ILLINOIS POLLUTION CONTROL BOARD
July 22, 1993

PEOPLE OF THE STATE OF ILLINOIS,	)	
Complainant,	)	
v.	)	PCB 92-164
	)	(Enforcement)
BERNIECE KERSHAW and DARWIN DALE KERSHAW d/b/a KERSHAW MOBILE PARK HOME,	)	
Respondents.	)	

ORDER OF THE BOARD (by G. T. Girard):

On October 29, 1992, the Attorney General, on behalf of the People of the State, filed this enforcement proceeding against the respondents Berniece and Darwin Kershaw. The complaint alleges violations of §§12 and 18 of the Illinois Environmental Protection Act, 415 ILCS 5/12, 5/18 (1992) pertaining to water treatment and discharges. On February 17, 1993, complainant moved for summary judgment on its complaint. No appearance was filed on behalf of the Kershaws, who did not respond to the motion.

On April 8, 1993, the Board granted the complainant's Motion for Summary Judgment and levied a $250,000 penalty, the sum requested by the Complainant. [1]

On April 27, 1993, Attorney Richard M. Kuntz filed an appearance on behalf of the Kershaws, and on May 12, 1993 Mr. Kuntz filed a motion for reconsideration of the summary judgment order. On May 24, 1993, the Complainant filed a motion for extension of time to file a response to the motion for reconsideration as well as a motion to disqualify Mr. Kuntz from representing the Kershaws in this proceeding. The motion correctly states that Mr. Kuntz has served and continues to serve

---

[1] As detailed in the Board's order, respondents could have been assessed seven hundred sixteen million one hundred thousand dollars ($716,100,000), based on the maximum penalties allowed by the Environmental Protection Act (415 ILCS 5/31 (1992) for the number and duration of the violations alleged. (Order of April 8, 1993, p. 4).

as a hearing officer for the Board in other cases [2]. The Complainant asserts that "Mr. Kuntz's simultaneous employment by the Board and the Respondents creates a conflict of interest that requires Kuntz to be disqualified as Respondent's attorney in this proceeding". The Board granted the People's motion for extension of time by order of May 27, 1993, which granted a 14-day extension from the date of the order disposing of the motion for reconsideration.

On June 8, 1993 Mr. Kuntz filed a memorandum, supported by affidavit, in opposition to the motion to disqualify by and through his attorney, Lee R. Cunningham. Pursuant to leave granted by the Board on June 17, 1993, the Complainant filed a reply in response to Mr. Kuntz memorandum on June 25, 1993 [3].

For the reasons stated below, the Board denies the Complainant's motion to disqualify Mr. Kuntz from representing the respondents in this case. In summary, the Board finds that there is no conflict of interest in Mr. Kuntz's representation of the Kershaws in this case and his service to the Board as hearing officer in other, unrelated cases.

FACTUAL BACKGROUND

There is no disagreement between the parties as to the factual circumstances in this case, but only as to the interpretation to be placed on those facts [4]. Mr. Kuntz was

---

[2] The Board hearing officer in this case, since its inception, has been Edwin H. Benn. Mr. Kuntz has had no involvement in this case on behalf or at the behest of the Board.

[3] The People's May 24, 1993 motion to disqualify will be cited a "Motion", Mr. Kuntz June 8, 1883 memorandum in opposition as "Resp. Memo", and the People's June 25, 1993 reply in response as "Reply".

