

ILLINOIS POLLUTION CONTROL BOARD
February 28, 1991

MARJORIE B. CAMPBELL,)
)
 Petitioner,)
)
 v.) PCB 91-5
) (Underground Storage Tank
) Reimbursement Fund)
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

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

This matter is before the Board on a motion to dismiss by the Illinois Environmental Protection Agency (Agency) filed January 22, 1991. On February 4, 1991 Petitioner responded to the motion to dismiss. On February 4, 1991, the Board received the Agency's motion to strike response, which the Board denied on February 7, 1991, and a motion for leave to reply which the Board granted on February 7, 1991. On February 19, 1991, the Board received the Agency's reply. The Petitioner has appealed an Agency determination that she is eligible for reimbursement from the State's Underground Storage Tank Fund for costs exceeding \$100,000.

The issue before the Board is whether or not the 35 day appeal time set forth in Sections 22.18b(g) and 40(a)(1) of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1989, ch. 111½, pars. 1022.18b and 1040) had passed before the Petitioner filed her appeal. The Petitioner asserts that the Agency decision was not final until December 3, 1990. The Agency, however disagrees and asserts that the final decision was made May 3, 1990.

The May 3, 1990 letter (Ag. Ex. B), clearly states the application for reimbursement was received and an Agency review "determined you [Petitioner] to be eligible to seek reimbursement from the Fund for corrective costs ... in excess of \$100,000". (Ag. Ex B). The letter continued to state that should the Petitioner have any questions, Petitioner should contact the Agency.

The Petitioner asserts that the Petitioner was not aware that the May 3 letter constituted a final decision. The Petitioner notes in its response to the Motion to Dismiss that: "Neither the May 3rd or July 5th communications from the Agency indicated a finality of decision, as both invited further

questions and comments." (Pet. Res. p. 3).

The Agency asserts that its decision of May 3 was final. In support of this the Agency cites several facts. On May 3, 1990, the Agency mailed a letter to Petitioner indicating that the \$100,000 deductible would be applied to reimbursement. On June 26, 1990, Petitioner's consultants sent a letter requesting the Agency to reconsider its May 3 decision. On July 5, 1990 the Agency sent a letter to Petitioner explaining the May 3 decision. On August 13, 1990 the Agency received a "gubernatorial inquiry" from the Lieutenant Governor's staff concerning the Agency's May 3 decision. An internal Agency memorandum, dated August 17, 1990 reiterated the May 3 decision. (Ag. p 2).

On October 18, 1990, the Agency was contacted by an attorney representing Petitioner by phone and later, October 29, 1990 by letter. On December 3, 1990, the Agency sent a letter to Petitioner's attorney indicating it would not further review its May 3, 1990 decision. This appeal was received by the Board on January 8, 1991. (Ag. p. 2 and 3).

The Agency further asserts that "[t]he fact that the Petitioner lodged a gubernatorial inquiry demonstrates that she was sophisticated and knew at that time that the Agency position was reasoned and firm." (Ag. p. 4).

The Board is persuaded, from its review of the entire record, that the Agency's final decision was made on May 3, 1990, and was reaffirmed upon reconsideration on July 5. However, the Board notes that it is possible that the Petitioner could not deduce that the decision was final solely from the May 3, 1990 letter. In a case involving a similar 35 day appeal period the Appellate Court, First District has ruled that the appeal time is tolled if the notice is "defective". (Johnson v. State Employees Retirement System, 155 Ill. App. 3d 616, 508 N. E. 2d 351, 108 Ill. Dec. 190) (Johnson).

In Johnson, the State Employees Retirement System (SERS) notified Johnson that he was ineligible for benefits. The letter stated, in part:

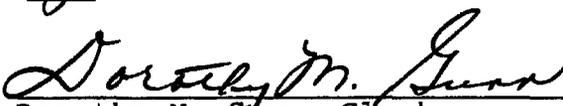
This constitutes final administrative review of your appeal by the State Employees' Retirement System. If you have any questions, please contact this office. (Johnson, p. 192).

The Court held that the "notice, without informing him [Johnson] of his right to appeal and the time limit for so doing, denied him due process of law. The defective notice, thus, tolled the 35-day filing period." (Johnson, p. 192]. Thus, Illinois law requires an agency to state what the right to appeal consists of for persons seeking agency determinations.

The Board finds that the Petitioner could have been confused as to when the decision was final and that the Agency did not clearly state that its decision was final. In addition, the Agency failed to give notice as to what appeal process was available to the Petitioner. Therefore, the Board finds that even if the May 3 decision was final, the appeal time was tolled and this Petition was timely filed. The Agency's Motion to Dismiss is denied.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 28th day of February, 1991, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board