

ILLINOIS POLLUTION CONTROL BOARD
July 10, 1997

IN THE MATTER OF:)
)
PETITION OF RECYCLE) AS 97-9
TECHNOLOGIES, INC. FOR AN) (Adjusted Standard - RCRA)
ADJUSTED STANDARD FROM 35 ILL.)
ADM. CODE 720.131(c))

INTERIM OPINION AND ORDER OF THE BOARD (by K.M. Hennessey):

This matter comes before the Illinois Pollution Control Board (Board) on the petition of Recycle Technologies, Inc. (RTI) for a solid waste determination regarding filtered used antifreeze. RTI alleges that the antifreeze is currently classified as a solid waste. RTI requests that the Board determine that the antifreeze is not a waste, but a raw material used in the manufacture of recycled antifreeze.

Now pending before the Board is the Illinois Environmental Protection Agency's (Agency) motion to dismiss the petition on two grounds. First, IEPA argues that the petition does not contain information required by Board rules. Second, the Agency notes that RTI's owner, Gary L. Gunderson, has filed the petition and purports to represent RTI in this matter. The petition does not indicate that Mr. Gunderson is an attorney, and the Agency argues that corporations may appear before the Board only through licensed attorneys. If Mr. Gunderson is allowed to represent RTI in this matter, the Agency argues, all proceedings in this matter would be void.

The Board finds that the petition is sufficient and denies the motion to dismiss on that ground. While the Board agrees that Illinois law precludes Mr. Gunderson from representing RTI in this matter, the Board finds that dismissal is unwarranted. Instead, the Board grants RTI 45 days from the date of this order to retain an attorney in this matter and for its attorney to file an appearance and an amended petition. The Board also establishes a schedule for the filing of the Agency's response to the petition and for RTI's reply to the Agency's response.

BACKGROUND

RTI filed a "Petition for Determining Whether a Material is a Solid Waste" under 35 Ill. Adm. Code 720.131(c) with the Board on April 30, 1997. The Agency filed a limited appearance and motion to dismiss on May 20, 1997 (Motion). RTI has not filed a response.

A motion to dismiss admits all facts properly pled, and will be granted if the complaint can be resolved as an issue of law. See Murphy v. S-M Delaware, Inc., 95 Ill. App. 3d 562, 420 N.E.2d 456 (1st Dist. 1981). In this case, the Agency argues that as a matter of law that the petition is insufficient and that Mr. Gunderson may not represent RTI in this proceeding. The Board addresses the Agency's claims in turn.

DISCUSSION

The Sufficiency of the Petition

The Agency argues that the petition is insufficient and should be dismissed because it does not meet the requirements of 35 Ill. Adm. Code 106.705. The Board finds that the requirements of that section do not apply here, however, and that the petition meets the requirements of the section that does apply, 35 Ill. Adm. Code 106.413. The Board therefore denies the motion to dismiss the petition on grounds of insufficiency.

As noted above, RTI seeks a solid waste determination under 35 Ill. Adm. Code 720.131. The rules provide that the Board will use the procedures of 35 Ill. Adm. Code 106 when determining whether a material is a solid waste. See 35 Ill. Adm. Code 720.133.

Subpart D of Part 106 contains a provision on the required contents of a petition for an adjusted standard pursuant to 35 Ill. Adm. Code 720.131. See 35 Ill. Adm. Code 106.413. The Board finds that this section, rather than the section that the Agency has cited (35 Ill. Adm. Code 106.705), applies to RTI's petition. See also 35 Ill. Adm. Code 106.410, 106.701(a).

Under Section 106.413, the petition must contain the following:

- 1) Identification of the regulation of general applicability for which an adjusted standard is sought;
- 2) A written statement, signed by the petitioner . . . or an authorized representative, outlining the scope of the evaluation, the nature of, the reasons for and the basis of the adjusted standard, consistent with the level of justification contained in the regulation of general applicability;
- 3) The nature of the petitioner's operations and control equipment; and
- 4) Any additional information which may be required in the regulation of general applicability. 35 Ill. Adm. Code 106.413(b).

The Board finds that RTI's petition contains the required information. First, the exhibits to the petition identifies the regulation of general applicability from which RTI seeks an adjusted standard – *i.e.*, 35 Ill. Adm. Code 721.102, which defines solid wastes. See Attachment 1 to petition. Second, the petition outlines the scope of the evaluation of, the nature of, the reasons for and the basis for the adjusted standard, in accordance with the factors outlined Section 720.131(c). Third, the petition outlines the petitioner's operations and control equipment. Finally, the petition addresses the criteria that the Board is to consider under Section 720.131(c). Accordingly, the Board finds that the petition is sufficient and denies the Agency's motion to dismiss on this ground.

