

ILLINOIS POLLUTION CONTROL BOARD
September 4, 2003

CITY OF CHICAGO, DEPARTMENT)	
OF ENVIRONMENT,)	
)	
Complainant,)	
)	
v.)	AC 03-11
)	(IEPA No. 02-05-AC)
CITY WIDE DISPOSAL, INC.,)	(Administrative Citation)
)	
Respondent.)	

CHARLES KING APPEARED ON BEHALF OF THE DEPARTMENT OF ENVIRONMENT;
and

EDWARD W. PIROK APPEARED ON BEHALF OF CITY WIDE DISPOSAL, INC.

INTERIM OPINION AND ORDER OF THE BOARD (by M.E. Tristano):

On October 25, 2002, pursuant to Section 31.1(b) of the Environmental Protection Act (Act) (415 ILCS 5/31.1(b)(2002)) the city of Chicago Department of Environment (Department) timely filed an administrative citation against City Wide Disposal, Inc. (City Wide). The Department alleges that City Wide violated Section 21 (p)(1) and (p)(7) of the Environmental Protection Act (Act), 415 ILCS 5/21(p)(1), (p)(7)(2002). The Department further alleges that City Wide violated these provisions by causing or allowing the open dumping of waste in a manner resulting in litter and deposition of construction or demolition debris at a facility located at 3910 South Loomis Street in Chicago, Cook County. The Department sought a penalty of \$6,000 for the alleged violation of the Act, the basis of which being that these are subsequent violations to those found by the Board in City of Chicago Department of Environment v. City Wide Disposal, Inc., AC 02-57 (Aug. 8, 2002). The administrative citation was based on an inspection conducted by Department Supervisor Lafayette Robertson on August 28, 2002.

On November 27, 2002, respondent filed a petition for review of the administrative citation pursuant to Section 31.1(d) of the Act, denying that it was operating an open dump and that the refuse was deposited on the property due to uncontrollable circumstances and immediately cleaned upon notification. The Board finds that Department Supervisor Robertson's issuance of the administrative citation was proper and that City Wide was operating an open dump. The Board notes that it has adopted a previous order, City of Chicago Department of Environment v. City Wide Disposal, Inc., AC 02-57 finding that the City Wide violated Sections 21 (p)(1) and 21 (p)(7) of the Act. Accordingly the Board finds that violations found in this administrative citation are subsequent violations of those statutory provisions and subject to a civil penalty of three thousand dollars (\$3,000) for each violation for a total civil penalty of six thousand dollars (\$6,000). 415 ILCS 5/42(b)(4-5) (2002).

ADMINISTRATIVE CITATION PROCESS

Section 31.1 of the Act authorizes the filing of administrative citations (415 ILCS 5/31.1 (2002)) and Part 108 of the Board's procedural regulations explains the administrative citation process before the Board (35 Ill. Adm. Code 108 *et seq.*). Administrative citations are an enforcement tool available to both the Agency and to local units of government under the Act. Administrative citations differ from enforcement actions in several respects. In particular, statutory penalties for administrative citations are set in the Act, and the Board has no leeway to consider mitigating factors in determining penalty amounts. *See* ILCS 5/42(b)(4-5)(2002).

PROCEDURAL HISTORY

As previously noted, this is the second administrative citation issued to City Wide for violations of sections 21(p)(1) and (p)(7) of the Act. On May 23, 2002, the Department issued an administrative citation to City Wide for violations of those sections, based on an inspection of City Wide's facility on April 16, 2002. City Wide did not request a hearing to protest the citation, and on August 8, 2002, the Board adopted an order finding that City Wide committed the violations and imposed the statutory penalty of \$1,500 per violation. City of Chicago Department of Environment v. City Wide Disposal, Inc., AC 02-57.

The Department served this administrative citation to Mr. Anthony Barbara, owner/operator of City Wide, on September 5, 2002. On October 25, 2002, the Department filed the administrative citation with the Board. On November 27, 2002, City Wide filed a petition to review the administrative citation. A hearing was held on June 3, 2003, at the James R. Thompson Center. At hearing, attorney Charles King appeared and participated on behalf of the complainant; attorney Edward W. Pirok appeared and participated on behalf of the respondent. Three witnesses testified during the hearing, Mr. Robertson on behalf of the Department and Mr. Barbara and Mr. Garcia for the respondent. Based upon the legal judgment, experience and observation at hearing, Hearing Officer Bradley Halloran found that all witnesses were credible in this matter. Tr. at 64. The Department filed its post-hearing brief on July 7, 2003 (Pet. Br.), and City Wide filed its post-hearing brief on July 28, 2003 (Resp. Br.).

