

ILLINOIS POLLUTION CONTROL BOARD  
November 7, 1985

MAURINE BACHERT, )  
an Individual, )  
 )  
Complainant, )  
 )  
v. ) PCB 85-80  
 )  
VILLAGE OF TOLEDO ILLINOIS, )  
a Municipal Corporation and )  
VICTOR L. WILSON, JOHN SCOTT, )  
KURT SCOTT, KENNETH MENDENHALL, )  
Individually, )  
 )  
Respondents. )

MS. MAURINE BACHERT, COMPLAINANT, APPEARED PRO SE;  
MR. BOBBY SANDERS APPEARED ON BEHALF OF THE RESPONDENT, VILLAGE  
OF TOLEDO;  
MR. KURT SCOTT, RESPONDENT, APPEARED PRO SE.

CONCURRING OPINION (by J. D. Dumelle):

Let me say at the outset that I agree that the Board's decision in this matter is procedurally and legally correct. Yet, it troubles me because it so clearly points up a shortcoming of our environmental protection program in this State.

Under the Illinois constitution every citizen has the right to a healthful environment. Under the Illinois Environmental Protection Act, every citizen is granted the power to file complaints against those who pollute in order to protect that right. But cases such as this serve to demonstrate how hollow that power can be.

Maurine Bachert brought this complaint because she believed that there were people in her community that were causing and allowing air pollution which interfered with her enjoyment of life. She attempted to remedy that perceived wrong on the local level, and, failing that, on the state level before this Board, where she has now again failed.

Why did she fail? Not because she was wrong, but rather because she did not adequately present her case. The majority points out that "the decision in this matter is based on a lack of sufficient evidence." (Op. at 5). This does not mean that sufficient evidence does not exist, but rather that insufficient evidence was placed in the record of this proceeding. Of course, the Board's decision must be based on what is in the record before it.

Over the years the enforcement process has become increasingly legalistic. In turn, it has become increasingly difficult for citizens to successfully prosecute cases before the Board without an attorney. The problem is not new; it is simply becoming worse. The Board has historically been more lenient to citizen prosecutors and in fact has a procedural rule [Section 103.200(h)] which allows the hearing officer to "examine and cross-examine any witness to insure a clear and complete record." Yet, the hearing officer cannot act as the prosecutor and make the citizen's case.

In this case Mrs. Bachert probably felt that she had a simple case. She looked around her and saw fires in drums around the community. She smelled smoke and it bothered her. She complained to the Village and it didn't stop. Therefore, she probably reasoned, the individuals who were doing the burning were causing pollution and the Village was allowing it. She came before the Board and told her story and expected the Board to stop it.

It is not that simple. In order to prove her case Mrs. Bachert had to present evidence establishing who was burning what, and when and where the burning was done. Beyond that she needed to present evidence that the Village of Toledo in some manner condoned violations of the State's open burning prohibition.

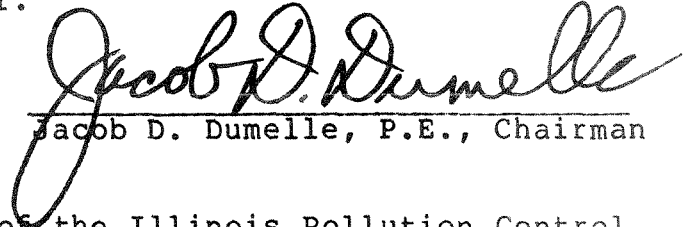
As the majority opinion points out, the necessary evidence was presented concerning only two instances of burning. One of those instances involved a person who was not named in the complaint. In that case the authorities responded and the fire was put out. In the other instance, Mr. Scott testified that the burning fell within an exception to the prohibition. Since Mrs. Bachert did not even see the materials being burned, the Board reasonably concluded that Mr. Scott was not in violation of the law.

The closest Mrs. Bachert comes to presenting adequate proof is through her log. (Compl. Ex. 1). Yet, that log does not indicate where the burning took place and only states a conclusion as to what was burned. This log certainly could have served as a useful tool upon which to base more complete testimony, but Mrs. Bachert in large part failed to supplement that information at hearing. Similarly, the photographs, standing alone, prove little. Some explanation of what they show is necessary to establish violations. Even if the entire log and all of the photographs had been properly placed into evidence, the Board could not find violations based upon them alone.


The hearing officer in this case could have given somewhat greater assistance to Mrs. Bachert, and probably should have. However, to give sufficient assistance, he would have had to make her case for her which would be clearly improper. A hearing officer is, after all, responsible for providing a neutral and fair forum, and is not to be an advocate for either party.

Based on the record, I believe that open burning violations have occurred in the Village of Toledo but that specific instances of such burning have not been proven, nor has the Village been proven to allow such violations. If Mrs. Bachert had an attorney, the result may have been different, but the present system is not set up to provide her one. Perhaps it should be.

For these reasons, I concur.

  
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Jacob D. Dumelle, P.E., Chairman

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was adopted on the 18th day of November, 1985.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board