

ILLINOIS POLLUTION CONTROL BOARD

November 2, 2006

MORTON F. DOROTHY,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 05-49
	)	(Citizens Enforcement – Air, Land)
FLEX-N-GATE CORPORATION, an Illinois	)	
corporation,	)	
	)	
Respondent.	)	

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

On September 8, 2004, complainant, Mr. Morton F. Dorothy filed a six-count citizen's enforcement complaint against respondent, Flex-N-Gate Corporation (FNG). The complaint concerns FNG's facility, known as Guardian West, located at 601 Guardian Drive, Urbana, Champaign County where FNG produces bumpers for vehicles. According to the complaint, as a result of an alleged spill of sulfuric acid inside the facility on August 5, 2004, FNG violated the Environmental Protection Act (Act) (415 ILCS 5 (2004)) and the Board's hazardous waste rules. The Board's hazardous waste rules are identical in substance to the federal rules implementing the Resource Conservation and Recovery Act of 1976 (RCRA).

On October 20, 2005, the Board granted in part FNG's motion for summary judgment, finding in favor of FNG on five of the six counts in Mr. Dorothy's complaint. On June 19, 2006, FNG moved the Board to sanction Mr. Dorothy by dismissing the remaining count I of the complaint: FNG's alleged need for and failure to have either a RCRA permit or RCRA "interim status." In the alternative, FNG's motion urges the Board to grant summary judgment in its favor on that count. To date, Mr. Dorothy has not responded to FNG's June 19, 2006 motion. On September 19, 2006, Mr. Dorothy filed an amended complaint alleging six new counts, for a total of seven counts.

In considering whether sanctions are warranted in this case, the Board considers whether "any person unreasonably fails to comply with any [Board rule] or any order entered by the Board or the hearing officer." 35 Ill. Adm. Code 101.800(a); see also Modine Mfg. Co. v. PCB, 192 Ill. App. 3d 511, 518, 548 N.E. 2d 1145, 1149 (2nd Dist. 1990). FNG seeks sanctions both for the course and pattern of conduct exhibited by Mr. Dorothy during these proceedings, as well as the alleged inadequacy of Mr. Dorothy's responses to specific discovery requests.

For the reasons below, the Board grants FNG's motion to the extent that the Board sanctions Mr. Dorothy. Without ruling on the adequacy of Mr. Dorothy's responses to FNG's discovery requests or the adequacy of his various privilege claims, the Board nonetheless finds that Mr. Dorothy has unreasonably failed to comply with various Board rules and hearing officer orders. As FNG has not directly addressed the substance of Mr. Dorothy's amended

interrogatory answers, the Board cannot find that FNG has sufficiently justified the drastic sanction FNG first requests: dismissal of count I of the complaint.

As a sanction, the Board instead bars Mr. Dorothy from alleging any new counts or making any new allegations unrelated to count I of his original complaint. Additionally, both as part of the Board's sanction and as procedurally deficient, the Board strikes Mr. Dorothy's amended complaint, filed on September 19, 2006. Granting FNG's motion for sanctions in this manner, the Board denies FNG's alternative request for summary judgment.

In this order, the Board first sets forth this case's procedural background. The Board then sets forth the applicable statutes and Board regulations, FNG's motion for sanctions, and Mr. Dorothy's amended complaint. Finally, the Board analyzes the parties' arguments and provides reasoning for granting FNG's motion for sanctions.

## **PROCEDURAL BACKGROUND**

### **Original Complaint**

On September 8, 2004, Mr. Dorothy filed a six-count enforcement complaint against FNG. FNG moved to dismiss the complaint on October 12, 2004. On February 3, 2005, the Board denied FNG's motion to dismiss and accepted the complaint for hearing.

On October 20, 2005, the Board granted summary judgment in favor of FNG as to counts II through VI of the complaint and denied both parties' motions for summary judgment on count I, directing the hearing officer to proceed expeditiously to hearing on that count. On November 14, 2005, Mr. Dorothy moved the Board to reconsider that order. FNG replied on November 28, 2005. On March 2, 2006, the Board granted Mr. Dorothy's motion for reconsideration in part. The Board, however, upheld the October 20, 2005 ruling granting summary judgment in favor of FNG on counts II through VI, leaving count I (failure to have a RCRA permit or interim status) as the only remaining count of Mr. Dorothy's original complaint.

