

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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SEP 16 2004

STATE OF ILLINOIS
Pollution Control Board

JOHNSON OIL COMPANY,)
Petitioner,)
v.) PCB No. 04-190
ILLINOIS ENVIRONMENTAL) (LUST Appeal)
PROTECTION AGENCY,)
Respondent.)

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
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Suite 11-500
Chicago, IL 60601

F. Ronalds Walker
Plews Shadley Racher & Braun
1346 North Delaware Street
Indianapolis, IN 46202

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a MOTION FOR RECONSIDERATION and TO DISMISS, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Dated: September 15, 2004

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MOTION FOR RECONSIDERATION and TO DISMISS

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.520 and 101.902, and by motion filed no later than 35 days following the receipt of an order entered by the Illinois Pollution Control Board ("Board") on September 2, 2004, hereby respectfully moves the Board to reconsider that order in that the Board erred in its decision. The Illinois EPA received service of the Board's order on September 6, 2004. In support of this motion, the Illinois EPA states as follows:

I. STANDARD FOR REVIEW

The purpose of a motion for reconsideration is to bring to the court's or Board's attention newly-discovered evidence which was not available at the time of the hearing, changes in the law, or errors in the court's or Board's previous application of the existing law. Vogue Tyre & Rubber Company v. Office of the State Fire Marshal, PCB 95-78 (January 23, 2003), citing to, Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 93-156 (March 11, 1993), and Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 572 N.E.2d 1154 (1st Dist. 1992).

The Illinois EPA argues that the Board's order dated September 2, 2004 ("September 2nd order" or "Order") was incorrect on two points. First, the Board erred in its application of

existing law regarding its acceptance of what is characterized as an amended petition for review filed by the Petitioner on August 23, 2004. Second, the Board erred in its application of existing law when it granted a motion for admission of John D. Moriarty on a *pro hac vice* basis. Based upon these errors, the Board improperly accepted the Petitioner's August 23, 2004 filing and therefore should instead dismiss the pending appeal.

II. THE BOARD HAS NO JURISDICTION OVER THIS APPEAL

The Board must dismiss the pending appeal on the basis that there is no jurisdiction to hear the appeal. This lack of jurisdiction is based upon the failure of the Petitioner to timely file a sufficient and adequate petition for review within the time allowed by Section 40(a)(1) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/40(a)(1)) and Section 105.406 of the Board's procedural rules (35 Ill. Adm. Code 105.406). On May 6, 2004, the Board entered an order extending the time to file a timely petition in this matter to July 28, 2004 ("July 28th petition"). On July 28, 2004, the Petitioner filed a petition seeking to appeal a final decision issued by the Illinois EPA on March 19, 2004. On August 5, 2004, the Board accepted the petition as timely filed but also found the petition to be deficient. The Board then ordered the Petitioner to file a "new petition" on or before September 4, 2004, finding that the corporation could not be represented by its manager. The Board went on to state that its decision deadline would recommence with the filing of an amended petition. On August 26, 2004, the Petitioner filed an "amended" petition ("August 26rd filing"), and in the September 2nd order, the Board accepted the August 26rd filing. Order, p. 1.

As the Board noted in an order dated August 5, 2004, the individual that signed the July 28th petition was identified as a manager of Johnson Oil Company, not as an attorney. It was not

until the August 26th filing that an attorney, F. Ronalds Walker, entered an appearance on behalf of the Petitioner.

It is well-settled law in Illinois that a pleading signed by a person who is not licensed to practice law in the State is a nullity even if a duly licensed attorney subsequently appears in court. Blue v. People of the State of Illinois, 223 Ill. App. 3d 594, 596, 585 N.E.2d 625, 626 (2nd Dist. 1992) (Citing, Fruin v. Northwestern Medical Faculty Foundation, Inc., 194 Ill. App. 3d 1061, 1063, 551 N.E.2d 1010, 1012 (1st Dist. 1990)). Where one not licensed to practice law has instituted legal proceedings on behalf of another, the suit should be dismissed; if the suit has proceeded to judgment, the judgment is void and will be reversed. Id.; See also, Midwest Home Savings and Loan Association v. Ridgewood, Inc., 123 Ill. App. 3d 1001, 1005, 463 N.E.2d 909, 912 (5th Dist. 1984).

