BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In Re Application of KLEEN ENVIRONMENTAL TECHNOLOGIES, INC.	Docket No.: TG-040248 ANSWER OF KLEEN ENVIRONMENTAL TECHNOLOGIES, INC. TO MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS

SUMMARY

The Motion for Award of Attorneys' Fees and Costs of Stericycle of Washington, Inc. ("Stericycle") should be denied because the Washington Utilities and Transportation Commission ("Commission") does not have the authority for such an award and because the facts do not support the motion. Stericycle has not requested a hearing to inquire further into the knowledge of the owners of Kleen Environmental Technologies, Inc. ("Kleen"). In addition, no other parties have filed motions pursuant to Order No. 7 ("Initial Order").

FACTS

The Birdinground Letter.

Although Kleen never authorized nor was aware of the apparent misconduct of its hired consultant, Allen McCloskey, Kleen once again apologizes to the Commission, to Administrative Law Judge Ann Rendahl, and to all parties of record for the submission of a fraudulent letter in this proceeding on Kleen's behalf. Because of the submission of that letter, Kleen's application has been dismissed.

Kleen is not challenging the findings and conclusions in the Initial Order that Mr. McCloskey likely gave false testimony under oath concerning both his knowledge and the derivation of Exhibit 23 (the "Birdinground letter") as well as his involvement and position with

CURRAN MENDOZA P.S.
Post Office Box 140
555 West Smith Street
Kent, Washington 98035-0140
(253) 852-2345
(253) 852-2030 (fax)

McCloskey Enterprises, Inc. Initial Order, ¶ 82. The Initial Order does not include any other findings of false testimony by Mr. McCloskey, nor does it include any findings of fraud by any employee or owner of Kleen.

Now, Stericycle is wrongly accusing Kleen of engaging in a coverup because Kleen's owners trusted Mr. McCloskey to lawfully oversee the application on Kleen's behalf. As well documented by Stericycle in its Motion, Kleen delegated all responsibility for this project to Mr. McCloskey. However, Kleen never authorized Mr. McCloskey to commit fraud.

Although Kleen became aware of problems with the Birdinground letter on October 15, 2004, Kleen had no knowledge that Mr. McCloskey was engaged in fraudulent activity, and had no reason to suspect so until after Mr. McCloskey's testimony on October 26, the last day of hearings in this proceeding. On that day, Mr. McCloskey required a medical leave of absence during his testimony following the offering of two exhibits by Stericycle: the written statement from Mr. Birdinground disputing his connection with the Birdinground letter; and printouts of the website of McCloskey Enterprises. TR 1988:9-15.

Kleen had no knowledge of the fraudulent nature of the Birdinground letter until after the letter had already been submitted for the record at the request of Mr. McCloskey. Exhibits 22, 37 and 54. TR 1891:16 and 1925:5-7. Kleen had no knowledge of Mr. McCloskey's false testimony until after conflicting evidence was presented by Stericycle on October 26, 2004. Declaration of Robert Olson.

Contrary to the assertions of Stericycle, there was no attempt by Kleen or its counsel to cover up anybody's responsibility for the letter. The October 15 email from Kleen's counsel to Judge Rendahl and all parties simply gave notice to all parties that Kleen intended to withdraw the Birdinground letter as an exhibit. Declaration of Stephen B. Johnson, Exhibit G[1]. If Kleen had intended to cover up something, it would have made more sense to not bring attention to the letter. Evidence of fraud did not become apparent until Mr. McCloskey's testimony on October 26, 2004. Until that point, Kleen continued to trust Mr. McCloskey.

[1] Stericycle fails to mention that its counsel's email on October 16, 2004, to Judge Rendahl and other counsel wherein Stericycle says it will offer the Birdinground letter as an exhibit, also fails to mention any issue of fraud.

CURRAN MENDOZA P.S.
Post Office Box 140
555 West Smith Street
Kent, Washington 98035-0140
(253) 852-2345
(253) 852-2030 (fax)

Mr. Robert Olson, President of Kleen, first became aware of problems with the Birdinground letter on October 15, 2004, when he received a call from Ms. Rebecca Johnston, Director of the American Indian Health Commission. TR 1882:16-22; 1891:20-23; 1897:13-1898:3. At that time, Mr. Olson had not seen the Birdinground letter and asked Mr. McCloskey to look into it. TR 1882:16-1883:19; 1891:23; 1901:16-1903:15; 1923:6-16. Since Mr. Olson had no reason to suspect anything improper of Mr. McCloskey at the time, he continued to rely on him to look into how the Birdinground letter came to Kleen. TR 1889:19-21; 1903:10-15; 1914:24-1915:11; 1925:25-1927:14; 1929:1-19.