As to count I, the Board held that FNG bears the burden to prove it is exempt from the requirement to obtain a RCRA permit or interim status. Dorothy v. Flex-N-Gate, PCB 05-49 slip op. at 14-20 (Oct. 20, 2005). The Board also held that FNG should plead any RCRA permit exemption as an affirmative defense. *Id.* FNG filed an amended answer on November 15, 2005, alleging an affirmative defense under RCRA's wastewater treatment unit exemption.

### **Discovery**

In a hearing officer order dated December 13, 2005, the hearing officer set February 14, 2006 as the deadline to complete all written discovery. FNG served complainant with twenty-two interrogatories, and requests for document production. *See* Mot., Exh. A, B.

FNG characterized its interrogatories as essentially asking two things:

First, what do you allege Flex-N-Gate did that required a permit?

Second, why do you think that Flex-N-Gate is not exempt from the permit requirement? Mot. at 10, Exh. A.

Among other things, the interrogatories ask what materials Mr. Dorothy refers to as constituting hazardous waste, their nature, quantity, and location; what is the basis for the allegation that FNG is required to have a RCRA permit or interim status; whether complainant agrees with FNG's contentions that various equipment and plant processes at FNG's site meet various RCRA definitions, and if not, why not. Mr. Dorothy filed responses on February 14, 2006. Mot., Ex. C.

Rather than provide the text of the interrogatories and Mr. Dorothy's responses in their entirety, the Board points (as did FNG on page 12 of the motion for sanctions) to Interrogatory No. 5 as an example, and Mr. Dorothy's initial response:

INTERROGATORY NO. 5: Flex-N-Gate contends that its Wastewater Treatment Equipment (as defined above) generates and accumulates a sludge that satisfies the definition of "wastewater treatment sludge" as that term is used in the definition of "wastewater treatment unit" contained in 35 Ill. Admin. Code § 720.110. Do you disagree with this contention, and, if so, please state the basis upon which you disagree including the specific portions of the definition of "sludge" at 35 Ill. Adm. Code § 720.110, and/or the definition of "hazardous waste" at 35 Ill. Adm. Code § 721.103, which you believe have not been satisfied.

Answer: Objection. The question calls for a legal conclusion, and/or requests Complainant's work product. Moreover, this is irrelevant because neither the Complaint nor Answer has alleged that any portion of the facility is a "wastewater treatment unit."

On April 13, 2006, FNG filed a motion to compel (Mot. to Compel), directed to the hearing officer, stating that Mr. Dorothy had not yet certified his responses to interrogatories nor had he responded to FNG's requests for production. In the motion to compel, FNG also noted that Mr. Dorothy had provided inaccurate responses to interrogatories, and asked him to remedy the inaccuracies in an amended response to interrogatories. Mot. to Compel, Exh. F. The hearing officer granted the motion to compel on May 9, 2006.

Mr. Dorothy filed amended interrogatory answers on May 11, 2006. By way of example, below is the amended response to Interrogatory No. 5.

Amended Answer: Objection. The question calls for a legal conclusion, and/or requests Complainant's work project. Mot., Exh. D.

### **Amended Complaint**

At a March 20, 2006 telephonic status conference, Mr. Dorothy announced his intention to file an amended complaint within 60 days. *See Morton F. Dorothy v. Flex-N-Gate Corp.*, PCB 05-49, Hearing Officer Order (May 20, 2006). No amended complaint or motion for an extension of time was filed by May 19, 2006, 60 days after the date of the hearing officer order.

FNG filed the instant motion for sanctions on June 19, 2006, which included an alternative motion for summary judgment on the remaining count I. At a July 12, 2006 telephonic status conference, the parties indicated that they were attempting to settle. *See Morton F. Dorothy v. Flex-N-Gate Corp.*, PCB 05-49, Hearing Officer Order (July 12, 2006). Settlement negotiations failed and the hearing officer granted Mr. Dorothy until September 19, 2006, to file an amended complaint and a response to the pending motion for sanctions and alternative motion for summary judgment.

