

ILLINOIS POLLUTION CONTROL BOARD
March 21, 2013

ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Complainant,)	
)	
v.)	AC 12-51
)	(IEPA No. 87-12-AC)
NORTHERN ILLINOIS SERVICE)	(Administrative Citation)
COMPANY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by T.A. Holbrook):

On December 31, 2013, the Illinois Environmental Protection Agency (Agency) filed a motion for leave to amend an administrative citation it had issued against Northern Illinois Service Company (NISC) on May 7, 2012. On January 22, 2013, NISC timely responded to the Agency's motion (Resp.). For the reasons stated below, the Board denies the motion as unnecessary and notes its authority to impose a civil penalty under Sections 31.1 and 42 of the Environmental Protection Act (Act) (415 ILCS 5/31.1, 42 (2010)).

Below, the Board first provides a procedural history of this case before summarizing the Agency's motion to amend and NISC's response. The Board then discusses the issues presented before issuing its order.

PROCEDURAL HISTORY

On May 7, 2012, the Agency filed an administrative citation alleging that, on March 14, 2012, NISC had violated Sections 21(p)(1), 21(p)(7), and 55(k)(1) of the Act (415 ILCS 5/21(p)(1), (p)(7), 55(k)(1) (2010)) at a facility owned by NISC in Rockford, Winnebago County. On May 21, 2012, the Agency filed proof of service of the administrative citation on the respondent on May 7, 2012. On June 11, 2012, NISC filed a petition for review. In an order dated June 21, 2012, the Board accepted NISC's petition for hearing.

On December 31, 2012, the Agency filed a motion for leave to file an amended citation (Mot.). On January 3, 2013, NISC filed a motion for an extension of time to respond to the Agency's motion. In an order on January 10, 2013, the Board's hearing officer granted the motion and extended the response deadline to January 25, 2013. On January 22, 2013, NISC filed a memorandum opposing the Agency's motion for leave to file an amended citation.

SUMMARY OF AGENCY'S MOTION

The Agency notes that the administrative citation it filed on May 7, 2012, stated that NISC “is subject to a civil penalty of One Thousand Five Hundred Dollars (\$1,500) for each of the violations identified above, for a total of Four Thousand Five Hundred Dollars (\$4,500).” Mot. at 2 (emphasis in original), citing 415 ICLS 5/42(b)(4-5) (2010). However, the Agency states that the Act provides that “the civil penalty amount shall be \$3,000.00 for each violation of any provision of subsection (p) of Section 21 . . . or subsection (k) of Section 55 that is the person’s second or subsequent adjudication violation of that provision.” Mot. at 2, citing 415 ILCS 5/42(b)(4-5) (2010). The Agency states that, on January 26, 2007, the Board issued a final opinion and order finding that NISC had violated Sections 21(p)(1) and 21(p)(7) of the Act and imposing a total civil penalty of \$3,000 plus hearing costs of \$672.25. Mot. at 2, citing IEPA v. N. Ill. Serv. Co., AC 05-40 (Jan. 26, 2007). The Agency adds that, although NISC did not appeal the finding that it had violated Section 21(p)(7), it did appeal the Board’s finding of a Section 21(p)(1) violation. Mot. at 2. The Agency reports that the Appellate Court affirmed the Board’s finding of that violation. *Id.*, citing N. Ill. Serv. Co. v. IEPA, 381 Ill. App. 3d 171 (2nd Dist. 2008).

The Agency states that,

[a]s the violations of Sections 21(p)(1) and 21(p)(7) of the Act alleged in the instant Administrative Citation will, if proven, constitute the Respondent’s second adjudicated violations of those provisions, the Complainant seeks leave to amend the Administrative Citation to reflect that the Respondent is subject to a civil penalty of Three Thousand Dollars (\$3,000) each for the Section 21(p)(1) and 21(p)(7) violations and One Thousand Five Hundred Dollars (\$1,500) for the Section 55(k)(1) violation, for a total of Seven Thousand Five Hundred Dollars (\$7,500). Mot. at 3.

In support of its request, the Agency argues that “Illinois has a liberal policy of allowing amendments to pleadings.” *Id.* at 1, citing 1515 North Wells, L.P. v. 1513 North Wells, L.L.C., 392 Ill. App. 3d 863, 870 (1st Dist. 2009). The Agency further argues that the Illinois Code of Civil Procedure “provides that, on just and reasonable terms, amendments to pleadings may be allowed at any time before final judgment.” *Id.*, citing 735 ILCS 5/2-616(a) (2010), 35 Ill. Adm. Code 101.500(a). The Agency adds that, because NISC was the respondent in the previous adjudication, NISC “will not be unduly burdened, prejudiced, or surprised by this proposed amendment.” Mot. at 3. The Agency requests that the Board grant leave to file an amended administrative citation within 14 days after ruling upon its motion for leave to do so. *Id.*

