ILLINOIS POLLUTION CONTROL BOARD
May 19, 1994

CONCERNED CITIZENS FOR A BETTER ENVIRONMENT,

Petitioners,

v.

CITY OF HAVANA and SOUTHWEST ENERGY CORPORATION,

Respondent.

PCB 94-44
(Landfill Siting Appeal)

GEORGE MUELLER AND RICCA C. SLONE, APPEARED ON BEHALF OF THE PETITIONERS;

DONALD BOGGS, APPEARED ON BEHALF OF THE RESPONDENT CITY OF HAVANA; AND

ROBERT M. OLIAN, OF SIDLEY & AUSTIN, APPEARED ON BEHALF OF THE RESPONDENT SOUTHWEST ENERGY CORPORATION.

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

This matter is before the Board on a third-party appeal of a decision by the City of Havana (Havana) granting site location suitability approval for a new regional pollution control facility to Southwest Energy Corporation (Southwest). This appeal is filed pursuant to Section 40.1(b) of the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1992)). Concerned Citizens for a Better Environment (CCBE) filed this appeal on January 25, 1994.

The Board's responsibility in this matter arises from Section 40.1 of the Act. (415 ILCS 5/40.1 (1992).) The Board is charged, by the Act, with a broad range of adjudicatory duties. Among these is adjudication of contested decisions made pursuant to the local siting approval provision for new regional pollution control facilities, set forth in Section 39.2 of the Act. More generally, the Board's functions are based on the series of checks and balances integral to Illinois' environmental system: the Board has responsibility for rulemaking and principal adjudicatory functions, while the Board's sister agency, the Illinois Environmental Protection Agency (Agency) is responsible for carrying out the principal administrative duties, inspections, and permitting. The Agency does not have a statutorily-prescribed role in the local siting approval process under Sections 39.2 and 40.1, but would make decisions on permit applications submitted if local siting approval is granted and upheld.

Hearing on this matter was held on April 6, 1994, before hearing officer Phillip Van Ness. Several members of the public attended and presented testimony at hearing. Briefs were due to be simultaneously filed on April 19, 1994. Southwest's brief was received on April 19, 1994, and CCBE's brief was received on April 20, 1994.

For the reasons detailed in this opinion, the Board finds that the siting proceedings before the City of Havana were fundamentally unfair.

Outstanding Motion

On May 6, 1994, the Board received a motion filed by petitioners to supplement authority. The motion asked the Board to accept a copy of a U.S. Supreme Court case which deals with whether incinerator ash is a hazardous waste. Because the Board does not reach the criteria, the motion is denied as moot.

BACKGROUND

Southwest submitted an application for siting approval of a new regional pollution control facility to accept and incinerate refuse-derived fuel for the production of electricity on July 9, 1993. (C000001-0055.)[1] Southwest submitted this application after a request was made by Havana asking Southwest to file an application. Southwest had previously submitted an application to Havana which was withdrawn. (Tr. at 144-145; C003268.)

Southwest's application indicates that it will subcontract the construction and operation of the facility to companies experienced in "their design and operation". (C000004.) Southwest proposes to convert 1,800 tons per day of refuse-derived fuel (RDF) to energy. (C000008.) RDF will be produced offsite and shipped to Havana. (C000009.)

In September, 1993, after the application was filed, the Havana Chamber of Commerce hosted a luncheon featuring Energy Answers president Pat Mahoney. (Tr. at 242.) Energy Answers would be contracted to construct and operate the facility. (C000126.) Also in September of 1993, Southwest sponsored a trip to visit a municipal waste incinerator operated by Energy Answers in Massachusetts. (Tr. at 75, 97, 126, 164, and 237-239.) The facility is called Semass.

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[1]The record before the City of Havana will be cited as "C00_ "; the transcript from the hearing before the Board will be cited as "Tr. at __"; the petitioners' brief will be cited as "Pet. Br. at __"; petitioners' exhibits will be cited as "Pet. Exh. __"; respondent's brief will be cited as "Res. Br. at __".