Mr. McCloskey told Mr. Olson that the letter was in response to form letters seeking shipper support.[2] TR 1884:9-1885:5. Mr. McCloskey told Mr. Olson that he didn't know Mr. Birdinground. TR 1903: 22-23. Mr. McCloskey told Mr. Olson that he had made calls and left messages looking into the matter. TR 1926:7-10. Mr. Olson did not realize that Ms. Johnston was not with the National Indian Health Board and therefore thought the Board had been contacted. TR 1927:12-14.[3]

When Mr. Olson first spoke to Mr. McCloskey about the problems with the Birdinground letter following the phone call from Ms. Johnston, it appeared to Mr. Olson that it was the first time Mr. McCloskey was aware of the problems. TR 1947:7-20. The October 21, 2004 letter from the owners of Kleen was an attempt to explain their limited knowledge of the situation. Exhibit 22. It was drafted by Mr. McCloskey (TR 1956:13-19; 1970:24-1971:1) but it was signed by the owners and at that time, there was no evidence to suspect Mr. McCloskey might be engaged in fraud.

As late as October 26, 2004, Mr. Olson still believed in Mr. McCloskey, saying the money paid to Mr. McCloskey had been well spent. TR 1914:5-13. Mr. Olson was even still

---

[2] Unfortunately, Kleen is unable to produce a copy of that form letter. The records request for the form letter was made during the last day of hearings, when Mr. McCloskey's health status was uncertain. TR 1905:6-1907:6. By the time it became clear that Mr. McCloskey was going to avoid further contact with Kleen, he had already removed most of his files from the offices of Kleen, including computer records. Declaration of Olson. It is possible the form letter was removed by Mr. McCloskey.

[3] Mr. Olson did not then know the difference between the National Indian Health Board and Ms. Johnston's organization, the American Indian Health Commission. TR 1928:8-15.

CURRAN MENDOZA P.S.
Post Office Box 140
555 West Smith Street
Kent, Washington 98035-0140
(253) 852-2345
(253) 852-2030 (fax)

willing to pay Mr. McCloskey for his services. TR 1941:8-15.[4] At the time of his own testimony on October 26, Mr. Olson had no idea of the source of the Birdinground letter, including no suspicions of either Mr. McCloskey or Stericycle. TR 1941:17-1942:15. To this day, contrary to Stericycle's assertion, the source of the Birdinground letter is not known (Motion, p. 16); although conclusions that Mr. McCloskey was involved certainly seem reasonable.

The continued reliance on Mr. McCloskey by the owners of Kleen, even to look into the source of the Birdinground letter, is not evidence of involvement by the owners in any attempted coverup. It is instead further evidence of how they delegated this project to Mr. McCloskey and how they still trusted him. Kleen had many reasons to trust Mr. McCloskey and none not to, at least not until after his aborted testimony on October 26, 2004. Declaration of Olson.

Having misplaced faith in someone is not engaging in a cover-up. Stericycle has not provided any evidence to question the trust the owners of Kleen put in Mr. McCloskey. It was not until the final day of testimony that Mr. McCloskey's credibility was proven to be suspect. It is easy now to look back and say that the owners of Kleen should not have trusted Mr. McCloskey, but at the time, it was not so obvious.

Stericycle wrongly suggests that Kleen tried to mislead the Commission about the history of its services to tribal facilities. Motion for Award of Attorney Fees and Costs ("Motion"), p. 13. Kleen never said it had a history with tribal health clinics; however, a list of the tribal facilities on which it provided services was provided, including the Nez-Perce, Colville, Makah and Sauk-Suiattle. Exhibit 37. All four of these tribes are on the list attached to the Birdinground letter. Exhibit 23. Mr. Olson testified that Kleen had been providing services to facilities on Indian property for roughly nine years, including some of those listed above. TR 1881:4; 1916:2-1917:5.

Stericycle tries to blame Mr. Olson for not knowing that the Birdinground letter makes an erroneous statement about the length of the history of the relationship between Kleen and

[4] Kleen has already paid $47,696.37 in legal fees for this unsuccessful application, plus Mr. McCloskey's consulting fees. Declaration of Olson.

