

ILLINOIS POLLUTION CONTROL BOARD
August 30, 1990

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Complainant,)
)
v.) AC 89-227
) (Administrative Citation)
) IEPA No. 9957-AC
JACK WRIGHT,)
)
Respondent.)

WILLIAM SELTZER APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY;

JACK WRIGHT APPEARED PRO SE.

OPINION AND ORDER OF THE BOARD (by J. C. Marlin):

This matter comes before the Board upon a petition for review of administrative citation ("citation") filed by Jack Wright on November 28, 1989. The citation was issued on October 18, 1989, by the Illinois Environmental Protection Agency ("Agency") pursuant to Section 31.1(d) of the Illinois Environmental Protection Act ("Act") (Ill. Rev. Stat. 1989, Ch. 111½, par. 1001 et seq.).

Hearing was held on March 22, 1990, in South Beloit, Illinois¹; no members of the public attended. The Agency presented one witness, Kenneth Bosie, field investigator for the Agency. Jack Wright testified on his own behalf. The parties elected not to file briefs, standing on their closing arguments. For the reasons given below, the Board finds the administrative citation was improperly issued and this case is dismissed.

BACKGROUND

The citation was issued to Jack Wright as present owner/operator of a facility located in Winnebago County, Illinois. The facility is operated without an Agency operating permit and designated with Site Code No. 2010450013. (The record

¹ The transcript is cited as "R. at ____".

indicates that the facility was not in violation of the Act for operating without a permit). The facility is commonly known to the Agency as South Beloit/Wright Brothers.

On the basis of an inspection conducted by Kenneth Bosie on August 31, 1989, the Agency determined that Jack Wright had operated the facility in violation of Section 21(q)(1) of the Act. The Agency subsequently issued a citation on October 18, 1989 for violation of Section 21(q)(1) and noted that Jack Wright is subject to a civil penalty of \$500.00 for the violation. Jack Wright then timely filed a petition for review with the Board.

APPLICABLE LAW

Section 21(q)(1) of the Act states:

No person shall in violation of subdivision (a) of Section 21, 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;

* * * * *

Section 31.1 of the Act sets forth the procedural aspects of an administrative citation. Section 31.1 provides, in part, that:

- a) The prohibitions specified in subsections (p) and (q) of Section 21 of this Act shall be enforceable either by administrative citation under this Section or as otherwise provided in the Act.
- b) Whenever Agency personnel or personnel of a unit of local government to which the Agency has delegated its functions pursuant to subsection (r) of Section 4 of this Act, on the basis of direct observation, determine that any person has violated any provision of subsection (p) or (q) of Section 21 of this Act, the Agency or such unit of local government may issue and serve an administrative citation upon such person within not more than 60 days after the date of the observed violation.

* * * * *

Penalties in actions of the type here brought are prescribed by Section 42(b)(4) of the Act which provides:

In an administrative citation action under Section 31.1 of this Act, any person found to have violated any provision of subsection (p) or (q) of Section 21 of this Act shall pay a civil penalty of \$500 for each violation of each such provision, plus any hearing costs incurred by the Board and the Agency. Such penalties shall be made payable to the Environmental Protection Trust Fund to be used in accordance with the provisions of "An Act creating the Environmental Protection Fund", approved September 22, 1979 as amended; except that if a unit of local government issued the administrative citation 50% of the civil penalty shall be payable to the unit of local government. Ill. Rev. Stat. 1989, ch. 111 $\frac{1}{2}$, par. 1042(b)(4).

DISCUSSION

Jack Wright contests the Agency's finding of violation, admitting that he allowed waste to be deposited on his property, but claiming that the material brought to the site does not constitute litter². Therefore, he reasons that he is not in violation of Section 21(q)(1) as alleged by the Agency (R. at 57-8). He also argues that the issuance of the citation was improper, and that he should not be required to pay the \$500.00 penalty because he has subsequently cleaned up the site, removing materials pursuant to directives of Agency representatives (R. at 36-8). Mr. Wright makes no claim that the violations were the result of uncontrollable circumstances.

Mr. Wright's argument that the issuance of the citation was improper is two pronged. First, Mr. Wright alleges that Mr. Bosie marked item number one on the "Open Dumping Inspection Report" ("Inspection Report") in error. Item number 1 states: "Causing or allowing litter (Section 21(q)(1) of the Act)." In support of this argument Mr. Wright points to item number 8 which Mr. Bosie had marked and scratched out. The Inspection Report is attached to the administrative citation and does show item number 8 as scratched out. Item number 8 states: "Causing or allowing the operation of an open dump so as to cause or threaten or allow the discharge of any contaminants so as to cause water pollution in Illinois (Section 12(a) and 12(d) of the Act)." Mr. Wright further pointed out that Mr. Bosie was new to the Rockford area and new to field inspection. (R. at 45). The Board does not find this argument persuasive.