Ms. Christine Zeman was contacted by the mayor of Havana who inquired if Ms. Zeman was interested in serving as hearing officer for the siting hearing. (Tr. at 31.) The mayor additionally asked Ms. Zeman if she would "assist in the development of a siting ordinance to direct how the proceedings would go". (Tr. at 31-32.) Ms. Zeman agreed to act as hearing officer and draft the siting ordinance. In addition, subsequent to the close of the record at the local level, Ms. Zeman presented a document entitled "Hearing Officer's Report to the City of Havana: Recommended Findings of Fact and Proposed Conclusions of Law". (C003238-3259; Tr. at 42.)

Public hearings were held on October 26, 27 and November 2, 1993. (C000099-1084.) A public comment period followed and on December 21, 1993, Havana voted to approve siting of the facility. (C001767-2864 and C000056-0077.) This appeal followed.

LEGAL FRAMEWORK

In appeals of local siting decisions, the Board must review the areas of jurisdiction and fundamental fairness. Section 40.1 of the Act requires the Board to review the procedures used at the local level to determine whether those procedures were fundamentally fair. (415 ILCS 5/40.1 (1992); E & E Hauling, 451 N.E.2d at 562.) In E & E Hauling, Inc. v. IPCB (2d Dist. 1983), 116 Ill.App.3d 586, 594, 451 N.E.2d 555, 564, aff'd in part (1985), 107 Ill.2d 33, 481 N.E.2d 664, the appellate court found that although citizens before a local decision-maker are not entitled to a fair hearing by constitutional guarantees of due process, procedures at the local level must comport with due process standards of fundamental fairness. The court held that standards of adjudicative due process must be applied. (See also Industrial Fuels, 227 Ill.App.3d 533, 592 N.E.2d 148; Tate v. Macon County Board, 188 Ill.App.3d 994, 544 N.E.2d 1176.) Due process requirements are determined by balancing the weight of the individual's interest against society's interest in effective and efficient governmental operation. (Waste Management of Illinois Inc. v. IPCB (2d Dist. 1989), 175 Ill.App.3d 1023, 530 N.E.2d 682.) The manner in which the hearing is conducted, the opportunity to be heard, the existence of ex parte contacts, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. (Hediger v. D & L Landfill, Inc. (December 20, 1990), PCB 90-163, 117 PCB 117.)

In addition, the siting process is governed by Section 39.2 of the Act. Section 39.2(a) provides that local authorities are to consider as many as nine criteria when reviewing an application for siting approval. These statutory criteria are the only issues which can be considered when ruling on an application for siting approval. Only if the local body finds

that all applicable criteria have been met by the applicant can siting approval be granted. Havana found that Southwest met its burden on all the criteria. (C000056-0077.) CCBE challenges Havana's findings on all the criteria.

When reviewing a local decision on the criteria, this Board must determine whether the local decision is against the manifest weight of the evidence. (McLean County Disposal v. County of McLean (4th Dist. 1991), 207 Ill.App.3d 352, 566 N.E.2d 26 McLean County.)

ISSUES

CCBE challenges siting approval of the incinerator by Havana on the grounds that the proceedings were fundamentally unfair as well as challenging Havana's findings on all nine of the statutory criteria. Specifically, CCBE asserts that the proceedings were fundamentally unfair because:

1. Several members of the city council engaged in improper *ex parte* contacts with the applicant and prejudged the siting controversy (Pet. Br. at 5);

2. The hearing officer at the local siting hearing engaged in improper *ex parte* contacts with the applicant (Pet. Br. at 10);

3. The local officials were incompetent to judge the merits of the application (Pet. Br. at 11); and

4. The application was too vague to make the public fully aware of the nature of the proposal and to permit opponents to respond (Pet. Br. at 13.).

CCBE also challenges as fundamentally unfair the failure of Mr. John Kirby, president of Southwest, to testify at the hearing before the Board. However, this challenge is properly one of due process before the Board and not of fundamental fairness before the decisionmaker.[2] The Board will examine this challenge in that light.

