

ILLINOIS POLLUTION CONTROL BOARD
May 21, 1998

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 97-8
) (Enforcement - Land)
CYBERAMERICA CORPORATION, f/k/a)
CANTON INDUSTRIAL CORPORATION,)
)
Respondent.)

ORDER OF THE BOARD (by C.A. Manning):

This matter is before the Board on “Complainant’s Motion for Modification of Final Order” (motion) filed April 10, 1998, on behalf of the People of the State of Illinois, by the Attorney General of the State of Illinois (complainant). In its motion, complainant asks the Board to reexamine its final decision of March 5, 1998, in which the Board denied complainant’s request for the imposition of punitive damages and attorney fees against respondent, CyberAmerica Corporation f/k/a Canton Industrial Corporation (CIC).

On April 21, 1998, CIC filed “Respondent’s Opposition to Motion for Modification of Final Order” (response). On April 27, 1998, complainant filed “Complainant’s Memorandum in Support of Motion for Modification of Final Order” (memorandum). CIC did not file a response to complainant’s memorandum.

For the following reasons, the Board strikes complainant’s memorandum and denies complainant’s motion to modify the Board’s March 5, 1998, decision.

CIC’S REQUEST TO STRIKE COMPLAINANT’S MEMORANDUM

CIC asks that the Board strike complainant’s memorandum of law filed two weeks after the filing of the motion to modify. CIC specifically argues that Sections 101.246 and 103.240 of the Board’s procedural rules do not provide a moving party 35 days to file a motion for reconsideration and an additional 14 days to file a memorandum in support of the motion. Resp. at 2. Complainant did not present any argument in support of its alleged right to file a memorandum two weeks after filing its motion to modify.

The Board strikes complainant’s memorandum because it was not filed within 35 days of the Board’s March 5, 1998, order as required under Sections 101.246(a) and 103.240 of the Board’s procedural rules (35 Ill. Adm. Code 101.246(a), 103.240). The memorandum was received by the Board on April 27, 1998, and was mailed on April 23, 1998. Even taking into consideration the time of mailing pursuant to Section 101.102 (35 Ill. Adm. Code 101.102),

the memorandum was filed on the 51st day after the date of the Board's March 5, 1998, order. Therefore, the memorandum will not be considered. See People of the State of Illinois v. Illinois Pollution Control Board et al., No. 97-64, slip op. at 4-6 (5th Dist. April 24, 1998).

The Board recently allowed a party to file additional pleadings in support of a motion to reconsider. See People of the State of Illinois v. ESG Watts, Inc. (March 19, 1998), PCB 96-107, slip op. at 2. However, in ESG Watts, the additional filings in support of the motion to reconsider were all filed with the Board during the 35 day period within which a party can file a motion for reconsideration (35 Ill. Adm. Code 101.246) or motion subsequent to entry of final order (35 Ill. Adm. Code 103.240). ESG Watts (March 19, 1998), PCB 96-107, slip op. at 2.

Additionally, the Board agrees with CIC that the Board's regulations do not provide for the filing of a motion for reconsideration to be followed by a later memorandum. While we did not specifically comment on the practice in ESG Watts, we note that a strict construction of our rules would require us to strike the memorandum, which was not accompanied by a motion for leave to file. Finally, we note that the memorandum contains citations to only one case not previously analyzed by the Board: a federal case interpreting "sufficient cause" as a "good faith" defense. Memorandum at 5.

MOTION TO MODIFY

Request to Require Immediate Penalty Payment by CIC

In the motion, complainant argues that since the motion does not challenge the judgment as to the actual costs for the tire removal, the filing of this motion should not stay the final order insofar as it requires payment of \$326,153.74 by CIC. Absent a timely filed petition for review by CIC or CIC's own motion filed pursuant to Section 103.240, complainant alleges that CIC must pay the full amount in corrective action costs no later than that specified in the Board's order of March 5, 1998, *i.e.*, on or before April 20, 1998.

