

ILLINOIS POLLUTION CONTROL BOARD

June 26, 2009

FOX MORaine, LLC,)	
)	
Petitioner,)	
)	
v.)	
)	PCB 07-146
UNITED CITY OF YORKVILLE, CITY)	(Pollution Control Facility
COUNCIL,)	Siting Appeal)
)	
Respondent)	
)	
KENDALL COUNTY,)	
)	
Intervenor.)	

HEARING OFFICER ORDER

On April 21, 2009, Valerie Burd testified at the three day hearing in the above-captioned case. As discussed in more detail later, at the time of hearing, Ms. Burd was the mayor of respondent, United City of Yorkville. (Yorkville) Ms. Burd had previously served as an alderman, until her swearing in as mayor on May 8, 2007.

On April 23, 2009, Fox Moraine, LLC. (Fox Moraine) tendered a written motion for a finding that Valerie Burd was not credible as a witness. The motion was marked as Hearing Officer Exhibit 2. On April 24, 2009, Fox Moraine filed an amended motion for a finding that Valerie Burd was not credible as a witness. (Amend. Mot.). On May 7, 2009, Yorkville filed its response in opposition to the motion and in support of Ms. Burd. (Resp.).

For the reasons set forth below, Fox Moraine's amended motion is denied.

FOX MORaine'S AMENDED MOTION

Citing the Board's order in Forest Preserve District of DuPage County v. Mineral and Land Resources Corporation, et al., PCB 96-84, slip op. at 2 (November 6, 1997), Fox Moraine argues that under the Board's present procedural rules the hearing officer is not required to make a finding regarding the credibility of each testifying witness. However, Fox Moraine acknowledges that a finding nonetheless assists the Board in its ultimate determination. (Amend. Mot. at 1). "A hearing officer's evaluation may also take into account contradictory statements made by a witness in the course of his or her testimony. However, the task of the hearing officer is not to weigh conflicting testimony of different witnesses." Forest Preserve District of DuPage County, slip op. at 2.

Fox Moraine argues that:

Valerie Burd (an alderman at all relevant times herein until May 8, 2007 when she was sworn in as mayor) was elected mayor on April 17, 2007, after having run as an anti-landfill candidate, and that she prejudged the merits of the case along with others controlled and influenced by her, and that she led a calculated, deliberate, collaborative effort to wrongfully deny the siting application. (Amend. Mot. at 2).

Fox Moraine opines that the record in the above-captioned matter “demonstrates conclusively that Valerie Burd was not a credible witness.” *Id.* Specifically, Fox Moraine first argues that Ms. Burd testified falsely on April 21, 2009, when she denied knowing that Ron Parish and Todd Miliron were landfill opponents. Amend. Mot. at 2-6. Mr. Parrish and Mr. Miliron were members of Ms. Burd’s campaign committee for mayor. *Id.* In support of its argument, Fox Moraine cites to portions of the transcripts regarding Yorkville’s annexation and landfill siting hearings where Mr. Parish and Mr. Miliron repeatedly expressed their respective annexation and/or anti-landfill positions.¹ The cited transcripts in the amended motion include City Council meetings and the landfill application hearings that Fox Moraine alleges Ms. Burd attended as a City alderman. *Id.*

In addition, Mr. Parish testified that he contributed a total of \$2,000 to the Burd campaign for mayor. Tr. at 159; 4-21-09. The donations are not reflected in the Illinois State Board of Elections Campaign Disclosure Report. Pet. Exhibit 15.

Fox Moraine notes that Mr. Parish was a member of Ms. Burd’s campaign committee as well as a member of Friends of Greater Yorkville (FOGY), an anti-landfill organization. Amend. Mot. at 6-7.

The remaining allegations set forth in Fox Moraine’s amended motion, including Ms. Burd’s testimony that she was not a landfill opponent prior to the final vote on the landfill application, are intended to buttress Fox Moraine’s argument that Ms. Burd was not a credible witness. Fox Moraine likewise finds troubling a number of other instances², including conflicting testimony, that Fox Moraine contends supports their argument that Ms. Burd’s testimony was not credible.

Yorkville’s Response

¹ Annexation was required before the landfill siting could go forward. Amend. Mot. 0. at 7; Tr. at 302; 4-21-09; Tr. at 154-155; 4-22-2009. Ms. Burd testified, however, that she had no knowledge of that scenario. Tr. at 178; 4-21-09.

