

ILLINOIS POLLUTION CONTROL BOARD
March 9, 1989

MODINE MANUFACTURING COMPANY,)
)
 Petitioner,)
)
 v.) PCB 87-124
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on a December 21, 1988 motion to reconsider filed by petitioner Modine Manufacturing Company (Modine). On January 6, 1989 respondent Illinois Environmental Protection Agency (Agency) filed its response in opposition to Modine's motion. Modine filed a motion for leave to file a reply on January 18, 1989. That motion is granted and the reply is accepted. On January 19, 1989 the Board issued an order directing the hearing officer to respond to claims made by Modine that it properly obtained extensions of the briefing schedule by oral motion. The hearing officer filed his response on January 26, 1989. Modine filed a reply to the hearing officer response on February 9, 1989.

Modine's motion to reconsider stems from the Board's November 17, 1988 order granting the Agency's motion for sanctions and dismissing with prejudice Modine's petition for review of a permit denial. The dismissal was based upon the Board's refusal to tolerate the delay of a petitioner who filed its brief 26 $\frac{1}{2}$ weeks after the original due date without ever moving for an extension of time. (The specific circumstances leading to the dismissal, and the Board's reasons for doing so, are set forth in the Board's November 17 order and will not be repeated here.) Modine advances three arguments in support of its request for reconsideration: 1) that the Board misapprehended the circumstances of this case; 2) that the dismissal is contrary to case precedent stating that such dismissal is an abuse of discretion under the circumstances of this case; and 3) the imposition of the severe sanction in this case is a radical departure from long-standing Board practice. The Agency responds to each of these claims, contending that: 1) any "misapprehension" by the Board of the circumstances of the case is attributable to Modine and thus is not a proper basis for reconsideration; 2) dismissal of the permit appeal is a proper sanction for Modine's failure to comply with a hearing officer

order and a Board order imposing filing deadlines; and 3) the Board did not act arbitrarily in dismissing this proceeding, and thus such dismissal is proper even if the Board departed from its usual practice.

After reviewing these claims, the Board is unconvinced by Modine's arguments and will deny Modine's motion for reconsideration. In support of its argument that the Board misapprehended the circumstances of the case, Modine reiterates the chronology of the case, and states that those circumstances show that counsel for Modine attempted in good faith to file the brief in accordance with the deadlines, but was prevented from doing so by a combination of pressing litigation matters, equipment failures and serious and prolonged health problems relating to Modine's senior counsel and his family. The Board is sympathetic to the problems encountered by Modine, but cannot ignore the fact that never during this 26½ week period did Modine file a written motion for extension of time or even contact the Board. Indeed, the litany of other "time-sensitive" litigation matters which Modine's counsel gave precedence over this proceeding leads the Board to wonder whether Board proceedings are given a "back seat" because parties believe that the Board is not serious about deadlines imposed by the Board or its hearing officers. (Motion to reconsider, pp. 8-14.) Modine has anticipated this point, and argues that counsel's conduct in seeking continuances from the hearing officer and keeping the Agency's attorney informed show that Modine's counsel's actions were free from any disregard or disrespect for the Board. However, in his January 30, 1989 letter to the Board, the hearing officer stated that while Modine's attorney did contact the hearing officer at various times regarding the brief, "none of the conversations between counsel for Modine and myself were represented to me as being 'oral motions' and no 'oral extensions' were granted by me." (Hearing officer response, p. 1.) The record contains no written motions for extension, and the hearing officer states that he did not grant any oral extensions of time. Given the record, offset only by Modine's claim that it believed that it had received extensions from the hearing officer, the Board finds that there were no formal extensions of the briefing schedule. Thus, as pointed out in the Board's November 17, 1988 order dismissing this proceeding, Modine's brief was filed 26½ weeks late. The Board will not tolerate such delay.

In connection with its claim that dismissal was an abuse of discretion under the circumstances of this case, Modine asserts that the Board's dismissal was done to make an example of Modine to encourage other counsel to adhere to the Board's schedule. This is simply not true. The Board carefully considered the circumstances of the proceeding before granting the Agency's motion for sanctions, and found that Modine's repeated failure to file its brief in a timely manner was unreasonable. Therefore,

the Board imposed the only realistic sanction available under 35 Ill. Adm. Code 107.101(c), and dismissed the proceeding. This case is an appeal, brought by Modine, of the Agency's denial of a permit. Pursuant to Section 40 of the Illinois Environmental Protection Act (Act), a permit appeal petitioner has the right to final Board action within 120 days. Ill. Rev. Stat. 1987, ch. 111 $\frac{1}{2}$, par. 1040. However, petitioners often waive that decision deadline, and Modine has done so in this case. One reason a decision deadline might be waived is that a pending permit appeal acts as a de facto stay on most enforcement proceedings, allowing the petitioner to operate without a permit.* Under the circumstances of this case, where Modine filed its brief 26 $\frac{1}{2}$ weeks late, without ever moving for an extension of time, the Board does not believe that a lesser sanction, such as not allowing Modine to file a reply brief, even begins to address the seriousness of Modine's violation of Board and hearing officer orders.

