

ILLINOIS POLLUTION CONTROL BOARD
December 3, 1998

DAVID MULVAIN,)	
)	
Complainant,)	
)	
v.)	PCB 98-114
)	(Enforcement - Citizens, Water)
VILLAGE OF DURAND,)	
)	
Respondent.)	
)	

ORDER OF THE BOARD (by G.T. Girard):

On March 9, 1998, David Mulvain filed a formal complaint with the Board. In that complaint, Mr. Mulvain alleged that the sewer system in the Village of Durand (Durand) is allowing excess infiltration into the sewer system and backup of sewage into basements. The complaint alleged that the sewer system is in violation of the Environmental Protection Act (Act) and the Board's regulations. The complaint further alleged that the Illinois Environmental Protection Agency (Agency) improperly issued a permit (1997-1A-4892) to Rockford Blacktop Construction, Inc. (Rockford Blacktop) which will result in additional overload to the sewer system. On May 21, 1998, the Board dismissed Rockford Blacktop and the Agency from this proceeding. (cite)

On October 7, 1998, Durand filed a motion for summary judgment (Mot.) arguing that the issues presented by the complainant "have already been addressed and acted upon by the IEPA and no new issues have been raised." Mot. at 3. On November 2, 1998, the Board received a response to the motion for summary judgment (Resp.) filed by complainant. Durand filed a reply on November 13, 1998 (Reply).¹ For the reasons discussed below, the Board finds that issues of material fact are left to be resolved and the motion for summary judgment is denied.

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (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." *Id.* Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.*, citing Purtill v. Hess, 111 Ill. 2d 299, 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 (2d Dist. 1994).

For the purposes of the motions pending before the Board, therefore, the Board must construe the pleadings, depositions, and affidavits strictly against the respondent on its motion for summary judgment.

¹ The motion, response and reply were all filed pursuant to a hearing officer order and were timely filed.

ARGUMENTS

Durand maintains that issues raised in the complaint have already been addressed by the Agency as a part of the permitting process for Rockford Blacktop and the review by the Agency of Rockford Blacktop's permit application was "particularly rigorous" due to the Agency's awareness of capacity problems on complainant's street. Mot. at 1-2. Durand also argues that the Agency determined as a part of the permit process that the available downstream transport was adequate to handle additional wastewater and the Board has "already ruled that it will not reverse or overrule" the permitting decision. Mot. at 2. Finally Durand maintains that substantial repairs have been made to the system and more are planned in the immediate future. Mot. at 3. Therefore, Durand maintains that there is no basis in fact for the complaint and summary judgment should be entered on behalf of the respondent. Mot. at 3.

In its reply, Durand offers affidavits to "substantiate that the only person to complain about the Durand sewer system since repairs were completed in 1997" was complainant. Reply at 1. Durand notes that the "incident occurred over four months ago during a 3.5 inch rainstorm." Reply at 1. Durand concedes that the flow rate may occasionally be exceeded during times of heavy rainfall but that fact is not sufficient to grant the relief requested. Reply at 2.

Complainant agrees that the Board has previously ruled in this matter that the Board will not review the issuance of the permit in this case. However, to the extent that the motion relies on the permit process as a basis for summary judgment, the complainant cites to Citizens Utility Board v. IPCB, 265 Ill. App. 3d 773, 639 N.E.2d 1306 (3rd Dist. 1994) for the proposition that a grant of a permit does not insulate violators of the Act or give them license to pollute. Resp. at 2. Complainant also points out that the present action is an enforcement action directed to specific violations of the Act and asserts that Durand has not provided any information or evidence directed to the question of the violations. Resp. at 2. Finally, complainant asserts that readings taken in June of 1998 indicate that the maximum permitted flow level has been exceeded (Resp. at 3) and that there have been additional backups since repairs were completed. Resp. at 4.

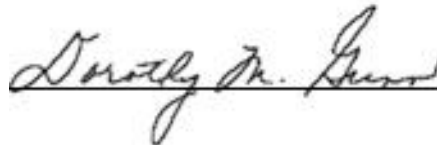
DISCUSSION

The respondent first argues that the issues raised in the complaint were handled by the Agency in a permit process. Durand maintains that even if Durand does have some problems the problems are not sufficient to require the relief requested. Both of these arguments are without merit. First, as complainant points out this is an enforcement action in which the Board must determine if Durand violated the Act. The Agency does not have the authority to rule on violations of the Act; that authority rests with the Board and the courts. See Sections 30 (directing the Agency to investigate alleged violations upon request of the Board) and 31 (the process for the Agency filing a complaint with the Board) of the Act and Section 33 (process for Board determinations of violation). Therefore, the Agency's decisions in a permit process are not binding on the Board in determining if a violation has occurred. See Citizens Utility Board v. IPCB, 265 Ill. App. 3d (complete cite). Second, if a violation has occurred, the question of relief is examined pursuant to statutory factors at Sections 33 and 42 of the Act. Thereafter the Board would decide if the relief requested is warranted; it would not make this decision in a motion for summary judgment.

Complainant has asserted several facts which if proved could support a finding of violation. Although Durand has provided affidavits, we find nothing in those affidavits which alleviates the questions of fact concerning alleged violations by Durand's operations of the sewer system. Therefore, the Board finds that there are issues of material fact and the motion for summary judgment is denied.

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 3rd day of December 1998 by a vote of 6-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board