BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant,	)	
	)	PCB 96-98
v.	)	Enforcement
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., Respondent.	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the RESPONDENTS' APPEAL OF HEARING OFFICER'S ORDER OF FEBRUARY 8, 2006 a copy of which is hereby served upon you.

David S. O'Neill

February 23, 2006

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RESPONDENTS' APPEAL OF HEARING OFFICER'S ORDER OF FEBRUARY 8, 2006

The Respondents, 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., by and through their attorney, David S. O'Neill, herein appeal to the full body of the Illinois Pollution Control Board the decisions in the Hearing Officer Order of February 8, 2006 for the above-captioned case and in support thereof states as follows:

PROCEDURAL BACKGROUND

1. On April 7, 2005, the Board issued an Order in the above-captioned matter. In this Order, the Board granted the Respondents' motion for extension of time to allow for limited discovery.
2. The April 7, 2005 Order specifically states that "the Board will grant the **respondents** additional time in order to conduct discovery...". Order of April 7, 2005 at 3. (emphasis added) In the Conclusion of the Order, the Board "grants **respondents'** motion for

extension of time and authorizes **respondents** to conduct discovery on the attorney fees issue". Id at 4. (emphasis added)

3. On April 25, 2005, the Complainant served upon the Respondents a series of discovery requests inconsistent with the Board's Procedural Rules and without the permission of the Board to serve such discovery requests.

4. On May 18, 2005, the Respondents filed a Motion to Strike Complainant's discovery requests.

5. In the Order of November 17, 2005, the Board extended the scope of discovery on the issue of the Complainant's Attorneys' Fees and Costs to allow the Complainant to also conduct discovery while directing that the discovery "**must** be limited to the issues regarding the reasonableness of the **People's** attorney fees and costs" (Order of November 17, 2005 at 3.) (emphasis added). The Board also stated that "[o]nce again, both parties are cautioned that professionalism and civility are required when appearing before the Board. Future offensiveness will not be tolerated, and may result in sanctions." (Id at 9).

6. In the Order, the Board both required the Respondents to respond to Complainant's discovery requests within thirty days of the date of the Order (December 16, 2005) (Id. at 3) and also by December 3, 2005 – a Saturday. (Id. at 9.)

7. In the Order of November 17, 2005, the Board ordered the hearing officer in this matter to hold a conference call on or before December 3, 2005 to set a detailed discovery schedule and to rule on objections to discovery (Id. At 9). To date, the hearing officer has failed to schedule or participate in this required conference call.

8. In light of the contradictory dates for responding presented in the Order of November 17, 2005 and because of lack of guidance and clarification from the Hearing Officer, the Respondents decided to comply with the earlier response date of December 3, 2005.

8. Under Board Procedural Rule 35 IAC 101.300(a), a document that is scheduled to be filed on a Saturday is due on the next working day.

9. The Respondents timely filed their responses to discovery on Monday December 5, 2005 and not after the earlier of the two deadlines stated in the Order of November 17, 2005 as implied in the Hearing Officer Order of February 8, 2006 (Hearing Officer Order of

February 8, 2006 at 1).

10. On December 14, 2005, the Respondents' filed with the Board a Motion to Quash the Complainant's Request for Deposition of David S. O'Neill and Michael Jagwiel – the attorneys for the Respondents.

11. On December 28, 2005, the Complainant filed a Second Motion for Protective Order and a Response to the Respondents' Motion to Quash in the same filing. The filing included a repeat of their request for a protective order.

12. The Respondents filed a Motion to Strike the Complainant's Motion for Protective Order on January 9, 2006.

13. On February 8, 2006, the hearing officer issued an order in which she denied the Respondents' motion to quash, denied the Respondents' motion to strike the Complainant's motion for protective order and granted Complainant's motion for protective order.

BASIS FOR APPEAL OF THE HEARING OFFICER ORDER BASED ON THE RESPONDENTS' REQUIREMENT TO COMPLY WITH THE BOARD'S ORDER OF NOVEMBER 17, 2005

14. In its Order of November 17, 2005, the Board clearly stated that discovery "**must** be limited to the issues regarding the reasonableness of the **People's** attorney fees and costs" (Order of November 17, 2005 at 3.) (emphasis added).

15. While the Board Order of November 17, 2005 clearly instructed the Hearing Officer to hold a conference call on or before December 3, 2005 to set a detailed discovery schedule and to rule on objections to discovery, the Hearing Officer has failed to do so.

16. From the date of the Order until either due date for response presented in the Order and even to the present date, the Complainant has 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 attorneys' fees and costs as required by the Boards Order of November 17, 2005 .

17. From the date of the Order of November 17, 2005 until either due date for response

presented in the Order, the Complainant made no attempt to act professionally and with civility to comply with the requirements of Supreme Court Rule 201(k). The Complainants – as the counsel responsible for trial of the case – had a duty to make personal consultation and reasonable attempts to resolve differences over discovery but failed to do so.

18. The Board also stated in its Order of November 17, 2005 that "both parties are cautioned that professionalism and civility are required when appearing before the Board. Future offensiveness will not be tolerated, and may result in sanctions." (Id at 9).