SUMMARY OF NISC'S RESPONSE

NISC argues that the Appellate Court recently reaffirmed the grounds on which the Agency may seek leave to file an amended administrative citation under Section 2-616(a) of the Code of Civil Procedure. Resp. at 1, citing Ponto v. Levan, 2012 Ill.App (2d), 110355, ¶ 25; see 735 ILCS 5/2-616(a). NISC argues that those grounds are (1) whether the proposed amended complaint would cure defective pleadings; (2) whether the amendment would surprise or

prejudice the opposing party; (3) whether the amendment was timely filed; and (4) whether the movant had previous opportunities to amend. Resp. at 1. NICS claims that, “[o]n each of these grounds, complainant’s motion fails.” *Id.*

NISC addresses the first of these grounds by claiming that the Agency’s proposed amendment cures no defect but only “cumulates the penalty which is sought.” Resp. at 1. NISC addresses the second ground by arguing that allowing the proposed amendment would prejudice it because discovery requests were served as long ago as August 6, 2012. *Id.* NISC also argues that the Agency served discovery requests on December 18, 2012, and that NISC “has expended time and effort in responding to that discovery. . . .” *Id.* NISC claims that effectively requiring it to re-start discovery would be “burdensome and oppressive.” *Id.*

NISC addresses the third ground by arguing that the motion for leave to file an amended complaint “has not been timely filed.” Resp. at 2. NISC claims that the Agency filed the citation on May 7, 2012, and that the Agency “has had in its own files for five years the subject matter for which it is seeking an amendment.” *Id.* NISC claims that the Agency has not explained why the motion for leave to amend was not more timely filed. *Id.* Regarding the fourth basis, NISC notes that “[o]ver seven months have passed since the date of the filing of the Administrative Citation. . . .” *Id.* NISC claims that the Agency “has had previous opportunities to amend” and that the Agency’s “tardiness should not be excused.” *Id.* NISC concludes by arguing that “the motion to amend the Administrative Citation should be denied.” Resp. at 2.

DISCUSSION

Section 31.1(d)(2) of the Act addresses the Board’s consideration of administrative citations and provides in pertinent part that

[i]f, based on the record, the Board finds that the alleged violation occurred, it shall adopt a final order which shall include the administrative citation and findings of violation as alleged in the citation, and *shall impose the penalty specified* in subdivision (b)(4) or (b)(4-5) of Section 42. 415 ILCS 4/31.1(d)(2) (2010) (emphasis added).

Section 42(b)(4-5) of the Act addresses civil penalties and provides in pertinent part that,

[i]n an administrative citation under Section 31.1 of this Act, any person found to have violated any provision of subsection (p) of Section 21 . . . or subsection (k) of Section 55 of this Act shall pay a civil penalty of \$1,500 for each violation of each such provision, plus any hearing costs incurred by the Board and the Agency, except that the civil penalty shall be \$3,000 for each violation of any provision of subsection (p) of Section 21 . . . or subsection (k) of Section 55 that is the person’s second or subsequent adjudication violation of that provision. 415 ILCS 5/42(b)(4-5) (2010).

In its June 21, 2013 order accepting NISC’s petition for hearing the Board stated that “[t]he civil penalty for violating any provision of Section 21(p) or 55(k) is \$1,500 for each violation, except

that the penalty amount is \$3,000 for each violation that is the person's second or subsequent adjudicated violation of that provision. IEPA v. N. Ill. Serv. Co., AC 12-51, slip op. at 2 (June 21, 2012), citing 415 ILCS 5/42(b)(4-5) (2010); *see* 35 Ill. Adm. Code 108.500(b). In the same order, the Board characterized the administrative citation process as "an expedited enforcement action brought before the Board seeking civil penalties that are *fixed by statute.*" IEPA v. N. Ill. Serv. Co., AC 12-51, slip op. at 1 (June 21, 2012) (emphasis added). The Board has recently stated that it cannot consider factors that may mitigate the amount of a civil penalty "because the civil penalties for administrative citations are set by the Act." County of Jackson v. Frances Klink, AC 10-30, slip op. at 2 (Sept. 2, 2010), citing IEPA v. Stutsman, AC 05-70, slip op. at 2 (Sept. 21, 2006); IEPA v. Jack Wright, AC 89-227, slip op. at 7 (Aug. 30, 1990).

The Agency's statement in the administrative citation filed on May 7, 2012, regarding the amount of a potential penalty provides the Board with no basis to deviate from the penalty amounts established by the Act. That statement does not suspend the Board's obligation to apply statutory penalties.

Accordingly, the Board denies the Agency's motion for leave to file an amended administrative citation as unnecessary. In the event that the Board finds in the course of this proceeding that NISC has violated any provision of Section 21(p) or 55(k) of the Act (415 ILCS 21(p), 55(k) (2010)) or that NISC admits any violation of one or more of those provisions as an element of a proposed settlement, the Board will assess a civil penalty in an amount as required by Sections 31.1 and 42(b)(4-5) of the Act (415 ILCS 5/31.1, 42(b)(4-5) (2010)).

ORDER

For the reasons stated above, the Agency's motion for leave to file an amended administrative citation is denied as unnecessary.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 21, 2013, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board