To date, Mr. Dorothy has not responded to FNG's motion for sanctions, or alternative motion for summary judgment. Mr. Dorothy filed an amended complaint on September 19, 2006, raising six new counts. The new counts include, in addition to the original allegation that FNG failed to have a RCRA permit or interim status, charges that FNG failed to have in place a waste minimization plan (required for large quantity generators), prepared "false" contingency plans, and released hydrogen sulfide emissions without an air operating permit or permit for "process emissions." FNG objected to the filing of the amended complaint on October 3, 2006.

### **APPLICABLE BOARD PROCEDURAL RULES**

Section 101.304(c) of the Board's procedural rules on service of documents provides:

Service may be effectuated by U.S. Mail or other mail delivery service, in person, my messenger, or as prescribed in Section 101.302(d), except for service of enforcement complaints and administrative citations which must be made personally, by registered or certified mail, or by messenger service. Proof of service of enforcement complaints and administrative citations must be filed with the Board upon completion of service. 35 Ill. Adm. Code 101.304(c).

Section 101.500(d) of the Board's rules for the filing of motions and responses provides, in part:

Within 14 days after service of a motion, a party may file a response to [a] motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion. 35 Ill. Adm. Code 101.500(d).

Section 101.800 of the Board's procedural rules provides the Board's authority for imposing sanctions for failure to comply with procedural rules, Board orders, or hearing officer orders:

If any person unreasonably fails to comply with any provision of 35 Ill. Adm. Code 101 through 130 or any order entered by the Board or the hearing officer, including any subpoena issued by the Board, the Board may order sanctions. The Board may order sanctions on its own motion, or in response to a motion by a party. 35 Ill. Adm. Code 101.800(a).

The offending person may be barred from filing any other pleading or other document relating to any issue to which the refusal or failure relates. 35 Ill. Adm. Code 101.800(b)(2).

The offending person may be barred from maintaining any particular claim, counter-claim, third-party complaint, or defense relating to that issue. 35 Ill. Adm. Code 101.800(b)(3).

As to claims or defenses asserted in any pleading or other document to which that issue is material, a judgment by default may be entered against the offending person or the proceeding may be dismissed with or without prejudice. 35 Ill. Adm. Code 101.800(b)(4).

Any portion of the offending person's pleadings or other documents relating to that issue may be stricken and, if appropriate, judgment may be entered as to that issue. 35 Ill. Adm. Code 101.800(b)(5).

Section 103.204(f) of the Board's procedural rules requires that certain notice be included with a complaint:

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 103.206(d) of the Board's rules regarding filing an amended complaint states in part:

If a party wishes to file an amendment to a complaint . . . that sets forth a new or modified claim, against another person, the party who wishes to file the pleading must move the Board for leave to file the pleading. 35 Ill. Adm. Code 103.206(d).

## **MOTION FOR SANCTIONS**

### **FNG's Arguments**

FNG moves the Board to sanction Mr. Dorothy for his alleged repeated failure "to validly respond to Flex-N-Gate's discovery" and "for other actions in this matter." Mot. at 12. As a sanction, FNG asks the Board to dismiss the only remaining count of Mr. Dorothy's original complaint. The Board considers, according to FNG, the nature and effect of the aberrant actions prior to the imposition of sanctions. Mot. at 15; citing *Int'l Union et al. v. Caterpillar Inc.*, PCB 94-240, slip op. at 10 (Aug. 1, 1996). FNG contends that Mr. Dorothy's actions in this matter "amply satisfy this standard." Mot. at 15.

FNG first raises Mr. Dorothy's failure to timely or sufficiently respond to discovery requests. FNG states that it served Mr. Dorothy with discovery requests on January 18, 2006. Only after the hearing officer granted FNG's motion to compel production of answers to the discovery requests, did Mr. Dorothy respond to the requests on May 11, 2006. FNG claims that in his amended responses to the interrogatories that FNG originally propounded on January 18, 2006, Mr. Dorothy continues to refuse to answer the majority of FNG's interrogatories. Mot. at 5.

