

ILLINOIS POLLUTION CONTROL BOARD
August 21, 2003

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 97-69
)	(Enforcement - Air)
ECONOMY PLATING, INC., an Illinois)	
corporation,)	
)	
Respondent.)	

ORDER OF THE BOARD (by N.J. Melas):

On June 30, 2003, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a motion for summary judgment against Economy Plating, Inc. (Economy Plating) on all counts of the second amended complaint filed in this matter. In a Board hearing officer order dated July 17, 2003, Board Hearing Officer Brad Halloran granted Economy Plating an extension of time until July 25, 2003, to file a response to the motion for summary judgment. To date, Economy Plating has not responded to the motion. Pursuant to Section 101.500(d) of the Board's procedural rules, if a party does not respond within 14 days or as provided by the hearing officer, the party waives objection to the Board granting the motion. 35 Ill. Adm. Code 101.500(d). For the reasons set forth below, the Board grants the People's motion.

BACKGROUND

On October 10, 1996, the People filed a three-count complaint against Economy Plating, Inc. (Economy). See 415 ILCS 5/31(c)(1) (2002), amended by P.A. 93-152, eff. July 10, 2003. The People allege that Economy Plating violated Sections 9(a) and (b) of the Environmental Protection Act (Act) and Sections 201.142, 201.143, 201.302, 201.144, 254.102(c), and 254.402 of the Board's air pollution regulations. 415 ILCS 5/9(a) and (b); 35 Ill. Adm. Code 201.142, 201.143, 201.302, 201.144, 254.102(c), and 254.402. The People further alleged that Economy Plating violated these provisions by operating equipment without a permit, constructing a tank and a fume scrubber without a permit, and failing to file annual reports.

The People filed an amended complaint on August 12, 2002, containing a total of five counts and alleging additional violations of Sections 9(b) and 9.1(d)(1) of the Act based on Economy violating federal regulations and certain conditions of its special operating permit. 415 ILCS 5/9(b) and 9.1(d)(1) (2002). Both the complaint and the amended complaint concern Economy's electroplating facility located at 2350 N. Elston Avenue, Chicago, Cook County.

The Board did not accept the People's amended complaint for hearing due to several errors. On November 14, 2002, the People filed a second amended complaint alleging the same violations and correcting all errors.

On November 21, 2003, the Board accepted the People's amended complaint for hearing. *See* 35 Ill. Adm. Code 103.212(c). The Board noted that Economy Plating must answer the complaint within 60 days after receiving the complaint, and directed the hearing officer to proceed to hearing. The People filed a motion to deem the facts alleged in the second amended complaint admitted on May 22, 2003. Economy did not respond to the People's motion to deem facts admitted, but did file a motion for leave to file an answer, attaching an answer, on June 3, 2003. On June 19, 2003, the Board granted the People's motion and denied Economy Plating's motion for leave. No hearing has been held in this matter.

BOARD RULES

Section 101.516(b) of the Board's procedural rules for enforcement actions provides:

If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment. 35 Ill. Adm. Code 101.516(b).

Under Section 201.142 of the Board rules, any person constructing a new emissions source or new air pollution control equipment, or modifying any existing emission source must first obtain a construction permit from the Agency. 35 Ill. Adm. Code 201.142. Section 201.143 of the Board rules prohibits the operation of any new emission source or new air pollution control equipment that would require a construction permit, without an operating permit from the Agency. 35 Ill. Adm. Code 201.143. Section 201.144 of the Board rules prohibits the operation of any existing emission source or existing air pollution control equipment without an operating permit from the Agency. 35 Ill. Adm. Code 201.144.

Section 201.302 requires owners or operators of any emission unit or air pollution control equipment to file annual air emissions reports. 35 Ill. Adm. Code 201.302. Section 254.102(c) clarifies that reporting requirements apply to owners and operators of small sources. Section 254.402, repealed at 25 Ill. Reg. 9856, effective July 17, 2001, established the reporting schedule for annual emissions report. 35 Ill. Adm. Code 254.402. The first annual emissions report was required for the calendar year of 1992, the deadline being October 1, 1993. 35 Ill. Adm. Code 254.402(a). Thereafter, annual emissions reports were due by May 1 of the subsequent year. 35 Ill. Adm. Code 254.402(b).