CIC alleges that the Board's March 5, 1998, ruling constitutes a final order. Resp. at 1. In the event the order is unacceptable to either party and an appeal is sought, CIC argues that Sections 101.246 and 103.240 of the Board's procedural rules provide for a stay of the final ruling until the appeal is resolved. Resp. at 1. Complainant's motion, CIC contends, is in essence an appeal of the order issued by the Board. Resp. at 1. CIC notes that Section 103.240 specifically provides that "[a] motion filed within 35 days stays enforcement of the final order and the time for appeal from such order runs anew after the Board rules upon the motion." 35 Ill. Adm. Code 103.240. CIC alleges that, according to Board procedure, any appeal stays the proceedings while a determination is made by the Board on the merit and applicability of that request to reconsider the Board's ruling. Resp. at 1-2. CIC asserts that there can be no "partial appeal which allows a party [complainant] to move for a change in that part of the ruling which was adverse to that party's intent, while causing that part which was ruled favorably to continue to remain in effect." Resp. at 2.

The Board denies complainant's request for a finding that the penalty portion of the March 5, 1998, order was not stayed by complainant's motion for modification. The Board finds that both Sections 101.246(c) and 103.240 expressly provide for a stay of a final ruling until the final disposition of the motion for reconsideration. See also 35 Ill. Adm. Code 101.302(a). The Board interprets its rules as providing that the motion filed by any party stays the effect of all portions of the order until the Board disposes of the motion.

Alleged Errors of Law

Complainant first contends that the Board erroneously applied existing law in finding that punitive damages were not warranted pursuant to Section 55.3(h) of the Environmental Protection Act (Act) (415 ILCS 5/55.3(h) (1996)) and that an award of attorney fees is not statutorily authorized pursuant to Section 55.3(g) of the Act (415 ILCS 5/55.3(g) (1996)).

Complainant asserts that the Board improperly concluded that since the Agency's Section 55.3(d) notice merely required the submission of a tire removal plan, and since CIC submitted a plan, then "CIC took action upon receipt of the Section 55.3(d) notice." Mot. at 4. Complainant argues that it is the removal of the tires and not the submission of a plan for such removal that is the identified preventative or corrective action. Mot. at 4. Complainant further contends that the Board improperly found that only the actions or omissions occurring after the issuance of the Section 55.3(d) notice are relevant. Mot. at 4. Complainant alleges that CIC's failure to act had already resulted in contempt findings and sanctions by the Fulton County Circuit Court prior to the issuance of the Section 55.3(d) notice. Mot. at 4. In light of the foregoing, complainant asks the Board to reexamine CIC's prior two-year history of noncompliance and impose punitive damages against CIC in the amount of \$326,153.74. Mot. at 4. No additional arguments were made by complainant in the motion regarding complainant's request to modify the Board's order denying attorney fees.

CIC asserts that the Board did not commit error when it determined that punitive damages and attorney fees were not warranted in this matter. CIC argues that Section 55.3(h) does not require that punitive damages be assessed; rather, it provides that punitive damages be imposed if the Board believes this to be an appropriate remedy. Resp. at 3. Further, CIC maintains that complainant has not asserted any new evidence for consideration and merely relies on its interpretation, which is contrary to the Board's opinion. Resp. at 2-3. CIC further argues complainant cites no authority in support of its arguments, but merely states its disagreement with the Board's conclusions. Resp. at 2-3. Finally, CIC contends that while complainant's request for attorney fees was considered by the Board, the Board unanimously determined that collection costs do not include attorney fees in this matter. Resp. at 3-4.

Complainant's motion to modify is filed pursuant to Section 101.246, Motions for Reconsideration (35 Ill. Adm. Code 101.246). In ruling upon a motion for reconsideration, or in this case a motion for modification, the Board is to consider, but is not limited to, error in the previous decision, and facts in the record which may have been overlooked. 35 Ill. Adm. Code 101.246(d). In Citizens Against Regional Landfill v. The County Board of Whiteside County (March 11, 1993), PCB 93-156, the Board stated that "[t]he intended purpose of a

motion for reconsideration is to bring to the court's attention to newly-discovered evidence which was not available at the time of the hearing, changes in the law, or errors in the court's previous application of the existing law." Koroglyuan v. Chicago Title & Trust Co., 213 Ill. App. 3d 662, 572 N.E. 2d 1154 (1st Dist. 1992).

The Board finds that the arguments presented in complainant's motion do not present the Board with any new legal authority, a change in the law, or any other reason to conclude that the Board's decision was in error. We do, however, want to make clear that our opinion does not equate submission of a tire plan with full compliance with a Section 55.3(d) notice as complainant erroneously concludes. However, actions taken by a person in response to receipt of a notice which do no amount to full compliance must be taken into account by the Board when we consider assessing punitive damages.