Second, FNG discusses Mr. Dorothy's untimely filing of his amended complaint. Mot. at 5. FNG states that Mr. Dorothy announced his intention to file a motion for leave to file an amended complaint during a telephonic status conference on March 20, 2006. In response, the hearing officer allowed Mr. Dorothy 60 days, or until May 19, 2006, to file the motion. When no extension motion or amended complaint was filed, FNG filed the pending motion for sanctions on June 19, 2006. Still no extension motion or amended complaint was filed by Mr. Dorothy by the July 12, 2006 telephonic status conference, during which the parties indicated that an attempt to settle was underway. Settlement negotiations failed and the hearing officer granted Mr. Dorothy until September 19, 2006, to file an amended complaint and a response to the pending motion for sanctions or alternative for summary judgment. Morton F. Dorothy v. Flex-N-Gate Corp., PCB 05-49, Hearing Officer Order (Aug. 29, 2006)

FNG asserts that Mr. Dorothy did not object to or seek any extension of time to respond to the requests for production. FNG further contends that Mr. Dorothy tried to obfuscate the Board's discovery rules in responding to interrogatories about FNG's wastewater treatment unit (WWTU). Specifically, FNG states:

Complainant responded that Flex-N-Date had never argued that it had a WWTU, despite the fact that Flex-N-Gate had just filed an Amended Answer asserting the WWTU exemption as an affirmative defense. Mot. at 7 (emphasis in original).

Finally, FNG argues that Mr. Dorothy simply ignored a hearing officer order. After delays in producing responses to discovery requests, FNG filed a motion to compel on April 13, 2006. The hearing officer granted the motion to compel. FNG asserts that Mr. Dorothy, however, ignored the hearing officer's orders by making the same objections (with one exception) to FNG's interrogatories that he had made before. Mot. at 7. FNG contends that this was the most severe of Mr. Dorothy's acts of noncompliance with the Board's rules or hearing officer orders, and argues that Mr. Dorothy should be sanctioned accordingly.

FNG lists Mr. Dorothy's sanctionable conduct throughout the proceeding as evidence that the requested sanction is warranted. Mot. at 8. FNG states that Mr. Dorothy's prior actions forced FNG to move the Board to strike multiple improper affidavits, and to admonish Mr. Dorothy for filing improper affidavits and making unsupported allegations. *Id.*

In addition, contends FNG, Mr. Dorothy disregarded Board rules by filing more than 120 interrogatories on FNG without seeking or obtaining leave of the hearing officer. Mot. at 9; citing 35 Ill. Adm. Code 101.602(a). In response, FNG filed a motion for protective order. Mot.

at 9. FNG concludes that the grand sum of Mr. Dorothy's actions demonstrate that the Board must sanction Mr. Dorothy. *Id.*

According to FNG, Mr. Dorothy's failure to meet deadlines or comply with Board orders and hearing officer orders has cost FNG time and resources. First, by all of the missed deadlines, FNG contends that Mr. Dorothy has delayed this proceeding by at least four months. Mot. at 10. Second, FNG contends that Mr. Dorothy's conduct has cost FNG additional litigation costs to prepare, for example, the motions to compel, for a protective order, and to strike and admonish. Third, FNG argues that Mr. Dorothy's conduct will cost FNG time and money to produce witnesses at hearing to testify about facts that may not be at issue and to prepare testimony on questions that may not be at issue. All of this could have been resolved, claims FNG, had Mr. Dorothy sufficiently answered the interrogatories. Mot. at 10.