CURRAN MENDOZA P.S.
Post Office Box 140
555 West Smith Street
Kent, Washington 98035-0140
(253) 852-2345
(253) 852-2030 (fax)

tribal facilities. Motion at 14. However, Mr. Olson never said he agreed with the statements in the Birdinground letter.

Hydroclave.

Kleen relied on Mr. McCloskey to present honest testimony about Kleen's use of the Hydroclave facility for treatment and disposal of medical waste. Declaration of Olson. Mr. McCloskey visited the Hydorclave site and spoke with representatives there. Id. There is no evidence in the record from the operator of the Hydroclave facility to challenge Kleen's trust in Mr. McCloskey on this matter. Kleen intended to be able to use the Hydroclave facility at some point (Id.), although not likely in the first year, as it was not included in the first year proformas. Exhibit 44.

Reusable Tubs.

Kleen relied on Mr. McCloskey to determine what services were needed and able to be provided under the permit sought in this application, including the use of reusable tubs. Declaration of Olson. Although Kleen initially intended to provide the services listed in the original tariff, there was no intent to mislead the Commission or any of the parties about the level of service proposed at the start of these hearings; the proforma financial statements for the first year were based on revenue from sales of only one size of cardboard box at $18.44 per box. Exhibits 32, 44 and 45. As it became clear during the hearings that some services could not be provided initially, the tariff was amended accordingly, including the removal of reusable tubs. Exhibit 32.

Backup Facility.

Kleen relied on Mr. McCloskey to present honest testimony about the availability of the incinerator in Spokane as a viable alternative to Covanta. Declaration of Olson. In conversations with Mr. McCloskey about his investigation of the Spokane facility, Mr. McCloskey always told Mr. Olson the Spokane incinerator was an available backup. Id. Mr.

CURRAN MENDOZA P.S.
Post Office Box 140
555 West Smith Street
Kent, Washington 98035-0140
(253) 852-2345
(253) 852-2030 (fax)

McCloskey even had Mr. Olson submit an application for a credit account to the City of Spokane. Id.

Generator Profile System.

Mr. McCloskey testified that it was premature to investigate the need, scope and cost of an online generator profile system until the permit sought in this application was granted. TR 312:10-11, 22-25; 314:11-13. Counsel for Stericycle agreed that the generators' needs needed to be identified first. TR 313:1. Kleen intended to provide such a system, but it would have taken time to develop. Declaration of Olson.

Certificate of Destruction From Covanta.

Kleen relied on Mr. McCloskey to present honest testimony about the availability of certificates of destruction from the Covanta facility. Declaration of Olson. Stericycle claims Mr. McCloskey's testimony about a certificate of destruction from the Covanta facility was "entirely imaginary". Motion at 22. However, Stericycle offers no evidence from a representative of the Covanta facility to contradict Mr. McCloskey's claim that Russ Johnston, of the Covanta facility, told Mr. McCloskey that he would work with Mr. McCloskey to provide such a certificate. TR 336:20-24. Mr. Olson was told by Russ Johnston that he and Mr. McCloskey discussed being able to work out a system where Kleen's manifests and Covanta's weight receipts could be used together to allow a representative from Covanta to sign the manifest with wording to certify that the material listed in the manifest and that matched the weight receipt had been destroyed. Declaration of Olson.

Kleen's Facilities.

It was not misleading for Kleen to not include in its prefiled testimony any information about where it would base its operations if the application was granted. Mr. Olson clearly testified that Kleen was not intending to use its existing facilities in Seattle for the operations proposed in the application. TR 222:20-22; 223:4-7. Mr. Kenneth Lee, Chief Financial Officer of Kleen, also testified about Kleen's proposed relocation to an alternative site. TR 609:18-

CURRAN MENDOZA P.S.
Post Office Box 140
555 West Smith Street
Kent, Washington 98035-0140
(253) 852-2345
(253) 852-2030 (fax)

611:12; 626:12-634-21; 679:13-680:16; 699:8-704:6; 709:12-712:6; 714:6-17. Kleen included marginal costs in its proformas to account for the additional cost of such a facility compared to its existing facility in Seattle. TR626:21-27:2 and Exhibit 44. Contrary to Stericycle's suggestion that Kleen's discussions with its current landlord were to modify its current building for the proposed services, Mr. Olson clearly testified that the current landlord would not be looked to for funding the necessary building modifications because Kleen would be needing a new space. TR 220:21-24; 222:16-224:9.

