

ILLINOIS POLLUTION CONTROL BOARD
January 8, 1998

MORTON COLLEGE BOARD OF)
TRUSTEES OF ILLINOIS COMMUNITY)
COLLEGE DISTRICT NO. 527,)
)
Complainant,)
)
v.) PCB 98-59
) (Enforcement-Land)
TOWN OF CICERO,)
)
Respondent.)

ORDER OF THE BOARD (by G.T. Girard):

This matter is before the Board on a motion to dismiss (Mot.) filed by respondent, the Town of Cicero (Cicero), on November 3, 1997. A response (Res.) was filed by the complainant, Morton College Board of Trustees of Illinois Community College District No. 527 (College), on November 10, 1997. In addition, by Board order of December 4, 1997, the Board accepted: 1) a November 10, 1997, motion filed by respondent asking the Board to take judicial notice of the respondent's complaint for declaratory and ancillary relief filed in Cook County Circuit Court; 2) a November 19, 1997, motion by complainant asking for time to file a supplement to complainant's response to the motion to dismiss and a November 26, 1997, supplemental response (S.Res.); and 3) a November 24, 1997, motion filed by respondent for leave to file a reply (Reply) to complainant's response to the motion to dismiss. On December 10, 1997, the Board received from Cicero a motion for leave to file a supplemental reply (S.Reply) *instanter*. The Board grants that motion.

After careful review of the arguments presented by the parties, the Board denies respondent's motion to dismiss. The Board finds that the Board has jurisdiction over this matter and the complaint is neither duplicitous or frivolous. Therefore, the Board accepts this complaint and directs this matter to be set for hearing.

BACKGROUND

Before proceeding to a discussion of the arguments in the pleadings, a brief discussion of the facts as alleged in the complaint (comp.) will be helpful. The site at issue in this proceeding is located in the Cicero, Illinois. Cicero owned the property from 1986 to 1994 when the College became the owner. Comp. at 2. A contract for the sale of the property was entered into on February 14, 1994 and the sale closed on November 30, 1994. *Id.* The complaint alleges that prior to the sale of the property, Cicero caused or allowed open dumping at the site. *Id.*

ARGUMENTS

Cicero offers three main arguments why the Board should dismiss this complaint. First Cicero asserts that the Board lacks subject matter jurisdiction over the “threshold” issue in this case. Second, Cicero maintains that the circuit court’s jurisdiction is “paramount” to the Board’s jurisdiction over the contractual issue in the case. Finally, Cicero argues that the filing of the complaint is premature pursuant to provisions of the Resource Conservation and Recovery Act (RCRA) (42 USC 6901 *et seq.*) and the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) (42 USC 9601 *et seq.*).

Subject Matter Jurisdiction

Cicero concedes that the Board has jurisdiction over citizen’s enforcement and cost recovery cases. Mot. at 4 citing to People v. NL Industries, 152 Ill.2d 82, 604 N.E.2d 349 (1992) (NL Industries). However, Cicero argues that the threshold issue in this case is whether the College has “assumed the environmental liability at the property.” Mot. at 4. Cicero argues that to resolve the issue of environmental liability requires construction of a contract between the parties which requires review of Illinois common law. Cicero states that the Board lacks the power to decide such issues as the Illinois General Assembly failed to endow the Board with that authority. Mot. at 4-5. Cicero recites the Board’s general statutory authority in the Environmental Protection Act (415 ILCS 5/1 *et seq.*(1996)) (Act) at 415 ILCS 5/5(a)-(d) and argues that nothing in the statute “either expressly or impliedly grants the power to the Board to construe a contract by determining as a matter of Illinois common law whether the parties bargained to transfer environmental liabilities to the buyer.” Mot. at 6.

The College disagrees that the “threshold issue” is the contractual issue regarding environmental liability. Res. at 6. Rather, the College maintains that the threshold issue is the existence of violations of the Act. The College maintains that only after the Board has found a violation of the Act is the question of who may be responsible decided. Res. at 6. The College asserts that Cicero’s position “ignores the fact that the Act vests subject matter jurisdiction with the Board.” Res. at 6.

