

ILLINOIS POLLUTION CONTROL BOARD
December 7, 1995

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| CONSOLIDATED DISTILLED PRODUCTS, INC., |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | PCB 96-39 |
| |) | (UST Fund) |
| OFFICE OF THE STATE FIRE MARSHAL, |) | |
| |) | |
| Respondent. |) | |

ORDER OF THE BOARD (by J. Yi):

This matter is before the Board on a petition for review filed by Consolidated Distilled Products, Inc. (Consolidated) on August 14, 1995. Consolidated is appealing a July 10, 1995 final determination of the Office of State Fire Marshal (OSFM) concerning Consolidated's eligibility to access the Underground Storage Tank Fund. On August 24, 1995 the Board accepted this matter for hearing.

On October 31, 1995, OSFM filed a general appearance before the Board. On November 6, 1995, OSFM filed a motion to dismiss Consolidated's petition for review for lack of jurisdiction and insufficiency of the pleadings. OSFM states that it was never served by Consolidated as required by the Board's procedural rules at 35 Ill. Adm. Code 107.123. Citing to Mr. "C" Food & Liquor v. Office of the State Fire Marshal, PCB 94-387, (January 11, 1995), the OSFM requests the Board to dismiss the action due to Consolidated's failure to serve OSFM the petition.¹ Additionally, OSFM argues that the petition is insufficient pursuant to the Board's procedural rules at 35 Ill. Adm. Code 107.122.

We deny the OSFM's motion to dismiss. Section 57.9(c)(2) states in pertinent part the following:

Within 60 days of receipt of the "Eligibility and Deductibility Determination" form ... the Office of the State Fire Marshal shall issue ... determination, and

¹In Mr. "C" Food & Liquor the Board found that the petition was insufficient as filed and that the petition contained no evidence that the OSFM has been served with notice of the petition's filing as is required by Section 107.123. The Board directed petitioner to file an amended petition curing the petition deficiencies but did not dismiss the petition. Unlike here, in Mr. "C" Food & Liquor the OSFM did not file a motion to dismiss for the inadequacies of the petition.

such determination or failure to act within the time prescribed shall be a final decision appealable to the Board. (415 ILCS 5/57.9(c)(2) (1994).)

There is no requirement for the petitioner to serve the OSFM in that section of the Act which confers subject matter jurisdiction upon the Board.

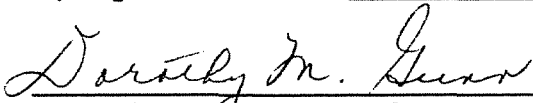
Since the requirement of service appears in the Board procedural rules and is not a statutory requirement to file the action before the Board, it is an issue concerning personal jurisdiction. (See Hutchinson v. Brothman-Sherman Theatres, 94 Ill.App3d 1066, 50 Ill.Dec. 422, 419 N.E.2d 530.) The OSFM filed a general appearance in this matter on October 31, 1995 subjecting itself to the Board's jurisdiction. (See In re Marriage of Linda Buchanio v. Charles Buchanio, 262 Ill.App3d 910, 200 Ill.Dec. 641, 635 N.E.2d 980.) Once the OSFM has subjected itself to the Board's jurisdiction, it can not argue at a later time in the proceeding that we lack personal jurisdiction over it. Additionally, for the reasons stated below an amended petition will be filed in this matter and since there is no statutory decision deadline in this matter, the OSFM has not been prejudiced by not being served with the petition.

We agree with the OSFM that the petition fails to meet the petition content requirements of 35 Ill. Adm. Code 107.122. We direct Consolidated to file an amended petition curing such deficiencies on or before January 5, 1996. Consolidated is also directed to serve the amended petition on OSFM pursuant to 35 Ill. Adm. Code 107.123. If Consolidated fails to timely file an amended petition or any other appropriate motion, this matter will be subject to dismissal.

A copy of the Board's recently-adopted procedural rules governing appeals from OSFM decisions is available from the Clerk's office. These rules should be consulted by the petitioner when preparing any amended petition.

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 7th day of December, 1995, by a vote of 6-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board