

ILLINOIS POLLUTION CONTROL BOARD
September 19, 2013

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 12-21
) (Enforcement - Land)
INTRA-PLANT MAINTENANCE)
CORPORATION, an Illinois corporation,)
IRONHUSTLER EXCAVATING, INC., an)
Illinois corporation, and RON BRIGHT, d/b/a)
QUARTER CONSTRUCTION,)
)
Respondents.)

ORDER OF THE BOARD (by C.K. Zalewski):

On August 26, 2013, Ironhustler Excavating, Inc. (Ironhustler) and Ron Bright (Bright) (collectively respondents) jointly filed a motion (Mot.) asking the Board to reconsider its July 25, 2013 opinion and order granting summary judgment in favor of the People of the State of Illinois (People). The respondents' August 26, 2013 filing also included a motion for leave to file *instanter*, the respondents' objections to the People's motion for summary judgment, and a cross-motion for summary judgment. On September 4, 2013 the Office of the Attorney General, on behalf of the People, filed a response (Resp.) in opposition to the motion to reconsider. Respondents filed their motion for leave to reply to complainant's response to motion to reconsider and modify Board order (Reply) on September 16, 2013.

Below, the Board briefly summarizes the procedure leading up to its July 25, 2013 opinion and order, the respondents' motion, the People's response, and respondents' reply. The Board grants the motion for leave to file the reply, but denies the motion for reconsideration.

BOARD OPINION AND ORDER OF JULY 25, 2013

On August 10, 2012, the People filed a motion for summary judgment against all four original respondents. The Board's procedural rules provide 14 days after service of a motion for a party to file a response. 35 Ill. Adm. Code 101.500(d). By hearing officer order, however, the initial deadline for respondents to file a response to the People's motion was January 31, 2013. Hearing Officer Order (Jan. 8, 2013). The deadline for respondents to file a response was extended twice before March 27, 2013, when Ironhustler and Bright again filed a motion for extension of time. Hearing Officer Orders (Jan. 29, 2013) (March 11, 2013). On March 28, 2013, the Hearing Officer denied the motion for extension of time and directed the respondents to file a response as soon as possible. Hearing Officer Order (March 28, 2013).

During a telephone status conference on July 8, 2013, respondents Bright and Ironhustler again expressed an interest in filing a response to the People's motion within 30 days of the status conference. Hearing Officer Order (July 8, 2013). However, the Hearing Officer did not grant leave to file a response to the People's motion and granted no extension of the previously expired reply period. *Id.* At the time of the Board's July 25, 2013 opinion and order, neither respondent had filed a response to the People's motion for summary judgment.

On July 25, 2013, the Board granted the People's unopposed motion for summary judgment against Bright, Intra-Plant, and Ironhustler finding that each respondent violated Sections 21(a) and 21(e) of the Act. The Board entered a cease and desist order, required removal and proper disposal of the fill material, and assessed a civil penalty of \$10,000 against each respondent.

**MOTION TO RECONSIDER, PEOPLE'S RESPONSE, AND RESPONDENTS' REPLY
AND MOTION FOR LEAVE TO FILE**

In the motion for reconsideration, respondents argue they were "taken by surprise [by the Board's July 25, 2013 order] because the Board's Hearing Officer had just convened a phone status conference and entered an order on July 8, 2013 that noted on its face that the Respondents' (Ironhustler & Bright) Objections to the Complainant's pending Motion for Summary Judgment would be filed "within 30 days, along with a motion for leave to file *Instantly*." Mot. at 1-2. Respondents also argue that "[c]omplainant's pending Motion for Summary Judgment was not susceptible to a proper response at the time of its filing because additional discovery was prompted by its contents and depositions of IEPA personnel were required" and "pending action by the U.S. Supreme Court was expected to further illuminate a particular point that the Respondents wished to raise in their pleading."¹ Mot. at 2.

On September 4, 2013 the People replied to respondents' motion for reconsideration. The People stated that "the intended purpose of a motion for reconsideration is to bring to the court's attention *newly discovered* evidence that was *not available at the time of hearing*, changes in the law or errors in 'the court's previous application of the existing law.'" Resp. at 3 (emphasis in original) (citation omitted). The People state that "[t]he only arguably 'new' evidence Respondents have submitted are the August 16, 2013 affidavit of Ron Bright and the August 23, 2013 affidavit of Michael Rapps." Resp. at 4. The People argue that because Mr. Bright and Mr. Rapps have been involved with the case since its inception and because the affidavits provided only information that predated the State's motion for summary judgment, their testimony does not constitute new evidence. The People also argue that the U.S. Supreme Court's ruling in Peugh v. United States 133 S. Ct. 2072 (2013), the only purported change in the law cited by the respondents, "has no bearing on this case." Resp. at 5.