Modine also argues that the Board should reconsider its grant of the Agency's motion for sanctions because its decision was an unwarranted departure from long-standing practice. Modine contends that this case is undistinguishable from Alton Packaging Corp. v. Pollution Control Board, 146 Ill. App. 3d 1090, 497 N.E.2d 864, 100 Ill. Dec. 686 (5th Dist. 1986). However, the Board agrees with the Agency that the two proceedings are distinguishable. In Alton Packaging, the appellate court reversed the Board's dismissal of variance and site-specific rulemaking petitions as sanctions for Alton Packaging's failure to diligently prosecute the matters. In reversing the Board, the appellate court noted that by dismissing the petitions outright, the Board had departed from its prior custom and practice of first ordering a matter to hearing when it perceives a delay. The court stated that administrative bodies are bound by prior custom and practice in interpreting their rules and may not arbitrarily disregard them. 100 Ill. Dec. at 688. In this case, Modine's appeal was dismissed after hearing, and after Modine failed to comply with a hearing officer and Board-ordered briefing schedule. It obviously would have served no purpose to order a hearing in this case, where the delay occurred after hearing and in violation of specific hearing officer and Board orders. The Board does not believe that it has departed from any

*The Board notes that in some cases, Section 16(b) of the Illinois Administrative Procedure Act specifically allows a permit appeal petitioner to continue operating under the terms of a prior permit until the Board takes final action on a permit appeal. Ill. Rev. Stat. 1987, ch. 111 $\frac{1}{2}$, par. 1016(b). The record implies that Modine did not have a prior permit, but the point remains: a permit appeal petitioner can sometimes avoid compliance with stricter requirements by delaying its appeal.

prior custom and practice by dismissing the proceeding. In fact, the Board is unsure if it has any prior practice in a case where a post-hearing brief was filed 26½ weeks after its original due date, since it does not recall ever encountering such a situation. In any event, the Board does not find that it acted arbitrarily in dismissing this proceeding.

The Board also rejects Modine's contention that it (the Board) must issue some type of "warning" to litigants that the Board will enforce its deadlines and rules strictly. The Board agrees that it has been liberal in granting extensions of time, and that it has also been liberal in granting the Agency leave to file permit records and variance recommendation instanter. The Board must point out, however, that the Agency is statutorily required to file permit records and variance recommendations. Ill. Rev. Stat. 1987, ch. 111½, pars. 1037(a), 1040. Thus, the Board questions whether it has any authority to disallow such late filings. The Board also agrees that there are legitimate reasons why parties must sometimes seek extensions and leave to file instanter, and that there is a need for flexibility in Board practice. The Board emphasizes that the sanction imposed upon Modine is based upon the circumstances of this case, where Modine filed its brief 26½ weeks late, without seeking an extension of time, in violation of both hearing officer and Board orders. The Board believes that it has no obligation to "warn" litigants that existing rules on sanctions will be enforced, where the Board views each situation individually.

The Board notes that in its February 9 reply to the hearing officer letter, Modine asks the Board to compare the circumstances of this case with the circumstances in Beecher Development Company, AC 88-14 (February 2, 1989). In Beecher Development, the Board on its own motion allowed the Agency to file its post-hearing brief 42 days late. The Agency had not moved for an extension, nor did it include a motion to file instanter with the brief. The Board recognizes that its action in Beecher Development might be viewed as inconsistent with its actions in this case, but finds that the cases differ significantly. First, the delay in filing was 42 days (6 weeks) in Beecher Development versus 26½ weeks in this proceeding. The Board views a 42-day delay as serious, but believes that the 42 days does not compare to a 26½ week delay. Second, the Agency brief, though late, was filed without any reminder. In this case, Modine received two telephone calls and one letter from the Agency reminding it of the deadline and a special order of the Board requiring compliance with the deadline. The brief was still late. Third, this proceeding was dismissed only upon the Agency's motion for sanctions. No motion for sanctions was filed in Beecher Development. The Board does not believe that its action in Beecher Development in any way excuses Modine's violation of hearing officer and Board orders.

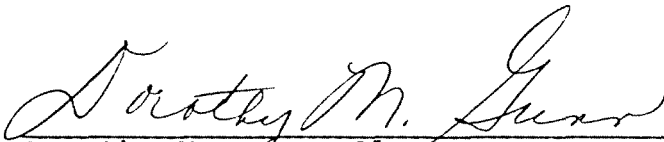
In sum, the Board dismissed this proceeding as a sanction for Modine's repeated and unreasonable delay and violation of hearing officer and Board orders. It is undisputed that the brief was filed 26½ weeks after its original due date. The Board has determined that Modine never received an extension of time from the hearing officer, and thus rejects Modine's argument that the issue on reconsideration is whether the sanction was properly imposed based upon Modine's filing of its brief three business days after the deadline established in the Board order. (Reply to hearing officer letter, p. 9.) None of Modine's excuses change the fact that hearing officer and Board orders were repeatedly violated. (Compare this case with IEPA v. Elizabeth Street Foundry, Inc., PCB 86-161 (November 29, 1988), where the Board granted respondent's motion for extension of a Board-ordered filing deadline, based upon health problems in respondent's attorney's family.) The sanction imposed upon Modine was based upon the repeated violations, and not solely upon Modine's failure to file its brief in accordance with the Board-imposed deadline. The Board finds no reason to reverse its earlier determination that Modine's unreasonable violations of hearing officer and Board orders warrants dismissal of the proceeding.

Finally, the Agency contends that the dismissal of this permit appeal constitutes an adjudication on the merits of this case, pursuant to Supreme Court Rule 273. Ill. Rev. Stat. 1987, ch. 110A, par. 273. The Board is not bound by Rule 273, and will not apply it here. The dismissal of Modine's permit appeal is not an adjudication on the merits.

IT IS SO ORDERED.

R. Flemal dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 9th day of March, 1989, by a vote of 6-1.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board