

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF CHICAGO DEPARTMENT)
OF ENVIRONMENT,)
)
Complainant,)
)
v.)
)
JOSE R. GONZALEZ,)
)
Respondent.)

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JUN 30 2008

STATE OF ILLINOIS
Pollution Control Board


Site Code:0316485103
AC: 2006-040
(CDOE No. 06-03-AC)

NOTICE OF FILING

TO: Mr. Bradley P. Halloran
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

Ms. Jennifer A. Burke, Senior Counsel
City of Chicago, Dept. of Environment
30 North La Salle Street, 9th Floor
Chicago, Illinois 60602

PLEASE TAKE NOTICE that we have this day filed with the Clerk of the Illinois Pollution Control Board, Respondent's **Sur-Reply Brief**.
Dated at Chicago, Illinois, this 30th day of June, 2008.



JEFFREY J. LEVINE, P.C.
Attorney for Respondent
JOSE R. GONZALEZ

Jeffrey J. Levine, P.C. #17295
20 North Clark Street, Suite 800
Chicago, Illinois 60602
(312) 372-4600

PROOF OF SERVICE

The undersigned, being first duly sworn on oath, deposes and says that he served a copy of the Notice together with the above mentioned documents to the person to whom said Notice is directed by hand delivery, this 30th day of June, 2008.



JEFFREY J. LEVINE, P.C.

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JOSE R. GONZALEZ'S SUR-REPLY

Now comes the Respondent, JOSE R. GONZALEZ, by and through it's counsel Jeffrey J. Levine, P.C., and for his Sur-Reply, states and asserts as follows:

1. In their May 13, 2008, Reply Brief, the City contends that the evidence and testimony at hearing demonstrated violations. Respondent contends that contrary to the City's position, the evidence and testimony demonstrated 1) an ineffective investigation, 2) selective prosecution, 3) false testimony, 4) an utter contempt for the process which included a failure to provide discovery and providing selective information, 5) complaints against entities with no basis, 6) false allegations, and 7) evidence that Complainant's witness, Investigator Macial, was seeking a bribe.

2. The central question was whether Respondent, Jose Gonzalez, an individual who is not the actual owner of the property in question (Mr. Gonzalez controls the LLC that owns the property), had caused or allowed the waste and whether the alleged violation resulted from uncontrollable circumstances. The City has the burden of proof in these hearings. 415 ILCS 5/31.1(d)(2)(2004); 35 Ill. Admn. Code 108.400.

Ineffective Investigation

3. The investigation performed by Complainant's witness indicated a secure property wherein

trucks from E. King Trucking, a subcontractor to Paschen Construction, were cleaning waste from the CTA which had been deposited on the property in question, contrary to an agreement to keep the waste in containers. Also evident were indications of fly dumping.

4. The investigator testified that he stopped trucks removing material from the site (May 9, 2007, Tr. 46), that the investigation was complete (May 9, 2007, Tr. 50), and that he would have conducted a further investigation. See: May 9, 2007, Tr. 45-62.

Selective Prosecution

5. Neither the CTA, Paschen Construction or E. King Trucking were ever ticketed even though an adequate investigation would have revealed that those entities caused and allowed the violation.

False Testimony

6. The City cannot meet its burden because portions of its witnesses testimony is false and demonstrates an utter disregard for the process. See: May 9, 2007, Tr. 42, 116-24.

Failure to Provide Discovery/Providing Selective Information

7. The City's witness withheld documents such as business cards and field notes. See: May 9, 2007, Tr. 53, 59, 82-84. He also admitted to failing to disclose information at a deposition as he did not believe that it was "pertinent." See: May 9, 2007, Tr. 118

Complaints Against Entities with no Basis

8. Mr. Macial charged Speedy Gonzalez Landscaping, Inc., with violations although he had no evidence against that entity. See: May 9, 2007, Tr. 99, 130, 132 &153.

False Allegations

9. The alleged violations against Respondents included baseless allegations regarding securing the property, salt unloading operations, ACM or asbestos, waste next to residential homes

and oil flowing into the sewer. May 9, 2007, Tr. 68, 129-32. Macial, a senior environmental inspector (May 9, 2007, Tr. 7), contended that these charges were put into his investigative report because Respondent Speedy Gonzalez Landscaping, Inc., committed the additional offenses (May 9, 2007, Tr. 130). Macial however had no evidence that the offenses occurred. May 9, 2007, Tr. 68, 129-32.

Macial Seeking a Bribe

10. The evidence at hearing reveal that Mr. Macial was seeking a bribe from Mr. Gonzalez and the latter's failure to comply resulted in the offenses charged. See: May 9, 2007, Tr. 126-27, 181-83, 204.

Argument

11. The evidence presented conclusively demonstrates that Respondent neither caused nor allowed the waste. The hearing record is replete with testimony that Respondent repeatedly worked to secure access to the property. An earthen berm was constructed around the property (May 9, 2007, Tr. 197), and a gated fence was installed at the entrance to the site. May 9, 2007, Tr. 205. The owner testified that after the property was initially cleaned, the locks on the gate have been cut and additional fly dumping occurred. The gates have been replaced numerous times and additional gates have been installed. See: May 9, 2007, Tr. 205. A gate was present on the date of the alleged violation. May 9, 2007, Tr. 9.

12. Rather than causing or allowing the waste, the owner has fought fly-dumpers since acquiring the property which he is developing. See: May 9, 2007, Tr. 173, 199. The owner was in the process of putting down a gravel road to gain access to the back portion of the property with heavy equipment when he was ticketed. May 9, 2007, Tr. 187-92.

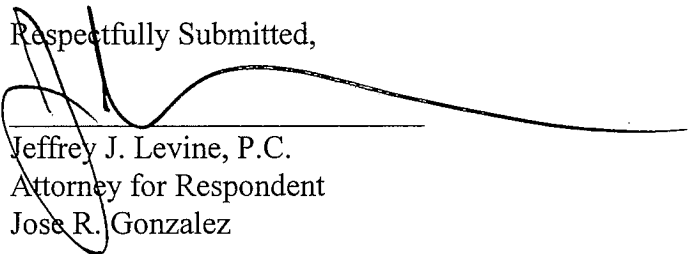
13. The inspector testified that Respondent would be given a reasonable time to clean up the

property “from the date of the inspection.” May 9, 2007, Tr. 159.

14. In *IEPA v. Cadwallader*, AC 03-13 (IPCB May 20, 2004), the site had “no fence and was easily accessible from a heavy trafficked roadway.” The City has failed to carry its burden that Respondent either allowed waste to remain on the property or failed to make repeated efforts to secure the site to prevent others from dumping waste. Respondent’s agent, seeking to develop the site, repeatedly sought to secure the site, and cleaned up fly-dumped material. When others deposited waste contrary to an agreement, he organized a massive clean-up which included putting in a stone road to allow heavy equipment access to other waste.

15. Complainant has failed to present evidence that Respondent acquiesced in any manner to the waste deposited by others. The waste deposited by fly-dumpers, who repeatedly cut the lock on the gate or knocked it down, must be deemed uncontrollable circumstances. The CTA waste deposited by E. King Trucking (which was supposed too be stored in containers) was removed within the reasonable time indicated by the City’s witness.

Wherefore, for the above and forgoing reasons, Respondent Jose Gonzalez prays that the Illinois Pollution Control Board dismiss Complainant’s Administrative Citation and for such further relief as it deems just and equitable.

Respectfully Submitted,

Jeffrey J. Levine, P.C.
Attorney for Respondent
Jose R. Gonzalez

Dated: June 30, 2007

Jeffrey J. Levine, P.C. #17295
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