Mr. Dorothy's conduct clearly demonstrates bad faith, submits FNG. Mot. at 11. FNG contends that Mr. Dorothy's numerous delays, multiple unsupported allegations of criminal activity by Flex-N-Gate's employees, missed deadlines, and nonresponsive answers to interrogatories constitute bad faith and clearly were "meant simply to delay this matter." *Id.* at 11-13. FNG states that the Board's procedural rules give the Board authority to dismiss count I of the complaint as a sanction for Mr. Dorothy's "disparagement" of these proceedings. *Id.* at 14, citing 35 Ill. Adm. Code 101.800(b)(3). FNG notes that the discovery requests and the hearing officer order granting the motion to compel both relate to count I. A proper sanction, therefore, would be to bar Mr. Dorothy from maintaining the claim set forth in that count. *Id.*

The Board has not hesitated to impose serious sanctions in the past, states FNG. Mot. at 14. The Board has struck a respondent's closing brief from the record for failing to comply with a hearing officer order. *Id.*, citing Logsdon v. South Fork Gun Club, PCB 00-177, slip op. at 5 (Dec. 19, 2002). The Board has dismissed counts of complaints or entire proceedings for failing to comply with its order and relevant procedural rules. *Id.*; citing IEPA v. City of Oregon, PCB 78-37, slip op. at 2 (Dec. 4, 1980); IEPA v. Celotex Corp., PCB 79-145, slip op. at 5 (July 2, 1986); *aff'd*, IEPA v. Celotex Corp., 168 Ill. App. 3d 592, 522 N.E.2d 888 (3rd Dist. 1988). FNG asserts that the Illinois Appellate Court has also upheld the Board's dismissal of a petition as a sanction. *Id.*, citing Modine Mfg. Co. v. PCB, 192 Ill. App. 3d 511, 518, 548 N.E.2d 1145, 1150 (2nd Dist. 1990).

For the reasons stated above, argues FNG, the nature and effect of Mr. Dorothy's actions warrant the imposition of a sanction. FNG claims that the Board should therefore exercise its authority to dismiss count I of the complaint as a sanction for Mr. Dorothy's conduct. Mot. at 15.

### **Board Analysis**

The Board's procedural rules give the Board authority to impose sanctions for the unreasonable failure to comply with any Board rule, or Board or hearing officer order. See 35 Ill. Adm. Code 101.800(a). Sanctions may include barring the offending person from filing pleadings or documents relating to issues to which the failure relates. 35 Ill. Adm. Code

101.800(b)(3). Sanctions can also include striking any portion of the offending party's pleadings. 35 Ill. Adm. Code 101.800(b)(5).

As stated by the Fourth District Appellate Court, the Board has broad discretion in determining whether to impose sanctions for refusal to comply with an order of the Board. Grigoleit Co. v. PCB, 184 Ill. Dec. 344, 350, 613 N.E.2d 371, 377 (4th Dist. 1993). Board hearing officer orders are entitled to the same deference as Board orders, and the Board may impose sanctions for a violation of those orders. In the past, the Board has considered the repeated nature of an offending party's conduct in considering what kind of sanction to impose. Modine Mfg. Co., 548 N.E.2d at 1149. In Modine, the appellate court agreed that "flagrant and continued infringements" of Board procedures and rules cannot be tolerated. *Id.*; citing Brantley v. Delnor Hospital Inc., 120 Ill. App. 2d 185, 192, 256 N.E.2d 369 (2nd Dist. 1970).

The Board generally imposes sanctions with the goal to compel cooperation with Board rules, rather than punish the offending party. Celotex Corp., 168 Ill. App. 3d 592, 522 N.E.2d 888. Courts have also found, however, that it is appropriate to consider "using sanctions as a general deterrent to provide a strong incentive for all litigants to fully and accurately comply with procedural rules." Modine Mfg. Co., 548 N.E.2d at 1150.

The Board finds that Mr. Dorothy's failure to timely respond to discovery requests, failure to meet deadlines, and repeated failure to comply with Board procedural rules and hearing officer orders constitutes sanctionable behavior. By failing to meet deadlines, this proceeding has been delayed repeatedly since its inception and throughout the discovery process. Mr. Dorothy's repeated infringements of Board procedures amounts to a general disregard for the Board's authority. The Board notes that previously in this proceeding, on October 20, 2005, the Board granted a motion filed by FNG to strike unsupported statements and to admonish respondent. Because Mr. Dorothy continues to disregard the admonition, the Board finds here that sanctions are warranted. The Board now considers what sanctions are appropriate.

