

ILLINOIS POLLUTION CONTROL BOARD
December 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 motion for sanctions filed by the Skokie Valley Asphalt Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick (respondents) on November 15, 2006. The People of the State of Illinois (People) filed a response to the motion on November 29, 2006. For the reasons explained more fully below, the Board denies the respondents' motion for sanctions.

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). After a lengthy series of pleadings, the Board issued an order on September 7, 2004, setting up a detailed pre-hearing schedule and directing the hearing officer to schedule a hearing no later than December 22, 2006. People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 8 (Sept. 7, 2004). In that order, the Board noted that no additional discovery requests would be allowed. *Id.* On October 6, 2006, the Board's hearing officer set this matter for a hearing to occur on December 12, 2006.

The respondents filed their first motion for sanctions on October 10, 2006. On November 2, 2006, the Board issued an order denying the respondents' first motion for sanctions. *See* People v. Skokie Valley Asphalt, Co., PCB 96-98, slip op. at 8 (Nov. 2, 2006). In that order, the Board found that the People did not fail to comply with the September 7, 2006 Board order, and directed both parties to proceed expeditiously to hearing in this matter. *Id.* at 3-

4. As noted, a hearing in this matter regarding attorney fees and costs is currently set for December 12, 2006.

RESPONDENTS' MOTION FOR SANCTIONS

In its motion, the respondents assert that the People failed to produce Michael C. Partee (Partee) for deposition as required under the Board's discovery schedule of September 7, 2006. Mot. at 3. The respondents argue they are materially prejudiced by this failure to comply with the Board's order, and that they do not have the materials desired to properly depose another witness. *Id.* In addition, the respondents assert that their opinion witness does not have the information she requires to form her opinion and prepare her expert report, and that the respondents do not therefore have the information they require to prepare for hearing. *Id.*

The respondents contend that in order to protect them against undue prejudice in the disposition of this matter, the Board should apply Supreme Court Rule 219(c)(v) to dismiss this action with prejudice. Mot. at 4. In the alternative, the respondents assert that the Board should bar any and all testimony and strike any and all pleadings involving issues addressed by the discovery requests of the respondents in accordance with Section 101 .800 of the Board's procedural rules. *Id.*

PEOPLE'S RESPONSE

In response, the People argue that the motion for sanctions should be stricken on procedural grounds or denied on substantive grounds. Resp. at 1. The People assert that the motion for sanctions does not comport with the clear and unambiguous pre-hearing schedule set forth in the Board's September 7, 2006 order and the requirement to attempt to informally resolve discovery disputes before seeking Board intervention set forth in the hearing officer's February 8, 2006 order. Resp. at 1-2. Further, the People contend that the motion seeks extraordinary relief without stating any legal or factual basis and should be denied because it is without merit. Resp. at 2.

The People assert that the hearing officer's February 8, 2006 order granting the People's motion for protective order stated that the respondents' attorney must relate the measures taken to resolve problems with the People's attorneys before filing a motion related to any discovery problem. Resp. at 3. The People contend that the issue of Partee's appearance at deposition and at hearing has been addressed between the parties. *Id.* The People note that on December 15, 2005, the People wrote the respondents' attorney pursuant to Illinois Supreme Court Rule 201(k) in a full and good faith attempt to resolve Partee's expressly-stated objection to being listed as a potential hearing witness. *Id.* The December 15, 2005 letter is attached to the response as Exhibit A.

In the December 15, 2006 letter, the People state that Partee is the attorney representing the People at hearing, that none of his fees or costs are included in the fee petition, and that he will not be testifying at the hearing. Resp. at 3, Resp. Ex. A. The People note that the letter provided that in order to informally resolve the potential dispute, the respondents should contact the People's attorney within 14 days of this letter, and that if no response is forthcoming, the

People will reasonably assume that respondents agree with their position. *Id.* The People assert that the respondents' attorney did not respond to the December 15, 2005 letter. Resp. at 3.

