

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
BOARD OF REGISTRATION OF HAZARDOUS WASTE SITE
CLEANUP PROFESSIONALS

In the Matter of:)

James J. Decoulos,)
Respondent)

Docket No. LSP 10AP 01

OPPOSITION TO MOTION TO DISMISS

The Board of Registration of Hazardous Waste Site Cleanup Professionals
("Board"), by its attorney, hereby opposes Respondent's Motion to Dismiss.

The Length of the Board's Investigation is Not Grounds for Dismissal

Mr. Decoulos argues that a four-year limitations period should apply to this matter and that the Order to Show Cause is therefore time-barred because he received it on January 12, 2010, four years and 27 days after the Board received the Complaint on December 15, 2005.

In the absence of a statutory limitations period, delay in investigation of complaints for professional discipline cannot be a basis for dismissal of a disciplinary action. *Matter of London*, 427 Mass. 477, 481 (1998) (attorney discipline). The Board's authorizing statute, G.L. c. 21A §§19-19J, does not state a limitations period for the investigation of disciplinary complaints, and the Board's regulations likewise do not commit the Board to a limitations period.

Mr. Decoulos argues that a limitations period is needed because an LSP's defense could be prejudiced by the loss of evidence over time. Motion p. 5, quoting Posternak letter. Yet Mr. Decoulos offers no evidence or argument that the passage of time has

caused him any loss of evidence or otherwise affected his ability to defend against the Order to Show Cause.

The time spent by the Board investigating the Complaint against Mr. Decoulos was not out of the ordinary because at that time in the Board's history, the Board was facing a large backlog of Complaints. The Board's investigation, therefore, did not involve any inordinate delay. The Complaint against Mr. Decoulos was filed in December 2005. The Complaint Review Team interviewed Mr. Decoulos on December 12, 2007, and May 12, 2008, and the full Board made its initial decision in July 2009 that sufficient facts existed to warrant discipline. After further discussion with Mr. Decoulos, the Board issued its Order to Show Cause in January 2010.

Mr. Decoulos claims that he was prejudiced in the settlement of civil litigation related to the Eagle Gas site because the Board did not permit the Complainant to withdraw the Complaint. He states that that he did not receive a copy of the letter dated August 15, 2007 sent from the undersigned counsel to Complainant's attorney stating that the Board would not halt its investigation. Mr. Decoulos states that he never would have entered into the settlement if he had known that the Board would continue to investigate. Motion ¶17 p. 4 and p. 5. However, the Board notes that the date of the settlement between Mr. Decoulos and Eagle Gas was July 23, 2007, which was before the Board's letter. Therefore, Mr. Decoulos does not have a basis to claim he was prejudiced by not being copied on the August 15, 2007 letter.

The Board will not halt an ongoing investigation based upon a complainant's request. If the Board has determined, after review of the Complaint and the LSP's

written response to the Complaint,¹ that the allegations warrant investigation, the Board will not stop the investigation because the Complainant asks the Board to do so. The Board's responsibility is to protect public health, safety, welfare and the environment, G.L. c. 21A §19b, and not the interests of particular complainants or LSPs.

The Board Has Not Deliberately Delayed Producing MassDEP Documents to Mr. Decoulos

Mr. Decoulos claims that the Board and MassDEP took "deliberate action" to delay producing documents and correspondence to him and this delay has prejudiced his defense. He characterizes documents that the Board produced to him on October 7, 2010, as "newly discovered evidence" that provides "significant support for the actions of the Respondent and demonstrates that the Department failed to fulfill its most basic duties in overseeing response actions at a Tier IA site." Motion p. 6.

The Board reiterates that the documents at issue were created, received, and maintained by MassDEP and thus were generally not in the Board's possession until the Board requested and received them, therefore they were also available to Mr. Decoulos directly from MassDEP. In fairness, the Board did say it would produce all documents it had received from MassDEP.

The undersigned counsel acknowledges that on October 7, 2010, she produced to Mr. Decoulos electronic copies of documents that the Board had received from MassDEP, and regrets her unintentional oversight that caused a delay in the Board's production of these MassDEP documents. Affidavit of Lynn P. Read. The Board,

¹ The Complaint and the LSP's written response are redacted of all identifying information by the Board's staff before they are presented to the Board for review.

however, denies that these documents are “newly discovered evidence” or that they provide significant support for Mr. Decoulos in this action.

The documents produced were publicly available from MassDEP in the permanent public file that MassDEP maintains in this matter and that is available by the normal file-review process that has been in place at MassDEP SERO for many years. Mr. Decoulos’s documentation shows that he did not pursue his request to MassDEP for documents until September 27, 2010, after he filed his prepared testimony. Exhibit I to Affidavit of Decoulos in Support of Motion to Compel.

