

ILLINOIS POLLUTION CONTROL BOARD
September 20, 2007

CHAD GIFFORD,)
)
Complainant,)
)
v.) PCB 08-13
) (Citizens Enforcement - Noise)
AMERICAN METAL FIBERS, INC.,)
)
Respondent.)

ORDER OF THE BOARD (by T.E. Johnson):

On August 1, 2007, Chad Gifford (Gifford) filed a complaint against American Metal Fibers, Inc. (American Metal). The complaint concerns allegedly violative sound emissions from American Metal's manufacturing facility at 13420 Rockland Road in Lake Bluff, Lake County. American Metal has filed a motion for dismissal of the complaint or, alternatively, for an order both requiring the complaint's completion and allowing American Metal more time to file a motion challenging the complaint. For the reasons below, the Board denies the motion to dismiss and its alternative request for relief and accepts the complaint, as modified by this order, for hearing.

In this order, the Board first describes Gifford's complaint and American Metal's motion. Next, in ruling on the motion and deciding whether to accept the complaint for hearing, the Board discusses whether the complaint is duplicative or frivolous. Lastly, the Board gives American Metal 60 days to file an answer and directs the parties to hearing.

PLEADINGS

Under the Environmental Protection Act (Act) (415 ILCS 5 (2006)), any person may bring an action before the Board to enforce Illinois' environmental requirements. *See* 415 ILCS 5/3.315, 31(d)(1) (2006); 35 Ill. Adm. Code 103. In this case, Gifford alleges that American Metal violated Sections 24 and 25 of the Act (415 ILCS 5/24, 25 (2006)) and Section 901.102 of the Board's noise regulations (35 Ill. Adm. Code 901.102) by emitting various sounds from the manufacturing facility to Gifford's residence during the day and night. Complaint at 3. Gifford claims that American Metal is in violation of "[n]oise levels allowed to class A land from class C land during day and night operations." *Id.* Gifford asks the Board to order American Metal to build a sound wall, to operate during normal business hours, to install sound baffles on and redirect fans and filtration devices, and to otherwise abate the noise. *Id.* at 5.

Within 30 days after being served with a complaint, a respondent may file a motion to dismiss or challenge the sufficiency of the complaint and alleging that the complaint is duplicative or frivolous. *See* 35 Ill. Adm. Code 101.506, 103.212(b). American Metal states that

it was served with the complaint on August 3, 2007. Motion at 1. On August 29, 2007, American Metal filed its motion for dismissal or alternative relief.

In its motion, American Metal asserts that it could not “responsibly or appropriately” move to dismiss the complaint as duplicative or frivolous “due to the incompleteness of the Complaint.” Motion at 1-2. American Metal points out that purported attachments to the complaint (a map, police reports, and video evidence) are in fact not attached to the complaint. *Id.* at 2. American Metal nevertheless indicates that the complaint may be frivolous due to its “many points of incredibility” and that the company would not object to the dismissal of the complaint as frivolous. *Id.*, *see also id.* at n.1.

American Metal then proceeds to dispute various allegations of the complaint, asserting, for example, that the complaint “is incredible in claiming that sealing windows and other soundproofing efforts have no effect.” Motion at 3. The company maintains that there are other noise sources in the area, and asserts without explanation that the complaint “seeks relief that the Board does not have the authority to grant.” *Id.* at 2-3. By its motion, American Metal seeks dismissal of the complaint as “defective and incomplete” or alternatively an order that “stays indefinitely the time for [American Metal] to make any further Motion to Dismiss or otherwise plead until at least thirty (30) days after the Complaint is corrected” *Id.* at 3-4.

On September 5, 2007, Gifford filed a response opposing American Metal’s motion. According to Gifford’s response, he recognizes that there is other noise in the area but that his concern remains American Metal’s operations. Response at 1. As for the attachments omitted from the complaint, Gifford states that the “proof” of his case need not be submitted with his complaint. *Id.* Gifford, however, states that he is prepared to offer numerous pieces of evidence in support of his allegations, including a formal statement from a noise consultant, sound measurement recorded on video, a noise log, police reports, and satellite maps. *Id.* at 2.

DISCUSSION

Legal Standards

When ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all inferences from them in favor of the non-movant. Dismissal is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief. *See People v. Peabody Coal Co.*, PCB 99-134, slip. op. at 1-2 (June 20, 2002); *People v. Stein Steel Mills Co.*, PCB 02-1, slip op. at 1 (Nov. 15, 2001), citing *Import Sales, Inc. v. Continental Bearings Corp.*, 217 Ill. App. 3d 893, 577 N.E.2d 1205 (1st Dist. 1991).

Section 31(d)(1) of the Act provides that “[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing.” 415 ILCS 5/31(d)(1) (2006); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is “identical or substantially similar to one brought before the Board or another forum.” 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests “relief that the Board does not have the authority to grant” or “fails to state a cause of action upon which the Board can grant relief.” *Id.*

Complaint

Gifford alleges, among other things, that American Metal violated Section 24 of the Act and Section 901.102 of the Board's noise regulations. Section 24 provides that no person shall:

[E]mit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the Board under this Act. 415 ILCS 5/24 (2006).

