

ILLINOIS POLLUTION CONTROL BOARD
October 1, 2009

CITY OF CHICAGO DEPARTMENT OF)
ENVIRONMENT,)
)
Complainant,)
)
v.) AC 06-39
) (Administrative Citation)
SPEEDY GONZALEZ LANDSCAPING,)
INC.,)
)
Respondent.)

CITY OF CHICAGO DEPARTMENT OF)
ENVIRONMENT,)
)
Complainant,)
)
v.) AC 06-40
) (Administrative Citation)
JOSE R. GONZALEZ,)
)
Respondent.)

CITY OF CHICAGO DEPARTMENT OF)
ENVIRONMENT,)
)
Complainant,)
)
v.) AC 06-41
) (Administrative Citation)
1601-1759 EAST 130th STREET, L.L.C.,)
)
Respondent.)

CITY OF CHICAGO DEPARTMENT OF ENVIRONMENT,)	
)	
Complainant,)	
)	
v.)	AC 07-25
)	(Administrative Citation)
1601-1759 EAST 130th STREET, L.L.C.,)	(Consolidated)
)	
Respondent.)	

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

This order denies pending joint motions for reconsideration and for stay filed by two of the three respondents in these consolidated administrative citations. Below the Board sets forth an abbreviated background and procedural history of the case, followed by the Board's discussion of and ruling upon the motions.

BACKGROUND AND PROCEDURAL HISTORY

Complainant, the City of Chicago Department of Environment (CDOE), filed four administrative citations with the Board alleging violations by three respondents. The Board docketed the citations as AC 06-39, AC 06-40, AC 06-41, and AC 07-25. The site at issue in all four citations is located at 1601 E. 130th Street in Chicago, Cook County. The site is roughly 7.5 acres in size and is designated with Site Code No. 0316485103. The respondents are Speedy Gonzalez Landscaping, Inc. (SGLI) (AC 06-39), Jose R. Gonzalez (Mr. Gonzalez) (AC 06-40), and 1601-1759 East 130th Street, L.L.C. (130th LLC) (AC 06-41 and AC 07-25).

Dockets AC 06-39, AC 06-40, and AC 06-41 concern an inspection of the site that took place on March 22, 2006, while the site inspection at issue in docket AC 07-25 occurred on October 3, 2006. The citations alleged violations of various provisions of Section 21(p) of the Environmental Protection Act (Act) (415 ILCS 5/21(p) (2006)). Through the four citations, CDOE asked the Board to impose the statutory civil penalty of \$1,500 per violation, for a total civil penalty of \$25,500, as well as hearing costs.

Respondents filed their respective petitions for review with the Board and, in separate orders, the Board accepted each petition for hearing. Four hearings, one for each citation, were conducted consecutively in Chicago over May 9 and May 17, 2007. The parties then filed several motions with the Board, as well as post-hearing briefs, culminating at the end of June 2008, after which the parties discussed settlement to no avail.

On March 19, 2009, the Board issued its interim opinion and order. The Board granted respondents' motions to consolidate the four administrative citations for purposes of decision, denied CDOE's motions to strike respondents' motions to dismiss, denied respondents' motions

to dismiss, and accepted an offer of proof made by one of the respondents. The Board then found violations in two of the four actions. Specifically, the Board determined that SGLI (AC 06-39) did not cause or allow the open dumping of waste on March 22, 2006. The Board also found that on March 22, 2006, Mr. Gonzalez (AC 06-40) and 130th LLC (AC 06-41) allowed the open dumping of waste in a manner resulting in litter, scavenging, open burning, and the deposition of general construction or demolition debris, but did not cause or allow the open dumping of waste in a manner resulting in the deposition of waste in standing water. Finally, the Board decided that the fourth citation must be dismissed because it was improperly issued (AC 07-25). *See City of Chicago Department of Environment v. Speedy Gonzalez Landscaping, Inc.*, AC 06-39, *City of Chicago Department of Environment v. Jose R. Gonzalez*, AC 06-40, *City of Chicago Department of Environment v. 1601-1759 East 130th Street, L.L.C.*, AC 06-41, *City of Chicago Department of Environment v. 1601-1759 East 130th Street, L.L.C.*, AC 07-25 (consol.) (Mar. 19, 2009) (Interim Order).

After receiving hearing cost filings, the Board issued its final opinion and order on June 4, 2009, imposing civil penalties and hearing costs. Specifically, in AC 06-40, the Board assessed Mr. Gonzalez the statutory civil penalty of \$6,000 for the four violations of Section 21(p), as well as Board hearing costs totaling \$1,340.40, for a total amount due of \$7,340.40. In AC 06-41, the Board assessed 130th LLC the statutory civil penalty of \$6,000 for the four violations of Section 21(p), as well as hearing costs totaling \$1,189.40, for a total amount due of \$7,189.40. *See City of Chicago Department of Environment v. Speedy Gonzalez Landscaping, Inc.*, AC 06-39, *City of Chicago Department of Environment v. Jose R. Gonzalez*, AC 06-40, *City of Chicago Department of Environment v. 1601-1759 East 130th Street, L.L.C.*, AC 06-41, *City of Chicago Department of Environment v. 1601-1759 East 130th Street, L.L.C.*, AC 07-25 (consol.) (June 4, 2009) (Final Order).

