

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY
PENNSYLVANIA**

In the Matter of:

Bruce and Patricia Fox
711 Worthington Avenue
Clairton, PA 15025

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Doc. No.: SA 17-001055

Type of Pleading:
APPEAL OF ADMINISTRATIVE
ORDER DATED MAY 14, 2019

Filed on Behalf of:
Bruce and Patricia Fox
Appellant

Counsel of Record:
D. SCOTT LAUTNER, Esq.
Pa. I.D. No. 80134

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**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY
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APPEAL OF ADMINISTRATIVE ORDER DATED MAY 14, 2019

TO THE PROTHONOTARY:

Notice is given that Bruce and Patricia Fox, appeal from the Administrative Order dated May 14, 2019 from the decision of the Allegheny County Health Department. A copy of said decision is hereby incorporated by reference and attached as Exhibit "A".



Appellant or Attorney for Appellant

ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARING

BRUCE FOX AND PATRICIA FOX, : In re: 711 Worthington Avenue
: Clairton, PA 15025
Appellants, :
: Docket No. ACHD-17-033
v. :
: Copies Sent To:
ALLEGHENY COUNTY HEALTH : *Counsel for Appellants:*
DEPARTMENT, : D. Scott Lautner, Esq.
: 68 Old Clairton Road
Appellee. : Pittsburgh, PA 15236
: *Counsel for Appellee:*
: Jeffrey R. Bailey, Esq.
: ALLEGHENY COUNTY HEALTH
: DEPARTMENT
: 301 39th Street, Building 7
: Pittsburgh, PA 15201

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

I. INTRODUCTION

On July 14, 2017, a fire erupted in the City of Clairton. The fire occurred at the property of Bruce and Patricia Fox (the “Foxes” or “Appellants”), located at 711 Worthington Street, Clairton, PA 15025 (the “Fox Property”). The Allegheny County Health Department (“ACHD” or the “Department”), as well as the Allegheny County Fire Marshal’s Office, investigated the fire, and determined that it was caused by heat generated from a large pile of mulch, grass clippings, leaves, and other debris that had been dumped on the Fox Property. The Department cited the Foxes for several violations of ACHD Rules and Regulations pertaining to solid waste and air

pollution. The ACHD also assessed a \$4,170 civil penalty against the Foxes for these violations.

The Foxes contend that the civil penalty should be nullified for two reasons: First, because the ACHD allegedly did not present sufficient evidence that the fire originated on the Fox Property. Second, because the fire was allegedly caused by an underground coal seam beneath the Fox Property.

After considering the evidence and testimony presented at the hearing, as well as the briefs submitted by the parties, this tribunal finds that the ACHD has met its burden of proving by a preponderance of the evidence that the Foxes violated ACHD Rules and Regulations concerning solid waste and air pollution. The testimony and evidence indicate that the fire originated on the Fox Property because of the dumping of mulch and other debris there.

II. EVIDENCE

The following exhibits were offered into evidence by the ACHD and admitted¹:

- D1: Curriculum Vitae
- D3: Fire Marshal's Investigative Report
- D5: Collective Exhibit (D22-26)
- D6: Report
- D7: Letter
- D8: Photographs
- D9: Photographs by Deputy Fire Marshal Michele Gregory
- D11: Notice of Violation from ACHD Solid Waste Program
- D12: Notice of Violation from ACHD Air Quality Program
- D13: Administrative Order
- D16: Video
- D17: Google Earth Images
- D18: Property Assessment Page for 711 Worthington Avenue

¹ The Foxes did not submit any evidence or present any witnesses at the hearing.

D19: Response
D20: Amended Answers
D21: Discovery Requests
D22: Answers to Interrogatories
D23: Reply to Second Motion to Compel
D24: Appellants' Reply
D25: Appeal dated July 25, 2017

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:

Background

1. On July 15, 1998, Appellants Bruce and Patricia Fox (the "Foxes" or "Appellants") purchased a property at 711 Worthington Avenue, Clairton, PA 15025 (the "Fox Property"). (Ex. D18).
2. The Fox Property has a steep ravine along a boundary line shared with a property owned by the City of Clairton. (Ex. D18-19; Hearing Transcript ("H.T.") at 89, 153).
3. Since around 2004, landscapers paid the Foxes to deposit grass clippings, wood chips, leaves, and dirt on the Fox Property. (Ex. D3 at ACHD-0016; Ex. D22 at Interrog. Nos. 4(c), 4(g); H.T. at 31, 32, 48).
4. Between February 2017 and August 2017, the Foxes received a total of \$2,778 from landscapers to dump materials on the Fox Property. (Ex. D22 at Interrog. No. 4(h)).
5. By July 2017, the size of the compost/mulch pile at the Fox Property was 150 feet long, 75 feet wide, and between 75 and 100 feet deep. (Ex. D3 at ACHD-0016; ; H.T. at 18, 153). The pile consisted of grass, wood chips, leaves, and dirt. (Ex. D3; H.T. at 19).
6. At all times relevant to this proceeding, the Foxes did not obtain an annual operating permit from either the ACHD or the Pennsylvania Department of Environmental Protection ("DEP") for the disposal of solid waste at the Fox Property. (Ex. D19 at Admis. No. 4; H.T. at 170).