BACKGROUND

On August 28, 2002, Department Supervisor Lafayette Robertson, inspected the facility located at 3910 South Loomis Street, Chicago, Illinois operated by City Wide Disposal, Inc. During the course of his inspection, Mr. Robertson noted demolition debris and litter in various small piles on the property. The debris contained concrete blocks, wooden pallets, bricks and concrete debris mixed with scrap metal. Tr at 18. Mr. Robertson took numerous pictures to document the presence of litter and demolition debris. Exhibit A. He then went to the office of City Wide and spoke to Mr. Barbara, the owner/operator, notifying him of the waste on the ground and asked whether City Wide had a permit to operate a waste transfer station. Mr. Barbara indicated that he did not have a permit and his employees deposited the waste on the ground unknown to him. Tr at 13. Mr. Robertson consulted with his supervisor and returned to City Wide on September 5, 2002 to issue an administrative citation for open dumping. Mr. Barbara stated that the material was dumped by a part-time employee, Mr. Orhelio Garcia. Tr at

41. Mr. Barbara explained that the dumping was due to a language barrier between the truck driver and his supervisor and that the debris was appropriately disposed once he was notified of its presence by Mr. Robertson. Tr. at 41.

STATUTORY BACKGROUND

Section 21 of the Act states, in pertinent part:

No person shall

- a. Cause or allow the open dumping of any waste.
* * *
- p. In violation of subdivision (a) of this Section, cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:
 - 1. litter;
* * *
 - 7. deposition of
 - (i) general construction or demolition debris as defined in Section 3.78 of this Act; or

Open dumping is defined as “the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill.” 415 ILCS 5/3.24 (2002). Refuse is defined as “waste” (415 ILCS 5/3.31 (2002)), and waste includes “any garbage . . . or other discarded material” 415 ILCS 5/3.53 (2002). Disposal is defined as “the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste . . . into or on any land . . . so that such waste . . . or any constituent thereof . . . may enter the environment or be emitted into the air or discharged into any waters, including ground waters.” 415 ILCS 5/3.08 (2002).

Litter is defined in the Litter Control Act as “any discarded, used or unconsumed substance or waste . . . (and) may include, but is not limited to, any garbage, trash, refuse, debris, rubbish . . . or anything else of an unsightly or unsanitary nature, which has been discarded, abandoned or otherwise disposed of improperly.” 415 ILCS 105/3 (2002).

“General construction or demolition debris” is defined in section 3.160(a) of the Act (415 ILCS 5/3.160(a)), which provides:

- (a) “General construction or demolition debris” means non-hazardous, uncontaminated materials resulting from the construction, remodeling, repair, and demolition of utilities, structures, and roads, limited to the following: bricks, concrete, and other masonry materials; soil; rock; wood and wood products; wall coverings; plaster; drywall; plumbing fixtures; non-asbestos insulation; roofing shingles and other roof coverings; reclaimed asphalt pavement; glass; plastics that are not sealed in a manner that conceals waste; electrical wiring and components containing no

hazardous substances; and piping or metals incidental to any of those materials. General construction or demolition debris does not include uncontaminated soil generated during construction, remodeling, repair, and demolition of utilities, structures, and roads provided the uncontaminated soil is not commingled with any general construction or demolition debris or other waste.

ISSUES AND ANALYSIS

The Board summarizes the issues and arguments raised by the parties in the section below. City Wide raised three major issues in challenging the validity of the administrative citation: (1) that the alleged violation was the result of uncontrollable circumstances; (2) that a necessary prerequisite to a citation for open dumping is a prolong period of debris deposit; (3) that immediate remedial action by ownership after inspection eliminates the violation.

City Wide first argues that the alleged violation was the result of uncontrollable circumstances. City Wide maintains that the administrative citation was the result of Mr. Garcia dumping one truckload of construction debris at the Loomis cite. Tr. at 41. Mr. Garcia, a part time driver was given instructions by Mr. Falano, the dispatcher, to dump the debris in the back. Tr. at 42. Mr. Garcia misunderstood the instructions to deposit the debris at the rear of the Shred-All property a licensed transfer station located at 43rd Street rather placing the debris at the City Wide leased property at 39th and Loomis due to a language barrier. Tr. at 44. Further, it had been the standard operating procedure for City Wide for four months to deposit waste, litter and debris at Shred-All. Tr. at 42. City Wide argues that the debris was the result of an uncontrollable circumstance, misunderstanding instruction and language difficulties. Resp.Br. at 3.

The Department states that City Wide's argument that the alleged violation was the result of uncontrollable circumstances due to a language barrier is insufficient. The Department argues that this circumstance was far from unavoidable. It could have been avoided if City Wide had the most rudimentary efforts to ensure that the drivers and the dispatcher could properly communicate. Pet. Br. at 7.

The Board rejects City Wide's argument that a misunderstanding or language difficulties constitutes an uncontrollable circumstance in this instance. In ESG Watts, Inc. v. IEPA, AC 89-131 (June 7, 1990), the Board found that since ESG Watts could have foreseen a circumstance it could have taken action to prevent, thus the Board denied the defense based on uncontrollable circumstances. The Board ruled that even the presence of adverse weather conditions would not normally warrant a finding of uncontrollable circumstances rather these must make action a near impossibility. Dan Heusinkved, County Clerk, County of Whiteside, State of Illinois, AC 87-25 (Jan. 21, 1988); Montgomery County v. Rita Hefley, AC 93-45 (Apr. 21, 1994). The Board has found an uncontrollable circumstance is just that, an extremely unusual occurrence that cannot possibly be envisioned. A part-time driver working for City Wide approximately five days per month could and should have received appropriate training on disposal. Further, the unnoticed dumping of debris on City Wide's leased property demonstrates a lack of supervision of employees. The Board finds that lack of appropriate training and adequate supervision of employees does not rise to the level of an uncontrollable circumstance. Clearly, management

should implement safeguards to assure the proper disposal and storage of construction debris; that is a foreseeable task.