19. Despite the fact that both the Hearing Officer and the Complainant elected to totally disregard the ruling of the Board on November 17, 2005, the Respondents endeavored to fully comply with the somewhat ambiguous order that the Respondents had hoped would be clarified through the mandatory hearing with the Hearing Officer or through the required 201(k) consultation that should have been initiated by the Complainant's attorneys before the Respondents answers to discovery were due on December 5, 2005.

20. The Respondents prepared their answers with full respect of the Board's Oder of November 17, 2005 which clearly states that discovery "**must** be limited to the issues regarding the reasonableness of the **People's** attorney fees and costs" (Id. at 3.) (emphasis added). Failure to limit its responses in compliance with the Board's order would leave the Respondents subject to the risk of sanctions as threatened in the Board's Oder of November 17, 2005 (Id. at 9).

21. The Hearing Officer mistakenly states that the Respondents' "discovery responses violate the spirit of the Board's order" to support the granting of the Complainant's motion for protective order and in denying Respondents' Motion to Quash Depositions (Hearing Officer Order of February 18, 2006 at 1). In fact, the Respondents were the only party to this matter that showed regard for the Board's order and complied with the same.

BASIS FOR APPEAL OF THE HEARING OFFICER ORDER BASED ON THE REQUIREMENT TO COMPLY WITH SUPREME COURT RULES 201(b) AND 213(d)

22. Coincidental to the requirements of the Board's Order of November 17, 2005 is the standard for discovery stated in the Committee Comments to the Illinois Supreme Court Rule 201(b) that "the information sought appears reasonably calculated to lead to the discovery of admissible evidence".

23. In their answers and objections, the Respondents argue that the interrogatories are not calculated to be admissible evidence and are not relevant.

24. The Hearing Officer implies that her rulings to deny the motion to quash and to grant the protective order are based on the Respondents failure to meet a burden to supply case law "to defend their assertion that the information would not be admissible or lead to information admissible at hearing" (Id.). Under Supreme Court Rule 213(d) the Respondent has no such burden.

25. Supreme Court Rule 213(d) clearly states that "[a]ny objection to an answer or to the refusal to answer an interrogatory shall be heard by the court upon prompt notice and motion of the party propounding the interrogatory". The Committee Comments to this paragraph state that "motions to hear objections to interrogatories must be noticed by the party seeking to have the interrogatories answered". The burden is clearly on the Complainant to prove that the information would be admissible or lead to information admissible at hearing.

26. The Hearing Officer fails to rule as to whether or not "the information sought appears reasonably calculated to lead to the discovery of admissible evidence", but instead rules that because the Respondents fail to supply case law that it has no duty to supply, she summarily dismisses the motions and arguments.

27. Similarly, the Hearing Officer dismisses the Respondents motion to strike the motion for protective order by stating that the "motion to strike offered no compelling argument to grant that motion (Id. at 1,2) without reviewing the arguments in light of Board's Procedural Rules, without explaining why the arguments are not compelling or explaining why or how a standard that an argument be compelling is the standard to be applied in

this matter.

BASIS FOR APPEAL OF THE HEARING OFFICER ORDER BASED ON THE REQUIREMENT TO COMPLY WITH SUPREME COURT RULES 3.7

28. The Hearing Officer implies that her rulings to deny the motion to quash and to grant the protective order are based on the Respondents failure to provide "argument or case law to defend their assertion that the information... would violate the attorney-client privilege" (Id. at 1).

29 The Respondents note that the statement that the attorney-client privilege would be violated is sufficient argument to bring the matter before the Board and that the Respondents have no duty to site case law in support of arguments, especially in situations involving issues of legal ethics that every licensed attorney in the state of Illinois has an absolute duty to comprehend.

30. It is well established in legal ethics that the attorney-client relationship makes it ethically improper for an attorney to testify in most matters in which he is counsel. Lavin v. Civil Service Comm. (1st Dist. 1974), 18 Ill. App. 3d 982, 310 N.E. 2d 858, et. al.

31. Supreme Court Rule 3.7(a) states:

> A lawyer shall not accept or continue employment in contemplated or pending litigation if the lawyer knows or reasonably should know that the lawyer may be called as a witness on behalf of the client...,

Supreme Court Rule 3.7(b) states:

> If a lawyer knows or reasonably should know that the lawyer may be called as a witness other than on behalf of the client, the lawyer may accept or continue the representation until the lawyer knows or reasonably should know that the lawyer's testimony is or may be prejudicial to the client.

31. Under the provisions of Supreme Court Rule 3.7, both of the attorneys for all of the Respondents would need to withdraw if the Hearing Officer's Ruling of February 8, 2005 is allowed to stand and the motion to quash is denied.

32. While not strictly prohibited, courts usually only require an attorney to testify when the

circumstances absolutely necessitate such testimony. Cannella v. Cannella (2d Dist. 1971). 132 Ill. App. 2d 889, 270 N.E. 2d 114.