In their reply and motion for leave to reply to complainant's response, respondents cite Section 101.522 of the Board's procedural rules which provides, "[t]he Board or hearing officer,

¹ While respondents cite Peugh v. United States 133 S. Ct. 2072 (2013) in the documents that accompanied the motion for reconsideration, there is no specific reference to a Supreme Court case in the motion for reconsideration.

for good cause shown on a motion after notice to the opposite party, may extend the time for filing any document or doing any act which is required [by Board rule] either before or after the expiration of time.” Reply at 2, citing 35 Ill. Adm. Code 101.522. Respondents argue that “protracted and recurring health issues severely impaired” their ability to timely file a response to the complainant’s motion for summary judgment. Reply at 2. Respondents argue that because the hearing officer would only extend the deadline for respondents once without the opposing party’s agreement, it is the complainant, rather than the Board, that determined whether an extension was granted in this case. *Id.*, citing Hearing Officer Order (March 28, 2013). Respondents characterize their motion for reconsideration as “based entirely upon the procedural situation” and urge the Board to reconsider its July 25, 2013 decision based on the procedural state of this case on that date. *Id.* at 3.

DISCUSSION

In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to conclude that the Board’s decision was in error. 35 Ill. Adm. Code 101.902. In Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156 (Mar. 11, 1993), the Board observed that “the intended purpose of a motion for reconsideration is to bring to the court’s attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court’s previous application of the existing law.” Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992).

The Board grants respondents’ motion for leave to file a reply. After considering all the filings, for the reasons discussed below, the Board denies respondents’ motion for reconsideration. In the instant case, respondents’ motion asserts that they were “taken by surprise” when they received the Board’s July 25, 2013 order and had they known that the Board was preparing to issue the order they would have “promptly filed an appropriate motion directly with the Board.” Mot. 2-3. The People’s August 10, 2012 motion for summary judgment, however, had been filed for nearly one year at the time of the Board’s order. The Board’s procedural rules provide 14 days after service of a motion for a party to file a response. 35 Ill. Adm. Code 101.500(d). After an agreed stay of the 14-day deadline and two extensions granted by the Hearing Officer pursuant to Section 101.522 of the Board’s procedural rules, 119 days had passed since the March 28, 2013 deadline when the Board issued its order on July 25, 2013.

Respondents’ motion also claims that they needed to conduct discovery, including depositions, to respond to the People’s motion. The Board notes, however, that the depositions of Illinois Environmental Protection Agency staff were taken on November 28 and November 29, 2012 which allowed ample time for respondents to file objections and a cross motion before the initial due date of January 31, 2013. Hearing Officer Order (Jan. 8, 2013). Neither respondents’ motion for reconsideration nor respondents’ motion to file *instanter* provide an explanation for respondents’ delay beyond the March 28, 2013 extended deadline.

Furthermore, the July 8, 2013 hearing officer order did not provide a reasonable basis for respondents to believe that the hearing officer had exercised her discretion to grant an additional extension for respondents to respond to the summary judgment motion. The hearing officer

reported on the respondents' statements when she wrote "[r]espondents now expect to file a response to the People's motion for summary judgment within 30 days, along with a motion for leave to file *instanter*." Hearing Officer Order (July 8, 2013). If the respondents' motions had been filed any time before July 25, 2013, the Board would arguably be required to consider the motions as it considers all motions filed with the Clerk. If the Board granted any such motion to file *instanter*, the Board may also have allowed a reply. The hearing officer referenced this when she wrote, "[a]fter the response is filed, a deadline will be set for the People's reply." *Id.* None of these statements created a reasonable expectation that the response deadline had been reopened or extended for an additional 30 days.

Respondents argue that the Board should consider their response to the summary judgment motion in the interests of "fairness and accuracy". Mot. at 3. The Board, however, must balance the interests of respondents presenting their tardy response to the summary judgment motion with the People's interest in timely consideration of their motion for summary judgment. In addition, the Board has an interest in bringing matters before it to resolution in an efficient manner and enforcing the deadlines established in hearing officer orders, which may be appealed to the Board.

The Board finds that respondents provided no new evidence or a change in the law that would indicate the Board's July 25, 2013 order was in error. The Board agrees with the People that the testimony of Mr. Bright and Mr. Rapps, while dated August 2013, pertained to evidence in existence for more than one year before the People filed the summary judgment motion on August 10, 2012. Therefore, the testimony is not newly discovered evidence that was not available at the time of the Board's July 25, 2013 decision. In addition, the Board finds the Peugh case, a criminal case that discusses how criminal sentencing guidelines may be affected by the Ex Post Facto Clause, unpersuasive as a basis for reconsideration. In their filings, respondents argue about the reasons for delay in filing the response to the People's motion for summary judgment. The Board, however, finds these arguments misplaced to support a motion for reconsideration. Therefore, the Board denies respondents' motion for reconsideration, rendering the motion for leave to file *instanter* moot, and closes the docket.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2010); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 19, 2013, by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

John T. Therriault, Clerk
Illinois Pollution Control Board