

ILLINOIS POLLUTION CONTROL BOARD
October 23, 1986

IN THE MATTER OF:)
)
HAZARDOUS WASTE PROHIBITIONS) R 86-9
)

ORDER OF THE BOARD (by J. D. Dumelle):

This matter comes before the Board upon a October 6, 1986 motion for disqualification filed on behalf of Citizens for a Better Environment (CBE). On October 3, 1986 CBE filed a motion for recusal directed to Board Member J. Theodore Meyer to which the Illinois Environmental Regulatory Group responded on October 6, 1986. On that date Board Member Meyer stated at a special Board meeting that he would not recuse himself. This motion was subsequently filed.

The Board will not reach the merits of this motion since it finds that matters such as this should primarily be determined by the Board Member involved. Absent compelling circumstances the Board will not assert any authority it may have to order one of its members not to participate in any particular vote. Nowhere in the Act is such authority expressly granted to the Board, and CBE has cited no case law indicating that the Board has any such powers.

Section 7(a) of the federal Administrative Procedure Act states that "on the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter a part of the record and decision in the case." However, there is no similar state provision and, as pointed out in The United Corporation, 32 S.E.C. 633,634 (1951), that section "does not relate to charges of bias against members of the [Securities and Exchange] Commission acting in their quasi-judicial capacity. See S. Rep. No. 752, 79th Cong. 2nd Sess. (1946) 21; H.R. Rep. No. 1980, 79th Cong., 2nd Sess. (1946) 34-35." Furthermore, the S.E.C. has held that "it does not have the authority to rule upon the qualifications of its members, and that each individual member must determine his own qualification." Otis & Co., 31 S.E.C. 380 (1950). Similarly, the Nuclear Regulatory Commission has stated that "consistent with the Commission's past practice, and the generally accepted practice of the federal courts and administrative agencies, the Commission has determined that disqualification decisions should reside exclusively with the challenged Commissioner and are not reviewable by the Commission." Pacific Gas and Electric Co., 48 Ad. L. 819 (NRC 1980). It so held despite the fact that by

regulation the Commissioners do review Appeal Board member's decisions not to disqualify themselves. Pacific Gas and Electric Co., 48 Ad. L. 820 (NRC 1980). Similarly, the FTC has traditionally viewed requests for disqualification as a matter primarily to be determined by the individual member concerned. Hearst Corp., 30 Ad. L. 1127 (FTC 1972). In Standard Oil Company of California et al. 29 Ad. L. 2nd 338 (FTC 1971) the FTC set forth its reasoning as follows:

The Procedure that was followed here is that which the Commission has always followed where motions to disqualify individual members of the Commission have been filed. As reiterated many times by the commission in previous cases:

"Section 7(a) of the Administrative Procedure Act clearly empowers the Commission to determine whether a presiding officer conducting a 'hearing' on behalf of the Commission is subject to 'personal bias or disqualification.' It is less clear that it was meant to apply to participation of individual agency members in final or appellate determinations. The inquiry called for by a motion for disqualification is necessarily subjective in nature. It is extremely difficult and delicate for a tribunal to assume the responsibility of weighing, objectively, the ability of one of its own members to make an objective judgement in a case. Further, the existence of such a power to disqualify carries with it an inherent danger of abuse, as a potential instrument for suppression of dissent.

"Under the Commission's practice, disqualification is treated as a matter primarily for determination by the individual member concerned, resting within the exercise of his sound and responsible discretion."

American Cyanamid Company, 59 FTC 1488 (Order of December 20, 1961); id, 60 FTC 1885 (Order of February 5, 1962 denying motion to reconsider); Campbell Taggart Associated Bakeries, Inc., 62 FTC 1510 (Order of May 7,

1963); *id.*, 62 FTC 1511 (Order denying reconsideration). *Bakers of Washington, Inc.*, 66 FTC 1569; *Sun Oil Co.*, 66 FTC 1570. See also *Carvel Corporation*, 66 FTC 1577. Furthermore, this policy is consistent with the practice followed by the Supreme Court and other Federal and State multimembered judicial tribunals when a motion to disqualify a member is filed, where there is no clear statutory authorization for the court to disqualify one of its members. Frank, "Disqualification of Judges." 56 Yale LJ 605, 612. See also *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 US 897 (1945), (statement of Justice Jackson): 'Because of this lack of authoritative standards it appears always to have been considered the responsibility of each Justice to determine for himself the propriety of withdrawing in any particular circumstances.' We believe that the procedure used in this case was proper and consistent with the law.

The Federal Communications Commission reached a somewhat different result in *In the Matter of Segal and Smith*, 5 F.C.C. 3 (1937) wherein it held that "the Commission has jurisdiction to hear and determine a motion to disqualify a member of the Commission from participation in and consideration of a judicial or quasi-judicial proceeding in which he is challenged on grounds of personal bias, malice or prejudice." 5 F.C.C. 11. Support for that position is found in Section 4(j) of the Communications Act of 1934 as well as the "inherent jurisdiction and duty" of the Commission. 5 F.C.C. 12. However, the matter before the Board is neither judicial nor quasi-judicial, but is quasi-legislative.

Board Members are appointed by the governor and confirmed by the Senate. They are equal and independent. To allow a majority of the Board to determine the eligibility to vote of an individual Member in a particular regulatory proceeding would be to travel a road fraught with hazards. The Board does not believe that in a regulatory proceeding it should exercise its authority, if any, to rule on the qualification of one of its members to participate in the decision absent compelling circumstances. No such compelling circumstances have been demonstrated here.

CBE's motion to disqualify is hereby denied.

IT IS SO ORDERED.

Board Member J. Theodore Meyer concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 23rd day of October, 1986 by a vote of 6-0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board