RTI's Representation

The Agency notes that RTI is represented in this matter by its owner, Mr. Gunderson. The petition does not state that Mr. Gunderson is an attorney, and the Agency argues that RTI may be represented only by an attorney. In support of its argument, the Agency relies on provisions in the Attorney Act (705 ILCS 205/1 *et seq.* (1996)) and the Corporation Practice of Law Prohibition Act (CPLP Act) (705 ILCS 220/1 *et seq.* (1996)). The Agency further argues that the Board's rule allowing non-attorneys to appear before the Board is not valid in this case.

Section 1 of the Attorney Act provides in part: "No person shall be permitted to practice as an attorney or counselor at law within this State without having previously obtained a license for that purpose from the Supreme Court of this State." 705 ILCS 205/1 (1996). Section 1 of the CPLP Act specifically prohibits corporations from practicing law: "It shall be unlawful for a corporation to practice law or appear as an attorney at law for any reason in any court in this state or before any judicial body." 705 ILCS 220/1 (1996).

In order to rule on the Agency's Motion, the Board must decide (1) whether the representation of a corporation in an adjusted standard proceeding before the Board is the "practice of law" under these laws; (2) whether any exceptions to these laws allow Mr. Gunderson to represent RTI in this matter; and (3) whether the Board should dismiss this proceeding. The Board addresses each of these issues below.

Representation of a Corporation in an Adjusted Standard Proceeding as the "Practice of Law" under the Attorney Act and the CPLP Act. In support of its argument that a non-attorney's representation of a corporation in an adjusted standard proceeding is the practice of law, the Agency relies upon People v. Goodman, 366 Ill. 346, 8 N.E.2d 941, *cert. denied*, 302 U.S. 728 (1937). In that case, the court found respondent, a non-attorney, guilty of the unauthorized practice of law when he represented others in proceedings before the Industrial Commission. The court held, "[i]t is immaterial whether the acts which constitute the practice of law are done in an office, before a court, or before an administrative body. The character of the act done, and not the place where it is committed, is the factor which is decisive of whether it constitutes the practice of law." Goodman, 366 Ill. 2d at 357, 8 N.E.2d at 947. Thus, the Agency argues, the practice of law includes practice before an administrative body such as the Board. See Motion at 7, citing Goodman.

The Agency also argues that the representation of a corporation in an adjusted standard proceeding constitutes the practice of law. See Motion at 6. Finally, the Agency argues that any judgment in a case initiated by a non-attorney is void, even if subsequent appearances are made by an attorney. See Motion at 6-7, citing Housing Authority of Cook County v. Tonsul, 115 Ill. App. 3d 739, 450 N.E.2d 1248 (1st Dist. 1983); Midwest Home Savings & Loan v. Ridgewood, 123 Ill. App. 3d 1001, 463 N.E.2d 909 (5th Dist. 1984); Marken Real Estate & Management Corporation v. Adams, 56 Ill. App. 3d 426, 371 N.E.2d 1192 (1st Dist. 1977); Leonard v. Walsh, 73 Ill. App. 2d 45, 220 N.E.2d 57 (4th Dist. 1966).

The Board agrees that under Goodman and later cases, the practice of law may include practice before an administrative agency such as the Board. The Board also agrees that representation of a corporation in an adjusted standard proceeding involves the practice of law.

Generally, courts have held that the practice of law is “`the giving of advice or rendition of any sort of service . . . when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill.’” People ex rel. Chicago Bar Association v. Barasch, 406 Ill. 253, 256, 94 N.E.2d 148, 150 (1950), quoting People v. Schafer, 404 Ill. 45, 50, 87 N.E.2d 773, 776 (1949). For example, in the cases that the Agency has cited, as well as in other cases, the courts have held that that the practice of law includes the representation of a corporation in pre-trial and trial proceedings. See, e.g., Tom Edwards Chevrolet, Inc. v. Air-Cel, Inc., 13 Ill. App. 3d 378, 379, 300 N.E.2d 312, 313 (2d Dist. 1973) (“When one appears in court representing one of the parties, counsels and advises with such party and drafts pleadings, both in the trial court and in this [appellate] court, he is practicing law.”); Housing Authority of Cook County, 115 Ill. App. 3d at 742, 45 N.E.2d at 1250 (representation in pretrial proceedings is the practice of law); Midwest Home Savings & Loan, 123 Ill. App. 3d at 1004, 463 N.E.2d at 912 (filing a notice of appeal is the practice of law); Marken, 56 Ill. App. 3d at 429, 371 N.E.2d at 1194 (representation in pretrial proceedings constitutes the practice of law).

