

ILLINOIS POLLUTION CONTROL BOARD  
February 17, 2005

GINA PATTERMANN, )  
)  
Complainant, )  
)  
v. )  
) PCB 99-187  
BOUGHTON TRUCKING AND ) (Citizens Enforcement - Noise, Air)  
MATERIALS, INC., )  
)  
Respondent. )

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

On January 20, 2005, Ms. Gina Patterman moved the Board for leave to voluntarily dismiss this proceeding without prejudice pursuant to Section 101.500(a) of the Board's regulations, and Section 2-1009 of the Code of Civil Procedure. 35 Ill. Adm. Code 101.500(a); 735 ILCS 5/2-1009. Ms. Patterman also requested Boughton Trucking and Materials, Inc. (Boughton) to submit its reasonable litigation expenses.

On January 24, 2005, Boughton submitted a preliminary statement of its litigation costs, totaling \$33,776.95. On January 25, 2005 Boughton filed a response and objection to Ms. Patterman's motion. On the same day, Ms. Patterman moved the Board or hearing officer to cancel the hearing scheduled for January 31 and February 1, 2005, for expedited review of her motion for voluntary dismissal, and for leave to file a reply to Boughton's response to that motion. On January 26, 2005, Boughton objected to Ms. Patterman's motion to cancel hearing.

On January 27, 2005, Board Hearing Officer Brad Halloran cancelled the hearing scheduled for January 31 and February 1, 2005, as the parties await the Board's ruling on Ms. Patterman's motion for voluntary dismissal.

On February 2, 2005, Boughton supplemented its response to Ms. Patterman's motion for voluntary dismissal. Boughton stated that due to the short time allowed for preparation of its expedited response, its total expense figure did not include a bill from one of Boughton's expert witnesses. Boughton states its new total of expenses, supported by affidavit, is \$34,726.95. Ms. Patterman replied on February 14, 2005.

For the reasons set forth below, the Board grants Ms. Patterman's motion to voluntarily dismiss without prejudice and denies Ms. Patterman's motion for expedited review as moot. The Board does not award costs as Boughton requests. However, the Board notes that in any subsequent litigation filed with the Board by Ms. Patterman concerning the same set of alleged facts and violations, the Board will consider Ms. Patterman's prior discovery sanctions in determining how to proceed. On August 7, 2003, the Board found Ms. Patterman's past conduct in this proceeding amounted to an abuse of discovery. As a sanction, the Board barred Ms.

Patterman's noise consultant from testifying at hearing regarding Boughton's noncompliance with the Board's noise regulations and possible modifications to Boughton's facility.

### **MOTION TO VOLUNTARILY DISMISS**

The Board denies Ms. Patterman's motion for leave to file a reply finding the parties have adequately addressed the issue of voluntary dismissal. The Board's procedural rules allow the Board to look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent. 35 Ill. Adm. Code 101.100(b). Parts 101 and 103 of the Board's procedural rules governing general provisions and enforcement actions, respectively, contain no provision governing voluntary dismissals in enforcement actions. Therefore, because the Environmental Protection Act (Act) and Board's procedural rules are silent, the Board will consider Section 2-1009 of the Code of Civil Procedure and Supreme Court Rule 219.

Section 2-1009 of the Code of Civil Procedure regarding voluntary dismissals provides:

The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause. 735 ILCS 5/2-1009 (2002).

Supreme Court Rule 219 is entitled "Consequences of Refusal to Comply with Rules or Order Relating to Discovery or Pretrial Conferences." Section (e) of this rule states:

A party shall not be permitted to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit. In establishing discovery deadlines and ruling on permissible discovery and testimony, the court shall consider discovery undertaken (or the absence of same), any misconduct, and orders entered in prior litigation involving a party. The court may, in addition to the assessment of costs, require the party voluntarily dismissing a claim to pay an opposing party or parties reasonable expenses incurred in defending the action including but not limited to discovery expenses, opinion witness fees, reproduction costs, travel expenses, postage, and phone charges. S. Ct. Rule 219(e).

### **Ms. Patterman's Arguments**

In her one page motion for voluntary dismissal, Ms. Patterman states that she may, at any time before hearing, upon notice and payment of costs, dismiss this action without prejudice. Mot. at 1; citing 35 Ill. Adm. Code 101.510 and 735 ILCS 5/2-1009. Ms. Patterman requested that Boughton submit a statement of costs and that the Board dismiss this matter without prejudice.

### **Boughton's Response**

Boughton argues that Ms. Patterman's motion to voluntarily dismiss this matter without prejudice is defective because it lacks payment of costs, or in the alternative, proof that Ms. Patterman will pay costs in the future. Mot. at 4. Boughton contends that Section 2-1009 of the Code of Civil Procedure requires "payment of costs" before a plaintiff is entitled to dismissal without prejudice. Mot. at 4; citing Lewis v. Collinsville Unit #10 School District, 311 Ill. App. 3d 1021, 1027-28, 725 N.E.2d 801, 806 (5th Dist. 2000). Further, Boughton asserts that even though Ms. Patterman's motion states "Patterman shall pay such costs as are within the meaning of Section 2-1009 upon submission of a statement of the same from Respondent," the motion is not supported by an oath, affidavit, or certification. Mot. at 5; citing 35 Ill. Adm. Code 101.504. For these reasons, Boughton contends the motion is defective and should be denied.

Boughton argues that it is at minimum entitled to expenses should the Board grant Ms. Patterman's motion to dismiss without prejudice. Mot. at 5. Boughton states that Supreme Court Rule 219(e) is a companion rule to Section 2-1009 of the Code of Civil Procedure designed to prevent the use of voluntary dismissals to circumvent the consequences of discovery. *Id.*; citing Morrison v. C.G. Wagner, 191 Ill. 2d 162, 729 N.E.2d 486 (2000).