[4] The Board notes that the factual circumstances concerning Mr. Kuntz's employment as a hearing officer with the Board were provided by Board staff to the Office of the Attorney General (AGO) at its request prior to the filing of the motion. While the motion might appear to indicate that this occurred through a formal Illinois Freedom of Information Act (FOIA) (Ill. Rev. Stat. ch. 116, par. 201 et seq. _____ ILCS _____) request/response process (Motion, p. 2), such was not the case. As this type of information related to the disbursement of public funds is clearly "public information", the information was provided by staff to the AGO and to Mr. Kuntz once a telephone inquiry was followed by a written request. As the Board and members of its staff have repeatedly stated at conferences and other public meetings, the

appointed by the Board as a hearing officer in December of 1991. He has served as hearing officer in nine cases: four underground storage tank reimbursement appeals, three air permit appeals, an administrative citation case, and a citizens' noise enforcement case. Mr. Kuntz stated in the affidavit accompanying his motion that none of these cases were anticipated to go to hearing, having been closed, the subject of open waivers, or voluntary motions to dismiss. (Resp. Memo. Affidavit, par. 7). The complainant was not a party to, nor did the Attorney General appear in, any of those proceedings. (Id. at par. 4). As of the date of the Complainant's motion, the Board had paid Mr. Kuntz $1,885.13 for his services in these nine cases since his appointment as hearing officer. (Motion, p. 2).

The relationship of a hearing officer with the Board is governed by contract, which also fixes rates of compensation per case accepted and per day of hearing. A copy of Mr. Kuntz contract is attached as Exhibit 1 to his affidavit [5]. The hearing officer is not an employee of the Board, but is instead an independent contractor. As Kuntz correctly notes, the contract for July 1, 1992 through June 30, 1993 "does not place any restrictions on his ability to represent clients before the Board or otherwise". (Resp. Memo. p. 2).

The duties of a hearing officer are specified in the Board's procedural rules at 35 Ill. Adm. Code 101.220 and 103.200. Unlike the practice at many other agencies, the Board's hearing officers do not make rulings or recommendations concerning the merits or outcome of any case. As Mr. Kuntz states, the hearing officers' primary functions is to "provide that a clear and concise [hearing] record is made available to the Board". (Resp. Memo. p. 3). Duties include scheduling and conducting of pre-hearing conferences and hearings, receiving and ruling on the admissibility of evidence, on-record assessment of the credibility of witnesses, and establishment of briefing schedules. All rulings and orders of the hearing officer are appealable to the Board. The Board additionally notes that hearing officers receive procedural and administrative instructions during the course of a case from Board staff, and are invited to call Board staff for any needed procedural and administrative advice during the course of a case.

As to the circumstances surrounding his involvement in this

Board does not require, and indeed disfavors, that information be requested by use of formal FOIA procedures.

[5] The Board notes that it uses only one standard contract and compensation schedule. Contracts are for one year periods, running from July 1 through June 30 to coincide with the state's fiscal year.

case, Mr. Kuntz states in his motion that:

> When respondents sought to retain Mr. Kuntz to represent them in this proceeding, Mr. Kuntz, after disclosing to respondents his status as a part-time hearing officer and obtaining their consent to his representation of them, reviewed the Illinois Environmental Protection Act, Board regulations and his contract with the Board and could find no provisions concerning a hearing officer serving as counsel in an unrelated proceeding before the Board. (Kuntz Aff. at pars. 4, 6, 7). Mr. Kuntz then telephoned [an unnamed] Board attorney to determine whether the Board had any rules or policies concerning a hearing officer representing a private client in a proceeding before the Board which is unrelated to the cases over which the hearing officer has presided or is presiding. (Kuntz Aff. at par. 7). The staff attorney informed Mr. Kuntz that there were no regulations, rules, or policies prohibiting such representation. (Kuntz Aff. at par. 7). On the contrary, the staff attorney told Mr. Kuntz that other hearing officers have previously represented private clients before the Board in proceedings unrelated to matters in which they acted as hearing officer. (Kuntz Aff. at par. 7).

Mr. Kuntz goes on to note that on May 24, 1993, Board staff provided him with a copy of an opinion of the Committee on Professional Responsibility of the Illinois State Bar Association (ISBA) [6].