Under Illinois law, a corporation can file a complaint only through a licensed attorney, and any action filed without an attorney is null and void *ab initio*. Berg v. Mid-America Industrial, Inc., 293 Ill. App. 3d 731, 732, 688 N.E.2d 699, 700 (1st Dist. 1997). Corporations may not appear in court through a layperson, only by a licensed attorney. Any proceedings which ensue in a case involving a layperson representing a corporation are null and void. This rule requiring initiation of an action by a duly licensed attorney applied even where the lay agent merely files the complaint over his own signature, and all subsequent court appearances are made by a duly licensed attorney. The purpose of the rule is to protect the litigants against the mistakes of those ignorant of the law and the schemes of the unscrupulous, and to protect the court itself in the administration of its proceedings from those lacking requisite legal skills. Berg, 293 Ill. App. 3d at 737, 688 N.E.2d at 704; Janiczek v. Dover Management Co., 134 Ill. App. 3d 543, 546, 481 N.E.2d 25, 26 (1st Dist. 1985).

This general rule has been found to extend beyond actions in circuit court, including a finding that an appeal initiated by a party without representation of an attorney licensed to practice in Illinois was a nullity. Midwest Home, 123 Ill. App. 3d at 1005, 463 N.E.2d at 912. Also included in the type of actions within the scope of the general rule are administrative proceedings. Oak Grove Jubilee Center, Inc. v. City of Genoa, 347 Ill. App. 3d 973, 985, 808 N.E.2d 576, 588 (2nd Dist. 2004) (Citing to, Janiczek, 134 Ill. App. 3d at 545, 481 N.E.2d at 26)). The Janiczek court referred to this general rule prohibiting representation of corporations by non-Illinois licensed attorneys as a strict one. Janiczek, 134 Ill. App. 3d at 545, 481 N.E.2d at 26.

There have been some noted exceptions to the general rule, but they have been very narrowly drawn and still pay heed to the general rule. In Janiczek, the court relied on the particular facts that the action in question was initiated by a then-duly licensed attorney who subsequently was disbarred. In the case of McEvers v. Stout, 218 Ill. App. 3d 469, 578 N.E.2d 321 (4th Dist. 1991), the appellate court also noted and adhered to the general rule, but again found a narrow exception based on the facts in that case involving an out-of-state attorney having initiated the complaint in question.

Here, there is no question that the Petitioner's July 28th petition was not signed by an attorney licensed in Illinois (or any other state, for that matter). It was not until the August 26rd filing that an attorney entered an appearance on behalf of Johnson Oil Company. The July 28th petition that initiated the present appeal was not filed by and through an attorney licensed in Illinois. The relevant and applicable case law, all of which is clear and on point, requires that the Board dismiss the present appeal as a nullity. If the Board were to proceed to judgment on the merits, all applicable legal precedent would result in the final decision also being found to be a

nullity. The Board should reconsider its decision to accept the “amended” petition and instead should dismiss the present appeal based on the plethora of relevant case law.

III. THE BOARD’S PROCEDURAL RULES REQUIRE DISMISSAL

There is an equally compelling alternative reason for the Board to dismiss the present appeal. As the Board has noted on many occasions, an appeal that is not timely filed cannot be heard since the Board lacks jurisdiction to do so. Solid Waste Agency of Northern Cook County v. City of Des Plaines, PCB 03-161 (June 5, 2003); Dewey’s Service, Inc. v. Illinois EPA, PCB 99-107 (February 4, 1999). A review of the Board’s procedural rules regarding the timely filing of petitions makes clear that the present appeal should be dismissed for lack of jurisdiction.

Section 101.300(b) of the Board’s rules (35 Ill. Adm. Code 101.300(b)) provides that documents will be considered filed when they are filed in conformance with the requirements found in Section 101.302 of the procedural rules and any other filing requirements specifically set out in other parts of the procedural rules. Section 101.400(a)(2) of the Board’s procedural rules (35 Ill. Adm. Code 101.400(a)(2)) provides that any person other than individuals must appear through an attorney at law licensed and registered to practice law in Illinois.¹

The July 28th petition filed by the Petitioner did not comply with the Board’s procedural rules, in that it specifically was not filed by an attorney licensed in Illinois. The deadline for filing a timely petition is set forth in both Section 40(a)(1) of the Act as well as Section 105.406 of the Board’s procedural rules. The Board cannot accept the July 28th petition as being in conformance with its procedural rules, since it violated Section 101.400(a)(2) of the Board’s procedural rules. Since the August 26rd filing was the first time a “petition” was filed on behalf