² Because of the Board's finding regarding the issuance of the AC, the Board will not address this issue.

The second prong of Mr. Wright's argument is that, because of the cooperation Mr. Wright gave the Agency and his prompt clean up of the site after the initial inspection, the \$500 fine should not be issued. Mr. Wright makes this argument based on statements he alleges were made by Mr. Bosie at the time of the initial inspection as well as at the follow-up inspection. Mr. Wright testified that at the initial inspection Mr. Bosie stated: "that if I did not comply with getting these items corrected I would be subject to a \$500 fine from IEPA. He stated that I had 30 days to get this work done." (R. at 33) Mr. Wright further offered his testimony, concerning the follow-up inspection, stating that:

Mr. Bosie was very pleased and satisfied with the condition and appearance of the area. He was pleased with the cooperation that I had shown. When I showed him the small pile of blacktop and dirt waiting to be trucked away he said, '[j]ust push it over the edge and cover it up. It isn't enough to amount to anything.' He assured me there would be no problem with an IEPA fine. He said I would probably hear from the IEPA in a few days and all would be okay. (emphasis added). (R. at 36).

Mr. Wright offered, as evidence of the actual clean up of the site, several photographs (Resp. Ex. 3 through 11) which show the site as cleaned up. In addition, Mr. Bosie, the Agency's field inspector, testified that within approximately three or four days "most of" the site "was already cleaned up." (R. at 21 and 27). In fact, Mr. Bosie states several times throughout the transcript that the site was cleaned up.

The direct testimony of Mr. Bosie does not refute or contradict Mr. Wright's testimony. In addition, the Agency did not rebut the testimony of Mr. Wright concerning the statements made by Mr. Bosie either on cross-examination or at closing arguments.

The sequence of events leading up to the issuance of the administrative citation is of particular interest in this case. The initial inspection of August 31, 1989, occurred when Mr. Bosie inspected Mr. Wright's property as a result of a complaint about a neighboring property, which was suspected of disposing of contaminated sand on Mr. Wright's property. Mr. Wright fully cooperated with the inspection when Mr. Bosie arrived at the site. As a result of that inspection, Mr. Bosie indicated in the "Narrative Inspection Report Document" (Resp. Ex. 1) that he explained to Mr. Wright "that he was in violation of the Environmental Protection Act which states that no person shall cause or allow the development and operation of a solid waste site without a permit." (Resp. Ex. 1 p. 2). On September 25, 1989, Mr. Wright received a letter from the Agency. That letter informed Mr. Wright that his noncompliance "may result in either of the following: The filing of an enforcement action with the

Pollution Control Board . . . and No. 2, the filing of a civil action in the Circuit Court." (R. at 34). That letter also mentioned the administrative citation procedure and stated that "this Agency may cause an Administrative Citation to be filed further with the Pollution Control Board with respect to such alleged violations without further notice." (R. at 34).

Mr. Wright responded on September 25, 1989, in writing to the Agency explaining that the site had been cleaned up. (R. at 35). Around the first of October, Mr. Bosie then returned for the follow-up inspection when he informed Mr. Wright that "there would be no problem with an IEPA fine." (R. at 36). On October 21, 1989, Mr. Wright received the administrative citation. Mr. Wright continued communicating with the Agency through both phone calls and letters. One such letter from the Agency to Mr. Wright on November 13, 1989, informed Mr. Wright that he would "have to clean up the property, maintain it in a proper condition and refrain from open dumping." (R. at 37).

Section 31.1(a) states that a violation of Section 21(p) or (q) "shall be enforceable either by an administrative citation under this Section or as otherwise provided by this Act." (emphasis added). The Agency, therefore, is bound by its selection. Upon discovery of an apparent violation of Section 21(p) or (q) of the Act, the Agency has several alternatives for continuing its enforcement process. Those alternatives are to file an administrative citation, to formally (per Section 31(d) of the Act) or informally seek voluntary compliance. Voluntary compliance is often sought as a means of avoiding a formal enforcement action. Failure of the pre-enforcement process under Section 31(d) of the Act is normally followed by the third option, a formal enforcement action under Section 31(a) of the Act.

Section 31.1(b) of the Act provides that an administrative citation must be filed within 60 days of an inspection; however, there is no time limitation on the filing of a formal enforcement proceeding. Section 31(a) of the Act the administrative citation process is designed for prompt and efficient enforcement of a limited number of straight-forward provisions of the Act. The formal enforcement process is designed to cover all violations of the Act and tends to be more lengthy and legally complex.

In this case the Agency proceeded as if it intended to seek voluntary compliance. Mr. Wright was clearly led to believe that the matter would be closed if he cleaned up the site within 30 days. However, the administrative citation was issued near the end of the 60 day period despite the fact that the Agency had proceeded under the pre-enforcement track and the site was cleaned up. The Board believes that in this instance the administrative citation was improperly issued.