DISCUSSION

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[2]The Board has previously distinguished between fundamental fairness of the siting proceeding and due process before the Board. (See, Turlek, et al v. Village of Summit and West Suburban Recycling and Energy Center, PCB 94-19, 94-21 and 94-22, consl. May 5, 1994.

The decision by a local government body as to whether to site a regional pollution control facility is an adjudicatory proceeding. (E & E Hauling, at 566.) In a landfill siting adjudicatory proceeding, the decisionmaker must resolve disputed facts and determine that the nine statutory criteria have been met. (*Id.*) The decisionmaker must be impartial and decide the issues based on the record before it. *Ex parte* contacts or other action which could unfairly influence the decisionmaker are improper in an adjudicatory proceeding. This differs from the legislative function that the governing body generally undertakes where decisions tend to be of a policy-making type.

Ex Parte Contacts by Council

The petitioners allege that *ex parte* contacts between the applicant and members of the Havana council have prejudiced the petitioners. The alleged contacts occurred during a luncheon meeting with the president of Energy Answers and a trip sponsored by Southwest to observe an incinerator in Massachusetts operated by Energy Answers. Southwest maintains that the contacts were incidental and did not affect the outcome of the decision by Havana. As discussed below, based on the record in this proceeding the Board finds that the *ex parte* contacts tainted the process and rendered the proceedings fundamentally unfair.

The petitioners assert that *ex parte* contacts occurred on several occasions between the mayor and at least five of the councilmen. (Pet. Br. at 9.) The petitioners argue:

> Here a majority of the council members - all those who ultimately voted in favor of the incinerator - accepted gratuities from the applicant and engaged in extensive *ex parte* contacts before the initial public hearing on the application. The communications almost certainly influenced the ultimate decision. Petitioners are prejudiced because the content of the communications were unknown to them, and they therefore had no opportunity to respond. (Pet. Br. at 9.)

The petitioners presented testimony indicating that a luncheon meeting with Patrick Mahoney, president of Energy Answers, was attended by five councilmen, the mayor and approximately 75 persons on September 16, 1993. (Tr. at 24.) The petitioners assert that luncheon was by invitation only and that incinerator opponents and other citizens were barred from the luncheon. (Pet. Br. at 7; Tr. at 24, 267.)

The petitioners also presented testimony by the mayor and several of the councilmen regarding a trip taken by those councilmen and the mayor to visit the Semass plant in

Massachusetts. The trip took place during pendency of the application, two weeks before the siting hearing, and was allegedly paid for by Mr. Kirby, who also went on the trip. (Pet. Br. at 8; Tr. at 237-239) While on the trip the group toured the Semass plant which is the model for the proposed incinerator in Havana (C000132-0135, C000143) and visited with employees of the facility. (Tr. at 76.)

According to the testimony given by the councilmen, the trip was not paid for by them. (Tr. at 100.) The councilmen stayed at a motel for either "two or three" nights and did not pay for their room charges. (Tr. at 103.) The trip began on Friday night when the group flew to Providence, Rhode Island and were shuttled to their motel. (Tr. at 103.) Dinner was provided Friday night. (Tr. at 106.) Saturday morning was spent taking a four or five hour tour of the Semass plant. (Tr. at 133.) Lunch was served at the plant (Tr. at 139.) Saturday evening dinner was again provided for the councilmen with Mr. Kirby and several employees of Energy Answers present. (Tr. at 140.) On Sunday several of the council members went site-seeing, including a visit to Plymouth Rock (Tr. at 114) and a pet cemetery. (Tr. at 115.) The council members agreed that the food was excellent (Tr. at 106) and one councilman said "I had a lot of things to eat. ... I just loaded up." (Tr. at 141.)

Southwest argues that while contacts did occur on the trip the "contacts did not affect or influence the ultimate siting decision nor did they cause prejudice to siting opponents". (Res. Br. at 18.) Southwest argues that the contacts were minimal during the trip and that the trip "was a general informational tour for interested Havana residents such as area business persons and the local newspaper publisher". (Res. Br. at 19.) Southwest admits that it sponsored the tour and provided tour participants with "accommodations, meals and transportation". (Res. Br. at 18-20.)

