

ILLINOIS POLLUTION CONTROL BOARD
October 17, 2024

IN THE MATTER OF:)
)
AMENDMENTS TO THE BOARD’S) R25-19
ADMINISTRATIVE RULES) (Rulemaking – Procedural)
2 ILL. ADM. CODE 2175)

OPINION AND ORDER OF THE BOARD (by B. F. Currie):

On September 5, 2024, the Board adopted amendments to its administrative rules at Part 2175 of Title 2 of the Illinois Administrative Code. The administrative rules, last amended in 2022, describe the Board’s organization, the types of Board proceedings, how to pay filing and copying fees, and how the public may access information. The Board amended the rules to update the provisions for open meetings to reflect recent statutory changes to the Open Meetings Act (OMA) (*see* 5 ILCS 120/7(a) (2022), as amended by P.A. 103-311 (eff. July 28, 2023)). The Board also made typographical changes suggested by the Joint Committee on Administrative Rules (JCAR) from prior amendments of these rules. Under Section 5-15 of the Illinois Administrative Procedure Act (IAPA), rules adopted for these purposes are immediately effective upon filing with the Secretary of State (SOS). *See* 5 ILCS 100/5-15(b) (2022). As of the date of this order, the SOS has not published the rule in the *Illinois Register* and it is not clear whether the SOS will do so. Today the Board responds to the position conveyed to the Board by the Index Department of the SOS.

The Board sets forth the statutory language of Section 5-15 of the IAPA; then proceeds to provide the background on the interaction of the Board’s staff with the Index Department of the SOS. The Board explains its analysis of law including Section 5-15 of the IAPA (5 ILCS 100/5-15 (2022)). The Board concludes with its response to the Index Department of the SOS.

STATUTORY LANGUAGE

Section 5-15 of the IAPA provides:

- (a) Each agency shall maintain as rules the following:
 - (1) A current description of the agency’s organization with necessary charts depicting that organization.
 - (2) The current procedures by which the public can obtain information or make submissions or requests on subjects, programs, and activities of the agency. Requests for copies of agency rules shall not be deemed Freedom of Information Act requests unless so labeled by the requestor.

- (3) Tables of contents, indices, reference tables, and other materials to aid users in finding and using the agency’s collection of rules currently in force.
 - (4) A current description of the agency’s rulemaking procedures with necessary flow charts depicting those procedures.
 - (5) Any rules adopted under this Section in accordance with Sections 5-75 and 10-20 of this Act.
- (b) The rules required to be filed by this Section may be adopted, amended, or repealed and filed as provided in this Section instead of any other provisions or requirements of this Act. 100 ILCS 5/5-15 (2022).

BACKGROUND

Below, the Board describes the interaction with the SOS Index Department regarding the adopted rule. First the Board explains the procedures followed after adoption by the Board. The Board then addresses the position asserted by the Index Department of the SOS, followed by the Board’s historical use of Section 5-15 of the IAPA to adopt similar statutory revisions and the SOS’s response.

Rule Filing

On September 18, 2024, the Board, under Section 5-15 of the IAPA, filed a certified copy of its Title 2 amendments with the SOS in compliance with Section 5-65 of the IAPA (5 ILCS 100/5-65 (2022)). It was then and remains the Board’s understanding that its Title 2 rule amendments took effect “immediately” upon that filing. 5 ILCS 100/5-15(b) (2022). Further, the Board’s filing included the required “notice” of these amendments “for publication in the next available issue of the Illinois Register.” 5 ILCS 100/5-65(b) (2022).

SOS Concern

On September 26, 2024, the Director of the SOS Index Department spoke with the Board’s General Counsel by phone and then on September 27, 2024, sent a letter to the Board. That letter is docketed in this rulemaking proceeding as Public Comment 1 (PC 1). In the letter, Director Finnigan indicated that the staff had questions concerning parts of the Board’s adopted rule “regarding the qualification” of the Board’s rule as a required rule under Section 5-15 of the IAPA (5 ILCS 100/5-15 (2022)). Specifically, staff questioned the amendment to Section 1275.120 (d)(2), which adopted changes implementing the General Assembly’s recent revision to OMA. The letter noted that the phrase adds the OMA language “or unexpected childcare obligations” to Section 1275.120 (d)(2). The letter states: “[i]t is not immediately clear to the Staff that this amendment qualifies as a Required Rule.” The letter asked that the Board provide additional explanation as to how this amendment meets the definition of a Required Rule under Section 5-15 of the IAPA (5 ILCS 100/5-15 (2022)); or, in the alternative, a withdrawal of the rule and a later filing through regular rulemaking. The letter requested the Board take action “on

or before 4:00 pm CST October 2, 2024, in order not to delay possible publication of the PCB Rule in the upcoming issue of the Illinois Register.”

History of Board’s Use of Section 5-15 of the IAPA

On October 1, 2024, the Board’s General Counsel sent a letter to Director of the Index Department docketed as PC 2. It noted that a response from the Board was not possible by October 2, 2024, due to the Board’s regular meeting schedule. The letter set forth the history of the Board’s use of Section 5-15 of the IAPA to adopt rules, including those implementing provisions of OMA.

In 1984, the Board initially adopted rules to address the provisions of the IAPA that are now located at Section 5-15 of the IAPA (5 ILCS 100/5-15 (2022)). That rulemaking was Public Information Rulemaking and Organization, R83-27 (Apr. 27, 1984). In that rulemaking, the Board adopted rules including the procedures for holding Board meetings on a regular schedule.

In 2006, the Board adopted an amendment that included revisions to its procedures on holding meetings. Among other items amended, the Board addressed statutory changes to the OMA. That rulemaking was Amendments to the Board’s Administrative Rules: 2 Ill. Adm. Code 2175, R04-09 (July 20, 2006). The rule was published on September 15, 2006, in the *Illinois Register* (30 Ill. Reg. 14990).