In addition, the documents discussed in Mr. Decoulos’s current Motion to Dismiss all date from 1997 or 1998, and therefore they do not support Mr. Decoulos’s defense in this action. The Hearing Officer has already ruled that Mr. Decoulos did not make the required showing that the testimony of Thomas Potter was necessary or relevant. The Hearing Officer accepted the Board’s argument that Mr. Potter’s information about site conditions in 1997 and MassDEP’s views of contaminant migration at the site in 1998 are irrelevant to whether Mr. Decoulos adequately supported his LSP Opinions beginning in 2003. Likewise, Mr. Decoulos has not shown that documents dating from 1997 and 1998, more than four years before he began working at the site, are necessary or relevant to the issue whether he collected and documented adequate information to support his LSP Opinions beginning in 2003.

MassDEP is Not a Necessary Party

Mr. Decoulos states that MassDEP is an indispensable party under the reasoning of Mass. R. Civ. P. 19(a), which requires that the tribunal must bring into the adjudication

persons in whose absence “complete relief cannot be accorded” or who will be affected by the outcome and their absence might impose inconsistent obligations on those who are already parties. He argues that MassDEP is a necessary party for two reasons: (1) the Board’s witnesses rely on “unsubstantiated and outdated practices from the Department;” and (2) MassDEP regulates surface water runoff that in Mr. Decoulos’s view caused the release at the outfall. He argues that the Board’s witnesses do not address the issue of surface water runoff, and unless MassDEP is made a party, he is “without an opportunity to properly rebut the contrary opinions and decisions of both the Board and the Department” and is denied fundamental fairness. Motion p. 9.

Mr. Decoulos was free to present expert testimony on “unsubstantiated and outdated practices from the Department,” and he has done so in the case of LNAPL remediation. He was also free to present testimony on non-point source pollution by persons who are not MassDEP employees, which he has not done. Moreover, the Hearing Officer has already ruled that Mr. Decoulos did not make a showing that testimony regarding regulation of non-point source pollution was necessary and relevant. Ruling and Order Regarding Motion for Order Compelling Discovery and Motion for Oral Testimony, p.2 (denying oral testimony of Fred Civian regarding surface water regulation).

The fact that MassDEP employees are witnesses does not mean that MassDEP is a necessary party. Mr. Decoulos will have adequate opportunity to cross-examine the Board’s witnesses who are MassDEP employees. The factfinder will determine whether statements made by such witnesses are adequately supported by a preponderance of the evidence presented at the hearing.

The rationale of Mass.R.Civ.P. 19 does not apply to MassDEP in this matter. Rule 19 permits a person who will be affected by a matter to participate, and it permits a tribunal to require persons to become parties if, in their absence, a judgment will fall too harshly on the existing parties. MassDEP will not be affected by the outcome of this adjudicatory hearing, which relates solely to Mr. Decoulos's individual LSP license. Similarly, the outcome of this matter will not fall unduly harshly on Mr. Decoulos if MassDEP is not made a party because MassDEP cannot share his obligations under the Board's rules. MassDEP's employees can only offer their opinions whether Mr. Decoulos's work complied with the MCP, and Mr. Decoulos can cross-examine them or offer contrasting expert testimony. Thus the presence of MassDEP as a party is not required to ensure that the Board's Rules of Professional Conduct will be applied appropriately to Mr. Decoulos.

Most fundamentally, MassDEP cannot be made a party to this action because the Board has no jurisdiction to render a ruling of law that would bind MassDEP. The issue for decision in this matter is whether Mr. Decoulos's Opinions comply with the Board's authorizing statute, G.L. c. 21A, and the Board's Rules of Professional Conduct, 309 CMR 4.00 and 7.00. The jurisdiction of the Board and the Hearing Officer to apply these statutes and regulations is limited to licensing LSPs and enforcing the Board's regulations, and does not extend to MassDEP.

CONCLUSION

For all the foregoing reasons, the Board of Registration of Hazardous Waste Site Cleanup Professionals requests that the Respondent's Motion to Dismiss be denied.

Respectfully submitted,
Board of Registration of Hazardous
Waste Site Cleanup Professionals,
By its Attorney,



Lynn Peterson Read

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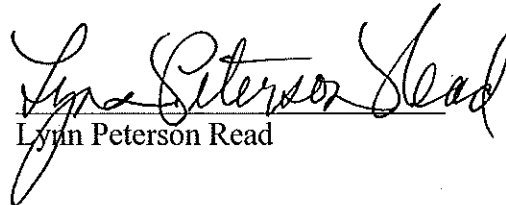
Phone: 617-348-4032

Date: October 14, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this date a true copy of the Opposition to Motion to Dismiss was served upon each party in this action by electronic mail to the following address: jamesj@decoulos.com.

10/14/10
Date



Lynn Peterson Read