STATUTORY BACKGROUND

Section 9(a) of the Act is a prohibition against air pollution. 415 ILCS 5/9(a) (2002). Section 9(b) prohibits the construction or operation of equipment that may contribute to air pollution or equipment that is designed to prevent air pollution, without a permit from the

Agency. 415 ILCS 5/9(b) (2002). Section 9.1(d)(1) of the Act makes any violation of Sections 111, 112, 165, or 173 of the Clean Air Act a violation of the Act. 415 ILCS 5/9.1(d)(1) (2002).

After the Board finds a violation, the Board considers all facts and circumstances involved in the enforcement order including, but not limited to, the factors set forth in Section 33(c) of the Act to devise an appropriate remedy for the violation. *See* 415 ILCS 5/33(c) (2002), *amended by* P.A. 93-152, eff. July 10, 2003. Section 33(c) of the Act provides in part:

In making its orders and determinations, the Board shall take into consideration:

- (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- (ii) the social and economic value of the pollution source;
- (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
- (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
- (v) any subsequent compliance. 415 ILCS 5/33(c) (2002), *amended by* P.A. 93-152, eff. July 10, 2003.

The maximum civil penalties the Board may assess are established by Section 42(a) of the Act, which provides in part:

[A]ny person that violates any provision of this Act or any regulation adopted by the Board . . . shall be liable to a civil penalty not to exceed \$50,000 for the violation and an additional civil penalty of not to exceed \$10,000 for each day during which the violation continues 415 ILCS 5/42(a) (2002), *amended by* P.A. 93-152, eff. July 10, 2003.

In determining the appropriate civil penalty, the Board may consider any mitigating and aggravating factors of record including those set forth in Section 42(h) of the Act:

- 1. the duration and gravity of the violation;
- 2. the presence or absence of due diligence on the part of the violator in attempting to comply with requirements of the Act and regulations thereunder or to secure relief therefrom as provided by this Act;
- 3. any economic benefits accrued by the violator because of delay in compliance with requirements;

4. the amount of monetary penalty which will serve to deter further violations by the violator and other persons similarly subject to the Act; and
5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator. 415 ILCS 5/42(h) (2002), *amended* by P.A. 93-152, eff. July 10, 2003.

MOTION FOR SUMMARY JUDGMENT

Standard of Review

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” *Dowd*, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment is a drastic means of disposing of litigation, and therefore it should only be granted when the movant’s right to the relief is clear and free from doubt.” *Dowd*, 181, Ill. 2d at 483, 693 N.E.2d at 370, citing *Purtill v. Hess*, 111 Ill. 2d 229, 240, 489. N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must “present a factual basis, which would arguably entitle [it] to a judgment.” *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

The People’s Arguments

The People contend that because the Board deemed all the material allegations of the People’s complaint against Economy Plating admitted, there remains no general issue of material fact for review. Mot. at 2. The People contend that, accordingly, the Board should grant the People’s motion for summary judgment on all five counts of the amended complaint. The People further ask the Board to order Economy Plating to cease and desist from further violations of the Act and Board regulations. *Id.* The People seek a civil penalty of \$50,000 for each violation of the Act and Board regulations, and an additional civil penalty of \$10,000 per day for each day the violation continues. *Id.*

DISCUSSION

The Board finds that the allegations deemed admitted pursuant to 35 Ill. Adm. Code 103.204(d) are sufficient to prove that the People are entitled to a judgment as a matter of law under 35 Ill. Adm. Code 101.516(b). Below the Board discusses how the admitted facts support each of the five counts of the complaint in turn.

Count I – Operating Equipment Without a Permit

In count I, the People contend that Economy Plating violated Section 9(b) of the Act (415 ILCS 5/9(b) (2002)) and Section 201.144 of the Board rules (35 Ill. Adm. Code 201.144) by operating six hard chrome electroplating tanks, six polishing lathe and a gas-fired boiler without the required operating permit from the Agency between March 7, 1983 and November 30, 1995. The People state Economy Plating violated these same provisions for operating a glass bead blasting operation with baghouse for the seventh scrubber between May or June of 1973 through November 30, 1995. Am. Pet. at 6. The People also contend in count I that Economy Plating violated Section 9(b) of the Act and Section 201.143 of the Board rules (35 Ill. Adm. Code 201.143) by operating a seventh hard chrome electroplating tank with a seventh fume scrubber without the required new source operating permit from the Agency between May or June of 1973 through November 30, 1995. *Id.*

Count II – Constructing a Tank and Fume Scrubber Without a Permit

The People contend in count II that Economy Plating violated Section 9(b) of the Act (415 ILCS 5/9(b) (2002)) and Section 201.142 (35 Ill. Adm. Code 201.142) of the Board rules by constructing a hard chrome electroplating tank with one fume scrubber without the required construction permit from the Agency. Am. Pet. at 9. The Board deemed these facts admitted on June 19, 2003.

