

ILLINOIS POLLUTION CONTROL BOARD
September 17, 1987

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Complainant,)
)
v.) AC 87-6
)
JAMES PRESSNALL,)
)
Respondent.)

MR. JAMES H. PRESSNALL APPEARED PRO SE.

MR. WILLIAM SELTZER APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

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

This matter comes before the Board on a Petition for Review, filed by James Pressnall (Pressnall) on March 5, 1987. Pressnall is seeking review of an administrative citation that was issued against him by the Illinois Environmental Protection Agency (Agency) and filed with the Board on January 27, 1987. A hearing was held in this matter on May 28, 1987 in Belleville, Illinois.

Section 31.1 of the Illinois Environmental Protection Act (Act) sets forth the process by which prohibitions specified in Section 21(p) of the Act may be enforced by administrative citations. Ill. Rev. Stat. 1986 Supp., ch. 111 1/2, par. 1031.1. After an administrative citation is issued and served upon a person, that person has 35 days in which to file a petition for review of the citation. If that person fails to file a petition within that time period, the Board is directed by Section 31.1(d)(1) of the Act to adopt a final order imposing the penalty as specified by the citation. The only time the Board may review the merits of a citation is when a petition for review of the citation is filed in a timely manner.

Alleged Procedural Errors

Pressnall claims that several procedural errors occurred concerning the hearing. First, he states in his brief:

Further, he [Pressnall] takes exception of the manner in which he was notified to appear for a hearing in Court Chambers, City Hall, Belleville, IL. He was not advised of his rights to legal counsel and was forced to testify, unprepared, on his own behalf. He was not advised to bring witnesses, which he

could well have done to collaborate his points and positions; unfair advantage has been taken by the IEPA.

(Pressnall Brief, p. 1).

Pressnall does not support any of these allegations with facts. Also, this is a civil, not criminal, action; as a result, it is not legally necessary to inform a respondent of his right to counsel. It is important to note that Pressnall petitioned for review of the administrative citation. That is, it was his own action which triggered the hearing. Section 31.1(d)(2) of the Act provides that when a petition for review is filed before the Board, the Agency or unit of local government which issued the citation "shall appear as a complainant at a hearing before the Board to be conducted pursuant to Section 32 of this Act." Section 32 of the Act states:

Any party to a hearing under this subsection may be represented by counsel, may make oral or written argument, offer testimony, cross-examine witnesses, or take any combination of such actions. All testimony taken before the Board shall be recorded stenographically. The transcript so recorded, and any additional matter accepted for the record, shall be open to public inspection, and copies thereof shall be made available to any person upon payment of the actual cost of reproducing the original.

Ill. Rev. Stat. 1985, ch. 111 1/2
par. 1032.

Given the clear language of the Act, it is difficult for the Board to understand how Pressnall can claim that he was uninformed as to how the hearing was to be conducted. The Board is not persuaded that Pressnall was prejudiced as he seems to claim.

Secondly, Pressnall claims that he was "denied a copy of the transcript of the hearing." (Pressnall Brief, p. 1). He states that the court reporter said that a copy could be purchased from the court reporting service for \$150. It appears that this cost is the sole basis for his failure to acquire a transcript. Section 32 of the Act, as quoted above, provides that all transcripts "shall be open to public inspection." Also, the Board will provide copies of a hearing transcript to any person upon payment of the actual cost of reproduction. At this point in time, the Board's cost for photocopying a transcript is based on a rate of 10 cents per page. Since the hearing in this matter generated a transcript that was 173 pages, the total cost for a copy of the hearing transcript, if procured from the Board, would

amount to \$17.30. Given that Pressnall could have reviewed the transcript at the Board's offices for free or purchased his own copy for \$17.30, the Board believes that Pressnall is not justified in claiming that he was denied access to a transcript. In addition, Pressnall claims that the lack of "a pre-trial hearing" prevented his preparation of an "adequate defense". (Pressnall Brief, p. 2). While a pre-hearing conference is helpful in many instances, it is certainly not necessary in all cases. The Board finds no reason to conclude that Pressnall was prejudiced due to the lack of a pre-hearing conference.

Finally, Pressnall claims that the hearing officer erred in failing to exclude witnesses from the hearing room while others testified. However, according to the hearing transcript, it is clear that Pressnall never made a request to exclude witnesses from the hearing room. Since Pressnall never made such a request at hearing, he waived any subsequent claim that he was prejudiced due to the lack of exclusion.