FNG does not ask the Board to compel Mr. Dorothy to provide more responsive answers to the interrogatories. Rather, FNG asks the Board to dismiss count I of Mr. Dorothy's original complaint as a sanction for not complying with various hearing officer orders, Board orders, and Board rules. FNG states that it has been and will continue to be prejudiced by Mr. Dorothy's conduct in this proceeding. By failing to respond to FNG's motion for sanctions, Mr. Dorothy has waived any objection to the Board granting the motion. 35 Ill. Adm. Code 101.500.

In the motion for sanctions, FNG argues that Mr. Dorothy failed to adequately plead all of his amended responses, but offers only two examples of how the responses fail. Mot. at 5 (Interrogatory No. 5), 6 (Interrogatory No. 16). At several points in the motion for sanctions, FNG states that Mr. Dorothy ignored the hearing officer's order granting FNG motion to compel. The Board notes, however, that Mr. Dorothy did not violate the hearing officer's order in its entirety. Mr. Dorothy responded to the request for production, amended his answers to the interrogatories by removing his objections based on the WWTU exemption, and certified his responses. FNG remains unsatisfied with Mr. Dorothy's amended responses, claiming they are still unresponsive. FNG maintains that Mr. Dorothy's failure to substantively respond to the



interrogatories prejudices FNG by depriving it of the ability to adequately prepare a defense or know what evidence it needs to present at hearing.

The Board cannot determine, based on this record, whether Mr. Dorothy's amended responses are inadequate, or whether he has properly claimed privilege. Neither the motion for sanctions nor the motion to compel enumerates the interrogatory responses to which FNG objects. While a letter FNG attached to the motion to compel (Exh. D) does list the answers FNG believes were nonresponsive, the Board will not now guess whether FNG, subsequent to Mr. Dorothy's amended responses, maintains the same objections to the amended responses. Without ruling on the merits of the amended responses, the Board nonetheless finds that Mr. Dorothy's pattern of delay and disregard for the Board and hearing officer's authority are sufficient to justify sanctions.

The Board, however, declines to dismiss count I of Mr. Dorothy's original complaint, as FNG requests. The Board has dismissed a petition for review of an air permit as a sanction in the past. Modine Mfg. Co. v IEPA, PCB 87-124 (Nov. 17, 1988); *aff'd*, Modine Mfg. Co., 548 N.E.2d 1145. In Modine, however, Modine Manufacturing Company (MMC), the offending party, delayed the case by more than 26 weeks. The Board found that MMC's failure to meet deadlines set by the hearing officer amounted to "repeated and unreasonable delay and violation of hearing officer and board orders." Modine Mfg., PCB 87-124, slip op. at 5 (Mar. 9, 1989). In granting the Agency's motion for sanctions and dismissing the case with prejudice, the Board noted "never during the 26½ period did MMC request an extension of time or even contact the Board." Modine Mfg., PCB 87-124, slip op. at 2 (Mar. 9, 1989).

More recent Illinois decisions show that Illinois courts will dismiss an action as a sanction only as a last resort. "Dismissing an action against a plaintiff or entering judgment against a defendant 'is the most drastic of sanctions and should be imposed reluctantly and only as a last resort when all other enforcement powers at the court's disposal have failed to advance the litigation.'" Nationwide Mutual Ins. Co. v. Kogut, 354 Ill. App. 3d 1, 8; 819 N.E.2d 1127, 1133 (2004), citing Easter Seal Rehab. Center for Will-Grundy Counties Inc. v. Current Dev. Corp., 307 Ill. App. 3d 48, 51, 716 N.E.2d 809, 240 (1999). Illinois courts generally hold that "the sanction of dismissal should be invoked only in those cases where the actions of a party show a deliberate, contumacious, or unwarranted disregard of the court's authority." Modine Mfg. Co., 548 N.E. 2d 1149; citing Unity Ventures v. PCB, 132 Ill. App. 3d 421, 434, 87 Ill. Dec. 376, 476 N.E.2d 1368 (1985).

The court upheld a dismissal and found deliberate, contumacious and unwarranted disregard of the court's authority when a party failed to participate in good faith in an arbitration hearing, continued to argue objections after overruled, "became contemptuous to the arbitration panel yelling & continuing refusal to the panels [*sic*] direction to proceed," and left the arbitration, in effect terminating the defendant's participation in the proceedings. Givens v. Renteria, 347 Ill. App. 3d 934, 937, 808 N.E.2d 1009, 1011 (Dec. 12, 2003).

