

SEP 28 2004

PEOPLE OF THE STATE OF ILLINOIS,)
 Complainant,)
)
 v.)
)
 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)

PCB 96-98

Enforcement

STATE OF ILLINOIS
Pollution Control Board

RESPONDENTS' INITIAL RESPONSE TO AND MOTION TO STAY AND/OR
EXTEND TIME TO RESPOND TO
COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS

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 respond to the Board's Opinion and Order of September 2, 2004 and respectfully request the Board to correct deficiencies in the Opinion and Order that prejudice the parties rights to proceed in accordance with the Board's procedural rules. Similarly, the Respondents can not adhere to the scheduled time allotment to respond to the Complainant's request for attorneys' fees and costs (Opinion and Order of Sept. 2, 2004 at 23) and request a stay and/or an extension of time to respond. In support of these request, Respondent states as follows:

1. In its Opinion and Order of September 2, 2004, the Board fails to state whether or not the Opinion and Oder is a final opinion and order of the Board from which a decision on attorneys fees and cost has been bifurcated or whether the Board will issue a final Opinion and Order after

it has decided the issue of attorneys' fees and costs.

2. In accordance with Board Procedural Rule 101.520, "any motion for reconsideration or modification of a final Board order must be filed within 35 days after receipt of the order" (35Ill.Adm. Code 101.520).

3. In accordance with Board Procedural Rule 101.960 "final Board orders are appealable" (35Ill.Adm. Code 101.906(b)) to the appellate court pursuant to Supreme Court Rule 335. Under Supreme Court Rule 335, the appeal must be made within thirty days of the final order (Ill. S. Ct. Rule 335).

4. Because the Board has failed to clearly state whether or not the Opinion and Order of September 2, 2004 is a final opinion and order, the parties have been prejudiced in their rights to move for reconsideration or appeal of the Order.

5. In the Opinion and Order of September 2, 2004, the Board allows the Respondents only fourteen days to reply to the Complainants petition for attorneys' fees and costs. (Opinion and Order of Sept. 2, 2004 at 23) However, the Board fails to allow the Respondents time for evidentiary hearing on the issue of attorneys' fees and costs.

6. The Respondents are entitled to an evidentiary hearing on the Complainant's petition for fees and costs. George v. Chicago Transit Authority, 107 Ill.App3d 784,787 (1st Dist., 1982) (error not to allow evidentiary hearing).

7. In neither the Hearing on October 30 and 31, 2003 before the Illinois Pollution Control Board nor in its Closing Argument and post Trial Brief which was filed Instantly on January 15, 2004, did the Complainants make comment concerning Complainant's entitlement to costs and attorney's fees. There was no evidence entered at the Hearing that supported either the justification of attorneys' fees and costs or the amount and appropriateness of the costs and attorneys' fees that could be justified. The Complainant also made no argument made for attorneys' fees and costs in the Closing Argument and Post Trial Brief.

8. By failing to petition for attorneys' fees and cost at hearing or in closing briefs, the Complainants have waived their right to such fees and costs and any such petition at this time should be denied by the Board.

9. Because the Complainant's did not make any statements regarding attorneys' fees and

costs at Hearing or in the Complainant's Closing Argument, the Respondents had no recommendations to which to reply with exhibits, testimony, expert witnesses and cross-examination.

10. The law allows the Respondents the full opportunity to cross-examine the Complainants' attorney under oath. Murukas v. Murukas, 99 Ill. App.2d 342, 348 (1st Dist., 1968). The burden of proof rests upon the attorney to establish his claim for fees and costs. The Board is not bound by the petitioning attorneys' opinion of what constitutes a reasonable fee. Estate of Healy, Ill.App.3d 406,409,411 (2nd Dist., 1985).

11. The Respondents are entitled to propound interrogatories; The respondents are entitled to request the production of documents; The Respondents are entitled to issue third party subpoenas to corroborate any representations of the Complainants' attorneys; and the Respondents are entitled to depose the Complainant and its attorneys. Chicago Professional Sports Limited Partnership et. al. v. National Basketball Association, 1966 U.S. Dist., LEXIS 1525 (N.D. Ill. 1996).

12. The Respondents are entitled to call an expert witness to opine as to the reasonableness of the attorneys' fees and costs demanded by the Complainant. Estate of Healy, 137 Ill.App.3d 406, 411 (2nd Dist., 1985). See also Johns v. Klecan, 198 Ill.App.3d 1013, 1024 (1st Dist., 1990).

13. The fees and costs incurred by the Respondents may be used to provide the best available comparable standard to measure the reasonableness of Complainant's expenditures in litigating issues of the case. Chicago Professional Sports Limited Partnership et. al. v. National Basketball Association, 1996 U.S. Dist. LEXIS 1525 (N.D. Ill. 1996),g

14. In its "Attorneys Fees and Costs Petition" that was filed with the Board on September 17, 2004, the Complainant's attorneys have generated time sheets and cost sheets supported by affidavits in an attempt to justify its petition for costs and fees. The Respondents require evidentiary hearings and discovery to challenge these statements and investigate the possibility of fraud and perjury on behalf of the Complainant and their attorneys.

15. These fabrications of costs and fees are not only without basis in the Hearing record but are also based on facts that are unsupported by sufficient documentation and have most likely been fabricated solely for the purposes of this claim. The Complainant has failed to submit actual

time sheets, pay stubs, pay rates, invoices or receipts to support any of their request for fees and costs. The submission of affidavits at this juncture in the proceedings is totally improper and can not be accepted as a substitute for evidence on the record. The Respondents need to take depositions, propound interrogatories and review documents to prepare its arguments that these petitions for fees and cost are not justified.