Southwest also argues that the generic information provided on the tour of the Semass plant was "much less rigorous and technical" (Res. Br. at 20) than the information provided at the public hearing on the application. Further, Southwest asserts that there was no attempt to discuss adjudicative facts or influence the councilmen. (*Id.*) Southwest points out that each of the councilmen testified at hearing that he based his decision on the record of the siting procedure. (Tr. at 79, 116, 120, 150, 174, 175.)

Southwest cites to several cases in support of the proposition that a reviewing court will not reverse a local siting decision because of ex parte contacts without a showing of prejudice or a showing that the proceeding was "irrevocably tainted". (F.A.C.T. v. PCB, 555 N.E 2d 1178, (3rd Dist. (1990); DiMaggio v. Solid Waste Agency of Northern Cook County, PCB 89-

178, ___ PCB ___, (January 11, 1990), Waste Management, 530 N.E.2d 697-698; E & E Hauling, 451 N.E.2d 555, 571.)

The Board first notes that a party can, by inaction in the proceeding before the local siting board, waive its right to raise the issue on appeal to the Board. (Fairview Area Citizens Task Force v. IPCB, (3rd Dist. 1990) 144 Ill. Dec. 659, 555 N.E.2d 1178.) However, in this proceeding, the petitioners did file a motion to disqualify Mayor McNeil, Ed Ray, Bill Schmidt and Leonard Thomas with the hearing officer at the siting hearing. (C001086 and C000109.) Thus, the petitioners have preserved their right to raise this issue on appeal.

The Board finds that the trip to the Semass plant sponsored by the applicant was improper in this case. Southwest consistently referred to the Semass plant as the model for the Havana proposed incinerator. (C000129, C000132.) Southwest presented extensive testimony at the public hearing on the siting regarding the operation of the Semass plant to bolster the application. (C000134-0143.) Further, Southwest presented into evidence several drawings depicting the Semass operations (C001132-1135) and letters from Massachusetts officials commending the operation of Semass. (C001138-1150.) Thus, it is clear that the applicant relied extensively on the Semass operations as a model for the Havana site.

Although the testimony before the Board indicates that the entire council was invited to tour the Semass plant (Tr. at 75, 175 and 236), there is no indication that the general public was invited on the tour. Therefore, the Board finds that the applicants' sponsorship of and payment for a tour of a facility used as the model for the proposed facility which included the council but not the public generally led to a fundamentally unfair proceeding. The petitioners were prejudiced. Petitioners were without benefit of seeing the model site and thus were unable to appropriately address all the impressions formed by the councilmen who toured Semass to view the model site used as a reference in these proceedings.

Prejudgment by Council

The petitioners next assert that the councilmen and the mayor showed a predisposition to the incinerator by their actions in regard to the referendum and the annexation. (Pet. Br. at 6-7.) Specifically, petitioners point to a letter from the Mayor on city stationary which was mailed to the citizens of Havana urging support of the incinerator in the referendum. (Pet. Br. at 6; Pet. Exh. 6.) The petitioners assert that the letters were sent in envelopes belonging to Southwest. (*Id.*) The petitioners also allege that some of the councilmen placed yard signs in support of the incinerator in their yards prior to the referendum. (Pet. Br. at 6; Tr. at 144.) The petitioners also

presented testimony indicating that Councilman Schmidt confronted an opponent to the landfill during the annexation hearing and became verbally and physically abusive. (Pet. Br. at 7; Tr. at 208-210.) Testimony was also presented that the mayor had become verbally abusive to some of the opponents of the incinerator. (*Id.*)

The petitioners argue that the mayor's actions at the council meeting where the siting vote was taken also showed bias. (Pet. Br. at 8.) Petitioners assert that the proponents were allowed to make excessive noise and show approval or disapproval of council action. However, opponents were "yelled at" by the mayor for quietly talking among themselves. (Pet. Br. at 8-9; Tr. at 247-249.)

