

ILLINOIS POLLUTION CONTROL BOARD
March 17, 2005

ILLINOIS AYERS OIL CO.,)
)
 Petitioner,)
)
 v.) PCB 05-48
) (UST Appeal)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

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

On January 6, 2005, the Board dismissed Illinois Ayers Oil Co.'s (Illinois Ayers) petition for appeal because the appeal was not timely filed. Illinois Ayers and the Illinois Environmental Protection Agency (Agency) had agreed to extend the appeal period for filing a petition for review until December 1, 2004. Illinois Ayers filed the petition on December 2, 2004. Illinois Ayers is asking the Board to reconsider dismissing the petition for review. For the reasons discussed below, the motion to reconsider is denied.

PROCEDURAL BACKGROUND

On September 16, 2004, the Board, at the parties' request, extended until December 1, 2004, the time period within which Illinois Ayers could appeal a July 28, 2004 determination of the Agency. *See* 415 ILCS 5/40(a)(1) (2002); 35 Ill. Adm. Code 105.406. The Agency denied reimbursement for certain costs claimed for corrective action at a site located at 310 State Street, Beardstown, Cass County.

On December 2, 2004, the Board received Illinois Ayers' petition asking the Board to review the Agency's determination. Illinois Ayers "sent to the Clerk" the filing "via FedEx" on December 1, 2004. Based on the Board's procedural rules at 35 Ill. Adm. Code 101.300(b)(1), the Board found that Illinois Ayers petition for appeal was filed on December 2, 2004, and was not timely filed.

The Board determined that because the petition was not filed within the time specified in Section 40(a)(1) of the Environmental Protection Act (Act) (415 ILCS 5/40(a)(1) (2002)), the Board lacked jurisdiction to hear the appeal. *See Wei Enterprises v. IEPA*, PCB 04-23 (Dec. 4, 2003). Therefore, the Board dismissed this petition and closed the docket.

On February 14, 2005, Illinois Ayers filed a motion for reconsideration (Mot.). On March 1, 2005, the Agency filed a response (Resp.) to the motion to reconsider. For the reasons discussed below the Board denies the motion to reconsider.

STATUTORY AND REGULATORY BACKGROUND

Section 40(a)(1) of the Act provides in part:

If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the Agency. However, the 35-day period for petitioning for a hearing may be extended for a period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period. 415 ILCS 5/40(a)(1) (2002).

The Board's procedural rules provide in pertinent part that if documents are "filed in person or by messenger service or mail delivery service other than U.S. Mail, documents are considered filed when they are received by the Clerk." 35 Ill. Adm. Code 101.300(b)(1).

MOTION

Illinois Ayers argues that the Board "misapplied the principle of jurisdiction in this matter" and that the Board may have overlooked evidence. Mot. at 2. Thus, reconsideration by the Board is appropriate, according to Illinois Ayers. Mot. at 1-2. Illinois Ayers presents five general theories as to why the Board should reconsider the decision dismissing this appeal and accept Illinois Ayers petition for appeal. The following paragraphs will summarize each of those five theories.

The Board Does Have Jurisdiction to Hear the Petition

Illinois Ayers asserts that the provisions of Section 40(a)(1) of the Act are "permissive" not mandatory. Mot. at 3, citing M.I.G. Investments v. IEPA, 122 Ill. 2d 392, 396; 523 N.E.2d 1 (1988). Illinois Ayers emphasizes that Section 40(a)(1) of the Act states that the "applicant may, within 35 days" appeal a decision of the Board. Mot. at 3. Illinois Ayers asserts that the legislatures use of the permissive verb "may" instead of "must" means that the requirement is not jurisdictional, but rather a procedural mechanism. Mot. at 3, citing People v. Arnold, 323 Ill. App. 3d 102, 110 (1st Dist. 2001). Illinois Ayers argues that the difference between a jurisdictional provision and a procedural mechanism is that the jurisdictional provision restricts the powers of the Board, while a procedural mechanism permits the Board to employ the Board's discretion. Mot. at 4.