In 2014, the Board adopted additional changes to Section 2175.120, using the required rules provisions. Amendments to the Board’s Administrative Rules: 2 Ill. Adm. Code 2175, R15-10 (Oct. 16, 2014); *see* 38 Ill. Reg. 22834 (Nov. 24, 2014). And in 2020, the Board adopted changes to implement provisions of OMA that allow for video meetings under emergency declarations by the Governor. Amendments to the Board’s Administrative Rules: 2 Ill. Adm. Code 2175, R21-17 (Aug. 13, 2020); *see* 44 Ill. Reg. 14166 (Sept. 4, 2020).

The General Counsel’s response also pointed to rules adopted by other Boards and Commissions that used Section 5-15 of the IAPA (5 ILCS 100/5-15 (2022)) to implement OMA. The Procurement Policy Board and the Illinois Community College Board, have adopted rules implementing the OMA using Section 5-15 of the IAPA. As the Board did in this case, those boards adopted rules specifically allowing for meeting attendance of their respective Board Members by “other means.” *See* 32 Ill. Reg. 1153; 42 Ill. Reg. 7764.

SOS Response

Later that day the SOS replied by email, docketed as PC 3, stating in its entirety that:

Based upon your letter, we have decided to delay publishing in the Illinois Register the recent PCB rule filed with the Index Department in order to provide your agency and the Index Department more time to review the same. PC 3.

The response did not indicate how much time review by the Index Department would require or how long publication would be delayed.

BOARD DISCUSSION

As stated above, the Board has not received additional information from the Index Department of SOS. The Board notes that the letter from the Index Department of SOS did not identify any failure of the Board to comply with the SOS's "rules concerning the form of documents to be filed with the Secretary of State" or "rules setting forth the manner in which agencies shall submit notices required by [the IAPA] for publication in the Illinois Register." 5 ILCS 100/5-70(a) (2022).

And while the Board's Title 2 rules have changed over the years, two pertinent items have remained constant since the Board originally adopted the rules over four decades ago. They have always been adopted as "required rules" and become effective immediately under Section 5-15 of the IAPA (or its predecessor, Section 4.01), and they have always addressed the conduct of the Board's public meetings. *See, e.g., Public Information, Rulemaking and Organization (2 Ill. Adm. Code 2175)*, R83-27, slip op. at 7; *Amendments to the Board's Administrative Rules 2 Ill. Adm. Code 2175*, R21-17, slip op. at 6-7 (Aug. 13, 2020). Since 1996, Section 2175.120 has covered how Board members may, in compliance with the OMA (5 ILCS 120/7 (2022)), attend those meetings, including by means other than physical presence. *See, e.g., Illinois Pollution Control Board Administrative Rules: Organization, Public Information and Proceedings*, R96-15, slip op. at 6 (Jan. 18, 1996); *Amendments to the Board's Administrative Rules: 2 Ill. Adm. Code 2175*, R04-9, slip op. at 3, 8-9 (July 20, 2006).

Further, the Board's rule adopted in this proceeding is not only consistent with these long-standing precedents, it is also consistent with the Environmental Protection Act (Act). The Act created the Board and charged it with deciding contested cases and establishing regulations to restore and protect the environment. *See* 415 ILCS 5/5(b)-(d) (2022). Under the Act, the Board must hold at least one meeting each month that is open to the public and for which public notice must be given at least 48 hours beforehand. *See* 415 ILCS 5/5(a) (2022). The Board generally holds two open meetings each month. *See* 2 Ill. Adm. Code 2175.125(a). The Environmental Protection Act further specifies that "[t]hree members of the Board shall constitute a quorum to transact business; and the affirmative vote of 3 members is necessary to adopt any order." *Id.* Accordingly, the Board "makes all decisions on adjudicatory cases and regulatory matters at open meetings." 2 Ill. Adm. Code 2175.120(a).

Based on the plain reading of the IAPA, along with the Act, the Board finds that the Title 2 rule on the conduct of the Board's open meetings, including how its members may lawfully attend those meetings to vote on Board decisions, describes an integral part of the Board's "organization" within the meaning of Section 5-15(a)(1) of the IAPA. *See* 2 Ill. Adm. Code 2175.120 ("Board Meetings") of 2 Ill. Adm. Code 2175.Subpart A ("Introduction and Organization"). In addition, as the Board is powerless to propose or adopt any rule without the affirmative vote of at least three of its members, the Title 2 rule on how Board members may attend open meetings to vote on such rules necessarily describes a part of "the agency's

rulemaking procedures” under Section 5-15(a)(4) of the IAPA. Section 5-15(b) therefore authorizes the Board’s amendment of Section 2175.120(d)(2).

The Board also notes that its use of the IAPA’s Section 5-15 to adopt Title 2 rules concerning OMA compliance has never been objected to by JCAR or opposed by any member of the public. Moreover, while this amendment for “unexpected childcare obligations” fits squarely within Section 5-15(a), it would also seem a dubious use of State resources to put this statutory phrase through the regular IAPA rulemaking process.

CONCLUSION

Based on the Board’s interpretation of the IAPA, the Board is disinclined to withdraw its rules at this time. As the Board has complied with the IAPA, the SOS’s rules, and followed its own precedents and those of other agencies, the Board respectfully requests that the Index Department publish the Board’s amendments to 2 Ill. Adm. Code 2175 in the next available issue of the *Illinois Register* pursuant to SOS’s obligations under Sections 5-15 and 5-65 of the IAPA (5 ILCS 100/5-15, 5-65 (2022)).

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on October 17, 2024, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board