

ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARING

MR. JOHN FRIES; JOHN FRIES	:	In Re: Open Burning at Property:
LANDSCAPE & MAINTENANCE;	:	
PREMIUM LANDSCAPE SUPPLY;	:	Parcel ID: 1215-R-148-0000-00
DANIEL B. PIERCE PROPERTY	:	
GROUP LLC;	:	Docket No. ACHD-19-002
	:	
<i>Appellants,</i>	:	<u>Copies Sent To:</u>
	:	<i>Counsel for Appellants:</i>
v.	:	Dennis M. Blackwell, Esq.
	:	THE BLACKWELL LAW FIRM
ALLEGHENY COUNTY HEALTH	:	Benedum Trees Building, 9 th Floor
DEPARTMENT,	:	223 Fourth Avenue
	:	Pittsburgh, PA 15222
<i>Appellee.</i>	:	
	:	<i>Counsel for Appellee:</i>
	:	Jason K. Willis, Esq.
	:	ALLEGHENY COUNTY HEALTH
	:	DEPARTMENT
	:	301 39 th Street, Building 7
	:	Pittsburgh, PA 15201

**DECISION AND ORDER OF THE ALLEGHENY COUNTY HEALTH
DEPARTMENT HEARING OFFICER**

I. INTRODUCTION

This case concerns alleged illegal open burning in West Deer Township, in violation of the Allegheny County Health Department’s air pollution regulations. On December 2, 2018, the Allegheny County Health Department (“ACHD” or the “Department”) received a complaint from the manager of a personal care home in Allison Park, PA that an illegal open burn was occurring just down the road in West Deer Township. The complaint alleged that Appellant John Fries Landscape & Maintenance was burning material, and that the smoke from the burn was contaminating the personal care home. Based on this complaint, the Department

issued an Enforcement Order against Appellants John Fries, John Fries Landscape & Maintenance, Premium Landscape Supply, and Daniel B. Pierce Property Group LLC (collectively “Appellants”) and assessed a \$1,870 civil penalty against Appellants for violations of ACHD Article XXI—Air Pollution Control, pertaining to open burning.

Appellants filed a timely appeal of the Enforcement Order, contending that the ACHD failed to meet its burden of proof regarding any of the alleged open burning violations because it never demonstrated that a fire existed on Parcel ID 1215-R-148-0000-00 (the “Property”) on the dates in question.

After considering the relevant law, the evidence and testimony presented at the hearing, and the briefs submitted by the parties, this tribunal finds that the Department has failed to meet its burden of proving by a preponderance of the evidence that Appellants violated the applicable provisions of Article XXI pertaining to open burning. The \$1,870 civil penalty is therefore vacated.

II. EVIDENCE

The following exhibits were introduced by the ACHD, and admitted¹:

- D1: Complaint
- D2: Photograph
- D3: Photograph
- D4: Penalty Calculation Document

III. FINDINGS OF FACT

Based on this tribunal’s review of the evidence, and having resolved all issues of credibility, the following facts are established:

¹ Appellants did not offer any exhibits into evidence.

- 1) On Sunday, December 2, 2018, the Allegheny County Health Department (“ACHD” or the “Department”) received a complaint via its 24/7 answering service alleging that an illegal open burn was taking place in West Deer Township. (Hearing Transcript (“H.T.”) at 7,9).
- 2) The complaint was made by Mike Kaufman, the administrator at Concordia, an assisted care home located at 3476 Cedar Ridge Road, Allison Park, PA 15101. (*Id.*).
- 3) The complaint stated:

“Landscaping company [sic] is burning all sorts of material such as rubber and painted wood. The Borough has spoken to him previously. Sunday 12-02-2018 the smoke from his fire was so bad the assisted care home was though [sic] to be on fire because it was covering the building itself.” (Ex. D1; H.T. at 8-9).
- 4) The landscape company mentioned in the complaint was Appellant John Fries Landscape & Maintenance. (Ex. D1).
- 5) West Deer Township’s police and fire departments responded to a similar report on December 2, 2018, the day of the alleged open burning violations. (H.T. at 6). The blaze at Parcel ID 1215-R-148-0000-00 (the “Property”) was ultimately extinguished by West Deer Township’s fire department. (H.T. at 44).
- 6) On Monday, December 3, 2018, ACHD Engineering Process Technician Jim Bollinger (“Mr. Bollinger”) responded to the complaint. (H.T. at 8-9).
- 7) While at Concordia conducting further investigation, Mr. Bollinger received a call from a West Deer Township Code Enforcement Officer who at that moment was speaking with John Fries (“Mr. Fries”), the owner of John Fries Landscape & Maintenance, Premium Landscape Supply, and Daniel B. Pierce Property Group LLC (collectively “Appellants”). (H.T. at 11, 44).
- 8) Mr. Bollinger was also presented with a photograph taken by William Payne (“Mr. Payne”) from West Deer Code Enforcement just before Mr. Bollinger’s arrival at the premises in question. (Ex. D3; H.T. at 18).
- 9) The photograph depicted a fire, which Mr. Bollinger estimated to be approximately 6’ x 6’ x 6’ in size. (Ex. D3; H.T. at 11).