Illinois Ayers argues that Section 40(a)(1) of the Act does not preclude the Board from accepting a permit appeal "commenced on or before a deadline, but actually received after the deadline." Mot. at 4. Illinois Ayers points out that the court affirmed the Board's acceptance of an appeal received by the Board after the appeal deadline in M.I.G. Investments. *Id.*

Technical Failure of Electronic Filing

Illinois Ayers attempted to file the permit appeal electronically using the Clerk's Office On-Line (COOL), but was unable to do so. Mot. at 5. Illinois Ayers argues that the technical

failure of the electronic filing should excuse the late filing of the permit appeal. Mot. at 5-6. Illinois Ayers cites to U.S. Leather, Inc. v. H&W Partnership, 60 F.3d 222, 226 (5th Cir. 1995) for support of the argument. Mot. at 6. In U.S. Leather, the court granted relief from a jurisdictional deadline because an ice storm knocked out power and phone lines, which resulted in an attorney being unable to retrieve motions in the attorney's computers. *Id.* The court granted this relief even though the courthouse was open. *Id.*

Illinois Ayers also relies on procedures implemented in Illinois' 18th Judicial Circuit Court (DuPage County). Mot. at 6. The procedures allow for filing of documents "effective as of the date filing was attempted" if there are technical problems. *Id.*

Overnight Delivery is Acceptable

Illinois Ayers asserts that the Board adopted the "mailbox" rule when a permit appeal was filed by Federal Express in Interstate Pollution Control v. IEPA, PCB 86-19 (Mar. 27, 1986). Mot. at 8. Illinois Ayers points out that the Board codified the "mailbox" rule when adopting procedural rules in 1989. Mot. at 8, citing Procedural Rules Revision, R88-5(A) (June 8, 1989). Illinois Ayers claims that the Board accepted filings shipped by Federal Express for "fifteen years with no reported difficulties." Mot. at 8. Illinois Ayers concedes that the Board adopted amendments to the procedural rules in 2001 which distinguish U.S. mail from other mail delivery services, however, Illinois Ayers argues that the change "did not appear to give rise" to comment. Mot. at 9.

Illinois Ayers maintains that under the circumstances of this case there is no material advantage to mailing a filing by U.S. mail. Mot. at 9. Illinois Ayers notes that the Board's procedural rules presume that a delivery by U.S. mail may take four days (35 Ill. Adm. Code 101.300(c)); however, overnight delivery delivers within 24 hours. *Id.* Illinois Ayers asserts that the Board's hearing officers dispense with the "mailbox" rule "to discourage the use of regular mail and its unpredictable delivery times." *Id.* Illinois Ayers argues that with respect to proving that a filing was actually commenced on the decision deadline, U.S. mail is no better than Federal Express. *Id.*

Promote the Purposes of the Act

Illinois Ayers argues that the legislative purpose of allowing the 90-day extension pursuant to Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2002)) is to encourage parties to resolve all or some of their disputes. Mot. at 10. Illinois Ayers opines that overly strict application of the time within which settlement discussion must conclude would "chill utilization of this valuable procedure." *Id.* Illinois Ayers further argues that the overall purpose of the Act is to promote a healthy environment and dismissal of this appeal would pose a potential harm. *Id.* Specifically, Illinois Ayers asserts that the potential harm is the non-payment for corrective action. *Id.*

Retroactively Extend the Time to Appeal

Illinois Ayers argues that the facts of this case are distinguishable from other cases that the Board has dismissed for want of jurisdiction. Mot. at 11. Illinois Ayers argues that the Board, the September 16, 2004 order extending the appeal deadline, could have extended the deadline for filing the appeal to December 5, 2004. Illinois Ayers assert that then, the December 2, 2004 filing would be timely. These facts distinguish this case from Wei Enterprises, according to Illinois Ayers. Mot. at 12.

AGENCY RESPONSE

The Agency disagrees with Illinois Ayers that reconsideration is appropriate. The Agency first argues that there are no grounds justifying reconsideration. Resp. at 3. Secondly, the Agency maintains that the Board's filing deadlines are jurisdictional. *Id.* Finally, the Agency argues that the Board should grant no further relief. Resp. at 5. The following paragraphs will summarize the Agency's arguments.

No Grounds for Reconsideration

The Agency argues that reconsideration is not appropriate because there is no newly discovered evidence or change in the law. Resp. at 3. The Agency asserts that the law applied by the Board in dismissing the permit appeal is well settled and the Board applied has the law consistently. Resp. at 3.