Administrative Citation Process

Section 21(p) of the Act consists of a list of prohibitions that may be enforced by administrative citations. Section 21(p) provides:

No person shall:...

- p) Conduct a sanitary landfill operation which is required to have a permit under subsection (d) of this Section, in a manner which results in any of the following conditions: [The subsection then lists twelve specific conditions].

Ill. Rev. Stat. 1986 Supp.,
ch. 111 1/2, par. 1021(p)

The citation that was issued to Pressnall states:

[T]he Illinois Environmental Protection Agency has determined that Respondent was conducting a sanitary landfill operation at the above-described facility, which was required to have a permit pursuant to Ill. Rev. Stat. 1985, ch. 111 1/2, par. 1021(d), without the required permits and in a manner which resulted in the following conditions:

- A. On December 16, 1986, said unpermitted landfill facility had uncovered refuse remaining from a previous operating day, in violation of Ill. Rev. Stat. 1986 Supp., ch. 111 1/2, par. 1021(p)(5).

- B. On December 12, 1986, said unpermitted landfill facility had open burning of refuse, in violation of Ill. Rev. Stat. 1986 Supp., ch. 111 1/2, par. 1021(p)(4).
- C. On December 16, 1986 said facility had unpermitted portions of its facility wherein refuse had been deposited, in violation of Ill. Rev. Stat. 1986 Supp., ch. 111 1/2, par. 1021(p)(9).

(Agency Citation, p. 2)

Section 31.1(d)(2) of the Act provides the standard for the Board's review of the administrative citation.

If, based on the record, the Board finds that the alleged violation occurred, it shall adopt a final order which shall include the administrative citation and findings of violation as alleged in the citation, and shall impose the penalty specified in subdivisions (b)(4) of Section 42. However, if the Board finds that the person appealing the citation has shown that the violation resulted from uncontrollable circumstances, the Board shall adopt a final order which makes no finding of violation and which imposes no penalty.

Ill. Rev. Stat. 1986 Supp., ch. 111 1/2, par. 1031.1(d)(2)

The Section further provides that the burden of proof is on the Agency or the unit of local government which issued the citation.

The Board has never before issued a decision upon a petition for review of an administrative citation; this is a case of the first impression. Consequently, it is necessary to closely examine the elements of a Section 21(p) offense as enforced by the administrative citation process. Such an examination can be accomplished by answering the questions: who; what; how; and when.

Who may be issued an administrative citation?

This question is answered simply. Section 21 states "No person shall". The term "person" is defined under the Act.

"PERSON" is any individual, partnership, co-partnership, firm, company, corporation,

association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.

Ill. Rev. Stat. 1986 Supp., ch. 111 1/2, par. 1003.26.

What type of facility is subject to an administrative citation enforcement action?

Subsection (p) of Section 21 further states, after the phrase "no person shall," "(c)onduct a sanitary landfill operation which is required to have a permit under subsection (d) of this Section." Subsection (d) states:

No person shall:

- d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:
 - 1) without a permit granted by the Agency or in violation of any conditions imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder, provided, however, that no permit shall be required for any person conducting a waste-storage, waste-treatment, or waste-disposal operation for wastes generated by such person's own activities which are stored, treated, or disposed within the site where such wastes are generated; or,
 - 2) in violation of any regulations or standards adopted by the Board under this Act.

This subsection (d) shall not apply to hazardous waste.

A plain reading of the language of subsection (p) suggests that only sanitary landfill operations which are also subject to subsection (d) may be subject to subsection (p). Also, subsection (d) makes no mention of the term "sanitary landfill operation". Given these observations, it is clear that subsection (d) does not define the term "sanitary landfill

operation" but merely provides additional limiting requirements which serve to delineate the scope of applicability under subsection (p). Therefore, the Board must look elsewhere in the Act for a definition of a "sanitary landfill operation".

The Act provides a definition for "sanitary landfill" in Section 3.41:

"Sanitary Landfill" means a facility permitted by the Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act, P.L. 94-580, and regulations thereunder, and without creating nuisances or hazards to public health or safety, by confining the refuse to the smallest practical volume and covering it with a layer of earth at the conclusion of each day's operation, or by such other methods and intervals as the Board may provide by regulation. (emphasis added).