Southwest points out that local officials are presumed to be objective and the presumption is not overcome by the mere fact that an official has taken a public position or expressed a strong view on a siting proposal. (Res. Br. at 15 citing E & E Hauling v. PCB, 481 N.E.2d 664, 668 (Ill 1985); Waste Management of Illinois v. PCB, 530 N.E.2d 682,695-696 (2nd Dist 1988); Citizens for a Better Environment v. PCB, 504 N.E.2d 166, 171 (1st Dist. 1987). Southwest further cites to Section 39.2(d) of the Act which specifically allows participation in the decision by a member of the county board even if that member has expressed an opinion publicly. (Res. Br. at 15.)

Southwest argues that, given this legal framework, the allegations made by CCBE are not sufficient to overturn Havana's siting decision. (Res. Br. at 16.) According to Southwest, the mayor did not vote on the siting issue (Res. Br. at 16; C000078-0081) and the expressions of support by two council members eight months prior to voting on the projects "do not demonstrate the kind of bias or predisposition necessary to nullify a siting determination". (Res. Br. at 16-17; Tr. at 144-145.)

Southwest has properly cited some of the extensive case law regarding alleged predisposition of the decisionmaker. (Res. Br. at 15.) Although the record indicates that members of the council made statements indicating a bias such statements are not sufficient to disqualify a decisionmaker. All of the councilmen testified that their decision was based on the record developed at hearing and on the application. Therefore, the Board finds that the councilmen were properly allowed to participate in the siting process and any predisposition did not result in a fundamentally unfair proceeding.

The Board is, however, dismayed at the actions of the Mayor. When presiding over the actual council meeting where the siting vote occurred, the mayor clearly showed bias. Further, the drafting of a letter by the mayor supporting the incinerator on Havana stationary mailed by Southwest is a disturbing indication

of bias. In the event of a tie vote by the council, the mayor would be required to vote. However, the Board need not rule on the mayor's actions as he did not vote on this siting application; however, such actions are not condoned.

Alleged Errors at Hearing

Lastly, the petitioners point to two specific alleged errors which occurred at the actual siting hearing. (Pet. Br. at 8.) The petitioners allege that on the morning of the hearing, the applicant, the hearing officer and the city council were allowed to enter the building early. (*Id.*) The petitioners were allegedly not allowed in until five minutes before the hearing began. (*Id.*) Further, the petitioners presented testimony that the "majority of the city council slept, read the newspaper, went out for coffee and doughnuts, or went out for a smoke. It did not appear to me that they needed any information to make a decision. It appeared to me they had made a decision." (Tr. at 263-264.)

The Board finds that the failure to admit the general public into the hearing room until five minutes before the hearing is not fundamentally unfair. The record gives no indication that the failure to open the doors earlier prejudiced the petitioners. Further, at the public hearing, the applicant's attorney explained that the applicant had entered early to set up equipment which would be available for anyone to use. (C000111.)

The case law is well settled that council members need not attend the hearings. The appellate courts have affirmed the Board in finding that it is acceptable for the decisionmaker to rely on transcripts of the public hearing in rendering its decision. (City of Rockford v. County of Winnebago, 542 N.E.2d 423 (Ill App. 2d Dist. 1989); Waste Management of Illinois v. Pollution Control Board (1984) 123 Ill. App.3d 1075, 79 Ill.Dec. 415, 463 N.E.2d 969 ("As long as the entire record was available for review by the full county board all members heard the case irrespective of their attendance.") We therefore find that the failure of Havana council members to attend the entire hearing did not render the proceedings fundamentally unfair.

Relationship Between the Hearing Officer, the City, and the Applicant

The petitioners assert that Hearing Officer Zeman indicated a level of bias in favor of the applicant which should disqualify her. (Pet. Br. at 11.) They base their arguments on several aspects of the relationship between John Kirby and Ms. Zeman throughout the application and hearing process. Southwest argues that the contacts between Ms. Zeman and John Kirby were

procedural in nature and that petitioner could produce no evidence of bias in Ms. Zeman's actions.

