

ILLINOIS POLLUTION CONTROL BOARD
November 7, 1991

GEORGE WEBER CHEVROLET,)
)
 Petitioner,)
) PCB 91-182
v.) (Underground Storage Tank Fund
) Reimbursement Determination)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (By J.C. Marlin):

This matter is before the Board upon respondent's "findings" and a motion to dismiss instanter filed October 25, 1991 by the Illinois Environmental Protection Agency ("Agency"). On October 28, 1991 the Agency filed a motion to file its record instanter. The motion to dismiss seeks to have the petitioner's underground storage tank fund reimbursement determination appeal dismissed on jurisdictional grounds.

The Board had previously requested the parties comment on the jurisdictional issue via Board order dated October 10, 1991. The filings were to be received by October 22, 1991. Only the Agency has responded to the Board's request. The Agency's motion to file the motion to dismiss instanter is granted. We now turn to the substance of the Agency's motion to dismiss.

The Agency argues that petitioner's appeal, filed September 20, 1991, came far too late to satisfy the 35 day appeal period prescribed by Section 22.18(b) of the Act. The Agency's partial denial letter was dated January 8, 1991. Relying upon Kevin Holmes v. Aurora Police Pension Fund Board of Trustees, et al., No. 2090-1432 (2nd Dist., slip opinion August 9, 1991) the Agency asks the Board to recognize that Johnson v. State Employees Retirement System, 155 Ill. App. 3d 616, 508 N.E.2d 351 (1987), applies only to matters where applicant had a recognized property interest. The Johnson court case had imposed a duty upon an agency to inform an applicant of its appeal rights following denial. Because here the legislature only gave an applicant the potential to receive reimbursement for certain required expenditures, and not a property interest, the Agency argues, any failure to notify the applicant of its appeal rights would not toll the appeal period.

The burden of asserting a protectible property interest and a failure to give due process lies with the petitioner. Baker v. DuPage County, 703 F. Supp. 735 (N.D. Ill. 1989). Because the petitioner has failed to respond to the Board's order, we cannot find that petitioner's burden of demonstrating a protectible property interest has been made. Therefore, the matter is

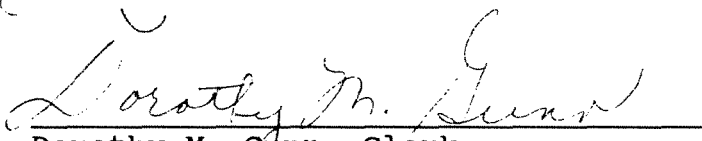
dismissed. We make no finding on the substantive issue itself however. The Agency's request to file the record instanter is mooted.

Section 41 of the Environmental Protection Act, Ill.Rev.Stat. 1989, ch. 111 1/2, par. 1041, provides for appeal of Final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

Board Member J.D. Dumelle dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above and Order was adopted on the 7th day of November, 1991 by a vote of 6-1.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board