Section 3.41 of the Act, Ill.
Rev. Stat. 1986 Supp., ch. 111
1/2, par. 1003.41.

It naturally follows that the type of facility subject to a Section 21(p) enforcement action must be a permitted facility as described in Section 3.41 as well as be a facility which is required to have a permit under the Section 21(d). One may argue that there is a substantive difference between the terms "sanitary landfill" and "sanitary landfill operation". The Board, though, does not see any such distinction. Given that there is a statutory definition of "sanitary landfill" and that there is no statutory definition of "sanitary landfill operation", it is the Board's position that the legislature did not intend to create a term with new legal significance when it used the phrase "sanitary landfill operation". In other words, "sanitary landfill operation" is plainly read to be equivalent to the phrase "operation of a sanitary landfill". In short, sanitary landfill operations include only those facilities that are permitted by the Agency and meet the other requirements of Section 3.41. Therefore, sanitary landfill operations that are subject to administrative citation enforcement of Section 21(p) must in the least be permitted by the Agency and fall within the other requirements of Section 3.41. The additional requirement that the facility must be a sanitary landfill operation "which is required to have a permit under subsection (d) of the Section," (emphasis added) further strengthens the position that only permitted facilities may be subject to an administrative citation enforcement of Section 21(p).

From the above analysis, it can be concluded that if a person is conducting a landfill operation without a permit, hence

the facility is not a sanitary landfill as defined by the Act, then that person may not be issued an administrative citation for the enforcement of Section 21(p). Instead, that person could be subject to a regular enforcement action for the violation of Section 21(d). As noted earlier, subsection (d) does not mention the term "sanitary landfill". Therefore, unlike subsection (p), subsection (d) is designed to enable actions to be brought against unpermitted facilities.

One fact which further bolsters the position that only permitted facilities may be subject to administrative citation involves the wording of the prohibited conditions listed in subsection (p). Section 21(p)(9) states, "deposition of refuse in any unpermitted portion of the landfill." (emphasis added). The language of this prohibited condition implies that the remainder of the landfill is permitted. If non-permitted facilities were meant to be subject to a 21(p) enforcement action, condition (9) would have likely been drafted to read "deposition of refuse in any unpermitted landfill."

How must a facility be operated in order to be subject to an administrative citation enforcement action?

This question is easily answered by the statutory language. Section 21(p) sets forth twelve specific prohibited conditions. If a facility, which is of the requisite type as discussed above, is operated such that any of twelve prohibited conditions occur, then the person operating that facility could be subject to Section 21(p) enforcement action.

When must the prohibited conditions occur for there to be a violation of Section 21(p) as enforced by an administrative citation?

Section 31.1 of the Act states that "subsection (p) of Section 21...shall be enforceable either by administrative citation...or as otherwise provided by this Act." Ill. Rev. Stat. 1986 Supp., ch. 111^{1/2}, par. 1031.1(a). The answer to the above question is different depending on how Section 21(p) is enforced. In an administrative citation enforcement action, the prohibited condition must occur at the time the facility is being inspected by Agency personnel or personnel of a unit of local government which issues a citation. Provisions of the Section 31.1 of the Act dictate this conclusion. Determination of a violation by the issuer of an administrative citation must be "on the basis of direct observation." An administrative citation must then be issued and served "within not more than 60 days after the date of the observed violation." (emphasis added). Ill. Rev. Stat. 1986 Supp., ch. 111^{1/2}, par. 1031.1(b). The Act further requires that the citation served must include "an affidavit by the personnel observing the violation attesting to their material actions and observations." (emphasis added). Ill. Rev. Stat. 1986 Supp., ch. 111^{1/2}, par. 1031.1(b)(5).

It is clear from the above references to Section 31.1 that the prohibited conditions, upon which an administrative citation may be issued, must have been observed by personnel of the Agency or unit of local government issuing the citation. Conversely, if the personnel did not observe the prohibited condition, an administrative citation cannot be issued on the basis of that condition's existence.

As stated above, Section 21(p) can be enforced through the more traditional procedure of an enforcement action conducted pursuant to Section 31. In such an action, direct observation of the prohibited condition by Agency designated would not be necessary before a violation can be found. Other types of evidence could be utilized to prove the violation.

The Board may find that the violation occurred only when all of the above-described elements are fulfilled. The Board will next evaluate the particular facts at hand in the context of those elements.

