

ILLINOIS POLLUTION CONTROL BOARD
November 7, 1985

MAURINE BACHERT,)
an Individual,)
)
Complainant,)
)
v.) PCB 85-80
)
VILLAGE OF TOLEDO ILLINOIS,)
a Municipal Corporation and)
VICTOR L. WILSON, JOHN SCOTT,)
KURT SCOTT, KENNETH MENDENHALL,)
Individually,)
)
Respondents.)

MS. MAURINE BACHERT, COMPLAINANT, APPEARED PRO SE;
MR. BOBBY SANDERS APPEARED ON BEHALF OF THE RESPONDENT, VILLAGE
OF TOLEDO;
MR. KURT SCOTT, RESPONDENT, APPEARED PRO SE.

OPINION AND ORDER OF THE BOARD (by J. Marlin):

This enforcement case comes before the Board upon the June 12, 1985 filing of a complaint alleging air pollution violations of Section 9(a) of the Illinois Environmental Protection Act (Act), Ill. Rev. Stat. 1983, ch. 111 1/2, par. 1009(a) and open burning violations of 35 Ill. Adm. Code 237.102 against the Village of Toledo, Illinois (Village) and individuals Victor L. Wilson, Lewis Russell, John Scott, Kurt Scott and Kenneth Mendenhall. The proof of personal service on others is defective because it is not sworn to or otherwise properly notarized, even though purportedly signed by a notary (Complainant's Exh. 4). On September 20, 1985, the Board denied the Village's motions to dismiss the complaint and to make the complaint more definite and certain as being untimely. Proof of service on the Village was defective. There are no mail receipts signed by the Village or its agents and the personal service list is, as noted above, defective. (See IEPA v. Murray, 21 PCB 337, May 6, 1976). However, the Village did not raise this issue in its motion to dismiss and proceeded to submit itself to the jurisdiction of the Board by filing its answer.

Before reaching the main issues, a few preliminary ones need to be addressed. At hearing, the Village moved for a directed verdict before the start of complainant's case in chief. As there are no jury trials before the Board, the motion is denied. To the extent that the motion can be construed as one for judgment on the pleadings, it is denied as being late. Such a motion should have been submitted to the Board, not to the hearing officer, sufficiently prior to the hearing to enable the

Board to rule on it. All motions which could dispose of a case are decided by the Board (35 Ill. Adm. Code 103.140). Thus, to the extent that the Village's motion can be construed as a motion to find for defendant at close of plaintiff's evidence (Ill. Rev. Stat. 1985, ch. 110, par. 2-1110), it also is denied.

The Village objected to all diary entries in complainant's Exhibit 1 (C. Exh. 1) after the date of filing of the complaint (June 12, 1985). The Board sustains the objection and strikes those portions. There must be a definiteness as to time of alleged violation in order to allow the respondent sufficient time to defend against those alleged violations. While the complainant probably did not know that the proper way is to amend the complaint or file a motion to incorporate the new dates of alleged violations in the original complaint, the Board must adhere to the rules in order to avoid unfairness and undue surprise to the respondents.

The Village objected to the lack of foundation concerning the photographs comprising C.Exh.2 and C.Exh.3. The objection is sustained for complainant's failure to lay a proper foundation. To lay a proper foundation, the complainant needed to state at hearing that each photograph was a true and accurate representation of what she saw. In addition, each photograph would need to be connected by the complainant to the facts in the case. The photographs in question show numerous barrels that are apparently used for open burning, but the record does not adequately establish where they are located, when the pictures were taken, who took them, what they show, and how they relate to the complaint. Furthermore, some of the photographs were taken after the filing of the complaint and without a proper motion or amended complaint, they can not be considered.

Any other motions not addressed are denied and any other objections not ruled on are overruled.

Maurine Bachert is a resident of the Village of Toledo, Illinois. The Village is a municipal corporation of the State of Illinois and its population is approximately 1,100 people. Respondents John Scott, Kurt Scott and Kenneth Mendenhall are individuals who are alleged to have caused or allowed air pollution and open burning, as is respondent Victor Wilson, former president of the Board of Trustees of the Village.

The complaint alleges that respondents violated Section 9(a) of the Act which provides as follows:

No person shall:

- a) Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from

other sources, or so as to violate regulations or standards adopted by the Board under the Act;

The complaint further alleges that respondent violated 35 Ill. Adm. Code 237.102 which provides as follows:

- a) No person shall cause or allow open burning, except as provided in this Part.
- b) No person shall cause or allow the burning of any refuse in any chamber or apparatus, unless such chamber or apparatus is designed for the purpose of disposing of the class of refuse being burned.

An enforcement proceeding before the Board is civil in nature. The burden of proof in a civil proceeding is a preponderance of the evidence. Industrial Salvage Inc. v. County Board of Marion, PCB 83-173 (August 2, 1984), citing Arrington v. Walter E. Heller International Corp., 30 Ill.App.3d 631, 333 N.E.2d 50 (1975). A proposition is proved by a preponderance of the evidence when it is more probably true than not. Industrial Salvage, supra, citing Estate of Ragen, 79 Ill.App.3d 8 (1979). It is the complainant's burden to prove a proposition by a preponderance of the evidence.

