

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)
Appellant,) PCHB 01-160
CITIZENS AGAINST SEATAC) ORDER DENYING MOTION IN LIMINE
EXPANSION,) RE: WAC 371-08-475
Intervenor,)
v.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY and THE)
PORT OF SEATTLE,)
Respondents.)

On March 4, 2002, the Department of Ecology (Ecology) filed a motion in limine asking the Board to strike the pre-filed written direct testimony of Thomas R. Luster submitted by Appellant Airport Communities Coalition (ACC). The basis for the motion is that the testimony violates the Board's rules of practice. The Board's rule provides:

Former employee as an expert witness. No former employee of the department shall at any time after leaving the employment of the department appear, except when permitted by applicable state conflict of interest law, as an expert witness on behalf of other parties in a formal proceeding in which an active part of the investigation as a representative of the department was taken.

WAC 371-08-475(7).

1 The purpose of this rule is, much like the prohibitions on former state employees
2 contained in the State's ethic laws RCW 42.52.080, is to ensure the interests of the state are not
3 compromised after a person has completed his or her state service.

4 The appeal before the Board challenging the validity of the § 401 Certification issued by
5 Ecology was filed on August 23, 2001. Shortly thereafter, on September 12, 2001, the
6 Appellants filed a motion to stay the effectiveness of the § 401 Certification. Appended to their
7 motion for stay was the declaration of Mr. Luster. Appended to the Appellants' reply brief in
8 support of the stay, filed on October 8, 2001, was a second declaration of Mr. Luster. On
9 October 11, 2001, the Appellants' filed their preliminary list of witnesses in which Mr. Luster
10 was listed as a witness. He was not, however, included on the list of expert witnesses, but as a
11 witness in the category of "other persons." On November 16, 2001, the Appellants' filed an
12 updated preliminary list of witnesses, which continued to show Mr. Luster as a witness. On
13 January 18, 2002, Mr. Luster was deposed. He was further deposed on February 1, 2002. On
14 February 22, 2002, the Appellants filed their written, direct testimony, including the testimony of
15 Mr. Luster. On March 4, 2002, Ecology filed the motion in limine to strike the testimony of Mr.
16 Luster.

17 In matters relating to explaining governmental programs there is a thin line between
18 whether a witness is a lay witness or an expert witness. An expert witness generally relies on
19 special knowledge, skill, experience, or training in drawing inferences or giving opinions. Being
20 reimbursed for the cost to travel to depositions or to a hearing does not make a witness the expert
21 witness of the entity reimbursing the costs. The mere designation in a job title that an employee

1 is considered a subject matter expert, does not necessarily convert a witness into an expert
2 witness.

3 Regardless of whether Mr. Luster is an expert witness or a lay witness, Ecology has
4 waived their right to exclude Mr. Luster as a witness in this appeal. Ecology had numerous
5 opportunities to challenge Mr. Luster's inclusion on witness lists or to challenge the reliance on
6 Mr. Luster's declarations. Neither Ecology nor the Port raised any such objections. Waiting
7 over five months, until two weeks before the start of the hearing, to complain about a witness
8 results in a waiver of the right to object. An implied waiver may arise where a party's course of
9 conduct evidences an intention to waive a right or is inconsistent with any other intention.
10 *Kessinger v. Anderson*, 31 Wn.2d 157 (1948).

11 This waiver, and the resulting allowance of the testimony of Mr. Luster, shall not be
12 construed to be an opinion as to whether a violation of the state ethics law has or has not
13 occurred. The Board does not have jurisdiction to render such an opinion or to impose remedies
14 or penalties. That is the purview of the Executive Ethics Board or as otherwise provided in
15 42.52 RCW.

1 **ORDER**

2 For these reasons, the Board DENIES Ecology's motion in limine regarding the
3 testimony of Mr. Luster.

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5 SO ORDERED this 14th day of March, 2002.

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7 **POLLUTION CONTROL HEARINGS BOARD**

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12 **KALEEN COTTINGHAM,**

13 Presiding
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