

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MAY 02 2003

STATE OF ILLINOIS
Pollution Control Board

CITY OF KANKAKEE,)
)
Petitioner,)
)
v.)
)
)
COUNTY OF KANKAKEE, COUNTY)
BOARD OF KANKAKEE, and WASTE)
MANAGEMENT OF ILLINOIS, INC.,)
)
Respondents.)

PCB 03-03-125
(Third-Party Pollution Control
Facility Siting Appeal)

MERLIN KARLOCK,)
)
Petitioner,)
v.)
)
COUNTY OF KANKAKEE, COUNTY)
BOARD OF KANKAKEE, and WASTE)
MANAGEMENT OF ILLINOIS, INC.,)
)
Respondents.)

PCB 03-133
(Third-Party Pollution Control
Facility Siting Appeal)

MICHAEL WATSON,)
)
Petitioner,)
v.)
)
COUNTY OF KANKAKEE, COUNTY)
BOARD OF KANKAKEE, and WASTE)
MANAGEMENT OF ILLINOIS, INC.,)
)
Respondents.)

PCB 03-134
(Third-Party Pollution Control
Facility Siting Appeal)

KEITH RUNYON,)
)
Petitioner,)
v.)
)
COUNTY OF KANKAKEE, COUNTY)
BOARD OF KANKAKEE, and WASTE)
MANAGEMENT OF ILLINOIS, INC.,)
)
Respondents.)

PCB 03-135
(Third-Party Pollution Control
Facility Siting Appeal)

**WASTE MANAGEMENT OF ILLINOIS, INC.'S
MOTION *IN LIMINE* TO BAR EVIDENCE RELATING TO
PATRICIA BEAVER-McGARR AND CRITERION (iii)**

Respondent WASTE MANAGEMENT OF ILLINOIS, INC. ("WMII"), by its attorneys, Pedersen & Houpt, in support of its Motion *in Limine* to bar the introduction at the hearing of any evidence relating to Patricia Beaver-McGarr and/or criterion (iii), including, but not limited to, testimonial or documentary evidence presented by Sandra Listenbee or Mary Ann Powers, states as follows:

1. Petitioner Michael Weston has raised several fundamental fairness claims in this appeal, including claims that the public hearing was unfair because he was not able to *subpoena* documentation concerning the qualifications of Patricia Beaver-McGarr, WMII's expert witness on criterion (iii), or to subject her to recross-examination on the issue of her educational background.

2. On April 30, 2003, Petitioner served *subpoenas* on Sandra Listenbee, Registrar of Richard J. Daley College, and to Mary Ann Powers of Richard J. Daley College requiring them to appear at the hearing on May 6, 2003 and produce "the entire contents of the Richard J. Daley College file for Ms. Patricia Beaver-McGarr (formerly Patricia Beaver)."

3. In response to WMII's Motion to Quash the *subpoenas*, Petitioner argued that he should be allowed to present evidence at the hearing through these two witnesses to support his claim that Ms. Beaver-McGarr perjured herself at the public hearing by testifying that she obtained a degree from Richard J. Daley College on the theory that if he she perjured herself, her testimony should have been barred, and because it was not barred the County Board of Kankakee's ("County Board") decision was fundamentally unfair. Petitioner also contends that

he should be allowed to present evidence from these two witnesses to establish that the hearing was fundamentally unfair due to WMII's alleged refusal to produce Ms. Beaver-McGarr's diploma or to reproduce her for further questioning on her diploma.

4. It is apparent that any evidence from Ms. Listenbee and Ms. Powers can only be offered for the purposes of contradicting Ms. Beaver-McGarr's testimony, collaterally attacking her credibility and challenging the County Board's finding that criterion (iii) was met. In other words, Petitioner is arguing a manifest weight of the evidence issue under the guise of a fundamental fairness argument.

