

ILLINOIS POLLUTION CONTROL BOARD  
March 22, 1990

THE GRIGOLEIT COMPANY, )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 89-184  
 ) (Permit Appeal)  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 )  
 Respondent. )

ORDER OF THE BOARD (by J. Marlin):

Currently pending before the Board are Grigoleit's motion for summary judgment, and the Illinois Environmental Protection Agency's (Agency) motion to reverse the Hearing Officer's Order of February 23, 1990 regarding discovery. In summary, this Order 1) denies the motion for summary judgment 2) affirms the Hearing Officer's Order of February 23, 1990 and in so doing denies the Agency's motion.

Grigoleit's Motion For Summary Judgment

Grigoleit filed its motion for summary judgment on March 2, 1990 and the Agency filed its response on March 12, 1990.

The parties do not dispute the following factual sequence. Grigoleit mailed its application for permit renewal by certified mail on July 12, 1989. The Agency received the application on July 13, 1989. The Agency issued a permit denial on October 11, 1989. October 11 is the 90th day after July 13, 1989, but the 91st day after July 12, 1989.

The parties further agree that Section 39(a) of the Environmental Protection Act (Act) requires the Agency to take final action within 90 days "of the filing" of the application. The parties' dispute centers around the date an application is "filed" for the purposes of Section 39.

Grigoleit contends that the issue is controlled by Ill. Rev. Stat. 1987, ch. 1, par. 1026, which in summary provides that a writing is deemed filed when it is mailed, provided competent evidence of date of mailing is produced. (The competency of evidence presented by Grigoleit is not at issue here.) Grigoleit goes on to argue that the 90 day time period of Section 39(a) of the Act must be computed pursuant to Ill. Rev. Stat. ch. 1, par. 1012, to begin the first day after mailing and including the last day unless that day is a holiday which must be excluded. Grigoleit contends then, that the Agency's permit denial on

October 11 occurred on the 91st day after the application was "filed", i.e. mailed.

The Agency first argues that the Board cannot entertain motions for summary judgment pursuant to 35 Ill. Adm. Code 101.244, which provides:

A motion for summary judgment prior to hearing may be made by any party to an enforcement proceeding pursuant to Title VIII of the Act or a permit appeal pursuant to Title X of the Act. Specific rules for such motions for summary judgment are found in 35 Ill. Adm. Code 103 (enforcement proceedings) and 35 Ill. Adm. Code 105 (permit appeals).

The Agency asserts, correctly, that the Board has not adopted "specific rules" in Part 105. The Board has, however, proceeded to entertain summary judgment motions pursuant to the general authority granted by Section 26 of the Act, and accordingly rejects the Agency's argument.

As to Grigoleit's "mailed is filed" argument, the Agency submits that the Board should construe the time limits for Agency action in Sections 38, 39, 40, 40.1 and 41 of the Act in the same way as it has construed time limits for Board action. In Interstate Pollution Control Inc. v. IEPA, PCB 86-19, March 27, 1986, the Board first adopted a limited version of the mailbox rule, which has since been adopted as Section 101.102(d) of its own procedural rules. (In The Matter Of: Procedural Rules Revision, 35 Ill. Adm. Code 101, 106.Subpart F, 107, Opinion and Order of June 8, 1989, pp. 6, 29-30). The limited rule as adopted by the Board provides that initial pleadings permitted by the above-cited Sections are deemed timely filed when mailed, but that decision deadlines should be calculated from the date of receipt. The logic of the Board's ruling was that a litigant's ability to proceed with an action should not be frustrated by delivery delays beyond the litigant's control, while at the same time the Board's ability to timely comply with already "uncomfortably snug" decisions deadlines should not be frustrated by delivery delays beyond the Board's control. This logic applies equally to the responsibilities of the Agency. The purpose of the time deadlines of Section 39 (and other similar provisions) of the Act is to insure that applicants receive decisions from government within a reasonable time upon penalty of issuance of a permit by default, but not to "reward" applicants by unreasonable truncation of government's ability to make a considered decision.

The Board finds the Agency's denial was timely made on the 90th day of the filing i.e. Agency receipt, of Grigoleit's application. The motion for summary judgement is denied.

The Hearing Officer Order of February 23, 1990

The Hearing Officer's Order of February 23, 1990 disposes of various Agency challenges to discovery by Grigoleit. By Order of March 8, 1990, the Board agreed to review this order. Relevant pleadings include Grigoleit's February 14 motion to compel and February 16 supporting memorandum; the Agency's February 23 response; the Agency's March 1 motion to reverse the February 23 Order and March 3 supporting memorandum; Grigoleit's March 14 response and memorandum; a letter from the Hearing Officer dated March 7, and a transcript of hearing dated March 6.

The Board will not recite the particulars of the Hearing Officer Order and the parties' arguments in detail. The Agency has refused to allow certain deposition questions to be answered, and has refused to provide certain documents, on the basis of an asserted "predecisional deliberation privilege." The conclusion of the Hearing Officer was that:

"The claim of predecisional deliberative decisional privilege is not properly raised, nor is it warranted. To the extent that such a privilege may be available at the State level, the Respondent has not made the requisite showing necessary to invoke the privilege. ... no case cited by Respondent authorizes any such predecisional deliberative privilege by a State agency. The privilege claimed has no basis in Illinois case law that the Hearing Officer has been able to find. (Order, p. 1-2).

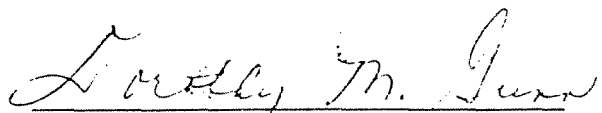
No arguments have been raised which convince the Board to disturb the Hearing Officer's Order. In so ruling, the Board takes no position on the admissibility at hearing of information obtained through the discovery process.

The Agency's motion to reverse is denied.

IT IS SO ORDERED.

Board Member B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above Order was adopted on the 22<sup>nd</sup> day of March, 1990 by a vote of 7-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board