The Board has previously addressed the issue of hearing officer bias in a landfill siting appeal case. In Citizens Against Regional Landfill v. Whiteside County and Waste Management of Illinois (CARL), 139 PCB 523, PCB 92-156, (February 25, 1993), the Board held that the same standard of determining bias can be applied to a hearing officer as applies to the decisionmaker. (139 PCB 535.) Using the standard as enunciated in E & E Hauling, the Board determined that the hearing officer may be disqualified for bias or prejudice if a "disinterested observer might conclude that he had in some measure adjudged the facts as well as the law of the case in advance of hearing". (*Id.*; E & E Hauling at 451 N.E.2d 565-566.) The Third District Appellate Court, in its analysis of the issue of hearing officer bias and conflict of interest noted that the hearing officer in the CARL case was "ultimately under the control and direction of the State's Attorney who is an elected official responsible to the community and subject to public disapproval . . .". (Carl, slip op. at 7.) Moreover, the court also found that, since the hearing officer was not the decisionmaker, the same standard of fundamental fairness does not apply to the hearing officer. (*Id.*)

Petitioners assert that several aspects of the relationship between Hearing Officer Zeman and Mr. Kirby should lead to a finding of fundamental unfairness. (Pet. Br. at 11.) The petitioners maintain that Mr. Kirby had the power to approve or disapprove the hiring of the hearing officer, exercised editorial control over documents prepared for Havana City Council's consideration, and may have been the client. (*Id.*) The petitioners support this assertion by pointing to the fee agreement signed by Havana, Mr. Kirby and Ms. Zeman, which allegedly gives Mr. Kirby the right to terminate the hearing officer. (Pet. Exh. 1 at 3; Tr. at 39.) A copy of the agreement was sent to Mr. Kirby and obligated Mr. Kirby to pay Ms. Zeman directly for bills submitted directly to him by Ms. Zeman. (Tr. at 45-46) Further, the hearing officer forwarded a copy of the draft ordinance prepared for this siting procedure to Mr. Kirby and accepted changes from him. (Pet. Br. at 10; Pet. Exh. 3 and 5 at 1-2; Tr. at 46.)

Southwest argues that the contacts between the hearing officer and Mr. Kirby were procedural in nature and that the hearing officer testified that the limited contact with Southwest and the Havana City Council did not "influence how she conducted the hearing or prepared her post-hearing recommendations to the city". (Res. Br. at 13.) Southwest also argues that the record demonstrates that the hearing officer conducted the proceeding in "an unquestionably even-handed manner that enabled all parties to participate effectively". (Res. Br. at 14.)

Hearing Officer Zeman testified that the fee agreement was arranged between her firm and Mr. Kirby and a clause was specifically added at Mr. Kirby's request "so that if the -- I was going to be terminated either at my will or the city's or his [Mr. Kirby], that enough time be given so that the transition in the hearing process would be a smooth one instead of an abrupt one". (Tr. at 39.) When asked directly if Mr. Kirby retained for himself the right to terminate her, Ms. Zeman stated: "That was in the standard contract, and I believe it was in the ultimate one that was sent to him." (*Id.*) In fact the executed fee agreement was signed by Mr. Kirby, the Mayor and the hearing officer. The fee agreement refers to Havana as the client and Southwest as the applicant. (Pet. Exh. 1.) When asked about the contact between the hearing officer, Havana and Mr. Kirby, Ms. Zeman stated that the contacts were mainly in writing. (Tr.at 37) The contacts did include sending the draft ordinance to Mr. Kirby and receiving it back with Mr. Kirby's comments. (Tr. at 45, 46.) The contact did not include providing Mr. Kirby with a draft of the findings the hearing officer prepared for Havana. (Tr. at 42.) Finally, Ms. Zeman read into the record a letter from Ms. Zeman to Mr. Kirby; that letter was also admitted as an exhibit. (Tr. at 48; Pet. Exh. 4) In pertinent part, the letter states: "Mayor McNeil has indicated you were satisfied with my services and certainly Southwest is the primary beneficiary of the services I rendered." (Pet. Exh. 4.)

