

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MARTIN MAGGIO,

Petitioner,

v.

COUNTY OF WINNEBAGO, WINNEBAGO
COUNTY BOARD and WINNEBAGO
LANDFILL COMPANY, LLC.

Respondents.

No. PCB 13-10

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STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

To: All Counsel of Record
See Attached Service List

PLEASE TAKE NOTICE that on November 8, 2012, I filed with the Clerk of the Illinois Pollution Control Board, 100 West Randolph, Suite 11-500, Chicago, Illinois, the attached **MOTION TO QUASH SUBPOENA**, a copy of which is herewith served upon you.

Ancel, Glink, Diamond, Bush, DiCianni &
Krafthefer, P.C.

DERKE J. PRICE

By:



Thomas G. DiCianni

Thomas G. DiCianni / ARDC #03127041

tdicianni@ancelglink.com

ANCEL, GLINK, DIAMOND, BUSH, DICIANNI & KRAFTHEFER, P.C.

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Martin Maggio v. County of Winnebago, et al.
Case No. PCB 13-10

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Petitioners, Michael S. Blazer and Thomas S. Yu:

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24 North Hillside Avenue
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Respondent, George Mueller:

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609 Etna Road
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Respondent, Gary Kovandan:

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Rockton, IL 61072

Respondent, Winnebago County Clerk

Margie M. Mullins, County Clerk
404 Elm Street
Suite 104
Rockford, IL 61101

Respondent, Winnebago County Board

Scott H. Christiansen, Chairman
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Rockford, IL 61101

Respondent, Winnebago Landfill Company, LLC

John Lichty, Chief Executive Officer
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Rockford, IL 61109

Respondent, Winnebago County State's Attorney's Office:

David J. Kurlinkus
400 West State Street, #804
Rockford, IL 61101

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MOTION TO QUASH SUBPOENA

NOW COMES Derke J. Price, the assigned hearing officer in this matter, by and through his attorneys, Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., and moves to quash the subpoena served on him, and in support states as follows:

1. A subpoena has been issued for Derke J. Price, the hearing officer for the above-captioned matter, to give his deposition on November 15, 2012. (A copy of the subpoena is attached as Exhibit A.) For the reasons that follow, the subpoena should be quashed.

2. The Clerk of the Illinois Pollution Control Board has statutory authority to issue a subpoena in connection with a matter before the Board. However, the Board can “quash or modify the subpoena if it is unreasonable or irrelevant.” Ill. Admin. Code, Title 35, Chap. 1, Part 101, Sec. 101.622.

3. The Illinois Administrative Code sets forth the statutory authority and duties of hearing officers hired by, and handling cases for, the Board. Ill. Admin. Code, Title 35, Chap. 1, Part 101, Sec. 101.610. There is no duty imposed on a hearing officer to provide testimony during any proceedings on review or appeal of the hearing officer’s decision, *Id.*

4. Illinois courts have determined that an administrative hearing officer “is responsible for weighing evidence, determining the credibility of witnesses and resolving

conflicts in testimony.” *Young v. Board of Educ. Of City of Chicago*, 338 Ill.App.3d 522, 529-30, 788 N.E.2d. 1153 (1st Dist. 2003). Courts have also held that when reviewing the decision of an administrative agency, the reviewing body “is limited to reviewing the record which was before the agency and may not consider new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency.” *Comito v. Police Bd. Of City of Chicago*, 317 Ill.App.3d 677, 692-3, 739 N.E.2d. 942 (1st Dist. 2000). If a determination is made that additional evidence is necessary for a full and proper review of the administrative decision, “[t]he Administrative Review Law does permit a reviewing court discretion to remand the case back to the agency for further development of the record, if necessary.” *Id.*

5. In *Comito*, the plaintiffs requested subpoenas of the board members who issued the administrative decision in order to find out which evidence the board members reviewed prior to entering their decision. The appellate court held that “the trial court would have improperly admitted additional evidence by allowing the depositions, in violation of the general rule prohibiting the trial court from considering new or additional evidence in an action to review the decision of an administrative agency.” *Id.* In another administrative review case in which the plaintiffs sought to introduce subpoenaed testimony on review, the appellate court held that “rather than hearing or considering new evidence the trial court deemed necessary upon review, the trial court should have remanded the matter to the administrative agency for a hearing to receive this necessary evidence. We determine that the court erred by accepting and considering evidence that was no presented in the administrative proceeding.” *Gezendorf v. Washington*, 207 Ill.App. 3d 397, 400, 565 N.E.2d 1054 (2d Dist. 1991).

6. In the case at hand, the Hearing Officer had a duty to prepare a complete and accurate record of proceedings to be filed with the Board. See Ill. Admin Code, Title 35, Chap.