- 10) Upon arriving at the premises at which the alleged fires had taken place, Mr. Bollinger took a photograph of the area from approximately the same place as Mr. Payne's photograph. (Ex. D2; H.T. at 13).
- 11) Mr. Bollinger observed that there was now a mound of dirt where there had previously been a fire. (H.T. at 13-14).
- 12) On December 19, 2018, the Department issued an Enforcement Order against Appellants for alleged violations of ACHD Article XXI—Air Pollution Control ("Article XXI" or "Art. XXI") pertaining to open burning and assessed a civil penalty of \$1,870. (Ex. D4).
- 13) On January 15, 2019, Appellants appealed the Department's Enforcement Order.
- 14) On July 24, 2019, an administrative hearing was held in this matter.

IV. DISCUSSION

The ACHD's Rules and Regulations place the burden of proof on the ACHD when it issues a civil penalty, as is the case here. ACHD Art. XI § 1105(C)(7)(a). The ACHD must prove the facts of the matter according to a preponderance of the evidence standard. *Id.* More specifically, the ACHD must prove by a preponderance of the evidence that the penalty was properly assessed because violations were present and that issuing the penalty was a lawful and reasonable exercise of its discretion, supported by the evidence presented. *See In re: Vilka Bistro*, Docket No. ACHD-18-003 (January 2, 2019); *In re: 916 2nd Street, McKees Rocks, PA 15136*, Docket No. ACHD-18-029 at *4 (December 21, 2018); *Perano v. DEP*, 2011 EHB 623, 633.

Regulatory Framework

There are two provisions of Article XXI that apply to open burning. Article XXI, § 2105.50 provides:

§ 2105.50 OPEN BURNING

[..]

a. General

1. No person shall conduct, or allow to be conducted, the open burning of any material, except where the Department has issued an open burning permit to such person in accordance with this Section or where the open burning is conducted solely for the purpose of preparation of food for human consumption, recreation, light, or ornament, and in a manner which contributes a negligible amount of air contaminants, and which is in accordance with subparagraphs A through C, below.

A. No material other than clean wood, propane, or natural gas may be burned except as provided for in this subparagraph.

- i. Charcoal may be used in an outdoor fireplace or grill for the purpose of cooking.
- ii. Commercially available fire logs, paraffin logs, or wood pellets may be used in outdoor fireplaces.
- iii. Paper or commercial smokeless fire starters may be used with clean wood to start an allowed fire.

B. Any volume of clean wood being burned shall be no larger than 3' wide x 3' long x 2' high and shall be at least 15 feet from the nearest neighbor's dwelling or inhabited area, any property line, roadway, sidewalk, or public access way.

C. Open burning using chimineas, firepits, or outdoor fireplaces may only be conducted using materials meeting Subparagraph A, above.

Article XXI § 2105.50(d)(1)E) also provides in relevant part:

d. Permits

1. The Department may issue a permit for open burning during a period specified by the Department, but only where the open burning is solely for: [...]

E. Clearing and grubbing wastes subject to, at a minimum, the following requirements:

i. Air curtain incineration units shall be used at all times when burning clearing and grubbing wastes.

ii. The use of air curtain incineration units shall not be permitted unless approved by the Department in writing with respect to equipment arrangement, design, and existing environmental conditions prior to commencement of burning.

iii. Approval for use of an air curtain incineration unit at one site may be granted for a specified period not to exceed three months, but may be extended for additional limited periods upon further written approval by the Department.

iv. The application for said permit must be accompanied by a non-refundable permit application fee, by check or money order payable to the "Allegheny County Air Pollution Control Fund," to cover the costs associated with processing, reviewing, and acting upon the application. The amount of the fee shall be set by the Board of Health.

v. If operated at commercial, industrial, or institutional facilities, the air curtain incinerator may also be subject to the NSPS requirements of 40 CFR 60 Subpart CCC.

