

ILLINOIS POLLUTION CONTROL BOARD
October 27, 1994

SANGAMON COUNTY,)
)
 Complainant,)
)
 v.) AC 93-42
) (Administrative Citation)
 NORMAN CLARK AND BRENDA) (SCDPH-93-AC-9)
 BERTRAND,)
)
 Respondents.)

ROBERT SMITH, SANGAMON COUNTY ASSISTANT STATE'S ATTORNEY,
APPEARED ON BEHALF OF SANGAMON COUNTY;

NORMAN CLARK AND BRENDA BERTRAND APPEARED *PRO SE*.

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

This matter comes before the Board upon an administrative citation filed by Sangamon County (County) pursuant to Section 31.1 of the Illinois Environmental Protection Act (Act) (415 ILCS 5/31.1 (1992)). The citation was filed on September 13, 1993, and alleges that respondents, Norman Clark, and Brenda Bertrand, as owners of property located in Sangamon County, Illinois, have violated Section 21(p)(1) and (3) of the Act. Specifically, the Agency alleges that the respondents violated Section 21(p)(1) by causing or allowing open dumping of waste resulting in litter, and Section 21(p)(3) by causing or allowing open dumping of waste resulting in open burning.

Respondents filed a letter with the Board requesting a hearing on September 23, 1993. Accordingly, a hearing was held on February 2, 1994, in Springfield, Illinois, before the Board's hearing officer, Deborah Frank. No members of the public attended the hearing.

The County presented one witness, Mr. Allen Alexander, Solid Waste Specialist with the Sangamon County Department of Public Health who inspected the site. Mr. Clark and Ms. Bertrand testified on their own behalf. Complainant's brief was filed on February 9, 1994, and respondents' brief was filed on February 10, 1994. Complainant's reply brief was filed on February 18, 1994, and respondents' reply brief was filed on March 3, 1994.

For the reasons enunciated below, the Board finds no violation to have occurred in this case.

APPLICABLE LAW

The administrative citation issued against respondents alleges violations of subsection (1) and (3) of Section 21(p) of

the Act. Section 21(p) provides that no person shall in violation of 21(a) of the Act:

Cause or allow the open dumping of any waste in a manner which results in any of the following occurrences at the dump site:

1. litter;

* * *

3. open burning;

* * *

Section 3.24 of the Act (415 ILCS 5/3.24) defines "open dumping" as the "consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill". The Act defines "refuse" as "waste", where "waste" is defined in Section 3.53 of the Act as "garbage...or other discarded material..." (415 ILCS 5/3.53).

The Board has adopted the definition of litter used in the Litter Control Act. (See St. Clair County v. Louis Mund, (August 22, 1991), AC 90-64). "Litter" means any discarded, used or unconsumed substance or waste and may include:

...any garbage, trash, refuse, debris...or anything else of an unsightly or unsanitary nature which has been discarded, abandoned or otherwise disposed of improperly.

(415 ILCS 105/3)

Pursuant to Section 31.1(d)(2) of the Act, the County bears the burden of proof in this case. (415 ILCS 5/31.) Also, pursuant to Section 31.1(d)(2) of the Act, if the Board finds that the alleged violation occurred, then the final order issued shall include a finding of violation, and shall impose the penalty of \$500 per violation as specified in subdivision (b)(4) of Section 42 of the Act.

BACKGROUND

This action concerns property on Sandhill Road in Springfield Township, Sangamon County. The property is owned by Norman Clark and Brenda Bertrand (Tr. at 13)¹ and has been

¹ The transcript in this proceeding will be cited as "Tr. at ___"; the administrative citation is unnumbered therefore the page numbers are established beginning with 1 and the citation

assigned EPA site code number 1678220072. At hearing, County employee Allen Alexander testified that he inspected the property on August 2, 1993, and believed it to be in violation of Section 21 of the Act. (Tr. at 6.) Mr. Alexander stated that he had previously inspected the property before August 2, 1993, and spoken to Mr. Clark on the telephone to inform him that the problems must be taken care of by the end of July 1993. (Tr. at 5.) Mr. Alexander submitted an affidavit attached to the administrative citation which stated that the inspection report he completed "is an accurate representation of affiant's observations" with respect to the subject property.

The inspection report attached to the administrative citation has checks in the blanks opposite "causing or allowing litter" and "causing or allowing open burning" under the heading of "Site Observation". Also attached to the citation is a page headed "Summary of Apparent Violations". Under that heading, Mr. Alexander indicates that open burning was checked because:

This apparent violation was marked on the checklist because open burning and/or evidence of open burning of waste was observed at the site. (AC at 11.)

On a second page also titled "Summary of Apparent Violations", Mr. Alexander indicated that causing or allowing litter was checked because "demo [sic] and other materials dumped at the site". (AC at 12.)

The County specifically alleges that the following materials were dumped on the property: demolition debris, including dimensional lumber, boards, and boards with nails sticking out of them; what appears to be parts of window frames; boxes; carpeting; and other construction material. (Tr. at 6, 10 and 11.) Attached to the inspection report are several pictures which, according to Mr. Alexander, picture the dimensional lumber, a piece of carpeting, and burned areas. (Tr. at 10-11; Compl. Exh. 5.)