The Board’s rules define an adjusted standard proceeding as a “contested case” and an “adjudicatory proceeding.” 35 Ill. Adm. Code 101.101. The Board’s rules also require the Board to hold at least one public hearing before granting an adjusted standard. 35 Ill. Adm. Code 106.415. Any person representing RTI therefore must represent RTI at that hearing, and must present arguments and precedents supporting a finding that the Board may grant an adjusted standard under 35 Ill. Adm. Code 720.131(c) and Subpart D of Part 106.

The Board finds that these tasks, like the representation of a party in pretrial and trial proceedings in a court, require legal knowledge or skill. At some point, then, Mr. Gunderson will necessarily be engaged in the “practice of law” under the Attorney Act and CPLP Act if he continues to represent RTI.

Applicability of Exceptions. The Agency argues that while the Attorney Act and the CPLP have exceptions, those exceptions do not apply here. Section 1 of the Attorney Act provides:

Nothing in this Act shall be construed to prohibit representation of a party by a person who is not an attorney in a proceeding before the Illinois State Labor Relations Board or the Illinois Local Labor Relations Board under the Illinois Public Labor Relations Act, as now or hereafter amended, the Illinois Educational Labor Relations Board under the Illinois Educational Labor Relations Act, as now or hereafter amended, the State Civil Service Commission, the local Civil Service commissions, or the University Civil Service Merit Board, to the extent allowed pursuant to rules and regulations promulgated by those Boards and Commissions. 705 ILCS 205/1 (1996).

Section 11 of the Attorney Act also contains exceptions: “The provisions of Section 1 hereof notwithstanding, corporations shall have the liberty to act through any officer, director, manager, department manager or supervisor in prosecuting as plaintiff or defending as defendant any small claims proceeding in any court of this state as authorized by Section 2-416 of the Code of Civil Procedure.” 705 ILCS 220/11 (1996).

Similarly, Section 5 of the CPLP Act provides an exception to that Act’s prohibition on the practice of law by corporations:

Nothing contained in this Act shall be construed to prohibit a corporation from prosecuting as plaintiff or defending as defendant any small claims proceeding in any court of this State through any officer, director, manager, department manager or supervisor of the corporation as authorized by Section 2-416 of the Code of Civil Procedure. 705 ILCS 220/5 (1994).

The Agency argues that this case does not fall within any of the exceptions to the prohibitions against corporations representing themselves in either the Attorney Act or the CPLP Act. See Motion at 7-8. The Board agrees. The Attorney Act does not list the Board as one of the administrative agencies before which non-attorneys may practice, and this case is not a small claims proceeding.

As the Agency has acknowledged, the Board’s current procedural rules allow an owner of a corporation to represent the corporation in an adjusted standard proceeding. See 35 Ill. Adm. Code 101.107(a)(2). Although the Agency has never before objected to this rule, the Agency now argues that to the extent that rule is in conflict with the Attorney Act and the CPLP Act, the latter laws control. See Goodman, 366 Ill. at 352, 8 N.E.2d at 945 (Industrial Commission rule allowing non-attorneys to appear held invalid). The Board agrees.¹ The Board therefore finds that no exception to the Attorney Act or CPLP Act allows Mr. Gunderson to continue to represent RTI in this matter.

Dismissal of this Proceeding. The Agency argues that this case must be dismissed. In support of its argument, the Agency relies upon several cases holding that proceedings initiated by a non-attorney are a nullity, even if all subsequent appearances are through an attorney. See Housing Authority of Cook County, 115 Ill. App. 3d at 1251, 450 N.E.2d at 1251; Marken, 56 Ill. App. 3d at 430, 371 N.E.2d at 1195; Leonard, 73 Ill. App. 2d at 47, 220 N.E.2d at 58. The Agency argues that any decision that the Board renders in this case will be void, and therefore the case should be dismissed.

For several reasons, the Board does not find dismissal appropriate here. The Board agrees that while neither the Attorney Act nor the CPLP Act require that cases initiated by non-attorneys must be dismissed, Illinois courts generally have held that a proceeding initiated by a non-attorney is void. However, this rule is not without exceptions. In Janiczek v. Dover

¹ The Board notes that its proposed revision of its procedural rules would require corporations to appear through attorneys. See In re: Revision of the Board’s Procedural Rules: 35 Ill. Adm. Code 101-130 (October 3, 1996), R97-8, slip op. at 10-11.