5. It is well-settled that the Board is not permitted to reweigh the evidence concerning the nine statutory criteria or a witness's credibility on appeal. Land & Lakes Co. v. Illinois Pollution Control Board, 319 Ill. App. 3d 41, 53, 743 N.E.2d 188, 197 (3d Dist. 2000); Landfill 33 Ltd. v. Effingham County Board, No. PCB 03-43 and 03-52 (cons.), slip op. at 3 (February 20, 2003). In Land & Lakes Co., the Illinois appellate court held that "it is for the local siting authority to determine the credibility of witnesses, to resolve conflicts in the evidence, and to weigh the evidence presented." Land & Lakes, Co., 319 Ill. App. 3d at 53, 743 N.E.2d at 197. In accordance with Land & Lakes Co., the Board in Landfill 33 Ltd. stated that "[w]here there is conflicting evidence, the Board is not free to reverse merely because the lower tribunal credits one group of witnesses and does not credit the other. [citation omitted]. Because the local government could have drawn different inferences and conclusions from conflicting testimony is not a basis for this Board to reverse the local government's findings." Landfill 33 Ltd., No. PCB 03-43 and 03-52 (cons.), slip op. at 3.

6. Even the Illinois appellate court in People of the State of Illinois v. Moore, 199 Ill.

App. 3d 747, 557 N.E.2d 537 (1st Dist. 1990)¹, the case on which Petitioner relies on to support its contention that the use of perjured testimony is fundamentally unfair, stated that issues concerning testimony "go merely to the credibility of the witness and of the evidence." Id., at 766, 557 N.E.2d at 549.

7. In this case, the County Board issued its decision granting local siting approval, subject to certain conditions, despite Petitioner's challenges and objection to Ms. Beaver-McGarr's qualifications as an expert. The Board cannot make its own findings of fact concerning Ms. Beaver-McGarr's qualifications, and cannot reweigh the evidence concerning her credibility as an expert witness. Therefore, it is improper to permit Petitioner to introduce evidence at the hearing concerning Ms. Beaver-McGarr's educational background, her qualifications as an expert, her testimony concerning criterion (iii) or any other matter that relates to the County Board's finding that criterion (iii) was met.

8. Even when reviewing fundamental fairness issues, it is improper for the Board to hear new evidence unless such evidence necessarily lies outside of the record. Land & Lakes Co., 319 Ill. App. 3d at 48, 743 N.E.2d at 194.

9. In this case, the issue of Ms. Beaver-McGarr's qualifications as an expert witness was raised and thoroughly exhausted by Petitioner at the public hearing. Petitioner subjected Ms. Beaver-McGarr to extensive cross-examination on the issue of her educational background. At Petitioner's request, an affidavit from Richard J. Daley College was furnished at the hearing concerning Ms. Beaver-McGarr's affiliation with the college, which is part of the record on appeal. Petitioner made his record concerning his objection to Ms. Beaver-McGarr's

¹ People of the State of Illinois v. Moore, is also inapposite in that it is a criminal case, not a local siting case.

qualifications as an expert witness, and the record was closed at the end of the public comment period. He cannot now reopen this issue and introduce additional evidence on appeal.

10. Moreover, a determination of whether the proceedings were fundamentally unfair due to WMII's alleged failure to present documentation concerning Ms. McGarr's qualifications, and alleged failure to present Ms. McGarr for supplemental recross-examination on the issue of her educational background does not require evidence from Ms. Listenbee or Ms. Powers, or a review of any other evidence outside of the record. Therefore, there is no legitimate basis for presenting the testimonial or documentary evidence from Ms. Listenbee or Ms. Powers at the hearing on May 6th.

WHEREFORE, WMII requests that the Hearing Officer bar the introduction at the hearing of any evidence relating to Patricia Beaver-McGarr and/or criterion (iii), including, but not limited to, testimonial or documentary evidence presented by Sandra Listenbee, Registrar of Richard J. Daley College, and to Mary Ann Powers of Richard J. Daley College, and provide such further and other relief as he deems appropriate.

Respectfully submitted,

WASTE MANAGEMENT OF ILLINOIS, INC.

By 

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