At hearing, Mr. Clark testified that his property was first inspected on June 2, 1993, by the Sangamon County Department of Public Health, and that thereafter he proceeded to clean up the property. (Tr. at 52.) Mr. Clark testified that there was no "permanent dumping" on the site. (Tr. at 14.) Specifically, he testified that he intended to use the materials allegedly dumped at his property: the lumber was to be used to construct a 12' X 16' storage shed and the carpet was used as a safe area for his three children under age four. (Tr. at 14, 15, and 16.)

Concerning the open burning, Mr. Alexander testified that

will be cited as "AC at ___".

"there was a large scorch area where it appeared that such things as dimensional lumber and other demolition debris had been burned" at the site. (Tr. at 6, 44-45.) Mr. Alexander described the photograph of the burn area to show some of the ashes and debris in that area. (Tr. at 11.) He further testified that he believed that burning occurred at the property based on his opinion of the size of the burn area, and because the ashes made it appear that "things such as dimensional lumber...boxes and things of that nature had been burned at the site". (Tr. at 12.)

Mr. Clark's testimony concerning open burning was limited to statements that he was clearing the woods, giving some of the timber away, and burning the trees and shrubbery. (Tr. at 21.) He cited the open burning provisions of the Act in support of his burning activities. (Tr. at 28-29.) In later testimony, Mr. Clark stated that he did not burn dimensional lumber on his property. (Tr. at 31.)

DISCUSSION

Section 31.1(d)(2) specifically provides that if there is a review requested for an administrative citation the "burden of proof shall be on the Agency or unit of local government". Thus, the County bears the burden of proof and must demonstrate that the alleged violations occurred. In this proceeding the County's evidence consists of the inspection report, photographs, and testimony of the inspector. The Board will examine the evidence with respect to each alleged violation.

First, the County alleges that the respondents caused or allowed open dumping resulting in litter. (AC at 2.) The inspection report indicates that on the site were "demo materials and other materials dumped at the site". (AC at 12.) Mr. Alexander testified that he saw various pieces of construction debris at the site as well as carpet. (Tr. at 6, 10 and 11.) However, Mr. Clark testified that the lumber was to be reused at the site and that the carpet was a safe area for his children to play while he worked at cleaning the site. (Tr. at 14, 15, and 16.) The only non-testimonial evidence is the photographs taken at the site which show lumber stacked in disarray and a carpet spread out in the area.

The Board is not persuaded that the violation of open dumping resulting in litter occurred. The evidence does not support Mr. Alexander's interpretation of the site. Mr. Clark's testimony is supported by the photographs. Although the lumber is in disarray there is no indication that the lumber has been finally disposed. The Board further notes that the photograph shows only used lumber and no other materials which would lead the Board to find that open dumping leading to litter occurred. Further, the inspector's photograph of the carpet shows that it was spread out on the ground which is supportive of Mr. Clark's

testimony that it was a play area for his children, rather than Mr. Alexander's interpretation that it was disposed. Therefore, the Board finds that the County has not proven that open dumping resulting in litter occurred.

In adjudicating the County's allegation that open dumping resulting in open burning occurred (AC at 2), the Board is placed in a difficult position. The evidence brought forward by the County alleging violation supports both the County's allegations and Mr. Clark's defense. A further complicating feature is that the Board's hearing officer found at hearing that Mr. Clark's testimony on open burning was not credible. While the Board regards this credibility finding seriously, we will not find Mr. Clark in violation based solely on this ruling. Rather, we will disregard Mr. Clark's testimony on this issue in his defense, and will, instead, determine if the County's evidence is sufficient to find a violation, since the burden of proof is on the County in this case.

The Board finds that the County has failed to carry the burden of proof by establishing that open dumping leading to open burning has occurred. The inspection report indicates that Mr. Alexander made a legal conclusion that open dumping resulting in open burning occurred, but the inspection report does not include the specific observations that led to that conclusion. The photographs do not support a finding of open dumping leading to open burning. The only evidence of open dumping leading to open burning is the testimony of Mr. Alexander at the Board hearing, when he remembered details of the ashes, including the allegations that nails were found. In summary, the evidence collected contemporaneously with the inspection supports Mr. Clark's defense, while the inspector's testimony at hearing supports a finding of violation. Therefore, the County did not carry its burden of proof in this proceeding.

For the foregoing reasons and based on the facts presented in this case, the Board finds that the respondents did not violate Section 21(p)(1) or 21(p)(3) of the Act on August 2, 1993.

This opinion constitutes the Board findings of fact and conclusions of law in this matter.

ORDER

The administrative citation (AC 93-42) is hereby dismissed against respondents Norman Clark and Brenda Bertrand, for the reasons given above.

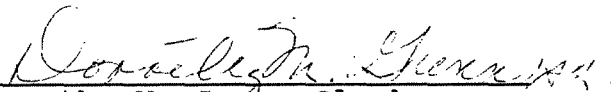
IT IS SO ORDERED.

Chairman Claire A. Manning and Board Member Marili McFawn concurs.

Board Members J. Theodore Meyer and Ron C. Flemal dissent.

Section 41 of the Environmental Protection Act (415 ILCS 5/40.1) provides for the appeal of final Board orders within 35 days of service of this decision. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 27th day of October, 1994, by a vote of 4-2.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board