On July 8, 2009, two of the three respondents, Mr. Gonzalez and 130th LLC, jointly filed a motion for reconsideration (Mot. Recon.) and a motion for stay (Mot. Stay). The Board addresses both motions today. CDOE filed a response (Resp.) in opposition to the motion for reconsideration on July 23, 2009. Mr. Gonzalez and 130th LLC filed a joint reply to CDOE's response on August 13, 2009 (Reply). The Board notes that a movant does not have a right of reply, and Mr. Gonzalez and 130th LLC failed to include a motion for leave to file with their reply. *See* 35 Ill. Adm. Code 101.500(e). However, CDOE has not objected to the filing of the reply, and Mr. Gonzalez and 130th LLC claim in the reply that CDOE's response is "mis-characterizing the facts and law." Reply at 1. The Board accepts the reply.

DISCUSSION

Motion for Reconsideration

A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." *Citizens Against Regional Landfill v. County Board of Whiteside County*, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991); *see also* 35 Ill. Adm. Code 101.902. A motion to reconsider may also specify "facts

in the record which were overlooked.” Wei Enterprises v. IEPA, PCB 04-23, slip op. at 3 (Feb. 19, 2004).

The Board has thoroughly reviewed the joint motion to reconsider, the response, and the joint reply. Much of the motion is devoted to repeating arguments already rejected by the Board. The Board finds that these arguments do not satisfy any of the articulated standards for reconsideration. For example, Mr. Gonzalez and 130th LLC restate allegations that CDOE withheld information sought through deposition or subpoena, but continue to cite no legal authority for their position that dismissal of the administrative citation actions was thereby warranted. Mot. Recon. at 11-13. CDOE correctly observes that:

In order to comport with procedural due process requirements, respondents before the Board should receive “the essential elements of a fair hearing before an administrative agency: an opportunity to be heard, the right to cross-examine adverse witnesses, and impartiality in ruling upon the evidence.” Ardt v. Dept. of Prof’l Regulation, 218 Ill. App. 3d 61, 69, 578 N.E.2d 128, 133 (1st Dist. 1991) (holding, *inter alia*, that administrative hearing did not violate plaintiff’s due process rights despite the fact that defendant state agency did not respond to plaintiff’s interrogatories) (citing Mahonie v. Edgar, 131 Ill. App. 3d 175, 476 N.E.2d 474 (1st Dist. 1985)). Consistent with this well-established holding and as the Board has already concluded, any alleged discovery omissions would have been harmless error and Respondents received a fair hearing in accordance with due process. Resp. at 6-7.

Moreover, the Board emphasizes that at bottom, the liability of these respondents was found based upon uncontroverted evidence, as set forth in the Board’s interim opinion of March 19, 2009. Interim Order, slip op. at 10-16, 24-29.

Mr. Gonzalez and 130th LLC also raise arguments never before made in this proceeding. For example, Mr. Gonzalez and 130th LLC assert new claims about the import of alleged CDOE failures to provide information (Mot. Recon. at 10-13; Reply at 3-4) and also suggest now that finding Mr. Gonzalez liable required “what amounts to the piercing of the Respondent corporation” (Reply at 1). These arguments, aside from being unpersuasive, are raised for the first time in the motion to reconsider or the reply and without any justification as to why they were not previously offered. The arguments are therefore waived. *See, e.g.*, Holzer v. Motorola Lighting, Inc., 295 Ill. App. 3d 963, 978, 693 N.E.2d 446, 457 (1st Dist. 1998) (“it is well-settled that one may not raise a legal theory for the first time in a motion to reconsider”; argument raised for the first time in a motion for reconsideration is waived); Gardner v. Navistar International Transportation Corp., 213 Ill. App. 3d 242, 248-49, 571 N.E.2d 1107, 1111 (4th Dist. 1991) (litigants should not be permitted to “stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling”); RACT Deficiencies – Amendments to 35 Ill. Adm. Code Parts 211 and 215, R89-16(A), slip op. at 18 (May 10, 1990) (arguments, made in a motion for reconsideration without justification as to why they were not raised earlier, are waived).