The People contend that on September 18, 2006, as part of another Rule 201(k) letter to Respondents' attorneys regarding other depositions in this case; the People wrote that the respondents listing Partee as a witness is improper; that he does not intend to submit to a deposition or to testify at a hearing; and that because the People never heard anything further from the respondents on this issue, and because the People's fee petition was not amended to include Partee's time, the People assumed that the objection is resolved. Resp. at 3, Resp. Ex. B. The People assert that the respondents' attorneys also failed to respond to the September 18, 2006 letter.

The People assert that on October 23, 2006, an additional Rule 201(k) letter that reiterated the position set forth in the December 15, 2005 and September 18, 2006 letters was sent upon receipt of the Partee deposition notice served on October 18, 2006. Resp. at 4. The People contend that the respondents did not respond to the October 23, 2006 letter. *Id.*

The People assert that depositions of People's attorneys Messrs. Cohen and Murphy were conducted on November 8 and 14, 2006. Resp. at 4. The People argue that, viewed in light of the Rule 101.800(c) factors to be considered in imposing sanctions, respondents' motion for sanctions is completely without merit. Resp. at 7. The People note that the Rule 101.800(c) factors include: (a) the relative severity of the refusal or failure to comply; (b) the past history of the proceeding; (c) the degree to which the proceeding has been delayed or prejudiced; and; (d) the existence or absence of bad faith on the part of the offending party or person. *Id.* The People argue that each of these factors weigh heavily against the imposition of sanctions against the People. *Id.*

DISCUSSION

The Board may impose sanctions for any unreasonable failure to comply with a Board or hearing officer order pursuant to Section 101.800 of the Board's procedural rules. 35 Ill. Adm. Code 101.800. The respondents argue that they have been materially prejudiced by the failure of the People to produce Partee for deposition as required under the Board's discovery schedule of September 7, 2006. Mot. at 3.

The Board has broad discretion in determining the imposition of sanctions. *See Freedom Oil Co. v. IEPA*, PCB 03-54 (Feb. 2, 2006). In exercising this broad discretion, the Board considers such factors as the relative severity of the refusal or failure to comply; the past history of the proceeding; the degree to which the proceeding has been delayed or prejudiced; and the existence or absence of bad faith on the part of the offending party or person. *Freedom Oil* (Feb. 2, 2006), citing 35 Ill. Adm. Code 101.800(c).

The Board denies the respondents' motion for sanctions. The Board first notes that dismissal of the action is inappropriate as the Board has already found respondents in violation of the Act and regulations, and imposed a \$153,000 civil penalty. *See People v. Skokie Valley Asphalt, Co.*, PCB 96-98, slip op. at 1 (Sept. 2, 2004). The current issue before the Board solely

concerns the potential award of attorney fees and costs. Further, a consideration of the factors set forth at 35 Ill. Adm. Code 101.800(c) reveals that sanctions are not appropriate in this instance. The record is clear that the People have attempted to address the issue of Partee's appearance at least three times through informal discovery practice. Thus, the People have not exhibited any bad faith, but have actually shown good faith in this matter. In addition, the People are not seeking to recover for Partee's time spent in this matter, and the respondents have been able to depose other attorneys for the People. The Board cannot see how the failure of the People to produce Partee is in any way prejudicial to the respondents' cause, much less severe. A review of the record indicates that the People's refusal to produce Partee has not resulted in delay of the proceedings, nor does the past history of the proceeding argue for any sanctions against the People.

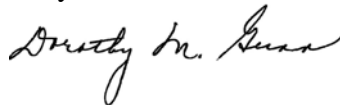
It should be noted once again that respondents have been given the opportunity to conduct extensive discovery on the fee petition, and that a hearing on the fee petition is scheduled for December 12, 2006. Respondents have had ample opportunity to pursue their claims on the fee petition. Over two years have passed since the Board initially issued the September 2, 2004 order directing the respondents to pay a civil penalty of \$153,000, but withholding 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). Again, the Board notes that any perceived failure of the respondents to fully address the People's fee and cost petition during this time is a problem of the respondents' own making.

CONCLUSION

The Board denies the respondents' November 15, 2006 motion for sanctions. The parties and the hearing officer are directed to proceed to hearing in this matter currently set to occur on December 12, 2006.

IT IS SO ORDERED.

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



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board