² Other instances include the Wildman law firm invoice for services from April 27, 2007 through May 29, 2007, in the amount of over \$94,000. This issue was addressed in a Hearing Officer order dated October 30, 2008.

Yorkville argues that:

Fox Moraine now feebly attempts to attack [Burd's] credibility by isolating a few statements made by two members of the public out of thousands and thousands of statements made by numerous people at approximately 200 hours of Yorkville meetings and hearings on proposed annexations and the proposed landfill in 2006 and 2007. Resp. at 1.

Yorkville also states the then-Alderman Burd "consistently testified at her deposition and the hearing [April 21, 2009] would not discuss the proposed landfill at meetings of her campaign committee, nor would she allow anyone at those meetings to discuss it." Resp. at 2. Yorkville also responds to a number of additional arguments advanced by Fox Moraine.

Discussion

Fox Moraine is correct that pursuant to the Board's current applicable procedural rules, the hearing officer is not required to make a credibility determination. 35 Ill. Adm. Code 101 effective January 1, 2001. However, adhering to the Board's long-standing practice of credibility determinations by the hearing officers, I will address Fox Moraine's amended motion to make a narrow credibility determination. The credibility determination relates to Ms. Burd's testimony and her knowledge or lack of knowledge of two of her campaign committee members, Mr. Parish and Mr. Miliron, and their respective anti-landfill positions.

In Forest Preserve District of DuPage County, Illinois, v. Mineral and Land Resources Corporation, et al., PCB 96-84, (November 6, 1997), the Board discussed the role of the hearing officer credibility determination in the context of a motion for mistrial. The motion was made after the Board staff hearing officer resigned his position after beginning a hearing, which was then to be presided over by another Board staff hearing officer. The Board stated that:

In evaluating credibility, a hearing officer assesses qualities such as demeanor, tone of voice, and various intangible characteristics that a transcript does not reflect. A hearing officer's evaluation may also take into account contradictory statements made by a witness in the course of his or her testimony. However, the task of the hearing officer is not to weigh conflicting testimony of different witnesses. The Board makes findings of fact based upon consideration of the entire record. 415 ILCS 5/33 (1996). PCB 96-84, slip op. at 2.³

³ At that time, 35 Ill. Adm. Code 103.203(d) required that the hearing officer make a statement as to the credibility of witnesses. The rule provided:

Mayor Valerie Burd testified at the Board's siting appeal hearing on April 21, 2009. Among other things, she testified that she had decided to run for mayor in late summer of 2006. (Tr. At 181; 4-21-09). She also testified that Mr. Parish and Mr. Miliron were regular members of her campaign committee that attended her campaign meetings every week. Tr. 182; 4-21-09. The campaign committee was in place up to at least the election on April 17, 2009. Tr. at 185; 4-21-09. She testified that she was not aware that Mr. Parish and Mr. Miliron were landfill opponents. Tr. at 182-184.

In Fox Moraine's amended motion, Fox Moraine sets forth at least five instances that took place in the annexation hearings (September 26, 2006 through November 30, 2006) where Mr. Parish clearly and unequivocally expresses his anti-landfill position. Amend. Mot. at 2. Similarly, Fox Moraine sets forth at least seven instances in the annexation and landfill hearings (September 26, 2006 through March 26, 2007) where Mr. Miliron speaks out against the landfill. Amend. Mot. at 3-5. At a City Council landfill siting hearing on March 26, 2007, and in one of his more vociferous opposition statements, Mr. Miliron stated that "I feel like a Jew being told Auschwitz is a summer camp. I had garbage storm troopers visit my home and take pictures." Record at C13339; Tr. at 122; 4-22-09. Yorkville does not refute Fox Moraine's allegation that Ms. Burd was present at all cited to meetings or hearings where Mr. Parish and Ms. Miliron voiced their respective opposition.⁴

At the hearing on April 21, 2009, Ms. Burd testified that she listens at the City Council meetings, but has never heard, or does not recall, any statements by Mr. Parish or Mr. Miliron opposing the landfill. She further testified that Mr. Miliron was disruptive and spoke out a lot, but she did not know he was affiliated with any group. Tr. At 188: 4-21-09. A portion of the April 21, 2009 Board hearing transcript reads as follows, with questions being asked by petitioner's attorney Mr. Mueller, and questions being answered by Ms. Burd:

Q. Were you aware that Todd Miliron was a landfill opponent?

A. Was I aware of it, no.

Upon the conclusion of the hearing, the Hearing Officer shall make a statement as to the credibility of witnesses. This statement shall be based on his legal judgment and experience and shall indicate whether he finds credibility to be at issue in the case and, if so, the reasons why. This statement shall become a part of the official record and shall be transmitted by the Hearing Officer to each of the parties in the case. No other statement shall be made or be appropriate unless otherwise ordered by the Board. 35 Ill. Adm. Code 103.203(d), as cited in PCB 96-84, slip op. at 2.