The Board first notes that the petitioners have not specifically listed areas of alleged bias. After examining the record in this case, the Board finds that the hearing officer did not exhibit bias. However the Board does not believe that the decisive issue in this case is whether or not the hearing officer was biased. Accordingly the test as enunciated in CARL and E & E Hauling does not apply in this case. Rather, the issue is whether the extensive contacts and the relationship between the hearing officer and the applicant contributed to fundamentally unfair procedures. Although the petitioners have not specifically listed areas of alleged bias, the Board does find that under the circumstances of this case, the relationship between the hearing officer, the city and the applicant created inherent bias.

The Board can find no statutory basis for the fee agreement between Mr. Kirby and Hearing Officer Zeman. Section 39.2(k) of the act states:

> A county board or governing body of a municipality may charge applicants for review under this section a reasonable fee to cover the reasonable and necessary costs incurred by such county or municipality in the siting review process.

The plain language of this section, when applied to the instant case, specifies that the Havana City Council could charge Southwest a reasonable fee to cover expenses generated by the application approval process. As Hearing Officer, Ms. Zeman should have been contracted by the City Council to perform her duties, and should have been paid by Havana. Adhering to the express language of Section 39.2(k) would remove the bias inherent in a situation where the applicant participates in hiring, remunerating, or possibly, terminating the Hearing Officer.

The law is well settled that the siting process is governed by the standards of adjudicatory due process and fundamental fairness. (E & E Hauling, at 566.) Even though bias was not shown, the Board believes that the relationship between the hearing officer and the applicant which was fostered by the city has contributed to the fundamental unfairness of the process. The hearing officer was interviewed for the position by a representative of the city and the applicant. The hearing officer testified that the initial meeting to discuss her employment was attended by the Mayor and John Kirby. (Tr. at 34.) Ms. Zeman further testified that the luncheon "was primarily to see whether I had familiarity with 39.2 and with the process in general" and both the Mayor and Mr. Kirby participated in the discussion. (Tr. at 35.) The fee agreement executed was signed by Ms. Zeman, Mayor McNeil and Mr. Kirby. The fee agreement specified that Ms. Zeman would submit bills directly to the applicant and be paid directly by the applicant. The hearing officer viewed Southwest as the primary beneficiary of her services. The applicant was allowed to review and comment on the ordinance prior to the ordinance being made public. Finally, the hearing officer drafted the finding of facts and conclusions of law ultimately adopted by the Havana council.

The contacts between Mr. Kirby and Ms. Zeman show a continued disregard on the part of the applicant and the City of Havana for adjudicatory due process. The mayor brought Mr. Kirby to the initial discussions regarding Ms. Zeman's employment and allowed Mr. Kirby to participate in determining Ms. Zeman's qualifications. The mayor signed an agreement which required Mr. Kirby to directly pay Ms. Zeman and granted Mr. Kirby the right to terminate Ms. Zeman. Havana allowed Mr. Kirby to review the siting ordinance, which set forth the procedures to be followed throughout the process. Thus, Havana allowed Mr. Kirby control over the hearing officer and the actions of the hearing officer which were clearly outside of adjudicatory due process. This contributed to the fundamental unfairness of the proceedings.

Technical Expertise of Public Officials

The petitioners assert that the city council lacked the technical expertise to review the siting application and thus,

rendered the proceedings fundamentally unfair. (Pet. Br. at 11.) The petitioners cite to testimony by the council members which indicated a lack of technical qualifications. (*Id.*) The petitioners also argues that the alleged reliance the council members placed on the operation of the Semass plant was misplaced as they did not discuss compliance history or the operating history of the facility. (Pet. Br. at 11-12.)

The Board finds this argument without merit. The Act specifically requires local siting decisions to be made by the governing body of the municipality. The Act does not require that the governing body have technical expertise. Rather, the Act requires the decision to be based on the application and the record developed during the process. Therefore, the lack of technical expertise does not render this proceeding fundamentally unfair.