Management Co., 134 Ill. App. 3d 543, 481 N.E.2d 25 (1st Dist. 1985), plaintiff brought a personal injury action, through an attorney, against several defendants. Before the case went to trial, plaintiff learned that his attorney had been disbarred before he filed the complaint on plaintiff's behalf. The trial court gave plaintiff leave to substitute counsel, which plaintiff did. The defendants then brought a motion to dismiss, arguing that because the complaint had been filed by a person not authorized to practice law, it was void. The trial court granted the motion to dismiss.

On appeal, the court noted that under Illinois law, an action initiated by someone not authorized to practice law should be dismissed, and if the action has proceeded to judgment, the judgment is void. Janiczek, 134 Ill. App. 3d at 545, 481 N.E.2d at 26. The court stated that while it did not disagree with these rulings, none of them involved a situation similar to that presented in Janiczek. The court held,

Given these unique circumstances, we believe that a rigid adherence to precedent would not advance, but would in fact defeat, the purposes of the rule prohibiting representation by non-attorneys. That rule is intended to protect litigants from the mistakes of the ignorant and the schemes of the unscrupulous and to protect the court itself in the administration of its proceedings from those lacking the requisite skills. But we do not believe that either of these purposes is promoted by the dismissal of plaintiff's action. Not only would such a result clearly penalize an innocent party possessing a substantial personal injury claim, but it also would overlook the fact that the party did secure the services of a licensed attorney to represent him at trial. Janiczek, 134 Ill. App. 3d at 546, 481 N.E.2d at 27.

The court also noted that several other jurisdictions have held that dismissal of proceedings initiated by a non-attorney is a drastic remedy not required in all cases. Janiczek, 134 Ill. App. 3d at 546, 481 N.E.2d at 27. The court concluded that dismissal was an "unreasonably harsh sanction," and directed the trial court to reinstate the case. Janiczek, 134 Ill. App. 3d at 546, 481 N.E.2d at 27. Other courts also have recognized that there are exceptions to the general rule. See, *e.g.*, McEvers v. Stout, 218 Ill. App. 3d 469, 472, 578 N.E.2d 321, 323 (4th Dist.), appeal denied, 142 Ill. 2d 655, 584 N.E.2d 131 (1991) (relying on Janiczek, court refused to hold a complaint a nullity, even though it was originally filed by an attorney not licensed in Illinois).

The Board finds that this case also presents special circumstances. The special circumstances here arise from the Board's own rules, which allow non-attorneys to represent corporations in adjusted standard proceedings. See 35 Ill. Adm. Code 101.107(a)(2). In addition, the Agency has never before raised an objection to the Board's rule. Given the Board's rule and the Agency's previous silence on the rule, it was reasonable for Mr. Gunderson to assume that he could represent RTI in this proceeding. The Board also finds that it need not dismiss this case simply to promote the purposes of the rule prohibiting representation by non-attorneys; those purposes will be well served if RTI retains an attorney before this matter proceeds any further. For these reasons, the Board denies the motion to dismiss.

However, in order that this case may proceed properly, the Board grants RTI 45 days to retain an attorney and for that attorney to file an appearance and an amended petition in this case. The Agency's response to the petition is due 30 days following the filing of the amended petition, and RTI may file a reply to the response within 14 days of the filing of the Agency's response. See 35 Ill. Adm. Code 106.414.

The Board stresses that under the Attorney Act and the Board's rules, individuals may represent themselves in adjudicatory proceedings before the Board without the aid of an attorney. See 705 ILCS 205/11 (1996); 35 Ill. Adm. Code 101.107(a)(1). Furthermore, this ruling does not extend to the representation of corporations by non-attorneys in rulemaking proceedings, which no Illinois court has held to be the practice of law. But in an adjusted standard case -- which is an adjudicatory proceeding -- a corporation must be represented by an attorney.

ORDER

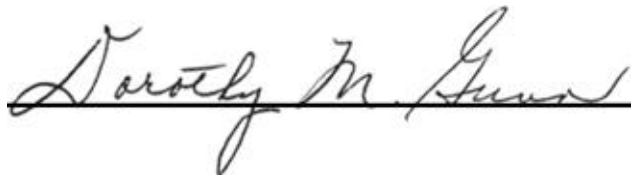
1. The Agency's motion to dismiss this case is denied.
2. Within 45 days of the date of this order, RTI must retain an attorney to represent it in this matter and its attorney must file an appearance and an amended petition.
3. Within 30 days of the date on which RTI's attorney files an appearance and an amended petition, the Agency must file a response to the petition.
4. Within 14 days of the filing of the Agency's response, RTI may file, through an attorney, a reply to the Agency's response.

IT IS SO ORDERED.

Chairman C.A. Manning concurred.

Board Member J.T. Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above interim opinion and order was adopted on the 10th day of July, 1997, by a vote of 5-1.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board