

ILLINOIS POLLUTION CONTROL BOARD  
October 16, 2003

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
v. ) PCB 96-98  
) (Enforcement – Water)  
SKOKIE VALLEY ASPHALT, CO., INC., )  
EDWIN L. FREDERICK, JR., individually )  
and as owner and president of SKOKIE )  
VALLEY ASPHALT, CO., INC., and )  
RICHARD J. FREDERICK, individually and )  
as owner and vice president of SKOKIE )  
VALLEY ASPHALT, CO., INC., )  
)  
Respondents. )

ORDER OF THE BOARD (by T.E. Johnson):

This matter is before the Board on a September 9, 2003 motion to dismiss the second-amended complaint and to recuse attorney Joel J. Sternstein (Sternstein), filed by Skokie Valley Asphalt Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick (respondents). On September 11, 2003, the complainant filed a response to the motion.

For the reasons articulated below, the Board grants the motion in part. The Board finds that no prejudice or bias result from Sternstein's prior involvement. However, in order to avoid even the appearance of impropriety, Sternstein is disqualified from appearing in this matter. The Board declines to dismiss the second-amended complaint or void all orders issued regarding the second-amended complaint.

**MOTION TO DISMISS**

In their motion, the respondents assert that the complainant filed a second-amended complaint on July 26, 2003, and that concurrent with the filing of the second-amended complaint, Sternstein filed an appearance as co-counsel on behalf of the complainant. Mot. at 1-2. The Board accepted the complaint on October 17, 2002. The respondents contend that Sternstein was an employee of the Board for the period during which the instant matter was before the Board, and that in his capacity as an employee of the Board, he participated personally and substantially in the proceedings. Mot. at 2.

The respondents argue that Board regulations provide, *inter alia*, that no former 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 employee, unless the Board, and the applicable parties consent in writing after disclosure of the participation. See 35 Ill. Adm.

Code 101.112(b). The respondents assert that Sternstein did not disclose his earlier participation in this matter to the respondents. Mot. at 2.

The respondents assert that they have not consented in writing to allow Sternstein to represent the complainant in this matter. Mot. at 2. Finally, the respondents argue that any matters filed by the complainant and any orders issued by the Board subsequent to Sternstein's appearance are tainted by the apparent bias and conflict of interest. *Id.*

The respondents ask that the Board dismiss the second-amended complaint, and also void all orders issued regarding the second-amended complaint. Mot. at 2. The respondents further ask that Sternstein be recused from further representing the complainant in this matter. Mot. at 2-3.

### **RESPONSE**

In response, the complainant argues that since the respondents' motion to dismiss was not filed within 30 days after service of the second-amended complaint, it should be denied. Resp. at 1. The complainant asserts that by the time the Board issued the October 17, 2002 order accepting the second-amended complaint, Sternstein's entry of appearance had been on file for months. Resp. at 2.

The complainant acknowledges that Sternstein is a licensed attorney who previously worked for the Board in the capacity of attorney assistant, whose duties included drafting opinions and orders for the Board. Resp. at 3. The complainant argues that respondents' assertion that Sternstein personally and substantially participated in this case, is misplaced in that there is not a reference to any work, order or opinion written by Sternstein, nor is there a reference to any work, order or opinion written by Board Member Nicholas Melas, for whom Sternstein worked. Resp. at 2-3. The complainant maintains that respondents did not provide a basis for an inference that Sternstein personally and substantially participated in this case while working at the Board. Resp. at 3. The complainant asserts that this case was never assigned to Board member Melas during the time Sternstein worked for the Board (from July 1998 through June 2002). *Id.*

The complainant asserts that, when hired, Sternstein advised the Attorney General's Office (AGO) of the pending cases he worked on at the Board where the AGO represented a party. Resp. at 4. The complainant contends that Sternstein never worked on this case at the time he was employed by the Board so there is no conflict and no basis for recusal. *Id.*