Application as Filed

The petitioners assert that the application as filed fails to give enough detail to put the public on notice as to the "precise nature of the facility and operation". (Pet. Br. at 13.) The petitioners argue that the application "presents no site plan or design, promising instead that these 'technical details' will be made available to the permitting agency". (*Id.*) The petitioners charge that an application which is "so completely devoid of details regarding location, design and operation is insufficient as a matter of law". (*Id.*) The petitioners further asserts that the deficiencies were not cured at hearing. (Pet. Br. at 14.)

Southwest argues that the application describes the nature of the proposed facility and the general operations and safeguards, thus, clearly communicating the substance of Southwest's proposal. (Res. Br. at 12.) Southwest also argues that its application was sufficient when considering the "overall process of gaining local siting approval", which includes a public hearing and post-hearing comment period. (*Id.*) Southwest asserts that the Board "confirms that an application need not contain all material necessary for a local governing body to make a siting determinations". (*Id.*) Southwest cites to Tate v. Macon County Board (188 Ill.App.3d 994, 544 N.E.2d 1176 (PCB 88-126)) in support of this position. (*Id.*)

Southwest is correct that the Board has held that the application need not contain all material necessary for the local governing board to make its decision. In Tate, the Board specifically stated that: "an abbreviated siting application (one without technical supporting documents) is acceptable where, as here, such materials were available prior to the close of the hearing process". (Tate at 94 PCB 79.) In Town of St. Charles v. Kane County Board and Elgin Sanitary District (PCB 83-228,

229, 230, 57 PCB 203 (March 21, 1984), vacated on other grounds sub. nom. Kane County Defenders v. PCB et al., 129 Ill. App. 3d 121, 472 N.E.2d 150 (3rd Dist. 1984)), the Board upheld a siting application which was only two pages in length when filed.

In each of the above cited cases, additional data was filed either at hearing, or prior to hearing, which supported the initial application. Southwest presented testimony at the siting hearing and additional documentation in support of the application. Therefore, the Board finds that the application as filed and later supplemented at the siting hearing was sufficient and did not render the proceeding fundamentally unfair.

Due Process Before the Board

Petitioners argue that their inability to question Mr. Kirby the at the Board hearing deprived them of due process. Petitioners maintain that the record needs more details with regards to Mr. Kirby's corporate interests as well as the contacts Mr. Kirby had with the decisionmaker in this process.

The Board believes that the record is clear as to Mr. Kirby's varied business interests. (for example see Tr. at 45-46.) Further, in response to a motion to continue filed by petitioners, Southwest filed summaries of testimony by Mr. Kirby in another proceeding before the Board. Southwest also indicated that it did not object to petitioners making use of that testimony. Thus, the information filed by Southwest and the testimony of the council members is sufficient to allow the Board to render a decision on the issues of fundamental fairness. Therefore, the Board finds that petitioners were afforded due process before the Board.

CONCLUSION

These proceedings were tainted by extensive improper contact between the applicant and the decisionmaker. The applicant was allowed an opportunity to review the ordinance governing the siting proceeding prior to the ordinance being made public. The applicant interviewed and maintained a right to terminate the hearing officer who presided over the siting hearing. The applicant sponsored a trip to a facility in Massachusetts by the Havana City Council. At least one luncheon was held where the applicant and the decisionmaker attended and the general public was not allowed. The combination of these factors lead the Board to find that the proceedings before the City of Havana did not comport with the standards for an adjudicatory proceeding and hence were fundamentally unfair.

ORDER

For the reasons expressed in the above opinion, the City of Havana's December 21, 1993, decision on the application of Southwest Energy Corporation is hereby reversed as being fundamentally unfair. This docket is hereby closed.

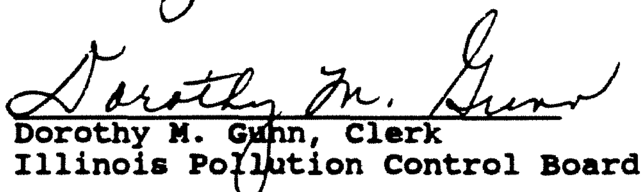
IT IS SO ORDERED.

Board Member J. Theodore Meyer concurs.

Chairman Claire A. Manning abstains.

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 19th day of May, 1994, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board