The Board agrees with the College that the threshold issue in any enforcement action brought before the Board is whether or not a violation has occurred. If no violation has occurred, there is no need to determine responsibility. Clearly, the Act gives the Board the authority to review and determine violations of the Act. The six count complaint filed by the College alleges, in part, that Cicero violated the Act by causing or allowing open dumping and by disposing, treating, storing or abandoning waste at a site which does not meet the requirements of the Act or Board regulations. Although, Cicero may or may not have contracted with the College to assume responsibility for clean-up of the site, Cicero cannot contract for immunity from violations of the Act and civil penalties under the Act. The Act does not contain any provision which would allow such action by Cicero, nor can the Board find any case law which supports such a proposition. Therefore, the Board does have subject matter jurisdiction in this matter. Further, even if a contract between the College and Cicero did transfer responsibility for clean-up of the site, such a contract would not be a defense against alleged violations of the Act.

Circuit Court Jurisdiction

Cicero argues that if the Board has jurisdiction in this matter, that jurisdiction is concurrent with the circuit court. Mot. at 8. Cicero cites to Section 22.2(f) of the Act in support of this argument. Section 22.2(f) provides, in part, that “costs of remedial action by a unit of local government may be recovered in an action before the Board.” Cicero maintains that it is this section of the Act that the Illinois Supreme Court “held sufficient to establish concurrent jurisdiction in both the circuit court and the Board to hear cost recovery cases.” S.Reply at 3-4, citing NL Industries.

Cicero asserts that the Board does not have exclusive jurisdiction to hear citizen enforcement actions. Cicero quotes Employers Mutual Companies v. Skilling, 163 Ill.2d 284, 644 N.E.2d 1163 (1994) (Employers Mutual) which states:

The courts of Illinois have original jurisdiction over all justiciable matters. (Ill.Const. 1970, art. VI, § 9.) The legislature may vest exclusive original jurisdiction in an administrative agency. However, if the legislative enactment does divest the circuit courts of their original jurisdiction through a comprehensive statutory administrative scheme, it must do so explicitly. People v. NL Industries (1991) 152 Ill.2d 82, 96-97, 178 Ill.Dec. 93, 604 N.E.2d 349.

Cicero also maintains that the circuit court’s jurisdiction is paramount in this matter. Mot. at 8. Cicero again cites to Employers Mutual to support Cicero’s position. Cicero asserts that since Cicero is seeking a determination of the construction of a contract, the issue is a question of law and the circuit court’s jurisdiction is paramount. Mot. at 10-11.

The College argues that the Board has exclusive jurisdiction over citizen actions alleging violations of the Act. S.Res. at 3. The College maintains that NL Industries, which Cicero relies on to establish concurrent jurisdiction, is a case brought by the Attorney General not a citizen’s enforcement case. The College asserts that the Act creates separate enforcement avenues for government actions brought by the Illinois Attorney General or a state’s attorney (Section 31(a) and (b)) and action brought by private citizens (Section 31(d)). S.Res at 3. Section 31(d) of the Act provides that “any person may file with the Board a complaint . . . against any person allegedly violating this Act.” The College also cites several cases to support its proposition that the Board has exclusive jurisdiction. Those cases are Lake County Forest Preserve District v. Ostro, PCB 92-80 (March 31, 1994; City of Elgin v. County of Cook, 257 Ill.App.3d 186, 629 N.E.2d 86 (1st Dist. 1993), aff’d in part, rev’d in part on other grounds; and Shepard v. R.A. Cullinan & Sons, Inc., NO. 95-1227 (C.D.Ill July 16, 1997) (not reported).

The Board is not persuaded, as Cicero argues, that the jurisdiction of the circuit court is paramount in this matter. Section 31(d) of the Act clearly states that “any person may file with the Board a complaint against any person allegedly violating this Act;” Section 31(d) of the Act does not specifically provide that “any person” may file a complaint with the circuit court. Thus, the plain language of Section 31(d) of the Act grants the Board jurisdiction over citizen enforcement actions such as this one before the Board.

With regard to Cicero's arguments concerning the Employers Mutual case, the Board finds that the facts of that case are distinguishable from this matter. In that case, Employers Mutual Company filed a motion with the Illinois Industrial Commission requesting leave to be added as a party-respondent in a proceeding. Employers Mutual Company additionally filed a suit for declaratory judgment in the circuit court. The plaintiff in the action before the Illinois Industrial Commission, who was a defendant in the circuit court action, filed a motion to dismiss the circuit court action. In this matter we have the respondent before the Board filing a case in circuit court and then asking the Board to dismiss the case before the Board based on the circuit court action. Thus, the facts in the two cases are quite different.