16. The pay rate for the Complainant's attorneys is obviously fabricated. The payment of attorneys' fees based on this rate would result in an unjustified windfall for the Illinois Attorney General's Office. Further, the request for Attorneys' Fees and Cost does nothing to account for all of the wasted attorneys' hours employed by the Illinois Attorney General's Office in filing frivolous motions, amended complaints, answering motions to object to the Complainant's attorney mistakes, delays and useless discovery. The Complainants need to use discovery to determine the true pay rate and actual productive hours applied to this case. This Respondents also need an opportunity to present expert witness testimony to prove that the Complainant's attorneys' fees and hours are unjustified and possibly fraudulent.

17. It is hard to justify a claim for attorneys' fees and cost by the Illinois Attorney General's office that is approximately ten times the amount that three Respondents combined paid to defend themselves against frivolous claims. It is also hard to justify an hourly fee for public service that is greater than the weighted-average fee charged by the Respondents' attorney even though Respondents' attorneys fees include costs. The Respondents need an opportunity to present information on their attorneys' fees so that these fees and costs may be used to provide a comparable standard to measure the reasonableness of Complainant's expenditures in litigating issues of the case.

18. By claiming attorney's fees for Assistant Attorney General Joel L. Sternstein, the Complainants have again raised the issue of the Complainant's misconduct in allowing Attorney Sternstein to participate in this matter in clear violation of Board's Procedural Rule Section 101.112. The rule clearly states that "[n]o former Board Member or Board employee may represent any other person in any Board proceeding in which he or she participated personally and substantially as a Board Member or Board employee..." (35 Ill. Adm. Code 101.112(b)). While this bar clearly applies to Attorney Sternstein, the Complainant demands fees for Attorney

Sternstein's time spent while in violation of the rule. The Respondents need to subpoena and take the depositions of the Complainant's attorneys, representatives of the Illinois Attorney General's Office and Members and employees of the Illinois Pollution Control Board to determine not only the extent and basis of this misconduct but also to determine why persons familiar with both the Board's procedural rules and Attorney Sternstein's employment history with the Board allowed this misconduct to occur. The extent of the misconduct needs to be determined to allow the Respondents to prepare arguments that payment of Attorney Sternsteins' fees would be unreasonable.

19. With respect to the misconduct under 35 Ill. Adm. Code 101.112(b), the Complainants need to perform discovery to determine if the Board's knowingly and wantonly allowed the violation of the rule or carelessly failed to develop safeguards to prevent violations of its rules to the extent that the Board should be barred from making a determination concerning the petition for attorney's fees and costs in this matter.

20. In its "Closing Rebuttal Argument and Reply Brief" filed with the Board on April 15, 2004, the Complainant claimed costs of \$5,574.84. This claim was supported by an affidavit of Assistant Attorney General Mitchell L. Cohen in which Mr. Cohen testifies that "statements set forth in this affidavits... are true and accurate". In its "Attorney Fees and Costs Petition" filed with the Board on September 17, 2004, the Complainant claimed costs of \$3,482.84. This claim was supported by an affidavit of Assistant Attorney General Mitchell L. Cohen in which Mr. Cohen testifies that "statements set forth in this affidavits... are true and accurate". There is an indication that both the Illinois Attorney General's Office and Assistant Attorney General Mitchell L. Cohen committed perjury in submitting its affidavit of April 13, 2004. The Respondents expect the Board that showed no hesitation in extracting \$153,000 from the retirement accounts of the Respondents for violation that involved primarily paper work errors to be at least equally resolute in pursuing an experienced attorney and officer of the court for his violations.

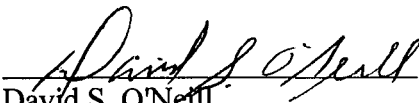
21. The Respondents need to take the deposition of Attorney Cohen and other representatives of the Illinois Attorney General's Office to determine the basis for possible perjury, the parties involved in the violation and the existence of similar violations in this proceeding. The

Respondents need this opportunity whether or not the Board decides pursue independent disciplinary action against Attorney Cohen and the Illinois Attorney General's Office because the Respondents need this information to prepare arguments that the costs are without basis and unreasonable in addition to requiring the information for potential disciplinary action.

Wherefore, the Respondent respectfully requests the Board to stay this proceeding in accordance with Board Procedural Rule 101.514 (b) and/or extend the time to respond to Complainant's Petition for Attorneys Fees and Costs in accordance with Board Procedural Rule 101.522 to allow the Respondents to perform discovery and participate in evidentiary hearings with respect to the Complainant's claims in the Complainant's Petition for Attorneys for and Costs;

and

The Respondents respectfully moves this Board to state whether its Opinion and Order of September 2, 2004 is a final, appealable opinion and order of the Board and that such statement be made in a timely manner to avoid prejudicing the parties right to appeal or move for reconsideration or in the alternative stay this proceeding in accordance with Board Procedural Rule 101.514(b) to allow the parties sufficient time to either move the Board for reconsideration or to appeal this matter to the appellate court.


David S. O'Neill

David S. O'Neill, Attorney at Law
5487 N. Milwaukee Avenue
Chicago, Illinois 60630-1249
(773) 792-1333