33. Neither the Complainant or the Hearing Officer have presented an argument that the testimony of the attorneys is necessary in this matter. In fact, the testimony is not necessary.

34. The courts have found that the practice of deposing opposing counsel is disruptive of the adversarial process and lowers the standards of the legal profession. Shelton v. American Motors Corp. (8th Cir. 1986), 805 F.2d 1323; Marco Island Partners v. Oak Development Corp. (N.D. Ill. 1987), 117 F.R.D. 418.

35. In N.F.A. Corp. V. Riverview Narrow Fabrics, the court expressed a concern that countenancing unbridled depositions of attorneys constitutes an invitation to delay, disrupt, harass and attempt to disqualify the attorney to be deposed and proposed that it would be appropriate to require the party seeking to depose an attorney to establish a legitimate basis for the request and demonstrate that the deposition will not otherwise prove overly disruptive or burdensome. ((M.D.N.C., 1987), 117 F.R.D. 83)

36. Given the Complainants history of failing to act with professionalism and civility in this matter, the Respondents fully suspect that the motives of the Complainant were, in fact, to further delay and disrupt this proceeding, to continue the harassment of the Respondents and to force the resignation of the Respondents' counsel. To protect against such unethical behavior, the Hearing Officer should have inquired as to the Complainant's motives and required the Complainant to establish a legitimate basis for the request and demonstrate that the deposition will not otherwise prove overly disruptive or burdensome. No such action has been taken.

36. The courts have held that "deposition of opposing counsel should be limited to situations where it is shown that: (1) no other means exists to obtain the information than to depose opposing counsel; (2) the information sought is relevant and unprivileged; and (3) the information is crucial to the preparation of the case. Shelton, 805 F.2d 1323; Harriston v. Chicago Tribune Co. (N.D. Ill. 1990), 134 F.R.D. 232.

37. Neither the Complainant or the Hearing Officer have presented an arguments that the

deposition of the attorneys is required to obtain information not available from other sources, that the information sought is relevant and unprivileged or that the information is crucial. In fact, the none of these requirements can be found in this situation.

38. In the past, the Board has been extremely reluctant to allow an attorney of record to testify, especially if the testimony of the attorney would endanger his or her representation of his client, without a showing that only that attorney can provide necessary information. Gallatin National Co. V. The Fulton County Board (June 15, 1992), PCB 91-256.

39. In the matter before the Board, the attorneys representations would be endangered and neither the Complainant or the Hearing Officer have shown that only the attorneys for the Respondents can provide the information. Further neither the Complainant or the Hearing Officer have shown the information is necessary. In fact, there is no necessary information that only the Respondents' attorney can provide.

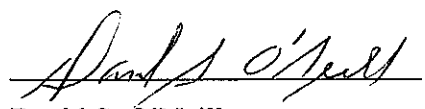
40. The standards propounded by the courts are consistent with the Board's Procedural Rules on the production of information under 35 Ill. Adm. Code 101.261 which also have not been considered in the arguments presented by the Complainant and the Hearing Officer.

41 In its Order of November 17, 2005, the Board clearly stated that discovery "**must** be limited to the issues regarding the reasonableness of the **People's** attorney fees and costs" (Order of November 17, 2005 at 3.) (emphasis added). There is no argument by the Hearing Officer or the Complainants that justifies the deposing of Respondents' attorneys in light of the limitations of the presented in the November 17, 2005 Board Order.

42. Absent a showing that the testimony of the Respondents' attorneys is necessary subject to the standards established by the Illinois Supreme Court Rules of Ethics, the Supreme Court Rules of Discovery, the precedents established by the courts, the Boards Procedural Rules, the ruling by the Board of November 17, 2005 and the requirement placed on the Complainant's attorneys to act with professionalism and civility, the Hearing Officer should not allow the deposition of the Respondents' attorneys to go forward and should not have denied the Respondents' Motion to Quash Complainant's Deposition Notices to Respondents Regarding Complainant's Fee Petition of December 14, 2005.

WHEREFORE, the Respondent respectfully appeal to the Board to reverse the Hearing Officer Order of February 8, 2006 and issue an order to grant the Respondents' Motion to Quash Complainant's Deposition Notices to Respondents Regarding Complainant's Fee Petition of December 14, 2005, grant the Respondents' Motion to Strike in Part Complainant's Second Motion to Quash Deposition Notices and Response to Complainant's Second Motion for Protective Order of January 9, 2006 and deny Complainant's Second Motion for Protective Order and Response to Respondents' Motion to Quash Deposition Notices.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached RESPONDENTS' APPEAL OF HEARING OFFICER'S ORDER OF FEBRUARY 8, 2006 by hand delivery on February 23, 2006 upon the following party:

Mitchell Cohen
Environmental Bureau
Assistant Attorney General
Illinois Attorney General's Office
188 W. Randolph, 20th Floor
Chicago, IL 60601

David S. O'Neill

NOTARY SEAL

SUBSCRIBED AND SWORN TO ME this 22nd

day of February, 20 06

Notary Public

OFFICIAL SEAL
RITA LOMBARDI
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXPIRES:09/08/07