The appellate court has stated that Section 24 is not a general statutory prohibition, as it contains the modifying language "so as to violate any regulation or standard adopted by the Board." Shepard v. PCB, 272 Ill. App. 3d 764, 768, 651 N.E.2d 555, 558 (2nd Dist. 1995). Section 24 is therefore "not a stand-alone provision, but a violation of certain Board noise regulations could result in a violation of Section 24." Roti v. LTD Commodities, PCB 99-19 (Nov. 5, 1998). Gifford alleges that American Metal has violated Section 901.102 (35 Ill. Adm. Code 901.102) of the Board's noise regulations, which establishes various daytime and nighttime numeric limits in decibels for sound emissions to Class A land. *Cf.* 35 Ill. Adm. Code 900.102 (nuisance noise prohibition); Charter Hall Homeowner's Association v. Overland Transportation System, Inc., PCB 98-81, slip op. at 19 (Oct. 1, 1998) (proving numeric noise violations requires "strict adherence to applicable measurement procedures").

The Board finds that Gifford's complaint provides a detailed account of the alleged noise violations, including the sources, frequency, duration, and nature of the sound emissions. Further, the complaint clearly states the provisions allegedly violated and the relief requested. The attachments referenced in but omitted from Gifford's complaint are not essential to the complaint and instead constitute items more typically offered as evidence at hearing. A complainant need not prove its case in his or her complaint. American Metal was fairly put on notice as to the allegations of and relief sought by Gifford's complaint. The complaint meets the content requirements of the Board's procedural rules. *See* 35 Ill. Adm. Code 103.204(c), (f).

Taking the complaint's allegations as true and drawing all inferences from them in favor of Gifford, the Board cannot find that no set of facts could be proven that would entitle Gifford to relief from American Metal. Accordingly, the Board denies American Metal's motion to dismiss the complaint. *See, e.g.,* Finley v. IFCO ICS-Chicago, Inc., PCB 02-208, slip op. at 8-9 (Aug. 8, 2002) (denying motion to dismiss based on alleged factual deficiencies in complaint). Further, as American Metal admits, the Board's procedural rules require any motions to dismiss a complaint based on duplicativeness or frivolity to be filed within 30 days after service of the complaint. *See* 35 Ill. Adm. Code 103.212(b). The Board cannot find that omission of the specified attachments from the complaint prejudiced American Metal's ability to file such a motion. The Board therefore denies the alternative relief requested by American Metal in its motion.

Gifford's complaint does allege a violation of Section 25 of the Act (415 ILCS 5/25 (2006)). Because Section 25 merely authorizes the Board to promulgate noise regulations, Section 25 cannot be violated by American Metal. The Board accordingly strikes from the

complaint the alleged violation of Section 25 of the Act as frivolous. *See, e.g., Geber v. Carri Scharf Trucking and Materials*, PCB 03-96 (Aug. 21, 2003) (striking as frivolous alleged violation of Section 25). No evidence before the Board indicates that Gifford's complaint is otherwise frivolous or duplicative.

Hearing

The Board accepts for hearing the complaint as modified by this order. *See* 415 ILCS 5/31(d)(1) (2006); 35 Ill. Adm. Code 103.212(a). Under the Board's procedural rules, a respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if a respondent fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider the respondent to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d). American Metal's filing of the motion to dismiss stayed the 60-day period for filing an answer to the complaint, which stay ends today with the Board's ruling on the motion. *See* 35 Ill. Adm. Code 103.204(e). Under these circumstances, American Metal has 60 days from its receipt of this order to file an answer to Gifford's complaint.

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2006). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

With Public Act 93-575, effective January 1, 2004, the General Assembly changed the Act's civil penalty provisions, amending Section 42(h) and adding a new subsection (i) to Section 42. Section 42(h)(3) now states that any economic benefit to respondent from delayed


compliance is to be determined by the “lowest cost alternative for achieving compliance.” The amended Section 42(h) also requires the Board to ensure that the penalty is “at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship.”

Under these amendments, the Board may also order a penalty lower than a respondent’s economic benefit from delayed compliance if the respondent agrees to perform a “supplemental environmental project” (SEP). A SEP is defined in Section 42(h)(7) as an “environmentally beneficial project” that a respondent “agrees to undertake in settlement of an enforcement action . . . but which the respondent is not otherwise legally required to perform.” SEPs are also added as a new Section 42(h) factor (Section 42(h)(7)), as is whether a respondent has “voluntary self-disclosed . . . the non-compliance to the [Illinois Environmental Protection] Agency” (Section 42(h)(6)). A new Section 42(i) lists nine criteria for establishing voluntary self-disclosure of non-compliance. A respondent establishing these criteria is entitled to a “reduction in the portion of the penalty that is not based on the economic benefit of non-compliance.”

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent’s economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 20, 2007, by a vote of 4-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board