Mr. Gonzalez and 130th LLC further argue that “there is no evidence that the costs imposed were reasonable.” Mot. Recon. at 13. The bases on which the Board assessed hearing costs are described in the final opinion of June 4, 2009. The Board required Mr. Gonzalez and 130th LLC to pay no more than the actual costs incurred by the Board for court reporting services, all in accordance with posted rates for hearings held in the geographical area of Illinois north of U.S. 36. The Board placed the court reporting invoices into the record and, as detailed in the June 4, 2009 opinion, assessed costs very conservatively. Final Order, slip op. at 5-7. The argument of Mr. Gonzalez and 130th LLC, the entirety of which is quoted above, provides no grounds for reconsidering the imposition of hearing costs.

Finally, Mr. Gonzalez and 130th LLC mischaracterize the Board’s decision. According to these respondents, the Board found that they allowed the open dumping of *only* the “CTA waste” and not *any* “fly-dumped waste.” Mot. Recon. at 1; Reply at 2. The Board found, however, that Mr. Gonzalez and 130th LLC allowed not only the open dumping of the CTA waste, but also the open dumping of “pre-existing waste” (*i.e.*, non-CTA waste that had been on the site since the property was purchased) by failing to remove the waste for some 15 months. The pre-existing waste included fly-dumped waste. Interim Order, slip op. at 25-26.¹

The Board finds that Mr. Gonzalez and 130th LLC have not identified newly discovered evidence that was unavailable at the time of hearing, changes in the law, errors in how the Board applied the law, or facts in the record that the Board overlooked. The Board therefore denies the joint motion to reconsider.

Motion for Stay

Mr. Gonzalez and 130th LLC move the Board to stay its final order of June 4, 2009, until resolution of their motion for reconsideration. Mot. Stay at 1. The Board denies the joint motion for stay as unnecessary. Under the Board’s procedural rules, a “timely-filed motion for reconsideration . . . stays the effect of the final order until final disposition of the motion.” 35 Ill. Adm. Code 101.520(c). Accordingly, by rule, the Board’s June 4, 2009 order was stayed with the timely filing of the joint motion to reconsider. By that same rule, today’s denial of the motion to reconsider lifts the stay.

CONCLUSION

For the reasons above, the Board denies the joint motions for reconsideration and for stay filed by Mr. Gonzalez and 130th LLC. The Board sets forth below its entire order of June 4, 2009, but the 45-day time period for payment of civil penalties and hearing costs now runs anew. *See Charter Hall Homeowner’s Assoc. v. Overland Transportation System, Inc.*, PCB 98-81, slip op. at 1-2 (July 8, 1999).

¹ The Board also found that neither of these respondents caused or allowed the open dumping of waste that, despite the presence of the locked gate, was fly-dumped *after* the acquisition of the site. Interim Order, slip op. at 26.

ORDER

1. In AC 06-39, the Board finds that CDOE did not prove that SGLI violated Section 21(p)(1), (p)(2), (p)(3), (p)(4), or (p)(7)(i) of the Act on March 22, 2006.
2. In AC 06-40, the Board finds that on March 22, 2006, Mr. Gonzalez violated Sections 21(p)(1), (p)(2), (p)(3), and (p)(7)(i) of the Act. The Board finds that CDOE did not prove that Mr. Gonzalez violated Section 21(p)(4) of the Act on March 22, 2006.
3. In AC 06-41, the Board finds that on March 22, 2006, 130th LLC violated Sections 21(p)(1), (p)(2), (p)(3), and (p)(7)(i) of the Act. The Board finds that CDOE did not prove that 130th LLC violated Section 21(p)(4) of the Act on March 22, 2006.
4. In AC 07-25, the Board finds that the administrative citation against 130th LLC for alleged violations of Sections 21(p)(1) and (p)(7)(i) of the Act on October 3, 2006, was improperly issued and dismisses the administrative citation.
5. In AC 06-40, the Board assesses Mr. Gonzalez the statutory civil penalty of \$6,000 for the four violations, as well as hearing costs totaling \$1,340.40, for a total amount due of \$7,340.40. In AC 06-41, the Board assesses 130th LLC the statutory civil penalty of \$6,000 for the four violations, as well as hearing costs totaling \$1,189.40, for a total amount due of \$7,189.40.
 - a. Mr. Gonzalez and 130th LLC must pay these respective total amounts no later than November 16, 2009, which is the first business day following the 45th day after the date of this order. Mr. Gonzalez and 130th LLC must pay by certified check or money order, made payable to the City of Chicago. The respective case number, case name, and respondent social security number or federal employer identification number must be included on the certified check or money order.
 - b. The certified check or money order must be sent to:

City of Chicago Department of Environment
Permitting and Enforcement Division
30 North LaSalle Street
Suite 2500
Chicago, Illinois 60602
 - c. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Act (415 ILCS 5/42(g) (2006)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2006)).

- d. Payment of the penalty does not prevent future prosecution if the violations continue.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 1, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board