The Board's Filing Deadlines are Jurisdictional

The Agency notes that one basis for reconsideration according to Illinois Ayers is that the provisions of the Board's rules are procedural, not jurisdictional. The Agency asserts that Illinois Ayers is wrong. Resp. at 3. The Agency maintains that the Board has consistently taken the position that the failure to file a petition for review in a timely manner results in the Board's lacking jurisdiction to review the petition. Resp. at 3, citing Dewey's Service v. IEPA, PCB 99-107 (Feb. 4, 1999); Indian Refining v. IEPA, PCB 91-110 (July 25, 1991).

The Agency opines that the rules and regulations promulgated by the Board have the force and effect of law, are presumed valid, and will be construed by the same standards as statute. Resp. at 3-4, citing IEPA v. Jersey Sanitation Corporation, 336 Ill. App. 3d 582, 588; 784 N.E.2d 867, 872 (4th Dist. 2003). The Agency goes on to state that the Board has the power to construe the Board's rules and regulations to avoid unfair or absurd results. *Id.*

The Agency argues that the time limitations for filing a timely petition are jurisdictional in nature. Resp. at 4, citing Pickering v. Illinois Human Rights Commission, 146 Ill. App. 3d 340; 496 N.E.2d 746 (2nd Dist. 1986). The Agency points out that in Pickering, the appellate court noted that statute of limitations are procedural in nature (Fredman Brothers Furniture Company v. Department of Revenue, 109 Ill. 2d 202; 486 N.E.2d 893 (1985)); however, a statute, which creates a substantive right unknown at common law, does not create a statute of limitations. Resp. at 4-5. In Pickering, the court found that a 180-day filing deadline was jurisdictional. Resp. at 5, 496 N.E.2d at 750. The Agency goes on to indicate that the Illinois Supreme Court has ruled that a requirement that a complaint for administrative review be filed

within a specified time is jurisdictional. Resp. at 5, citing Nudell v. Forest Preserve District, 207 Ill. 2d 409, 422; 799 N.E.2d 260, 267-68 (2003).

The Agency argues that there is no doubt that the time deadline for filing a petition for review is jurisdictional. Resp. at 5. Illinois Ayers failure to comply with the requirements results in the Board losing jurisdiction to hear the matter, according to the Agency. *Id.*

The Board Should Grant No Further Relief

The Agency disagrees that the Board should grant the relief requested even if the Board believes that there is no jurisdiction to hear the appeal. Resp. at 5. The Agency argues that Illinois Ayers did not contest the September 16, 2004 order, which granted the extension of the 90-day appeal period. Resp. at 5. According to the Agency, Illinois Ayers is therefore, bound by the findings of the Board. Resp. at 5. Furthermore, the Agency argues that there is no regulatory or statutory authority that would allow the Board to somehow “side-step” the time deadline for filing the petition as Illinois Ayers seems to suggest. Resp. at 5-6.

DISCUSSION

In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to conclude that the Board’s decision was in error. 35 Ill. Adm. Code 101.902. In Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156 (Mar. 11, 1993), we observed that “the intended purpose of a motion for reconsideration is to bring to the court’s attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court’s previous application of the existing law.” Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992). The Board finds that Illinois Ayers has presented no evidence or information on a change in the law which warrants reconsideration of the Board’s January 6, 2005 order. However, the Board will address the arguments put forth by Illinois Ayers to ensure a complete delineation of the Board’s decision.

Illinois Ayers argues that the requirement that an appeal be filed within a set time (either 35 days after the Agency’s decision or 125 days after the Agency’s decision if there is a 90-day extension) is not jurisdictional. That is simply incorrect. The Board has consistently held that the Board cannot and does not accept petitions for review filed outside the statutory time deadline. Dewey’s Service v. IEPA, PCB 99-107 (Feb. 4, 1999); Indian Refining v. IEPA, PCB 91-110 (July 25, 1991); DuPage Enterprises, Inc. v. IEPA, PCB 93-143 (Aug. 5, 1993); Standard Bank & Trust Company and Derk Ball Sr. v. IEPA, PCB 00-174 (May 4, 2000). This determination by the Board is well grounded in case law as pointed out by the Agency. Furthermore, in Panhandle Eastern Pipeline v. IEPA and PCB, 314 Ill. App. 3d 296; 734 N.E.2d 18 (4th Dist. 2000), the court agreed with Illinois Ayers’ premise that the language of Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2002)) is permissive. However, the court continues on and states: “The corollary rule, of course, is that such challenges may not be filed beyond the limitation periods contained in the statutes.” Panhandle, 314 Ill. App. 3d at 304; 734 N.E.2d at 24.

