

ILLINOIS POLLUTION CONTROL BOARD
November 6, 1997

FOREST PRESERVE DISTRICT OF)
DUPAGE COUNTY, ILLINOIS, a body)
politic and corporate in the County of)
DuPage, State of Illinois,)
)
Complainant,)
)
v.)
)
MINERAL AND LAND RESOURCES)
CORPORATION, a Delaware corporation,)
SOUTHWIND FINANCIAL, LTD., an)
Illinois corporation, f/k/a ABBOTT)
CONTRACTORS, INC., and BLUFF CITY)
MATERIALS, INC., an Illinois corporation,)
as assignee of ABBOTT CONTRACTORS,)
INC.,)
)
Respondents.)

PCB 96-84
(Enforcement - Land)

ORDER OF THE BOARD (by M. McFawn):

This case is before the Board on the “Motion for a Mistrial (Mishearing)” filed by respondents Southwind Financial, Ltd., and Bluff City Material, Inc. (Respondents) on October 27, 1997. The Forest Preserve District of DuPage County, Illinois (Complainant) filed “Complainant’s Response and Opposition to Respondents’ Motion for a Mistrial (Mishearing)” on October 29, 1997. After considering the arguments of the parties, the Board denies Respondents’ motion.

This case is currently in mid-hearing. Six days of hearings have been conducted to date. Complainant has presented its case; except for one witness called out of order by agreement, Respondents have not yet presented their case. Further hearing dates have not yet been set.¹ Hearings up to this point have been held before Hearing Officer Michael L. Wallace. Effective October 31, 1997, Hearing Officer Wallace resigned his position, and this case has been reassigned to Hearing Officer John Burds.

Based upon Mr. Wallace’s departure, Respondents seek declaration of a mistrial, claiming that they will be prejudiced if this case proceeds before a different hearing officer.

¹ On October 23, 1997, respondent Mineral and Land Resources Corporation filed a “Motion to Continue Hearing Date Until After Ruling on Motion in Respondent’s Favor.” Since no hearing date has been set, this motion is stricken as moot.

Respondents have identified three ways in which they may be prejudiced: (1) neither hearing officer will be able to fully assess the credibility of any particular witness since neither hearing officer will have heard all witnesses in the case; (2) the credibility of different witnesses will be judged based on different legal judgments and experiences by the two hearing officers; and (3) it will be virtually impossible for either hearing officer to determine whether he finds credibility to be at issue in the proceeding since neither hearing officer will hear all witnesses testify. These arguments are based upon 35 Ill. Adm. Code 103.203(d), which provides:

Upon the conclusion of the hearing, the Hearing Officer shall make a statement as to the credibility of witnesses. This statement shall be based upon 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.

The Board is not persuaded that any of the arguments identified by Respondents warrants declaring a “mistrial.”

Respondents’ first argument, that neither hearing officer will be able to assess credibility since neither will have heard all witnesses, confuses evaluation of credibility with weighing of testimony. 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). Therefore, the fact that different hearing officers may evaluate the credibility of different witnesses does not result in any prejudice to either party.

For the same reason, Respondents’ second and third arguments also fail. The different legal judgments and experiences of the hearing officers as applied to different witnesses results in no prejudice since each witness is evaluated for credibility individually, not in comparison to opposing witnesses. Furthermore, since each hearing officer will make a determination about the credibility of the witnesses testifying at the portion of the hearing over which he presides or presided, such determination cannot be contrary to findings by the other hearing officer.

Respondents have also suggested that having different hearing officers preside over Complainant’s case and Respondents’ case could result in inconsistent evidentiary rulings. The Board does not follow, and Respondents have not explained, how this could happen. In any event, a ruling of a hearing officer can be brought before the Board for review where a party

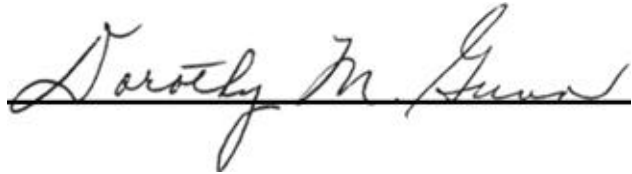
objects to the ruling. 35 Ill. Adm. Code 103.140(g). The Board is not persuaded by this argument.

For the foregoing reasons, Respondents' motion is hereby denied.

IT IS SO ORDERED.

Board Member K.M. Hennessey abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 6th day of November 1997, by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a solid horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board