As noted in ISBA Opinion No. 88-9, that opinion specifically overruled the Committee's Opinion No. 408 (July 13, 1974) which indicated that a private attorney who serves as a hearing officer for a state board should not accept employment from a defendant-respondent in unrelated actions instituted before the Board during the time he is acting as hearing officer and for a period of one year thereafter. In ISBA Opinion No. 88-9, the Committee noted that its overruling Opinion No. 408 was consistent with Opinion No. 557, dated November 5, 1976, in which the Committee concluded that an attorney who represents private clients before this Board in unrelated matters is not precluded from representing the Board in appellate matters on a case by case basis.

The Board affirms that the advice Mr. Kuntz received from the unnamed staff attorney is consistent with the Board's policy

---

[6] A copy of this opinion was also furnished to the AGO by Board staff prior to the filing of its motion to disqualify.

and practice. Prior to issuance of ISBA Opinion No. 88-9 in March of 1989, the Board did not allow its hearing officers to represent private clients before it in reliance on Opinion No. 408. Upon receipt of the Opinion No. 88-9 from the hearing officer who brought the question to the ISBA Committee, the Board began to allow its hearing officers to appear before it on behalf of private clients. Mr. Kuntz is not the only hearing officer currently on the Board's roster who is appearing before the Board on behalf of clients in cases unrelated to those in which he serves as hearing officer. The Board further observes that this is the first case in which the Board's policy and practice in this area has been challenged.

STANDARDS FOR MOTION TO DISQUALIFY

Mr. Kuntz asserts, and the Complainant does not challenge, that the standard of proof required for the granting of a motion to disqualify is a high one. Mr. Kuntz states that the granting of a motion to disqualify

> is a drastic measure which courts should hesitate to impose except when absolutely necessary. A disqualification of counsel, while protecting the attorney-client relationship, also serves to destroy a relationship by depriving a party of representation of [its] own choosing.... [S]uch motions should be viewed with extreme caution for they can be viewed as techniques for harassment.

Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 722-723 (7th Cir. 1982) (emphasis added). Accord SK Handtool Corp. v. Dresser Industries, Inc., 1993 Ill. App. LEXIS 549, 39 (1st Dist. 1993); Miller v. Norfolk & Western Ry. Co., 183 Ill. App. 3d 261, 538 N.E.2d 1293, 1297 (4th Dist. 1989). Because of the drastic nature of a motion to disqualify, the movant must make a strong showing that disqualification is necessary. Id.; Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983).

THE BASES FOR THE MOTION TO DISQUALIFY

The Complainant asserts that Mr. Kuntz should be disqualified from representing respondents in this case due to alleged violation of Rule 1.7(a) and 1.7(b) of the Illinois Rules of Professional Conduct and in furtherance of the public interest of preservation of public confidence in the integrity of the Board's deliberative process.

Rule of Professional Conduct 1.7(a)

Rule 1.7(a) of the Illinois Rules of Professional Conduct

provides:

> A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the client; and
>
> (2) each client consents after disclosure.

Illinois Supreme Court Rules, Art. VIII, Rule of Professional Conduct 1.7(a).

The Complainant asserts that the Board, as a governmental body cannot consent to dual representation.

> an attorney may not represent both a governmental body and a private client even if disclosure is made and the parties agree to such dual representation. "Where the public interest is involved, disclosure alone is not sufficient since the attorney may not represent conflicting interests even with the consent of all concerned".

In re LaPinska, 72 Ill.2d 461, 471, 381 N.E.2d 700, 704 (1978), quoting In re A. & B., 209 A.2d 101, 103 (N.J. 1965). In furtherance of this contention, the Complainant states that:

> The Board is a client of Kuntz in that the Board has employed and currently employs him as a hearing officer. Kuntz's employment by the Board clearly would be adverse to the Respondents. As an employee of the Board, Kuntz is a paid agent of the State of Illinois. The Complainant in this proceeding is the People of the State of Illinois. (Motion, p. 2-3).

Mr. Kuntz responds, however, that the Complainant's reliance on this rule is misplaced. He asserts that no attorney-client relationship exists between the Board and its hearing officers, and that this rule applies only when there is an already-existing attorney-client relationship which will conflict with a new representation that the attorney seeks to undertake. (Resp. Memo. p. 6).

