue that allowing discovery on a fee petition is unprecedented. Mot. for Order at 7. The People assert that the respondents have used this unprecedented discovery opportunity for the purpose of delaying entry of a final order. *Id.* The People argue that the fee petition should be granted based on the degree of responsibility involved in managing this case as well as the time and labor required. *Id.* at 9. The People note that the remaining \$100,575 sought in fees is documented, supported with sworn affidavits, and represents only a portion of the People's actual time and labor required to solve this case. *Id.* The People argue the its time and labor needed to resolve this case was the direct result of respondents' own decision to actively oppose the case. *Id.*

In addition, the People note, Assistant Attorney General Sternstein, whose fees were disallowed by the Board, was responsible for and performed numerous tasks in the preparation of this case, and his \$33,675 in fees will not be assessed against the respondents pursuant to the Board's April 7, 2005 order. Mot. for order at 9. Further, the People argue, this case was filed on November 3, 1995, but the earliest fees or costs included in the People's fee petition are Assistant Attorney General Cohen's fees beginning on May 29, 2002. *Id.*

The People contend that the \$150.00 per hour rate requested in the fee petition is supported by the Board's prior decisions. Mot. for Order at 10. The People argue that because the respondents have failed to substantiate their dispute of the fee petition, the Board should, as a matter of law, enter a final order assessing the \$100,575 in fees and \$3,482.84 in costs against the respondents. *Id.* at 12. Failing that, the People request that the Board direct the hearing officer to schedule a final hearing to occur no later than 60 days after deciding this motion. *Id.*

Respondents

The respondents move to strike the People's motion for final order, arguing that it is, in fact, a motion for reconsideration of the Board's April 7, 2005 order. Mot. to Strike at 2. The respondents assert that in its April 7, 2005 order, the Board stated that it will allow additional

time in order to conduct discovery and participate in a hearing regarding attorney fees and costs, and that the respondents have not been allowed to participate in a hearing regarding fees and costs. *Id.* at 3. The respondents argue that to issue a final judgment, the Board would have to rule that it is not allowing the respondents to participate in a hearing, thus reversing the prior order. *Id.*

The respondents contend that by filing the motion for final order, the People continue to demonstrate its total disregard and disrespect for the Board and the respondents. Mot. to Strike at 4. The respondents assert that if the attorneys for the People are the \$150 per hour trained professionals they claim to be, they should be held to the duty of comprehending and complying with the procedural rules and the general rules of professionalism. *Id.* The respondents argue that the People continue to file frivolous and baseless motions with the Board in continuation of the tactic to add false, inflammatory and prejudicial statements into the record through extraneous correspondences unnecessarily copied to the hearing officer and other maneuvers. *Id.*

People's Response to the Respondents' Motion to Strike

The People assert that the motion to strike the People's motion for final order is the respondents' ninth motion to strike over a ten-month period and is respondents' most venomous pleading to date. Strike Resp. at 2. The People contend that the motion to strike is entirely unresponsive to the People's motion for final order. *Id.* The People argue that the respondents have already realized the benefit of limited discovery that was allowed under the Board's April 7, 2005 order. *Id.* The People reiterate that the fee and costs petition contains well-pled facts in support of the request for entry of a final order and that respondents have not filed any counter affidavits. *Id.* at 3.

Discussion

The Board does not consider the People's motion for a final order a surreptitious motion for reconsideration of the Board's April 7, 2005 order, rather the Board views the motion as an attempt to achieve resolution of a matter that has been pending for a considerable amount of time. It should be noted again that the Board found the respondents in violation and imposed a civil penalty of \$153,000 on September 2, 2004. For that reason, the Board does not feel the respondents' motion to strike the People's motion for final order is meritorious, and denies the motion.

In the motion for a final order, the People ask for a final order assessing the \$100,575 in fees and \$3,482.84 in costs against the respondents, or, in the alternative, request that the Board direct the hearing officer to schedule a final hearing to occur no later than 60 days after deciding this motion. The respondents assert that the Board stated that it will allow additional time in order to conduct discovery and participate in a hearing regarding attorney fees and costs, and that the respondents have not been allowed to participate in a hearing regarding fees and costs.

The Board notes that it has allowed additional time for discovery and hearing; however because of the continual disagreements between the parties, this time has not been fully utilized. However, the Board declines to enter a final order at this time. Due in no small part to the

constant bickering between the parties, the record on the issue of attorney fees and costs remains incomplete. A hearing to resolve these issues is necessary. Thus, the Board denies the People's motion for a final order.

That said, the Board recognizes the desire of the People to resolve this matter in as timely a manner as possible at this point. To that end, the Board is setting up a detailed pre-hearing schedule and directing the hearing officer to schedule a hearing no later than December 22, 2006. Further, no additional discovery requests will be allowed. The parties are to complete discovery as set forth in the following schedule.

Pre-Hearing Schedule

<u>ACTIVITY</u>	<u>DATE</u>
New responses to all pending written discovery filed and served as directed in this order	September 21, 2006
Objections to responses to all written discovery filed and served	October 5, 2006
Board Meeting	October 19, 2006
Final Responses to all pending written discovery filed and served as directed by the Board	October 24, 2006
Notices of Depositions filed and served	October 31, 2006
Objections to Notices of Depositions filed and served	November 8, 2006
Board Meeting	November 16, 2006
Depositions completed	December 1, 2006

All discovery activities must be completed on or before the dates provided above. Any objections to the responses are to be directed to the Board. Discovery pleadings, including replies to the objections, that are not addressed by the schedule will not be allowed. The mailbox rule will not apply. The hearing officer is directed to schedule a hearing in this matter limited solely to the issues of attorney fees and costs prior to December 22, 2006. Concurrent briefs will be due on or before January 19, 2007. No response or reply briefs will be allowed.

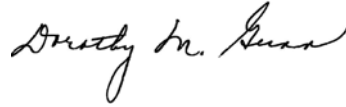
The parties are notified that any failure to abide by the schedule set forth will result in sanctions that may include the barring of testimony or the striking of pleadings pursuant to Section 101.800 of the Board's procedural rules.

CONCLUSION

The Board affirms the February 8, 2006 hearing officer order. Additionally, the Board denies the respondents' motion to strike the People's motion for final order, but denies the People's motion for a final order as well. The parties are directed to comply with the schedule set forth above. The hearing officer is directed to set a status conference with the parties to schedule a hearing as set forth in today's order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 7, 2006, by a vote of 4-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board