Count III – Failing to File Annual Reports

The People state in count III that Economy Plating violated Section 9(a) of the Act (415 ILCS 5/9(a)) and Section 201.302 of the Board regulations (35 Ill. Adm. Code 201.302) by failing to timely file annual emission reports for the years of 1992 and 1994. Am. Pet. at 12. Economy Plating filed the 1992 annual emissions report to the Agency on October 4, 1993, and the 1994 annual emissions report on February 29, 1996. The respective deadlines were October 1, 1993 and May 1, 1995.

Count IV – Violating Federal Regulations and Certain Conditions of its Special Operating Permit

The People contend that Economy Plating violated federal Clean Air Act regulation 40 C.F.R. 63.342 (c)(1)(ii) and conditions 1(b) and 1(c) of operating permit #73031926 for failing to maintain compliance with the chromium emission limit during a special permit compliance test on November 25, 1997. The People state Economy Plating failed to establish required testing parameters in violation of federal Clean Air Act regulation 40 C.F.R. 63.343(c)(1)(ii) during a compliance test performed on February 16, 2001. Finally, the People contend in count IV that Economy Plating violated 40 C.F.R. 63.346(b)(1) and (8) and special operating permit condition 4(b) for failing to maintain complete records of inspection, maintenance and repairs for the add-on air pollution control equipment. Am. Pet. at 19. Economy Plating contends that by violating special operating permit conditions, Economy Plating violated Section 9(b) of the Act. Economy Plating further contends that by violating federal regulations, Economy Plating violated Section 9.1(d)(1) of the Act.

Count V – Certification Violation

The People contend in count V that Economy Plating conducted an initial performance test on February 16, 2001. The People state the test results showed Economy Plating failed to comply with the performance test requirements as set out Economy Plating's operating permit in violation of Section 9(b) of the Act and special operating permit condition 5(a through i). Additionally, the People contend Economy Plating violated 40 C.F.R. 63.343(b)(1) by failing to comply with the parameters for the February 16, 2001 performance test, consequently also violating Section 9.1(d)(1) of the Act. Am. Pet. at 23.

Board Analysis

In a June 19, 2003 order, the Board deemed all of the facts contained in the People's second amended complaint admitted. Accordingly, the Board finds that Economy Plating violated Sections 9(a), (b), and 9.1(d)(1) of the Act and Sections 201.142, 201.143, 201.302, 201.144, 254.102(c), and 254.402 of the Board's air pollution regulations as alleged in the People's five-count amended complaint. 415 ILCS 5/9(a), (b), and 9.1(d)(1) (2002); 35 Ill. Adm. Code 201.142, 201.143, 201.302, 201.144, 254.102(c), and 254.402. The Board grants the People's motion for summary judgment on all five counts.

REMEDY

The parties have not yet analyzed the 33(c) or 42(h) factors regarding an appropriate remedy, including civil penalty, if any, in this proceeding. If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2002), *amended by* P.A. 93-152, eff. July 10, 2003. Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

Accordingly, the Board further directs the hearing officer to advise the parties that at hearing or in briefs, each party should: (1) discuss whether to impose a remedy, if any, including a civil penalty, for the violations and support its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) propose a civil penalty, if any, including a specific

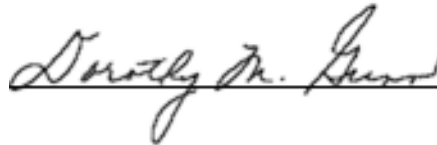
dollar amount, and support its position with facts and arguments that address any or all of the Section 42(h) factors.

CONCLUSION

Accordingly, the Board grants the People's motion for summary judgment on all five counts of its amended complaint. The Board further directs the parties to hearing on the issue of remedy.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 21, 2003, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board