Among other authorities, Mr. Kuntz cites ISBA Opinion No. 88-9. In the ISBA Opinion, as in this case, a private practitioner who served as a part-time hearing officer for the

Board sought to represent a private client in a proceeding before the Board. As in this case, the private client had never appeared before the lawyer in his capacity as a hearing officer. As in this case, there was nothing in the practitioner's contract with the Board limiting his ability to practice law. As in this case, the practitioner, in his capacity as a hearing officer, made no decisions on the merits of the cases over which he presided and made no recommendations to the Board regarding the merits of those cases. The ISBA Committee concluded that the predecessor of Rule 1.7(a) (which was substantially similar to current Rule 1.7(a)) did not preclude the practitioner from representing the private client before the Board because "the Hearing Officer does not have an attorney-client relationship with the Board, but rather is employed on an independent contractor basis". (ISBA Opinion No. 88-9 at 2, emphasis added).

The Complainant attempts to distinguish this opinion on the grounds that the instant case involves an enforcement action and the opinion involved a variance petition. (Mot. pp. 6-7) However, this is a "distinction without a difference" to the determination of whether an attorney-client relationship exists between the Board and its hearing officers. The Board does not consider its employment relationship with its hearing officers to be an attorney-client relationship. The undisputed facts of this case are identical to those presented to the ISBA Committee.

The Board finds that Rule 1.7(a) does not apply in this case.

Rule of Professional Conduct 1.7(b)

Rule 1.7(b) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after disclosure.

Illinois Supreme Court Rules, Art. VIII, Rule of Professional Conduct 1.7(b).

The Complainant asserts, without more, that:

> "[Mr.] Kuntz's representation of the Respondents may be materially limited by

> [Mr.] Kuntz's duties to the State of Illinois by virtue of his status as a Board hearing officer". (Motion at 4).

Mr. Kuntz argues that the Complainant does not explain how his representation of Respondents in this enforcement proceeding "may be" materially limited by his record-compiling duty as a hearing officer in unrelated cases which bear no relationship whatsoever to this enforcement proceeding. He notes that "vague and general inconsistencies giving rise to hypothetical conflicts in the mind of an opposing party will not justify so drastic a measure as disqualification". Miller v. Norfolk & Western Ry. Co., 538 N.E.2d at 1297 (citation omitted).

Mr. Kuntz believes that he has already demonstrated that he will vigorously represent Respondents in this proceeding. He notes that he has already filed a Motion to Reconsider the Board's April 8, 1993 order and another motion in opposition to the Attorney General's petition to recover its fees. Finally, Mr. Kuntz argues that Complainant has no standing to assert a Rule 1.7(b) violation as a basis for disqualification in this case in any event. The attorney-client relationship protected by Rule 1.7(b) in this case is the relationship between Mr. Kuntz and Respondents. He argues that Complainant is a stranger to this relationship, and as such, has no standing to complain about a contrived "material limitation" of that relationship. Evink v. Pekins Ins. Co., 122 Ill. App. 3d 246, 460 N.E.2d 1211, 1214 (2d Dist. 1984); In the Matter of Joel E. Sandahl, 980 F.2d 1118 (7th Cir. 1992) (same); Pacific Dunlop Holdings Inc. v. Barosh, 1993 U.S. Dist. LEXIS 955, 13 (N.D. Ill. 1993) (same).

The Board is persuaded by Mr. Kuntz arguments and finds that the Complainant's pleading fails to demonstrate any "material limitation" on his ability to represent the Kershaws in this case.