Illinois Ayers reliance on M.I.G. Investments is misplaced. The court in M.I.G. Investments states that the language of Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2002)) is permissive and notes that the Board has adopted a mailbox rule. M.I.G. Investments 523 N.E.2d at 3. Thus, M.I.G. Investments, while noting the permissive language of the Act, merely stands for the proposition that the Board can adopt a mailbox rule. However, the court does not address the consequences of failing to mail the appeal in a timely manner. The issue in this proceeding is Illinois Ayers' failure to properly utilize the mailbox rule. Furthermore, at the time of M.I.G. Investments, the Board had not adopted procedural rules setting forth the mailbox rule. M.I.G. Investments 523 N.E.2d at 3. The Board has now done so and on January 1, 2001, the current mailbox rule became effective. See Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20 (Nov. 2, 2000), slip op at 17; Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20 (Dec. 21, 2000).

Illinois Ayers next argues that because the electronic filing function with COOL failed, the Board should accept the late Federal Express filing. The Board disagrees. Any electronic failure of COOL does not excuse Illinois Ayers from the requirements of the Board's procedural rules. The Board's procedural rules specify how to file a document to be considered filed on the date of mailing and that is by using U.S. Mail. Illinois Ayers filed using Federal Express, which by rule is considered filed upon receipt in the Clerk's Office. Illinois Ayers could have sent the filing by U.S. Mail, as provided for in the Board's procedural rules, and the filing would have been timely. Illinois Ayers cannot now argue that a technical glitch with filing in COOL resulted in Illinois Ayers' failure to timely file the petition for review.

Illinois Ayers argues that using Federal Express to send the permit appeal in this case is somehow "equivalent" to U.S. mail and that the Board has accepted Federal Express filings for 15 years. The Board disagrees with Illinois Ayers. The Board's procedural rules specifically state that if a document is filed by U.S. Mail, the documents are considered filed when postmarked, if received by the Clerk's office after the filing deadline (*see* 35 Ill. Adm. Code 101.300(b)(2)). The Board's rules also specifically provide that if a document is "filed in person, by messenger service or mail delivers service other than U.S. Mail" documents are filed when *received* by the Clerk's office. Under the Board's rules, only documents sent by U.S. Mail will be deemed to be filed on the postmarked date if received after the filing deadline. See Jersey Sanitation 784 N.E.2d at 872 (the Board's interpretation that a document may be timely filed if mailed by U.S. Mail on the 35th day was correct).

Illinois Ayers is attempting to attack the validity or the application of the Board's procedural rules, specifically the mailbox rule. Section 29(b) of the Act (415 ILCS 5/29(b) (2002)) prohibits such a challenge. Illinois Ayers did not challenge the Board's procedural rules when adopted in 2000 as allowed under Sections 29(a) and 41 of the Act (415 ILCS 5/29(a) and 41 (2002)). Accordingly, Illinois Ayers has waived the right to challenge the provisions of the procedural rules, specifically the mailbox rule.

Illinois Ayers makes two final arguments. First, Illinois Ayers argues that by accepting the late petition, the Board will "promote the purposes of the Act" by reviewing reimbursement determinations of the Agency. Second, Illinois Ayers argues that the Board should retroactively extend the appeal period to December 5, 2004, which would result in the petition for appeal

being timely filed. The Board finds no legal basis for these arguments. The Act sets the time and procedures for appeals and extensions. The Board cannot deviate from those deadlines and procedures at a party's request.

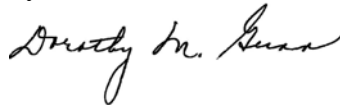
CONCLUSION

The Board denies the motion by Illinois Ayers for reconsideration of the Board's January 6, 2005 order dismissing Illinois Ayers' petition for review. Illinois Ayers presented no new evidence or information on a change in the law that warrants reconsideration of the Board's January 6, 2005 order.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 17, 2005, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board