1) Admissibility of Photograph in Exhibit D3

As a threshold matter, the parties dispute whether Exhibit D3 is admissible. Exhibit D3 is a photograph of a fire on the Property, taken by West Deer Township Code Enforcement Officer William Payne ("Mr. Payne") on December 3, 2018. Mr.

Payne took this photograph shortly before Mr. Bollinger arrived at the Property. (H.T. at 16-17). Mr. Payne spoke with Mr. Bollinger and sent Mr. Bollinger the photograph. (*Id.*).

Appellants argue that Exhibit D3 is not admissible because Mr. Bollinger did not take the photograph, and he did not have sufficient knowledge of the fire depicted in the photograph because he arrived on the scene after the fire had been put out. (*Appellants' Brief* at 19-20). The ACHD retorts that Mr. Bollinger has sufficient knowledge of the photograph's contents because he arrived on the scene shortly after the photograph was taken, and spoke with the photographer, Mr. Payne. (*ACHD Brief* at 9-10). This tribunal finds that the ACHD has the better argument here.

Pennsylvania case law states that photographs "have long been permitted to be entered into evidence provided that the demonstrative evidence fairly and accurately represents that which it purports to depict." *Commonwealth v. Serge*, 896 A.2d 1170, 1177 (Pa. 2006) (citing *Nyce v. Muffley*, 119 A.2d 530, 532 (Pa. 1956)). Additionally, the admission of photographs lies within the factfinder's discretion. *See AFSCME Dist. Council 88 v. County of Lehigh*, 798 A.2d 804, 808 (Pa. Cmwlth. Ct. 2002). "For authentication, proof of every step in making a photographic representation is not required. For example, even the photographer need not be called if another witness can authenticate the content." *Pierce v. Unemployment Compensation Bd. of Review*, 641 A.2d 727, 729 (Pa. Cmwlth. Ct. 1994).

Here, Exhibit D3 was taken shortly before Mr. Bollinger arrived on the scene. Mr. Bollinger is familiar with the scene, having visited it on December 3, 2018 to investigate the complaint against Appellants. Furthermore, it is undisputed that Mr. Bollinger and Mr. Payne, the photographer, spoke on December 3, 2018 about the contents of the photograph. Therefore, this tribunal finds that even though Mr. Bollinger was not the photographer of Exhibit D3, he has the requisite knowledge and experience to “authenticate the content” of it. Exhibit D3 is admissible.

2) Violation of Art. XXI § 2105.50.d.1.E (Land Clearing Open Burn Without Permit)

The ACHD assessed a civil penalty against Appellants for ostensibly burning land clearings without a permit. Article XXI § 2105.50.d.1.E declares, “The Department may issue a permit for open burning during a period specified by the Department, but only where the open burning solely for...[c]learing and grubbing wastes[.]” Article XXI exempts fires that are intended “solely for the purpose of preparation of food for human consumption, recreation, light, or ornament, and in a manner which contributes a negligible amount of air contaminants,” from this permitting requirement. Art. XXI § 2105.50.a.1.

The ACHD argues that Appellants violated these requirements because the fire was “primarily for the purpose of clearing and grubbing waste,” it contributed more than a negligible amount of smoke, and the Department never issued an open burning permit to Mr. Fries nor to any of his businesses. (*ACHD Brief* at 6-8).

Although Appellants concede that they have not been issued open burning permits, they counter that the Department has failed to prove that the fire was for

clearing and grubbing waste and that the amount of smoke was more than negligible. (*Appellants' Brief* at 12-15).

This tribunal finds that Appellants have the better argument here. First, the ACHD's claim that the burning on the Property was for the purpose of clearing and grubbing waste is based on second-hand information and evidence that is not in the record. The ACHD claims, "Appellants' West Deer grading permit indicates that extensive brush clearing was occurring on the property at the time." (*ACHD Brief* at 6). But this grading permit is not part of the record, and this tribunal sustained Appellants' counsel's objection as to the grading permit's contents. (H.T. at 16). The Department also claims that Mr. Bollinger "was able to deduce from the amount of smoke that evergreen brush, as opposed to seasoned firewood was being burned on site." (*ACHD Brief* at 6 (citing H.T. at 46-47)). But Mr. Bollinger admitted on cross-examination that he couldn't tell what was being burned, and didn't personally witness the alleged fires on either December 2nd or December 3rd. (H.T. at 34).

