

ILLINOIS POLLUTION CONTROL BOARD
February 28, 2019

IN THE MATTER OF:)
)
PROPOSED NEW 35 ILL. ADM. CODE 204,) R19-1
PREVENTION OF SIGNIFICANT) (Rulemaking - Air)
DETERIORATION, AMENDMENTS TO 35)
ILL. ADM. CODE PARTS 101, 105, 203, 211,)
and 215.)

ORDER OF THE BOARD (by K. Papadimitriu and C.K. Zalewski):

On February 5, 2019, the Illinois Attorney General (AGO), on behalf of the People of the State of Illinois (People), filed Assistant Attorney General Jason E. James' request for acceptance of appearance (Mot.). Mr. James believes that he did not personally and substantially participate in this rulemaking while employed as an Attorney Advisor at the Board. Mot. at 5. In the alternative, he requests the Board's consent to represent the People in this rulemaking under 35 Ill. Adm. Code 101.112(b), because of no actual or apparent risk of bias or prejudice. *Id.* On February 6, 2019, the Illinois Environmental Protection Agency (IEPA), the proponent of this rulemaking, filed its consent to Mr. James' representation of the People.

In this order the Board first discusses Mr. James' request, then finds that he did personally and substantially participate in this proceeding before leaving the Board but grants the Board's consent under 35 Ill. Adm. Code 101.112(b). The Board then addresses Mr. James' request to consider the motion before the scheduled hearing on February 26, 2019.

REQUEST FOR ACCEPTANCE OF APPEARANCE

On February 5, 2019, Mr. James filed a "Request for Acceptance of Appearance Pursuant to 35 IAC 101.112(b)." Mr. James notes that when this rulemaking proposal was filed on July 2, 2018, he was working at the Board as an Attorney Advisor and resigned from the Board on July 13, 2018. Mot. at 5. The motion cites 35 Ill. Adm. Code 101.112(b), which prohibits former Board employees from representing any person in a Board proceeding in which they personally and substantially participated while employed at the Board, unless the Board and proponents provide a written consent. *Id.* at 5, 7.

Mr. James asks the Board to not disqualify his appearance, which was filed together with the motion. He believes that Section 101.112(b) does not preclude his representation of the People in this proceeding because the "circumstances do not constitute personal and substantial participation." Mot. at 5. Mr. James points to the following circumstances: (1) Mr. James accepted an offer of employment at the AGO on June 27, 2018, before IEPA filed the proposal; (2) the Board did not act in this rulemaking until August 23, 2018, more than a month after he resigned; and (3) the AGO's involvement in this rulemaking never overlapped with Mr. James' employment at the Board, as the AGO did not file an appearance until July 16, 2018. *Id.* at 6.

Mr. James also cites People v. Skokie Valley Asphalt Co., PCB 96-98 (Oct. 16, 2003) as a precedent that supports his interpretation of Section 101.112(b). Mot. at 6.

In the alternative, Mr. James requests that the Board provide the written consent required by Section 101.112(b). He believes that there is neither any risk of actual bias or prejudice, nor any risk of an appearance of impropriety by Mr. James representing the People, because he did not “meaningfully participate” in this rulemaking while at the Board. Mot. at 7.

In addition, Mr. James requests that the Board makes its determination in time to allow him to represent the People at the hearing scheduled for February 26, 2019. Mot. at 8.

DISCUSSION

Mr. James’ motion raises three issues: (1) whether Mr. James “participated personally and substantially” in this rulemaking while he was at the Board, triggering the prohibition of Section 101.112(b); (2) if he did, whether the Board should exercise its discretion to grant a written consent for Mr. James’ representation of the People in this rulemaking; and (3) whether the Board should expedite consideration of Mr. James’ request. The Board addresses all three issues in the order they were raised.

Mr. James Participated Personally and Substantially in this Rulemaking

All persons taking part in a regulatory hearing and proceeding may represent themselves and others and may ask questions of witnesses or give testimony or comment as allowed by the hearing officer. 35 Ill. Adm. Code 102.100(b). However, Section 101.112 prohibits Board Members and Board employees from participating in Board proceedings in case of bias or conflict of interest; a prohibition that a hearing officer cannot waive. 35 Ill. Adm. Code 102.100, 102.100(a) (rulemakings are subject to Part 101 of the procedural rules).

Section 101.112 (b) requires that:

No former Board Member or Board employee may represent any other person in any Board proceeding in which he or she participated personally and substantially as a Board Member or Board employee, unless the Board and, as applicable, all parties or proponents in the proceeding consent in writing after disclosure of the participation. For purposes of subsections (a) and (b), representation includes consulting on legal or technical matters, and Board employee means a person the Board employs on a full-time, part-time, contract, or intern basis. 35 Ill. Adm. Code 101.112(b).

Mr. James argues that, although he was still at the Board at the time this rulemaking was filed, he at no point participated personally or substantially. Mot. at 5-6. The Board considers two of the factors he provides in support to be irrelevant to the Board’s consideration: (1) that Mr. James accepted an offer of employment at the AGO before IEPA filed this proposal; and (2) that AGO involvement in this rulemaking never overlapped with Mr. James’ employment at the Board. Neither of them addresses whether Mr. James participated in this rulemaking while still

at the Board, and whether his participation was personal and substantial. The Board, thus, only addresses the third factor – that the Board did not act in this rulemaking during the time Mr. James was still employed at the Board.