The Board finds that Mr. Dorothy unreasonably failed to comply with Board rules and hearing officer orders on numerous occasions. Although the Board finds that Mr. Dorothy's actions merit drastic sanctions, the Board finds that his actions do not rise to the level of

deliberate, contumacious or unwarranted disregard for the Board's authority that Illinois courts have found justifies the sanction of dismissal.

In Modine, the Board dismissed the action because it had no remaining avenue to sanction MMC that would adequately deter MMC and not also prejudice the Board. In contrast to Modine, here, FNG has filed the motion for sanctions at an earlier stage in the proceeding and there are methods available to sanction Mr. Dorothy other than dismissing the action.

The Board exercises broad discretion in imposing sanctions. Celotex Corp., 168 Ill. App. 3d at 597, 522 N.E.2d at 891. The behavior that is the basis of FNG's motion involves noncompliance with procedural rules and hearing officer orders governing discovery and missing deadlines involving filing the amended complaint. Rather than dismiss count I of Mr. Dorothy's original complaint, the Board instead bars Mr. Dorothy from alleging any new counts or making any new allegations unrelated to count I of his original complaint.

Mr. Dorothy initiated this proceeding with the filing of his original complaint over two years ago. Mr. Dorothy filed the amended complaint well after the filing of responsive pleadings and after the close of discovery. A December 13, 2005 hearing officer order set the deadline for written discovery as February 9, 2006, and a February 9, 2006 hearing officer extended that deadline by a week. At this late time, the Board will not allow Mr. Dorothy to amend his complaint by alleging six new counts. The new counts allege new facts that would require additional discovery when it is the discovery process itself that has consistently been abused.

Further, Mr. Dorothy did not comply with several of the Board's procedural rules in filing the amended complaint. Electronic service, the method Mr. Dorothy used to attempt service of his amended complaint, is not proper service under the Board's procedural rules. 35 Ill. Adm. Code 101.304. The Board rules require that Mr. Dorothy must file a motion for leave to file along with the amended complaint and direct that motion to the Board, which he failed to do. 35 Ill. Adm. Code 103.206(d). An amended complaint must also include the required notice to respondents about the effect of failing to timely file an answer to the complaint. 35 Ill. Adm. Code 103.204(f).

In considering whether to impose sanctions, the Board also considers the delay in filing the amended complaint. Mr. Dorothy first mentioned his intent to file an amended complaint on March 20, 2006. Mr. Dorothy stated he would do so within 60 days. Mr. Dorothy did not file any amended complaint or any motion for an extension of time. At a June 19, 2006 status call with the hearing officer and opposing counsel, Mr. Dorothy asked for two additional weeks to file an amended complaint. FNG opposed the oral motion. Settlement negotiations ensued and failed. Mr. Dorothy finally filed an amended complaint on September 19, 2006.

Amending the complaint at this late date to raise new, unsupported factual issues would unnecessarily delay the hearing even more than it already has been and unfairly prejudice FNG, which has complied with all deadlines throughout this proceeding. The Board grants FNG's motion to sanction Mr. Dorothy. As discussed above, the Board declines to dismiss count I of the complaint entirely, as FNG requests. Mr. Dorothy is a *pro se* litigant, albeit an attorney, and dismissal with prejudice is a drastic sanction. Further, FNG has failed to properly plead any

continued dissatisfaction with Mr. Dorothy's amended answers. Finally, the Board finds the sanction imposed today is more closely tailored to Mr. Dorothy's failures to comply.

Rather than dismissing count I of Mr. Dorothy's original complaint, therefore, the Board bars Mr. Dorothy from alleging any new counts or making any new allegations unrelated to count I of his original complaint. The original count I consists of alleged violations of Section 21(f) of the Act and Section 703.121(a) of the Board's rules. 415 ILCS 5/21(f) (2004); 35 Ill. Adm. Code 703.121(a). Barring Mr. Dorothy from adding claims at this late juncture is meant to provide a strong incentive for Mr. Dorothy as well as all litigants to comply with Board procedures.