Here, on July 17, 1995, the Agency issued notice pursuant to Section 55.3(d) of the Act, providing CIC with an opportunity to propose within 30 days a plan for corrective action. On August 25, 1995, albeit late, CIC submitted a plan for corrective action. Notably, the record reflects that CIC initiated its compliance plan as early as August 14, 1995. See Comp. Exh. 3. Despite complainant's contrary assertions, the Board found and continues to find that CIC did not fail "without sufficient cause to take preventative or corrective action pursuant to notice issued under subsection (d)..." See 415 ILCS 5/55.3(d) (1996). Accordingly, the Board denies complainant's motion to modify the March 5, 1998, order as it pertains to the aforementioned alleged errors of law.

Alleged Errors of Fact

Complainant also argues that the Board made mistakes of fact in the March 5, 1998, final order, and seeks clarification. Mot. at 2. Complainant alleges that these mistakes of fact were considered by the Board in its incorrect decision to deny complainant's request for punitive damages. Complainant first argues that, based on erroneous factual information, the Board determined that by "issuing" a registration the Agency allowed CIC to create a situation that the Fulton County Circuit Court and the Agency's Director later found to pose a threat to the public health and the environment. Mot. at 3. Next, complainant argues that the \$10,000 in financial assurance was posted by CIC in a trust fund at the National Bank of Canton, rather than the Used Tire Management Fund. Mot. at 2-3. Finally, complainant argues that the Board improperly inferred that when CIC was unable to make the business profitable, it suffered the loss of investment in the large quantity of tires it had "purchased from various suppliers." Mot. at 3.

While complainant contends that the Board made mistakes of law, CIC responds that any such mistakes are harmless error. Resp. at 4. CIC asserts that "none of the conclusions regarding punitive damages or attorney fees hinged on the understanding of the Board on how the Agency regulates waste tire management in Illinois." Resp. at 4. CIC argues that the Board correctly found that attempts were made to comply and reasonable efforts were obvious in CIC's performance. Resp. at 4-5. CIC alleges that some of the facts represented by complainant regarding the significant amounts of income CIC derived from vendors supplying

the used tires are overstated and erroneous. Resp. at 5. CIC states that Exhibit 3, as admitted by the hearing officer at hearing, demonstrates that CIC suffered a loss through September 30, 1994, of \$551,419, which was the only evidence of profit or loss before the Board. Resp. at 5.

Again, the Board finds that the arguments presented in complainant's motion do not present the Board with any new evidence, a change in the law, or any other reason to conclude that the Board's decision was in error. We note that the record before the Board left many issues unclear, *e.g.*, penalty amount and amount of tires at the facility. While the Board stated that the Agency "issued" CIC's registration, the Board in no way considered that the Agency allowed or had contributed to the creation of the environmental contamination at the CIC site. Indeed, the record is replete with evidence of Agency efforts to have the site remediated.

As to complainant's contention regarding the Board's observation concerning respondent's "loss of investment" in the tires it had "purchased from various suppliers," the point of the Board's observation was that the disposal of the tires by the Agency's contractor resulted in CIC receiving none of whatever economic benefit arguably existed in the used tires as commodities. Thus, complainant's argument is without merit. Finally, the identity of the entity to which CIC tendered financial assurance (bank or trust fund) is immaterial to the point which is germane to the decision: some financial assurance was paid – a finding which complainant does not contest.

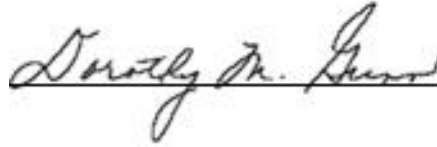
The Board carefully considered the facts and law in light of the Used Tire Management Act in issuing the final opinion and order and is not persuaded by complainant's arguments. Accordingly, the Board denies complainant's motion as it pertains to any alleged errors of fact.

CONCLUSION

For the foregoing reasons, the Board denies complainant's motion to modify the Board's final opinion and order of March 5, 1998. The Board strikes complainant's memorandum. Moreover, the Board finds that the pendency of complainant's motion stayed the Board's March 5, 1998, order through today. The Board hereby modifies the March 5, 1998, order to start anew the time clock in which CIC shall pay corrective action costs. Accordingly, CIC shall remit payment of corrective action costs in the amount of \$326,153.74 on or before July 6, 1998, to the name and address identified in the Board's March 5, 1998, order.

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 21st day of May 1998 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