⁴ Yorkville states that Parish did not attend any of the landfill siting hearings. Response at 5.

Q. Were you aware that Ronald Parish, who just testified, was a landfill opponent?

A. No.

Q. He was described, in fact, by Mr. Dombrowski not ten minutes ago as speaking out against the landfill at the meeting at the high school, which was a City sponsored meeting. That didn't cause you to become aware that he was a landfill opponent?

A. I don't recall when he said what. So no, we didn't—like I said, we never discussed it personally.

Q. You never listened to what he had to say at meetings?

A. I did listen to him, during the meetings when he spoke out against annexation, but I - - I did not discuss it with him personally.

Q. You never heard him speak out against the landfill?

A. I don't recall.

Q. And you never heard Todd Miliron speak out against the landfill at any city council meetings?

A. I don't recall who said what and when.

Q. Well at any meeting did you ever hear Todd Miliron speak out against the landfill?

A. I heard him speak out very passionately about issues, but if it was about the annexation, if it was about Sleepy Hollow Road, at this time I can't tell you exactly what he said.

Q. My question is: Did you ever hear Todd Miliron, at any city council meeting, speak out against the landfill?

A. I don't recall.

Q. And you never became aware that he was against the landfill?

A. We never discussed it.

Q. I'm asking you if you ever became aware that he was opposed to the landfill.

A. I can't comment. I don't recall what he said.

Mr. Mueller: Mr. Halloran, I'd ask you to direct the witness to answer the question. I think she's being intentionally evasive.

Mr. Halloran: I think that's either a yes or no, Mayor Burd, what Mr. Mueller was asking. If you could ask the question one more time and see what happens.

Q. Were you ever aware that Todd Miliron was an opponent of the landfill?

A. I don't know what to say to that. I don't - - no, I'm not aware of it.

Q. And Mr. Milliron was on your campaign committee, right?

A. Yes, he was.

Q. Mr. Parrish was on your campaign committee?

A. Yes.

Q. And also, did it embarrass you that a member of your campaign committee [Miliron] was being threatened with eviction of city council meetings when you were running for mayor?

A. Do you want me to answer that again?

Q. I'm just asking you. Did it embarrass you that he was being threatened with eviction?

A. No.

Q. And also, were the opposition groups and their members somewhat disruptive at the city council meetings dealing with annexation and the like, were they disruptive?

A. I - - yes. You could say they were disruptive, interrupting some of the discussions.

Q. Would you say Mr. Milliron was one of the most disruptive members of the opposition groups?

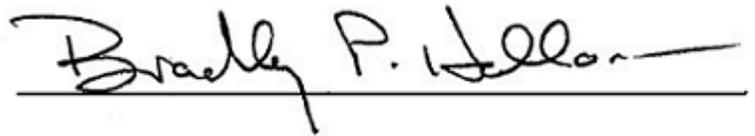
A. I can't say that he was affiliated with any group, so I don't know. He was disruptive. He spoke out a lot. Tr. At 182-184; 4-21-09.

While observing Ms. Burd testify, I did not observe or perceive any body language, difference in demeanor, vocal inflections or varied paralinguistic cues that would impeach her credibility. Since "the task of the hearing officer is not to weigh conflicting testimony of different witnesses," PCB 96-84, slip op. at 2, I make no finding as to the ultimate plausibility of any of Ms. Burd's statements. Such findings are within the province of the Board, based on its evaluation of the totality of the record and the testimony of all witnesses.

Conclusion

For all of these reasons, Fox Moraine's amended motion for a hearing officer finding that Valerie Burd was not a credible witness is denied.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Bradley P. Halloran". The signature is written in a cursive style and is positioned above a solid horizontal line.

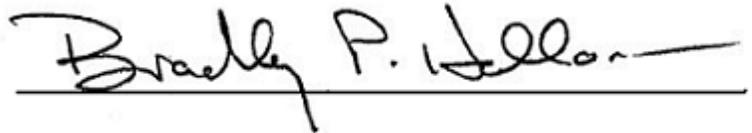
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order was mailed, first class, on June 26, 2009, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on June 26, 2009:

John T. Therriault
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A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a solid horizontal line.

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