The Public Interest

The most troublesome to the Board of the Complainant's challenges is the more general charge that, in various ways, the public interest is not well served by the Board's policy and practice of allowing its hearing officers to appear before it as the attorney for private clients in cases unrelated to those in which it serves as hearing officers. The essence of this argument is twofold, that:

1) "[Mr.] Kuntz's relationship with the Board may cause the Board to favor the Respondents, thereby undermining the Board's impartiality...prejudic[ing] the Complainant, the People of the State of Illinois", (Motion, pp. 7-8), and

2) "[Mr.] Kuntz's representation of the Respondents before the Board for which Kuntz serves as a hearing officer, creates the appearance of a conflict of interest and cannot be permitted. Impartiality is an intrinsic and indispensable feature of the Board's role, and Kuntz's dual representation may frustrate that necessary impartiality. (Motion, p. 9).

In support of these contentions, the Complainant cites In Re La Pinska, 72 Ill. 2d 462, 381 N.E.2d 700 (1978), Miller v. Norfolk & Western Ry. Co., 183 Ill. App.3d 261, 538 N.E. 3d 1293 (4th Dist. 1989), and In Re Vrdolyak, 137 Ill. 2d 407, 560 N.E.2d 840 (1990).

The complainant suggests that in this context the ISBA Opinion is:

> of no precedential value, and the Board should not rely on it. Complainant does not question the sincerity or intentions of the members of the Committee. The Committee members, however, are not accountable to the public and to the People of the State of Illinois. Rather, that duty belongs to the Board and to the Office of the Attorney General. Complainant believes that the ISBA opinion is significantly distinguishable from the instant case. Further, complainant disagrees with the findings and conclusions in that opinion. (Reply, p. 4-5)

Respondents distinguish two of the cases cited by complainant, La Pinska and Vrdolyak as being attorney disciplinary cases involving situations in which the attorneys in question accepted private employment found to be in direct conflict with their public duties as either attorneys for their governmental client, or as an elected official of a governmental entity being sued by the private client. In the third case, Miller, the appellate court found that disqualification was not proper where the city and a private client waived a potential conflict of interest in a case in which a law firm retained by a city represented the private client in a case with respect to the same subject matter as it had previously represented the city. (Resp. Memo. pp. 12-14).

While the Board believes that the cases cited by the Complainant are not controlling here, the Board certainly agrees with the general proposition that "[i]f we are to maintain public confidence in our system of government and the legal profession, attorneys who serve as public officials must avoid not only direct conflicts of interests, but also any situation which might appear to involve a conflict of interest". In re Vrdolyak, 137 Ill.2d 407, 425, 560 N.E.2d 840, 847 (Ill. 1990), quoting Higgins

v. Advisory Commission on Professional Ethics, 372 A.2d 372, 373 (N.J. 1977).

In this case Mr. Kuntz, acting on advice from the Board staff consistent with an ISBA ethics opinion relied upon by the Board, has not committed any impropriety in appearing in this case as the attorney for the Kershaws, who consented to the representation after full disclosure of Mr. Kuntz's situation. The Board has no doubt that Mr. Kuntz will vigorously represent his clients. The Board cannot and will not find that the possibility of creation of public misunderstanding generally of the impartiality of the Board and the relationship of the Board and its Hearing Officers amounts to the "strong showing" necessary to deprive a party of the attorney of its choice. [7]

The Board is not, however, unheeding of the concern expressed by the AGO. The Board, and its newly appointed Chairman, are in the process of reevaluating many of the Board's historic policies and practices. While the Board does not commit to conducting regulatory hearings concerning this issue (Resp. Memo. p. 16, par. 2), the Board will state that its consideration of these issues will not end with the disposition of these motions.

Again, in conclusion, the Complainant's motion to disqualify is denied. Complainant's response to respondents' motion to reconsider is due to be filed on or before August 6, 1993.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 22nd day of July, 1993, by a vote of 7-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

---

[7] Indeed, the Board notes that the Kershaws have, by handwritten letter received by the Board on July 3, 1993, expressed their desire to have Mr. Kuntz represent them and belief that the Complainant's instant motion is part of a pattern of harassment by government. (See esp. p. 6). (This letter was mailed to the Board, whereupon the Clerk made service of the letter on counsel for the parties.)