An Agency agreement not to bring an enforcement action was held to be binding on the Agency in the Second District Appellate

Court of Illinois. In Modine Manufacturing Co. v. Pollution Control Board, 193 Ill. App. 3d 643, 549 N.E.2d 1379, 140 Ill. Dec. 507 (1990) (Modine I), the Court discusses an unpublished decision in Modine Manufacturing Co. v. Pollution Control Board, 176 Ill. App. 3d 1172 (1988) (an unpublished order) (Modine II). In Modine I the Court explained that the Agency, in Modine II, had agreed to accept a compliance plan from Modine and to refrain from bringing an enforcement action. Modine asserted that the agreement not to institute enforcement proceedings for emission and permit violations barred the enforcement action brought by the Agency. In Modine II, the Court dismissed the action for emissions violations and remanded the case to the Board to set the penalty on the permit violations. In discussing Modine II the Court further stated "that the EPA had agreed not to pursue enforcement based on emissions violations but that no such agreement existed with respect to permit violations." Modine I (549 N.E.2d 1381, 140 Ill. Dec. 509).

Mr. Wright's assertion concerning the statements made by the Agency's field inspector are persuasive in light of the apparent Agency policy, at that time, of not proceeding with administrative citations if the sites were cleaned up. Indicative of such policy is that in 1989 and early 1990, the Agency filed motions to dismiss several administrative citations in which the Agency cited negotiations which had resulted in "cleanup of the subject open dump." (Illinois Environmental Protection Agency v. John Buris, Jr., AC 89-147, November 2, 1989) (Buris) and Illinois Environmental Protection Agency v. Raymond Tangman, AC 89-210, November 2, 1989 (Tangman)). In addition to Buris and Tangman, the Agency filed motions to dismiss administrative citations where the site had been cleaned up in Illinois Environmental Protection Agency v. City of Freeport, AC 89-253, January 11, 1990 and Illinois Environmental Protection Agency v. Kissner Company, AC 89-247, February 8, 1990.

The communication between the parties during the period from the inspection to the issuance of the administrative citation is most important in administrative citation cases. Communication is important because the citizens who are being cited with the administrative citation are often unfamiliar with the Act and enforcement procedures. In this case communication is of special significance. As the letter of September 25, 1989, stated, the Act allows the Agency to use either the administrative citation or formal enforcement proceedings. A plain reading of the statute indicates that the General Assembly did not intend that a citizen would be charged for the same violation under both the administrative citation provisions and the formal enforcement provisions of the Act for a specific violation on a given day.

In this case, the statements made by the Agency's field inspector, coupled with the correspondence received from the Agency by Mr. Wright, served to confuse Mr. Wright. Mr. Wright was informed by the Agency inspector that he had 30 days to clean

up the site or he would be subject to a \$500 fine. (R. at 33). Next Mr. Wright received the letter of September 25, 1989; followed by the statements of the Agency's inspector at the final inspection. Finally, on October 18, 1989, he received the administrative citation; even though, by the Agency's own admission, Mr. Wright had the site cleaned up within the 30 days given him by the inspector. (R. at 33).

The Board notes that in the formal enforcement process considerations such as the person's cooperation and voluntary clean up of the site can be considered in mitigation of damages or outright dismissal of the complaint. However, in administrative citation cases, Section 31.1 (d)(2) provides that no penalty shall issue if the Board finds, for any reason, that the violation did not occur or that the violation did occur but "resulted from uncontrollable circumstances". The Act, by its terms, does not envision a properly issued administrative citation being dismissed or mitigated because a person is cooperative or voluntarily cleans-up the site and the Board does not find differently today.

The Board does not view today's decision as limiting the Agency's ability to utilize the administrative citation process. If an inspector determines that a site is in violation the Agency may promptly issue an administrative citation. Alternatively, the Agency may give a person time to clean up the site with the decision to give time being binding upon the Agency during the specified time. If upon reinspection the site is still thought to be in violation an administrative citation could properly issue based upon the reinspection. The Board considers these steps to be a proper exercise of the Agency's discretion and authority as granted by the legislature under the Act.

Because of the assurance made by the field inspector and the confusion from the simultaneous pursuit of both pre-enforcement and administrative citation processes, the Board finds that the administrative citation was improperly issued and this case is hereby dismissed.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

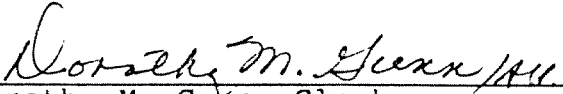
ORDER

For the reasons explained in the foregoing Opinion, the administrative citation is hereby dismissed.

IT IS SO ORDERED.

Board Members B. Forcade and J. Theodore Meyer concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 30th day of August, 1990, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board