The Board first must determine if the respondents have caused or allowed the discharge of contaminants into the environment. A contaminant "is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." (Section 3(d) of the Act). The Board recently found a municipal corporation to have caused or allowed the discharge of contaminants into the environment so as to cause air pollution by allowing leaf burning through its municipal ordinance, in contravention of a state statute. Greenland v. City of Lake Forest, PCB 84-155, June 13, 1985, on appeal, Second District, No. 85-541. The Board in Greenland cited the controlling law on the issue:

[t]he Second District Appellate Court entertained the cause or allow clause of Section 9(a) and stated that the respondent must "[exercise] sufficient control over the source of the pollution." Phillips Petroleum Co. v. IEPA, et al., 72 Ill. App. 3d 217, 390 N.E. 2d 620 (2d Dist. 1979). The Fifth District, in construing identical language in Section 12(a) of the Act, affirmed the Board and found that the respondent "had the capability of controlling the polluttional discharge." Meadowlark Farms, Inc. v. IPCB, et al., 17 Ill. App. 3d 851, 308 N.E. 2d 826 (5th Dist. 1974); Freeman Coal Mining Corp. v. IPCB, et al., 21 Ill. App. 3d 157, 313 N.E. 2d 616 (5th Dist. 1974). In interpreting the word allow, the Board has found that one can allow a discharge by poor practices which contribute to the problem. IEPA v. Bath, Inc. et al.,

PCB 71-52; Bath, Inc. et al. v. IEPA, PCB 71-224, (consol.), 2 PCB 433, September 16, 1971. The Fourth District, in affirming the Board, noted that to argue that a violation cannot be predicated upon the existence of burning in the absence of a finding that respondent by its affirmative act caused...the burning" is not persuasive. Bath, Inc. et al. v. IPCB, et al., 10 Ill. App. 3d 507, 294 N.E. 2d 778 (4th Dist. 1973).

The Board subsequently found that the City did have sufficient control over the source of the pollution and thus did cause or allow the discharge of contaminants into the environment (Greenland, slip op. at 5).

In this case, there is no village ordinance involved and state law controls. The Village is aware of its duty to enforce the open burning provisions of the Act (R. 72) and sends letters to alleged violators when complaints are received (R. 71,9). However, the Village stops short of prosecuting for open burning (R. 92). The evidence shows that when Mrs. Bachert complained of burning, the Village responded to check out her complaint (R. 27-9, 32, 63-5, 70, 77-9, 83). The only time the Village did not respond was when the Village policeman was off duty (R. 79). At such times, the sheriff's office takes over all calls. Id. In addition, when the Illinois Environmental Protection Agency (IEPA) sent a letter to the Village advising it that the IEPA had received an open burning complaint, the Village passed the information on to the citizenry by publication in the local newspaper (C.Exh. 5, R. 87). Furthermore, a Village Board "legal notice" was published after the date of the filing of this complaint requesting that the citizens stop burning domicile waste (C. Exh. 6, R. 12-13). The Board finds that there is insufficient evidence to show that the Village caused or allowed the discharge of contaminants into the environment or had sufficient control over any alleged burnings. The Board need go no further in consideration of Section 9(a). Likewise, the Board finds that there is insufficient evidence to find that the Village caused or allowed open burning pursuant to Section 237.102.

Testimony was presented regarding only two alleged instances of open burning. One of the fires was caused by an individual who was not named in the complaint (R. 26-29, 67). The other fire was started by Mr. Kurt Scott who testified he was burning wood scraps for cookout purposes within the exclusions of Section 237.120(e), (R.97). Mrs. Bachert complained that the odor from the "fireplace" smelled of garbage, tar, turpentine and was odoriferous. Id. The record does not adequately refute the cookout contention or document that Mr. Scott burned domicile waste on other occasions. There is insufficient evidence to find that Mr. Kurt Scott violated sections 9(a) of the Act or Section 237.102.

As for two other respondents, there was no evidence presented concerning Mr. John Scott and Mr. Kenneth Mendenhall. While some photos showing burning were entered into evidence (former C.Exh. 3), they have been stricken from the record for lack of foundation. The Board finds that there is insufficient evidence to find Mr. John Scott and Mr. Kenneth Mendenhall in violation of Sections 9(a) or 237.102. Likewise, there was no evidence to show that the former president of the Board of Trustees, caused or allowed anything. The Board finds that Mr. Victor Wilson did not violate Sections 9(a) or 237.102.

The Village has requested that the Board assess the Village's court costs in defense of this suit against Mrs. Bachert, yet cites no authority. The Illinois Supreme Court has held that authority for an administrative agency to award attorneys fees must be found in its enabling statute. City of Chicago v. Fair Employment Practices Commission, 65 Ill.2d 108, 357 N.E.2d 1154 (1976). Since no such Board authority exists in the Act, the request for court costs is denied.

It is clear that State laws exist to protect people from the problems caused by open burning of domestic waste and that citizens can reasonably expect this law to be enforced. The Board emphasizes that the decision in this matter is based on a lack of sufficient evidence. The complainant failed to be specific about such matters as the time and place of alleged burning and exactly what was being burned by whom. The Village has responded to open burning complaints and it is evident that burning does occur in the Village. The Village Clerk admitted open burning occurs (R. 88) and it was mentioned that burning is traditional in the general character and make up of the small community (R. 47). The Board will not reach a conclusion regarding the adequacy of the Village's enforcement of the State's open burning prohibition. Given the lack of evidence in this case, the Board cannot make additional findings.

This Opinion concludes the Board's findings of fact and conclusions of law in this matter.

ORDER

1. There is insufficient evidence in the record to show that respondents Village of Toledo, Victor L. Wilson, John Scott, Kurt Scott and Kenneth Mendenhall have violated Section 9(a) of the Act or 35 Ill. Adm. Code 237.102.
2. This proceeding is hereby dismissed.

IT IS SO ORDERED.

Board Member J.D. Dumelle Concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 7th day of November, 1985 by a vote of 7-0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board