### **AMENDED COMPLAINT**

#### **FNG's Response**

On October 3, 2006, FNG moved the Board to strike complainant's amended complaint because it fails both procedurally and substantively. FNG also asks that the Board strike count I of Mr. Dorothy's original complaint as a sanction, or grant summary judgment to FNG as to that count. Resp. at 7.

FNG states that Mr. Dorothy did not file a motion for leave to amend the complaint, despite FNG stating that such a motion was required in a prior pleading.<sup>1</sup> Resp. at 4; 35 Ill. Adm. Code 103.206(d). Further, FNG contends that Mr. Dorothy's amended complaint does not comply with Section 103.204 of the Board's procedural rules. 35 Ill. Adm. Code 103.204. Finally, FNG asserts it was not properly served with the amended complaint in accordance with Section 101.304 of the Board's rules. Resp. at 1; citing 35 Ill. Adm. Code 101.304.

FNG argues the Board should not allow Mr. Dorothy to avoid FNG's motion for sanctions by simply restating his count I in an amended complaint. Resp. at 6. According to FNG, it would be a waste of time to allow Mr. Dorothy to amend count I of the complaint because FNG has demonstrated in its motion for summary judgment that the count should be stricken. *Id.* at 6-7.

#### **Board Analysis**

Without addressing the substance of Mr. Dorothy's newly alleged claims, the Board strikes the amended complaint both as part of today's sanctions and as procedurally deficient. As discussed above, Mr. Dorothy did not comply with the Board's procedural rules in filing the amended complaint. Mr. Dorothy's amended complaint was not accompanied by a motion for leave to file directed to the Board. 35 Ill. Adm. Code 103.206(d). The amended complaint also did not include the required notice to respondents about the effect of failing to timely file an answer to the complaint. 35 Ill. Adm. Code 103.204(f). Finally, "electronic service," as

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<sup>1</sup> FNG cites to FNG's Motion for Clarification of Hearing Officer Order or, in the Alternative, for Immediate Telephonic Status Conference, filed June 22, 2006, at 3.

indicated on Mr. Dorothy's certificate of service, is not proper service pursuant to Board procedural rules. 35 Ill. Adm. Code 101.304.

Under these circumstances, the Board strikes the September 19, 2006 amended complaint. Additionally, in light of today's imposition of sanctions, the Board notes that Mr. Dorothy may only amend the complaint as to the existing count I.

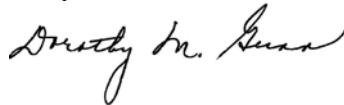
### **CONCLUSION**

The Board grants FNG's motion to sanction Mr. Dorothy. As a sanction, the Board bars Mr. Dorothy from alleging any new counts or making any new allegations unrelated to count I of his original complaint, which consists of alleged violations of Section 21(f) of the Act and Section 703.121(a) of the Board's rules. FNG's alternative motion for summary judgment on count I is denied at this time. In accordance with today's sanctions and for its procedural deficiencies, the Board strikes Mr. Dorothy's amended complaint, filed on September 19, 2006. Mr. Dorothy may amend the existing count I of his original complaint, but any amended complaint must be accompanied by a motion for leave directed to the Board, properly served in accordance with 35 Ill. Adm. Code 101.304, and include notice to the respondent of the consequences for failing to answer the amended complaint. In addition, any amended complaint must contain "the dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations." 35 Ill. Adm. Code 103.204(c)(2).

The Board allows Mr. Dorothy until December 4, 2006, to file any amended complaint in accordance with the Board's procedural rules and the limitations of this order. In setting this deadline, the Board does not intend to encourage the filing of an amended complaint, but rather to encourage the resolution of this proceeding in a timely manner. After expiration of that time period, if no amended complaint is filed, FNG may renew its motion for summary judgment or make any other appropriate motion. If an amended complaint is filed, FNG will have the applicable time periods under the Board's procedural rules to file any responsive pleadings. Consistent with these timeframes, the hearing officer must 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 November 2, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board