ARGUMENT

The Commission Has No Authority To Award The Attorney Fees Sought By Stericycle.

Stericycle's argument that the Commission has authority to award the attorney fees Stericycle seeks is based entirely on Stericycle's unsubstantiated assertion that the Commission's responsibility "necessarily carries with it the power ... to impose remedial sanctions ..." Motion at 25. Stericycle attempts to support this claim with a litany of court cases ruling on the inherent power of the courts to impose such sanctions. Id. at 26-30. Stericycle even tries to rely on a U.S. Supreme Court ruling comparing the functions of an administrative law judge with those of a trial judge. Motion at 30; citing Butz v. Economou, 438 U.S. 478, 513, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978). However, in Butz, the Supreme Court never considered whether an administrative law judge could issue sanctions as requested by Stericycle. Id. The few cases cited by Stericycle involving attempts by administrative agencies to award fees are all distinguishable.

Stericycle erroneously relies on a court's consideration of whether attorney fees recoverable under a specific statute in court can be recovered in an administrative hearing. In Cohn v. Department of Corrections, 78 Wn. App. 63, 895 P.2d 857 (1995), the court ruled attorney fees recoverable under RCW 49.48 could only be awarded by a court and not the Personnel Appeals Board. Id. at 67. The court emphasized that:

> Most importantly, an administrative agency has *only* those powers which are expressly granted or which are necessarily implied from statutory grants of authority. While agencies have implied authority to carry out their legislatively mandated purposes, agencies do not have implied authority to determine issues outside of that agency's delegated functions or purpose.

CURRAN MENDOZA P.S.
Post Office Box 140
555 West Smith Street
Kent, Washington 98035-0140
(253) 852-2345
(253) 852-2030 (fax)

Id. (emphasis original); citing Tuerk v. Department of Licensing, 123 Wn.2d 120, 124-125, 864 P.2d 1382 (1994).

Administrative law judges in cases before the Commission have been granted statutory authority "to administer oaths, to issue subpoenas for the attendance of witnesses and the production of papers, waybills, books, accounts, documents, and testimony, to examine witnesses, and to receive testimony in any inquiry, investigation, hearing, or proceeding in any part of the state, under such rules as the commission may adopt;" and to "enter an initial order including findings of fact and conclusions of law." RCW 80.01.060. It is not necessary to award attorney fees in this proceeding in order for the Commission to perform these statutory duties.

Stericycle cites no authority that this statutory grant of authority necessarily implies the power to grant the attorney fees requested by Stericycle. In fact, if such an implication existed, there would have been no need for WAC 480-07-425(2), which expressly grants authority to issue sanctions in discovery disputes.

The application of Kleen was dismissed pursuant to WAC 480-70-091(2)(c), which expressly authorizes dismissal of an application "if it includes false, misleading or incomplete information." Initial Order at 17. That authority does not include, nor does it require, an award of attorney fees as sought by Stericycle. There is no authority for such an award to be found anywhere in Title 81 RCW or Title 480 WAC.

Stericycle's reliance on the Colorado case of Hawes v. Colorado Division of Insurance, 65 P.3d 1008 (2003) for the position that administrative adjudicative bodies have inherent equitable powers to award attorney fees as courts is misplaced. The Hawes decision was based on the equitable exception to the American Rule known as the "common fund." Id. at 1024. There are no cases in Washington where an administrative agency has been allowed to award attorney fees under the common fund exception. Although the common fund doctrine is recognized in Washington, it requires the party seeking fees to have preserved or created a common fund for the benefit of others. Hamm v. State Farm Mutal Automobile Insurance Co., 88 P.3rd 395, 397 (2004). No such fund exists in the case now before the Commission.

CURRAN MENDOZA P.S.
Post Office Box 140
555 West Smith Street
Kent, Washington 98035-0140
(253) 852-2345
(253) 852-2030 (fax)

The Delaware case of Brice v. State of Delaware, Department of Correction, 704 A.2d 1176 (1998) can be distinguished. In Brice, a statute expressly allowed the administrative agency to "make employees whole." The court ruled that this could include an award of attorney fees, even though such an award was not expressly stated in the statute. Id. at 1179. No such authority has been conveyed to the Commission in the State of Washington.