1, Part 101, Secs. 102.418, 105.116 and 105.212. The Code states that any appeal of this Board's decisions must be "based exclusively on the record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the record pursuant to Section 40(d) of the [Environmental Protection] Act." Ill. Admin. Code, Title 35, Chap. 1, Part 105, Sec. 105.214. Section 40(d) of the Act contains similar language stating that "the decision of the Board shall be based exclusively on the record before the Agency including the record of hearing." 415 ILCS 5/40(d).

7. There is no relevant testimony the Hearing Officer could provide that would materially assist the Board in determining whether any basis exists to provide the Petitioner the relief requested. The record had been established and the Board must base its decision on that record. The Hearing Officer through a deposition cannot add evidence to that record. It would appear that the Petitioner wishes only to fish for testimony about what evidence the Hearing Officer credited. As in *Comito*, however, allowing the subpoenaed deposition of the Hearing Officer for that purpose would be improper.

Respectfully submitted:

DERKE J. PRICE

By:



Thomas G. DiCianni

Thomas G. DiCianni
ANCEL, GLINK, DIAMOND, BUSH, DICIANI & KRAFTHFER, P.C.
Attorney for Derke J. Price
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Chicago, Illinois 60603
(312) 782-7606
(312) 782-0943 Fax

Before the Illinois Pollution Control Board

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Petitioner,)	
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v.)	PCB 13-10
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COUNTY OF WINNEBAGO, WINNEBAGO)	
COUNTY BOARD and WINNEBAGO)	
LANDFILL COMPANY, LLC,)	
)	
Respondents.)	
)	

SUBPOENA FOR DEPOSITION

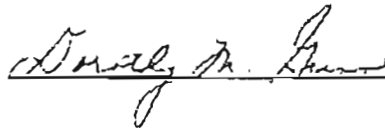
TO: Derke J. Price
 Ancel, Glink, Diamond, Bush, Dicianni & Krafthefer, P.C.
 1979 N. Mill St., Suite 207
 Naperville, IL 60563
 dprice@ancelglink.com

Pursuant to Section 5(e) of the Environmental Protection Act (415 ILCS 5/5(e) (2002)) and 35 Ill. Adm. Code 101, Subpart F, you are ordered to attend and give testimony at the hearing/deposition in the above-captioned matter at 10:00 a.m. on November 15, 2012 at 4580 Weaver Parkway, Conference Room, Warrenville, IL 60555.

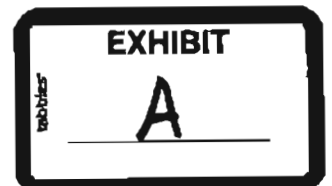
You are also ordered to bring with you documents relevant to the matter under consideration and designated herein: None

Failure to comply with this subpoena will subject you to sanctions under 35 Ill. Adm. Code 101.622(g) and 101.802.

ENTER:



Dorothy M. Gunn, Clerk



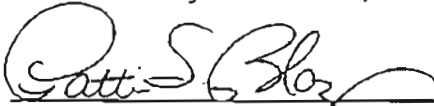
Pollution Control Board

Date: November 5, 2012

I served this subpoena for deposition by delivering a copy to Derke J. Price on November 5, 2012.



Subscribed and sworn to before me this 5th day of November, 2012.



Notary Public



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CERTIFICATE OF SERVICE

I, Darlene Hincks, a non-attorney, on oath, state that I served this **NOTICE OF FILING** and **MOTION TO QUASH SUBPOENA** upon the parties listed below at their respective addresses, via U.S. First Class Mail, proper postage prepaid, this 8th day of November, 2012.

Respondent, Charles F. Helsten:

HINSHAW & CULBERTSON
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389

Petitioners, Michael S. Blazer and Thomas S. Yu:

JEEP & BLAZER, LLC
24 North Hillside Avenue / Suite A
Hillside, IL 60162

Respondent, George Mueller:

MUELLER ANDERSON & ASSOCIATES, P.C.
609 Etna Road
Ottawa, IL 61350

Respondent, Gary Kovandan:

Gary Kovanda
231 Echo Drive
Rockton, IL 61072

Respondent, Winnebago County Clerk

Margie M. Mullins, County Clerk
404 Elm Street / Suite 104
Rockford, IL 61101

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Scott H. Christiansen, Chairman
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5450 Wansford Way / Suite 201
Rockford, IL 61109

Respondent, Winnebago County State's Attorney's Office:

David J. Kurlinkus
400 West State Street, #804
Rockford, IL 61101

Darlene Hincks

Darlene Hincks

SUBSCRIBED and SWORN to before
me this 8th day of November, 2012.

Jacquelyn C. Riley
Notary Public