Even if Employers Mutual could be read to give concurrent jurisdiction to the circuit courts and the Board in citizen's enforcement cases, Employers Mutual would support the Board proceeding with this case. The Court stated in that case that "[a]dministrative agencies are given wide latitude in resolving factual issues but not in resolving matters of law." Employers Mutual at 1166. The complaint before the Board includes several allegations with regard to which the Board must resolve issues of fact before the contractual issue is even relevant. Therefore, the Board finds that the jurisdiction of the circuit court is not paramount to the Board's jurisdiction in this case. The Board notes that if the parties believe that resolution of the circuit court case will expedite the Board's decision, the parties are free to request the Board to grant a stay of this proceeding pending the outcome of the circuit court case. See, Pearl v. Bicoastal Corporation, Singer Corporation and Eaton Corporation, PCB 96-265, (April 3, 1997).

Premature Filing

Cicero asserts that by letter dated October 8, 1997, the College gave notice to Cicero that it intended to sue for violations of CERCLA, RCRA and for violations of state law following expiration of a 60-day and 90-day notice provisions of CERCLA and RCRA. Mot. at 11. Cicero concedes that there is no requirement under Illinois law that a citizen provide notice to the Illinois Environmental Protection Agency prior to bringing a complaint. Mot. at 13. However, Cicero argues that because the College did voluntarily give notice of its intent to sue, the College should not be "allowed to go back on its word." Mot. at 13.

The College responds that this is a state cause of action and not a federal cause of action. Res. at 8. The College argues that there is no "statute, regulation or judicial decision requiring a complainant to await the expiration of a federal notice period before enforcing non-federal rights." Res. at 8.

The Board finds Cicero's argument without merit and declines to dismiss the complaint as premature.

DUPLICITOUS/FRIVOLOUS DETERMINATION

Section 103.124(a) of the Board's procedural rules, which implements Section 31(d) of the Environmental Protection Act (415 ILCS 5/31(d) (1996)) provides, in part:

If a complaint is filed by a person other than the Agency, the Clerk shall also send a copy to the Agency; the Chairman shall place the matter on the Board agenda for Board determination whether the complaint is duplicitous or frivolous. If the Board rules that the complaint is duplicitous or frivolous, it shall enter an order setting forth its reasons for so ruling and shall notify the parties of its decision. If the Board rules that the complaint is not duplicitous or frivolous, this does not preclude the filing of motions regarding the insufficiency of the pleadings. 35 Ill. Adm. Code 103.124.

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. Brandle v. Ropp, PCB 85-68, 64 PCB 263 (1985). An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board. Citizens for a Better Environment v. Reynolds Metals Co., PCB 73-173, 8 PCB 46 (1973).

Although, Cicero does not argue that the matter before the Board is either duplicitous or frivolous, the Board finds the record sufficient to make such a determination. The complaint filed in circuit court by Cicero is different from the complaint before the Board in several aspects. Therefore, the complaint is not duplicitous. Further, the complaint clearly states a cause of action upon which the Board may grant relief. Therefore, the complaint is not frivolous. Accordingly, this matter shall proceed to hearing.

The hearing must be scheduled and completed in a timely manner, consistent with Board practices. The Board will assign a hearing officer to conduct hearings consistent with this order and the Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer consistent with this order.

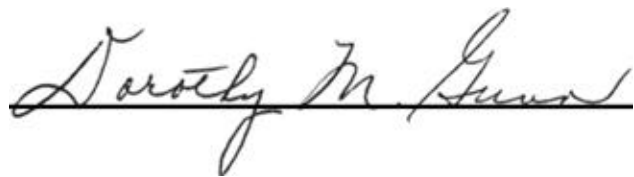
The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 30 days in advance of hearing so that public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses and all actual exhibits to the Board within five days of the hearing. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

CONCLUSION

The Board finds that the Board has jurisdiction over the issues in the complaint filed by the College and that the complaint was not filed prematurely. The Board further finds the complaint is neither duplicitous or frivolous and therefore this matter shall proceed to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 8th day of January 1998, by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a solid horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board