¹ This requirement, also imposed pursuant to Section 1 of the Corporation Practice of Law Prohibition Act (705 ILCS 220/1) and Section 1 of the Attorney Act (705 ILCS 205/1), was adopted by the Board in recognition that its previous practice allowing non-attorneys to represent a corporation was not consistent with the Attorney Act and the Corporation Practice of Law Prohibition Act.

of the Petitioner by an attorney licensed in Illinois, and since that filing was over a month after the time allowed pursuant to the Board's extension order dated May 6, 2004, the Board has no choice but to conclude that the August 26rd filing was untimely. The Board must dismiss the appeal since the only petition that conformed with the Board's procedural rules was filed on August 26, 2004, and pursuant to Section 101.300(b) of the Board's procedural rules, that is the date of filing an acceptable petition. That date is well beyond the deadline for filing an appeal here, and for that reason the Board lacks jurisdiction to hear this appeal. If the Board allows the appeal to proceed, it has granted itself relief from the requirements and prohibitions set forth in Section 40(a)(1) of the Act and Section 105.406 of the Board's rules; such deviation from statutory and regulatory standards is simply not allowable.

IV. THE BOARD CANNOT GRANT PRO HAC VICE MOTIONS

Also included in the Board's September 2nd order was the granting of a motion to allow John D. Moriarty to appear *pro hac vice* before the Board. This act by the Board was taken pursuant to Section 101.400(a)(3) of the Board's procedural rules. However, it is questionable at best whether the Board, or any other administrative agency, has the authority to grant such relief.

In the case of People ex rel. The Chicago Bar Association v. Goodman, 366 Ill. 346, 8 N.E.2d 941 (1937), the Illinois Supreme Court held that neither the General Assembly or an administrative agency has the authority to grant a layman the right to practice law. This holding was been followed in the case of Perto v. Board of Review, 274 Ill. App. 3d 485, 654 N.E.2d 232 (2nd Dist. 1995). In Perto, the court noted that in Illinois, only licensed attorneys are permitted to practice law. The legislature has no authority to grant a nonattorney the right to practice law even if limited to practice before an administrative agency. The ultimate authority to regulate

and define the practice of law rests with the Illinois Supreme Court. Perto, 274 Ill. App. 3d at 493, 654 N.E.2d at 238 (Citing to, Goodman, 366 Ill. at 349, 8 N.E.2d at 941).

In the present situation, the Board's authority to grant a motion *pro hac vice* rests solely in Section 101.400(a)(3) of the Board's procedural rules. Pursuant to the Goodman and Perto cases, however, only the Illinois Supreme Court and other courts of the state can grant such motions. There is no authority that supports the contention that an administrative agency can grant an out-of-state licensed attorney the ability to practice in Illinois in an adjudicated matter. To the contrary, there is specific authority that neither the legislature nor an administrative agency can allow an unlicensed individual to practice law in Illinois. But for the Board's September 2nd order, Mr. Moriarty would have no basis for practicing law in the present appeal, in that he is no different than a layperson in terms of his ability to practice law in Illinois.

Based upon the inherent inability of the Board to grant a motion *pro hac vice*, the Board should reconsider the portion of its September 2nd order and deny the motion for admission of Mr. Moriarty. The Illinois EPA is not raising any claims or concerns regarding Mr. Moriarty's qualifications as an attorney licensed in Indiana; rather, it is contesting the Board's decision to grant any out-of-state attorney the right to practice law before it.

V. CONCLUSION

The Illinois EPA respectfully requests that the Board reconsider its decision set forth in the September 2nd order and dismiss the present appeal. The failure of the Petitioner to have a licensed attorney file the petition renders the filing itself a nullity. Also, in the alternative, the petition filed on July 28, 2004, did not conform with the Board's requirements and thus could not be accepted as being filed. The only conforming petition was filed on August 26, 2004, well after the time allowed for filing a timely petition. That filing should be dismissed for lack of

jurisdiction since it was untimely. Finally, the Board should reconsider its decision to grant the motion *pro hac vice* and instead should deny motion on the basis that it lacks the authority to grant such relief.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent


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This filing submitted on recycled paper.