Boughton urges the Board to apply Rule 219(e) to order Ms. Patterman to pay reasonable expenses incurred in defending this action, which other Illinois courts have interpreted as including "discovery expenses, opinion witness fees, reproduction costs, travel expenses, postage, and phone charges." Mot. at 7; citing Morrison, 729 N.E.2d at 488-89; Scattered Corp. v. Midwest Clearing Corp., 299 Ill. App. 3d 653, 702 N.E.2d 167 (1st Dist. 1998). Boughton argues the assessment of reasonable expenses under Rule 219(e) is proper in situations where, as Boughton opines could occur here, the plaintiff seeks to avoid the consequences of discovery sanctions by dismissing the action without prejudice and refile at a later date. Valdovinos v. Luna-Manalac Medical Center, Ltd., 328 Ill. App. 3d 255, 764 N.E.2d 1264 (1st Dist. 2002).

According to Boughton, unless and until Ms. Patterman pays Boughton's reasonable expenses, dismissal without prejudice would be highly prejudicial to Boughton. Boughton notes it has incurred extensive attorney fees in addition to "costs" to defend itself in this nuisance action. Mot. at 10-11. Although the Board cannot award attorney fees in this forum, Boughton urges the Board to consider the prejudice it incurred in defending this action despite delays and the abuse of discovery requirements.

In summary, Boughton states that unless Ms. Patterman pays Boughton's reasonable expenses attributable to defending this action, the Board should not grant Ms. Patterman's motion for voluntary dismissal without prejudice. Boughton states its reasonable expenses include: discovery expenses, expert witness fees, reproduction costs, travel expenses, postage, phone charges, court reporter and transcription charges, and related costs, for a total of \$34,726.95. Mot. at 13; Mot. Att. 1.

### **Board's Analysis**

Boughton argues the Board should not dismiss this case without prejudice. Yet Boughton offers no precedent or authority in support of the proposition of dismissing a case with prejudice prior to hearing. Boughton asserts only that dismissal without prejudice is not

warranted under the Board's discretionary powers and that payment of costs is a prerequisite. Resp. at 10. Ms. Patterman moved the Board for voluntary dismissal before hearing. In accordance with Section 2-1009 and Illinois caselaw, the Board grants Ms. Patterman's motion for voluntary dismissal without prejudice.

The Board's procedural rules are silent on the issue of what merits dismissal with prejudice. Accordingly, the Board may look to the Code of Civil Procedure and the supreme court rules for guidance. Section 2-1009 of the Code of Civil procedure allows a plaintiff to voluntarily dismiss his or her action anytime before hearing, upon payment of costs.

Section 31(d) of the Act contains no provision for assessing litigation costs to or against parties to a citizen's enforcement action. Therefore, because the Illinois General Assembly did not give the Board the statutory authority, the Board cannot require the payment of costs to Boughton when granting Ms. Patterman's motion for voluntary dismissal without prejudice.

The Illinois Supreme Court has noted that at common law, the plaintiff could voluntarily dismiss without prejudice at any time before the judgment was returned. Kahle v. John Deere Co., 104 Ill. 2d 302, 472 N.E.2d 787 (1984). In Kahle, the circuit court allowed the plaintiff to voluntarily dismiss without prejudice on the first day of trial under Section 2-1009. In affirming the circuit court's decision, the supreme court stated: "[w]hile it is unfortunate that the defendants have been inconvenienced, that sometimes happens in our adversary system. As long as the dismissal order is subject to review, the defendants have suffered no legal prejudice." The Court concluded that it was the legislature that gave the courts discretion to dismiss with prejudice, but only after trial or hearing began, and that any further limits on the plaintiff's common law rights should be enacted by the legislature, not the courts. Kahle, 472 N.E.2d at 789. Accordingly, looking to the Code of Civil Procedure and Illinois caselaw for guidance, the Board grants Ms. Patterman's motion to voluntarily dismiss without prejudice.

Nonetheless, Ms. Patterman may not simply refile this action without consequence. Rule 219(e) prevents parties from avoiding compliance with discovery requirements in subsequent litigation by voluntarily dismissing an action. The committee comments to Rule 219(e) state: "this paragraph does clearly dictate that when a case is refiled, the court shall consider the prior litigation in determining what discovery will be permitted, and what witnesses and evidence may be barred." S. Ct. Rule 219, Committee Comments, Paragraph (e).

In her complaint, Ms. Patterman alleges ongoing nuisance noise and air pollution violations against Boughton. On August 7, 2003, the Board sanctioned Ms. Patterman by barring a noise consultant from testifying on her behalf regarding Boughton's noncompliance with the Board's noise regulations and possible modifications to Boughton's facility. Therefore, the Board notes that should Ms. Patterman refile an enforcement action against Boughton alleging that nuisance noise and air pollution violations occurred any time between the filing date of this action, June 17, 1999, and the date of today's order, February 17, 2005, the Board will consider this proceeding in determining what discovery, witnesses, and evidence will be permitted in any such subsequent proceeding. The Board maintains that parties cannot avoid the consequences of noncompliance with discovery requirements by simply voluntarily dismissing an action without prejudice and refiled at a later date.

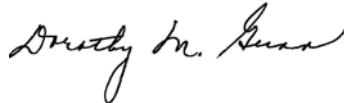
**CONCLUSION**

The Board denies Ms. Patterman's motion for leave to file a reply and grants Ms. Patterman's motion for voluntary dismissal without prejudice. The Board denies Boughton's request for litigation expenses and Ms. Patterman's motion for expedited review as moot.

IT IS SO ORDERED.

Section 41 (a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 17, 2005, by a vote of 4-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board