Citation Issued to Pressnall

First, James Pressnall, the Respondent, is certainly a "person" as defined under the Act.

Secondly, the Board must examine the type of facility that is the subject of the citation issued to Pressnall. In the citation, the Agency alleges, "[t]hat said [Pressnall's] facility has been operated as a landfill, operating without an Illinois Environmental Protection Agency Operating Permit." At hearing, an Agency employee, Kenneth G. Mensing, stated that the facility has never been issued a permit to dispose of any type of waste or refuse. (R. 22). Also, at hearing, Pressnall asserted that he was in the construction and salvage business, not a disposal business. He claimed that he could not remember anyone from the Agency telling him that his operation required a permit. (R. 160). It is clear from the record that Pressnall does not have an Agency permit to dispose of waste in a landfill. Consequently, in the context of an administrative citation, Pressnall's facility cannot be considered a "sanitary landfill operation which is required to have a permit under subsection (d)" of Section 21 of the Act. The Agency has not presented any evidence to indicate otherwise.

It is quite clear that the Agency believes it may issue an administrative citation to a facility which is not a sanitary landfill, as defined by the Act. It is the Board's position that such an action is without statutory authority and ignores the unambiguous language of the Act.

Since all four elements of an administrative citation must be proven, the failure to prove any one element warrants a

finding of no violation. Because the Agency failed to prove that Pressnall was conducting "a sanitary landfill operation which is required to have a permit under subsection (d)" of Section 21, the Board finds that the violations alleged by the administrative citation did not occur.

Although it is unnecessary now to evaluate the alleged occurrences of the prohibited conditions cited by the administrative citation, the Board is concerned with the Agency's apparent position with regard to the timing of those occurrences. The administrative citation charged that "[o]n December 12, 1986 an unpermitted landfill facility had open burning of refuse in violation of Ill. Rev. Stat. 1986 Supp., ch. 111 1/2 par. 1021(p)(4)." However, the inspection of the facility conducted by Kenneth Mensing and Kandy Ballard of the Agency, took place on December 16, 1986. At hearing, Mr. Mensing stated that at the time of the inspection he only saw evidence of a past fire: "There was [sic] no visible signs of smoldering, but it was my determination that there had been a recent fire involving some of the material at the site." (R. 22-23). However, according to Mensing, at the time of the inspection there was no observed fire. (K. 64).

As discussed earlier, when an administrative citation is issued by the Agency or unit of local government the personnel of the Agency or unit of local government must directly observe the prohibited conditions alleged by the citation. In other words, prohibited conditions which were not observed by such personnel may not be the subject of an administrative citation. No evidence was presented to suggest that any Agency personnel observed the Respondent conducting an open burning activity at Pressnall's facility on December 12, 1986. It naturally follows then that the Agency cannot properly allege such a violation in an administrative citation.

It is important to note that the Board is deeply concerned about any illegal dumping operation. However, the Board is equally concerned that the legal limits of the administrative citation enforcement program be strictly adhered to.

The Agency seems to take a position which, if followed, could have serious consequences for the enforcement of many regulatory requirements. If the Board finds a violation, under the administrative citation process, concerning an unpermitted site, the Board would be implicitly finding that the site requires a permit and must be operated like a permitted facility. This, in turn, could make the owner or operator of the site responsible for such items as a closure plan, post-closure care, monitoring wells, and bonding, just to name a few. Such an interpretation would lead to a legal morass of monumental proportions especially in instances involving illegal dumping without permission on private property.

Absent further legislative clarification on the administrative citation process, enforcement of the prohibitions against littering, open dumping, or other illegal disposal methods must presently be accomplished through the more traditional enforcement action process provided by the Act, not the administrative citation process.

Finally, Pressnall requests that he be reimbursed for the expenses he incurred in litigating his defense to the administrative citation. Although the Board is finding in his favor in this matter, the Act does not provide for an award for such costs.

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

ORDER

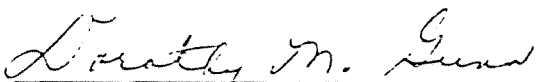
The Board hereby finds that the administrative citation filed on January 27, 1987 was improperly issued to James Pressnall. That administrative citation is stricken and this matter is accordingly dismissed.

IT IS SO ORDERED.

B. Forcade dissented.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985 ch. 111 ¹/₂ par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 17~~th~~ day of September, 1987, by a vote of 5-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board