Second, the ACHD's assertion that there was more than a negligible amount of air contaminants lacks evidentiary support. The Department cites to Mr. Bollinger's testimony that "the fire department was about to chop a hole in the roof of Concordia based on all the smoke that was leaving the property," to indicate that Appellants were creating excessive levels of smoke. (*ACHD Brief* at 8 (citing H.T. at 41)). Additionally, the ACHD claims that Mr. Bollinger was able to rely on his visible emissions training to determine there was excessive smoke. (*ACHD Brief* at 8).

But this is a flawed line of argument. For one, Mr. Bollinger himself never saw a fire at the Property on either December 2nd or December 3rd. (H.T. at 20, 28, 34, 39, 49, 50). For another, no one who actually saw either fire or responded to it testified at the hearing, which blunts the impact of Mr. Bollinger's second-hand testimony. Finally, the Department never links the claim about the fire department planning to chop a hole in Concordia's roof to any action by Appellants. No one from the fire department or West Deer Township testified, and no one at the hearing established a link between the original complaint and the alleged actions of Appellants on December 2, 2018. In sum, the ACHD has failed to demonstrate by a preponderance of the evidence that Appellants were engaging in unlawful open burning.

3) Violation of Art. XXI § 2105.50.a (Unattended Fire Larger Than 3' x 3' x 2')

The Department also assessed a civil penalty against Appellants for allegedly having an unattended fire that was too large. Article XXI § 2105.50.a.1.B. states, that for a fire, "Any volume of clean wood being burned shall be no larger than 3' wide x 3' long by 2' high and shall be at least 15 feet from the nearest neighbor's dwelling or inhabited area, any property line, roadway, sidewalk, or public access way."

The ACHD claims that the ash pile that Mr. Bollinger saw on December 3rd, was, from base to flame, "as much as 6' x 6' x 6' and thus too large to be an allowable recreational fire." (*ACHD Brief* at 8 (citing H.T. at 20)). Mr. Bollinger testified at the hearing that there were no indicators of a recreational fire when he

arrived, such as a grill, food, or people standing around for warmth. (*ACHD Brief* at 7). Based on this, the ACHD concluded that the fire “was primarily for the purpose of burning clearing and grubbing waste and as such Appellants were obligated to obtain a permit, which they failed to do.” (*Id.*).

Appellants retort by pointing out that Mr. Bollinger admitted at the hearing that he was not on Appellants’ property on December 2nd and did not witness any fire or smoke on December 3rd: “All Mr. Bollinger saw was a pile of ash that was the result of the extinguishing of a recreational fire that Appellants burned on December 3, 2018.” (*Appellants’ Brief* at 3 (citing H.T. at 28, 30, 34, 39, 49, 50)). Additionally, Appellants highlight Mr. Bollinger’s uncertainty about the size of the fire:

“Q: (by Mr. Blackwell) D-3 shows, you would agree, that flame is not over two foot high, correct?

A: (by Mr. Bollinger) It might be.

Q: Did you measure it?

A: I have to see the flames first.

[...]

Q: And you also said ‘if the flames were above.’ You don’t know that either?

A: I didn’t see the flames.” (H.T. at 30-31, 39).


This tribunal finds that Appellants have the better argument here. Mr. Bollinger, by his own admission, “wasn’t there to see the height of the fire.” (H.T. at 20). The ACHD did not present any witnesses who saw the fire. And the ACHD admits that the photograph in Exhibit D3 “is not being offered to prove the dimensions of the fire so much as circumstantial evidence validating the

information relayed to [Mr. Bollinger] by the code enforcement officials which ultimately formed the basis of his enforcement decision.” (*ACHD Brief* at 10).

However, none of this information relayed to Mr. Bollinger was admitted into evidence, and no code enforcement officials, members of the fire department, or anyone who saw the fire testified at the hearing to support Mr. Bollinger’s conclusory findings regarding the size of the fire. The Department has therefore failed to meet its burden of proving by a preponderance of the evidence that Appellants had a fire that was larger than what was permissible under ACHD Regulations.

CONCLUSION

This tribunal finds that the ACHD has failed to meet its burden of proving by a preponderance of the evidence that Appellants violated the above-listed provisions of Article XXI. The civil penalty amount of \$1,870 assessed against Appellants is therefore vacated. This decision may be appealed to the Court of Common Pleas of Allegheny County, Pennsylvania.



Max Slater
Administrative Hearing Officer
Allegheny County Health Department

Dated: October 18, 2019