The complainant attaches an affidavit sworn to by Sternstein to the response. In the affidavit, Sternstein states that during his tenure at the Board, Board Member Melas and he were responsible for drafting the opinions and orders on Board Member Melas' assigned enforcement cases. Aff. at 1. Sternstein states that the instant case (People v. Skokie Valley Asphalt, PCB 96-98) was not assigned to Board Member Melas during Sternstein's tenure at the Board. Aff. at 2. Sternstein states that he never drafted any opinions or orders or had any other involvement pertaining to Skokie Valley Asphalt during his tenure at the Board. Aff. at 2. Sternstein states that when he began working for the AGO, he provided a list of the pending enforcement cases

that he was working on while at the Board, and that he would not, nor would he be allowed to, work on enforcement cases for the AGO, that he previously worked on at the Board. *Id.* Sternstein states that during his tenure at the Board, he never participated personally and substantially in any proceeding related to Skokie Valley. *Id.*

### **DISCUSSION**

Generally all motions to strike, dismiss or challenge a pleading must be filed within 30 days after service of the pleading unless the Board determines that material prejudice would result. *See* 35 Ill. Adm. Code 101.506. The complainant is correct in arguing that any motion attacking the second-amended complaint was required to be filed by November 2002. However, as the respondents assert that Sternstein's employment with the Board was not disclosed, the Board finds that the respondents would be materially prejudiced were the motion to dismiss not heard. Accordingly, the motion will be considered.

No former 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 employee, unless the Board, and the applicable parties consent in writing after disclosure of the participation. 35 Ill. Adm. Code 101.112(b). As neither disclosure was made nor consent given, the only issue is whether or not Sternstein participated personally and substantially in the instant matter while an employee of the Board. The complainant argues that Sternstein's involvement did not rise to the level of "personal or substantial" participation. The Board must, therefore, determine what constitutes "personal and substantial" participation.

Although the case was never assigned to Board member Melas during Sternstein's tenure (July 1998 through June 2002), the docket reveals that the Board issued two orders on this case during that time period. On May 3, 2001, the Board denied a motion for summary judgment filed by the complainant; and on August 9, 2001, the Board granted respondents' motion for leave to file a reply *instanter*, granted complainant's motion to reconsider, but upheld the Board's prior ruling that genuine issues of material fact were present and directed the case to hearing. A review of the Board's Meeting Minutes for those two meetings confirms that Member Melas voted on each of the orders. *See* Board Meeting Minutes, May 3, 2001 and August 9, 2001.

Sternstein states in his affidavit that he never drafted any opinions or orders or had any other involvement pertaining to Skokie Valley Asphalt during his tenure at the Board, and therefore, never participated personally and substantially in any proceeding related to Skokie Valley. The record indicates that his direct superior, Member Melas, voted on two orders involving this matter. It 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. Of course, attorney assistants do not cast votes. Further, as a seven-person board, any one Board Member is never the sole vote on any given case. Nonetheless, the Board views Sternstein's prior Board employment under these circumstances as personal and substantial participation. Accordingly, the Board disqualifies Sternstein from further appearances in this case.

The Board does not find any prejudice as a result of Sternstein's prior involvement, and is not convinced that matters filed by the complainant and orders issued by the Board subsequent to Sternstein's appearance are tainted.

Since the second-amended complaint was accepted on October 17, 2003, the Board has issued four orders in this case. On March 20, 2003, the Board denied the complainant's motion for summary judgment. On June 5, 2003, the Board denied complainant's motion for leave to file a reply, granted complainant's motion to strike affirmative defenses in part (striking the first two affirmative defenses, but allowing the third) and denied Skokie Valley's motion to dismiss the Fredericks from the case. On July 24, 2003, the Board denied the respondents' motion for reconsideration, and on September 4, 2003, the Board granted complainant's second motion to compel in part, and denied it in part.

A review of the record does not indicate, nor do the respondents assert any specific instances of bias as a result of Sternstein's prior involvement. The respondents' request that the Board dismiss the second-amended complaint, and void all orders issued regarding the second-amended complaint, is denied.

### **CONCLUSION**

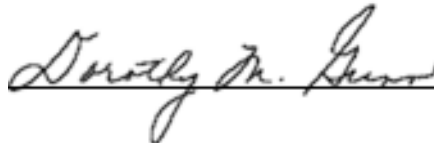
The Board grants respondents motion in part. Although no prejudice or bias resulted from Sternstein's prior involvement in this matter, Sternstein is disqualified from further appearing in this proceeding. Additionally, the Board declines to dismiss the second-amended complaint or void all orders regarding said complaint.

IT IS SO ORDERED.

Board Member M.E. Tristano dissented.

Board Member N.J. Melas abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 16, 2003, by a vote of 5-1.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board