The second argument that City Wide makes in challenging the validity of the administrative citation is that a necessary prerequisite to a citation for open dumping is a prolonged period of debris deposit. City Wide relies on Rochelle Disposal Service, Inc. v. PCB, 266 Ill. App. 3d 192, 639 N.E 2d 988, 203 Ill Dec. 429 (2nd Dist. 1994), to challenge the validity of the administrative citation. They suggest that Rochelle interprets the spirit of the statute in that they believe it states that there must be an act, not an inadvertent act caused by uncontrollable circumstances. City Wide contends that Rochelle argues that when “uncovered refuse had to be there overnight, it supports the view that if debris is inadvertently on the ground for an hour or two until it is discovered but when discovered is immediately taken to the standard transfer station, as in the present case, the inadvertent placement is not, in fact, a true violation.” Resp. Br. at 5-6.

The Department argues that the length of time the debris remained on the ground is not an element of the violation and misinterpreted Rochelle. The Department argues that in Rochelle, a landfill operator received administrative citations for failing to apply daily cover to the landfill in violation of Section 21(o)(5) of the Act and failing to contain and collect litter at the end of an operating day in violation of Section 21(o)(12) of the Act. Rochelle, contends the Department, involved a permitted disposal facility and did not concern open dumping. The Department, therefore argues, that Rochelle and the present case are inapposite. Pet. Br. at 7-8.

City Wide presents two concepts that should be addressed; first, a minimum time is required to allow a finding; second, immediate action to remediate is all that is required. The Board finds that Rochelle Disposal is distinguishable from the case at hand for numerous reasons. Rochelle Disposal was a permitted disposal facility and the proceeding did not involve open dumping. The landfill operator was charged with violation Section 21 (o)(5) of the Act, not Section 21 (p). The Board does not read Rochelle Disposal to imply a minimum period being overnight but the courts found that such a period was a clear violation. Further, the record of the current proceeding does not provide any evidence to support the contention that the construction debris/waste was at the 39th and Loomis site for a minimal period of time. No statements from Mr. Garcia or Falano, nor any documents or records were offered in support of this contention. What has been presented is the possibility of an 8/28 dumping and inspection by the Department followed closely by appropriate disposal without supporting documentation. The Board finds that the length of time the debris remained on the ground is not an element of the violation.

In regard to immediate corrective action, the Board has held that post-citation activities of the citation recipient are not material to whether a violation had occurred and to the Board’s subsequent review of the citation. Lincoln Chamber of Commerce, AC 89-26 (May 25, 1989). By its terms, the Act does not envision dismissal or mitigation of a properly issued administrative citation because a person is cooperative or voluntarily cleans up the site. IEPA v. Jack Wright, AC 89-227 (Aug. 30, 1990). Clean-up of a site is not a mitigating factor under the administrative citation program. IEPA v. Dennis Grubaugh, AC 92-3 (Oct. 16, 1992). In this case, the City inspector observed and documented open dumping had occurred prior to his visit of August 28. He gave notice to Mr. Barbara, who admits that the debris was deposited on the site by Mr. Garcia. Tr. at 13, 41. Mr. Barbara stated that subsequent to discussion with inspector

Robertson, the construction debris was removed and brought to Shred-All for appropriate disposal. Tr. at 41. Based upon these observations and admission, the Board finds that City Wide's actions do not render the administrative citation as void.

CONCLUSION

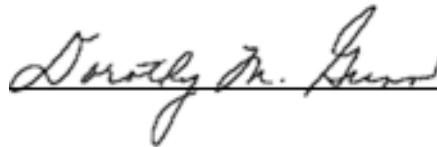
Based on review of the record and the pertinent provisions of the Act, the Board finds that open dumping occurred at the site. The Board further finds that none of the explanations offered by City Wide justify a finding of uncontrollable circumstances. For these reasons, the Board finds that City Wide violated Sections 21(p)(1) and 21(p)(7) of the Act. This interim opinion constitutes the Board's interim finding of fact and conclusions of law.

ORDER

1. The Board finds that City Wide Disposal, Inc., violated Sections 21(p)(1) and 21(p)(7) of the Environmental Protection Act. 415 ILCS 5/21(p)(1) and 21(p)(7) (2002).
2. The City of Chicago, Department of Environment must file a statement of its hearing costs within 14 days of the date of this order, on or before September 1, 2003. The statement must be supported by affidavit and served on City Wide Disposal, Inc. Within the same 14 days, the Clerk of the Board must file and serve a statement of the Board's hearing costs supported by affidavit. Respondent may file any objections to these statements within 14 days of service, on or about October 1, 2003.
3. The Board will then issue a final order assessing a statutory penalty of \$3,000 for each violation for a total civil penalty of \$6,000. In addition, the Board will award appropriate costs.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on September 4, 2003, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board