Mr. James points to the Board’s decision in People v. Skokie Valley Asphalt Co., PCB 96-98 (Oct. 16, 2003), to support his position. In Skokie, the Board found that an Attorney Advisor whose Board Member voted on several decisions in a proceeding participated personally and substantially in that proceeding, even if he did not draft any of the orders personally. Skokie, PCB 96-98, slip op. at 3.

The Board stated in Skokie that “[i]t is presumed that all Board Members reach well reasoned decisions on each case they vote on, and are adequately prepared to make such decisions. Attorney assistants necessarily play an integral part in preparing their Board Member for each Board Meeting”. Skokie, PCB 96-98, slip op. at 3. The Board here also recognizes that the work of an Attorney Advisor commences once the Board receives a filing, because it becomes available to all Attorney Advisors and other Board staff for review and discussion with the Board Members. Mr. James does not argue that he was precluded from participating in any initial work or internal discussions in this proceeding after it was filed with the Board. To address cases with which an employee was involved *before* joining the Board, the Board screens its employees and shields them from working on those cases. Mr. James does not argue that the Board took any such measures with respect to his participation in this proceeding.

Under these circumstances, the Board finds that Mr. James’ participation in this proceeding while employed at the Board did amount to “personal and substantial”. Next, the Board considers whether it should, nevertheless, exercise its discretion under Section 101.112(b) to grant Mr. James a consent to represent the People in this proceeding.

The Board Consents to Mr. James Appearance on Behalf of the People

Section 101.112 (b) is not a blanket prohibition. It allows the Board and parties or proponents of the proceeding to waive a conflict disclosed by former Board Members and Board employees on case-by-case basis.

In this case, Mr. James disclosed his prior participation in this proceeding, and obtained IEPA’s written consent as the proponent. This completes two of the requirements of Section 101.112(b). Section 101.112(b) also requires a written consent of the Board. The Board has discretion whether to allow a representation based on the circumstances of a case.

In this rulemaking, the Board grants its consent because the Board believes that allowing Mr. James to represent the People in this rulemaking will not prejudice any participant. At the time Mr. James left the Board, no participant other than the proponent, which consents to Mr. James’ representation, had filed any substantive information or stated their position in this proceeding. Mr. James, thus, did not have access to or an opportunity to discuss any participant’s position, other than the proposal itself. Also, none of the participants filed objections to Mr. James’ appearance. Considering these circumstances, the Board finds it appropriate to consent to Mr. James’ representation of the People in this proceeding.

The Board Deems Necessary to Afford Full Response Time Before Its Decision

The Board makes decisions only at its open meetings that are sufficiently noticed to the public. 35 Ill. Adm. Code 101.108(d). Mr. James's request is, by definition, a "motion." 35 Ill. Adm. Code 101.202 ("Motion" means "a request made to the Board or the hearing officer for the purposes of obtaining a ruling or order directing or allowing some act to be done in favor of the movant."); *see also* 35 Ill. Adm. Code 101.500(a). If a person desires the Board to rule on a motion before a hearing, that motion should be filed 21 days prior to the regularly scheduled Board meeting before the noticed hearing date. 35 Ill. Adm. Code 101.508. Motions filed late will be considered if the time permits. *Id.* The Board affords a 14-day period for any person to respond to a motion; and the Board will not grant any motion before that period expires unless allowing 14 days would result in undue delay or material prejudice. 35 Ill. Adm. Code 101.500(d).

Mr. James' motion was filed on February 5, 2019. Mr. James asks the Board to consider his motion in time for him to participate at the February 26, 2019 hearing in this rulemaking. A regularly scheduled Board meeting preceding that hearing was on February 14, 2019. Mr. James motion was filed only nine days before that meeting.

Mr. James' motion made no argument that any undue delay or material prejudice would result if the Board did not expedite consideration. The Board found no justification to do so. The AGO provided no reasons for the Board to believe it could not file an appearance of another attorney to participate at the hearing, if the Board does not rule on the motion on time.

Without any justification provided, the Board found it necessary to allow participants of this rulemaking a full 14-day period to respond to this motion, to avoid any potential prejudice against any of the participants or any appearance of bias. Given when the motion was filed, the Board could not have granted Mr. James' request to consider his motion before the scheduled February 26, 2019 hearing.

CONCLUSION

The Board finds that circumstances of Mr. James' participation in this proceeding before leaving the Board amount to personal and substantial participation. The Board, however, for the reasons stated in this order, consents to Mr. James' representation of the People in this proceeding under Section 101.112(b). Mr. James satisfied requirements of Section 101.112(b): disclosed his prior participation and obtained consent from both the Board and the rulemaking proponent. The Board, therefore, accepts his appearance in this proceeding on behalf of the People.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 28, 2019, by a vote of 5-0.

A handwritten signature in cursive script that reads "Don A. Brown". The letters are fluid and connected, with a prominent loop on the "D" and a long, sweeping tail on the "B".

Don A. Brown, Clerk
Illinois Pollution Control Board