

**OHIO BOARD OF TAX APPEALS**

Carroll E. Newman, )  
Adams County Auditor, )  
 )  
Appellant, ) (THERMAL EFFICIENCY EXEMPTION)  
 )  
vs. )  
 )  
Thomas M. Zaino, Tax Commissioner ) (Denying Motion to Disqualify, Motion to  
of Ohio, Cincinnati Gas and Electric ) Reassign and Motion for Participation  
Company, Columbus Southern Power ) by George Sansoucy  
County, and Dayton Power and Light )  
Company, )  
 )  
Appellees. )

APPEARANCES:

For the Appellant -	David C. DiMuzio, Inc. David C. DiMuzio 1900 Kroger Building 1014 Vine Street Cincinnati, Ohio 45202
For the Appellee - Tax Commissioner	Jim Petro Attorney General of Ohio Janyce C. Katz Assistant Attorney General State Office Tower, 16 <sup>th</sup> Floor 30 East Broad Street Columbus, Ohio 43215
For the Appellee - Power companies	Vorys, Sater, Seymour and Pease Anthony L. Ehler Jeffrey Allen Miller 52 East Gay Street - P.O. Box 1008 Columbus, Ohio 43216-1008
For the Appellee - Cincinnati Gas and Electric Company	Julie L. Ezell Cinergy Services, Inc. 1000 East Main Street Plainfield, Indiana 46168-1782

Entered July 21, 2005

Ms. Margulies and Mr. Eberhart concur. Mr. Dunlap not participating.

These matters are before the Board of Tax Appeals upon a number of motions, each emanating from an appeal by the appellant, Adams County Auditor (“appellant auditor”), contesting the issuance of certain thermal efficiency improvement certificates granted to the Cincinnati Gas & Electric Company, the Columbus Southern Power Company, and the Dayton Power & Light Company (“appellee power companies”). The motions also emanate from certain decisions made by this board and our attorney examiner as these matters have progressed to ultimate resolution. The original hearing in this matter was held on February 18, 2003. At that time the board’s attorney examiner presiding over the hearing excluded the testimony of an expert witness intended to be called by appellant auditor. That ruling was reconsidered and overturned by this board and a second hearing was held, at which time the testimony of George Sansoucy was entered into the record.

On November 1, 2004, a “motion to strike testimony and for sanctions” was filed by counsel for the appellee power companies. Appellant auditor opposed this motion by entering a memorandum contra to said motion. Eventually, on May 20, 2005, appellee power companies sought a hearing on their motions. A hearing was scheduled by the attorney examiner. Appellant sought reconsideration of the order scheduling a hearing, arguing that scheduling a hearing was beyond the authority of an attorney examiner. As a second ground for reconsideration, counsel argued that the sanctions motion could potentially “tie the hands” of this board on the merits of the appeal.

This motion for reconsideration received a response and a reply. Also filed by the appellant auditor is a “motion for recusal of the hearing examiner, or in the alternative, motion for the board to substitute hearing examiner for sanction hearing.” Through that filing, counsel for the appellant auditor argues that the attorney examiner presiding over the present matter proved through his conduct at hearing that he could no longer be objective in ruling on the motion to strike the testimony of the expert witness as well as the motion concerning sanctions.

After the board docketed the motion to strike and after the board scheduled the hearing as requested by appellee power companies, the board received a notice of appearance on behalf of the expert witness, George Sansoucy, which indicated that counsel intends to appear at the hearing presently scheduled for July 28, 2005 and that counsel intends to represent Mr. Sansoucy’s personal interest in this matter. The entry further provided:

“Since the sanctions hearing’s effect may be far reaching and would extend to matters far outside the scope of the above-referenced case we will be actively involved in protecting Mr. Sansoucy’s name, reputation and interest.”

Following the entry of appearance, the board received a memorandum in opposition to Mr. Sansoucy’s participation in the hearing scheduled for July 28, 2005. The memorandum in opposition was followed by a reply from counsel for Mr. Sansoucy.

This order will address the following motions: the motion for reconsideration of the scheduling of the hearing to be held July 28, 2005, the motion for substitution of another attorney examiner or for direct participation by the board, and the motion to permit participation by counsel for Mr. Sansoucy.

As to the first motion, the board concludes that the scheduling of a hearing is procedural and affects no substantive rights. Cf. *Bank One, Columbus v. O'Brien* (Nov. 19, 1992), Franklin App. Nos. 92AP-683, 92AP-748, unreported. (A scheduling order neither determines the action nor affects a substantial right.) The board has delegated to its attorney examiners the authority to issue interim procedural orders which do not terminate proceedings. Ohio Adm. Code 5717-1-10(A). We agree that determinations ultimately made by consideration of testimony presented at hearing affects the rights of parties. However, in this case, the attorney examiner has done nothing more than schedule a hearing. He has made no resolution of the motions before the board.

Next, we deny the appellant auditor's request for disqualification and decline the invitation to personally preside at the hearing presently scheduled. We remind the parties that the ultimate determination regarding substantive issues has always been vested in the board. *Ritchie Photographic v. Limbach* (1994), 71 Ohio St. 3d 440. We have authorized the presiding attorney examiner to conduct the hearing in this matter.

Finally, we acknowledge that appellant auditor's expert witness has retained counsel. We will also, as a matter of courtesy, provide a copy of this order to counsel.<sup>1</sup> The board's hearings are open to the public; there is no bar to appellant auditor's witness' counsel's attendance. However, we permit participation in the currently scheduled hearing to only parties to the action. Therefore, the board does not accept counsel's entry of appearance in this matter and will not address his motion for recusal of the hearing examiner. Counsel for appellant auditor's witness is not permitted to participate in the hearing currently scheduled.

Ohio Adm. Code 5717-1-14(B) provides for the imposition of sanctions after an opportunity for a hearing. The hearing was scheduled after request by appellee power companies. However, the motion to strike and for sanctions is predicated upon testimony previously presented at an earlier hearing. Appellee power companies suggest that they wish to present costs incurred should monetary sanctions ultimately be imposed. Such testimony is appropriately entered through hearing. However, we remind the parties that the testimony has been taken regarding the earlier motions, and arguments have been made and countered in writing. The board expects that the hearing will proceed with the appropriate demeanor and that the hearing shall not be used as a venue for repetitive or disparaging comments.

The matter will proceed to hearing as currently scheduled.

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<sup>1</sup> A copy of this order will be mailed to Joseph Gibson, Gibson, Brelo, Ziccarelli & Martello, 55 Public Square, Suite 2075, Cleveland, Ohio 44113.