Similarly, the case of Unbelievable, Inc. v. NLRB, 118 F.3d 795 (D.C. Cir. 1997), does not stand for the principles claimed by Stericycle. In fact, the court in Unbelievable relied on a long line of U.S. Supreme Court decisions to state quite clearly that "there must be 'clear support' for the agency's claim that the Congress authorized the agency to order one party to pay the fees of another party." Id. at 802 and 806. There is a presumption against fee shifting. Id. Contrary to Stericycle's opinion of the ruling in Unbelievable, the court there did not conclude "that the Board could have made an award of attorneys' fees based on an explicit finding of bad faith." Motion at 34. Instead, the court ruled that the Board was specifically authorized by statute to award only negotiation costs for aggravated misconduct during the bargaining process, but not to award litigation expenses in the subsequent unfair labor practice proceeding. Unbelievable, Inc., 118 F.3d at 806. The attorney fees sought by Stericycle are for litigation expenses, not something else authorized by any statute or regulation.

Kleen Is Not Liable For Mr. McCloskey's Possible Perjury.

In addition to the reasons stated above, the following analysis is further proof of why an award of attorney fees in this circumstance is beyond the scope of this proceeding.

It is well accepted that a principal is generally not liable for the unauthorized unlawful conduct of its independent contractor. Hickle v. Whitney Farms, Inc., 148 Wn.2d 911, 924, 64 P.3d 1244 (2003) ("Hickle II"). Mr. McCloskey was clearly an independent contractor of Kleen as a hired consultant. Initial Order, ¶83. There is no evidence or finding that Kleen authorized, condoned or participated in any way in the conduct for which Mr. McCloskey has been found to have likely committed perjury. Kleen's application was correctly dismissed, but Kleen should not be further punished for the unauthorized and possibly illegal conduct of Mr. McCloskey.

CURRAN MENDOZA P.S.
Post Office Box 140
555 West Smith Street
Kent, Washington 98035-0140
(253) 852-2345
(253) 852-2030 (fax)

Although there are exceptions to the general liability exclusion of principals for the illegal conduct of independent contractors, the analysis of those factors is not within the scope of the Commission. A principal may be liable if the work is inherently dangerous, if the principal knew of and sanctioned the illegal conduct, or if the principal owed a nondelegable duty of care to persons injured by the work of the independent contractor. Hickle v. Whitney Farms, Inc., 107 Wash.App. 934, 29 P.3d 50 (2001) ("Hickle I"); affirmed and remanded by Hickle II. In Hickle II, the Supreme Court remanded for consideration of whether the principal was liable under the theory of negligent entrustment. 146 Wn.2d. at 925-926. To prove negligent entrustment, one must prove that the principal entrusted the independent contractor with a task, that the independent contractor was reckless or incompetent to handle the task, that the principal knew or should have known of the independent contractor's recklessness or incompetence, that the independent contractor's recklessness or incompetence created an unreasonable risk of harm, and that the injuries of the person seeking compensation were proximately caused by the negligent entrustment. Id.

Mr. McCloskey's work was not inherently dangerous. Thus, to order Kleen to pay attorney fees to Stericycle because of Mr. McCloskey's conduct, the Commission would need to find either that Kleen knew of and sanctioned the illegal conduct, that Kleen owed a nondelegable duty of care to Stericycle, or that all the factors of negligent entrustment are present.

Stericycle has not even argued any of this analysis and as set forth above throughout this answer, Kleen denies that it knew or should have known of Mr. McCloskey's improper conduct. More importantly, this type of analysis should be left for a trial court, not an administrative agency with special purposes. As stated by the Court of Appeals in Cohn:

> While agencies have implied authority to carry out their legislatively mandated purposes, agencies do not have implied authority to determine issues outside of that agency's delegated functions or purpose.

78 Wn. App. at 67.

CURRAN MENDOZA P.S.
Post Office Box 140
555 West Smith Street
Kent, Washington 98035-0140
(253) 852-2345
(253) 852-2030 (fax)

CONCLUSION

The duty of the administrative law judge has been correctly carried out in this proceeding by dismissing the application based on her finding that Mr. McCloskey presented fraudulent information. Now that the application has been dismissed, neither this administrative law judge nor the Commission has the authority to engage in fee shifting through an award of attorney fees as requested by Stericycle as sanctions. Stericycles's motion for sanctions should be denied.

DATED December 13, 2004.

CURRAN MENDOZA P.S.

By _____
Greg W. Haffner, WSBA #19414
Attorneys for Kleen Environmental Technologies, Inc.

CURRAN MENDOZA P.S.
Post Office Box 140
555 West Smith Street
Kent, Washington 98035-0140
(253) 852-2345
(253) 852-2030 (fax)