The Mulch Fire

7. On July 14, 2017, the Clairton Fire Department responded to a fire at the Fox Property. (Ex. D3; H.T. at 17).
8. The fire produced a significant amount of smoke that spread through the surrounding area. (Ex. D16).
9. Also on July 14, 2017, the Allegheny County Fire Marshal's Office dispatched Deputy Fire Marshals George Hollenberger ("Mr. Hollenberger") and Michele Gregory ("Ms. Gregory") to the Fox Property to investigate the cause of the fire. (Ex. D3; H.T. at 21).
10. Carbon monoxide readings taken by Mr. Hollenberger were 50 to 70 parts per million at the top and bottom of the mulch pile. (Ex. D3; H.T. at 20, 55). This concentration of carbon monoxide is considered harmful to humans if exposed for a significant period of time. (H.T. at 20).
11. On Friday, July 14, 2017 and Monday, July 17, 2017, the ACHD received citizen complaints as well as complaint referrals from the DEP and Environmental Protection Agency ("EPA") regarding the mulch fire. (H.T. at 87-88; 125-27). The complaints indicated that smoke from the fire at the Fox Property was entering nearby homes and causing odors. (H.T. at 126-27). Residents near the Fox Property were evacuated due to high carbon monoxide levels. (H.T. at 89-90).
12. The ACHD sent Najeeb Basher ("Mr. Basher") from its Air Quality Program and Barbara Zirngibl ("Ms. Zirngibl") from its Solid Waste Management Program to investigate the fire and respond to citizen complaints. (H.T. at 88, 152).
13. On July 17, 2017, Mr. Hollenberger and Ms. Gregory returned to the Fox Property to further investigate the fire. (H.T. at 26, 33).
14. Testimony at the hearing in this matter showed that the Allegheny County Fire Marshal's Office found that the fire on the Fox Property was caused by heat generated from decomposing mulch, leaves, and grass that was dumped on the Fox Property. (Ex. D3; H.T. at 33-34). Specifically, the decomposition of this debris "caused an exothermic reaction which create[d] a smoldering state." (H.T. at 33-34). The Fire Marshal's Office did not find evidence of any other ignition source. (H.T. at 45).
15. At the hearing, Mr. Basher and Ms. Zingribl testified that they determined that the fire was caused by the compaction of mulch and vegetative material

that was dumped on the Fox Property. (Exs. D11, D12; H.T. at 99, 153-54, 161-62).

Notices of Violation and Civil Penalties

16. On July 19, 2017, the ACHD's Solid Waste Management Program issued a Notice of Violation ("NOV") against the Foxes related to the illegal dumping of solid waste material on the Fox Property. (Ex. D11). The Program ordered that Appellants "[i]mmediately upon receipt of this Order, Cease and Desist all activities constituting illegal disposal of solid waste." (*Id.*).
17. On July 25, 2017, Appellants appealed the July 19, 2017 NOV. (Ex. D25).
18. On August 4, 2017, the ACHD Air Quality Program issued a Notice of Violation against Appellants relating to the fire on the Fox Property. (Ex. D12).
19. On August 15, 2017, Ms. Zirngibl re-inspected the Fox Property and observed that additional grass clippings had been deposited on the Fox Property in violation of the July 19, 2017 Order. (H.T. at 163-64).
20. On September 1, 2017, the DEP's Bureau of Abandoned Mine Reclamation ("DEP-BAMR") investigated the Fox Property to determine if the fire was caused by a mine. The DEP-BAMR determined that the fire was not mine-related. (Exs. D5-D7; H.T. at 63-64, 74-75).
21. On October 27, 2017, the ACHD issued an Administrative Order against the Foxes regarding the mulch fire and allegedly illegal dumping of solid waste at the Fox Property. The Administrative Order articulates violations of the ACHD's Article VIII ("Solid Waste and Recycling Management") and Article XXI ("Air Pollution Control") regulations and violations of the Order issued by the ACHD on July 19, 2017. The Administrative Order also assessed a civil penalty against the Foxes of \$3,020 for violations of Article VIII and \$1,150 for violations of Article XXI.
22. On November 13, 2017, the Foxes filed a Notice of Appeal.
23. On July 30, 2018, this Mr. Fox, counsel for Appellants, counsel for the ACHD, and this tribunal conducted a site visit of the Fox Property and surrounding area.
24. On January 8, 2019, an administrative hearing in this matter was held.

IV. DISCUSSION

Article XI, § 1105 of the ACHD's Rules and Regulations places the burden of proof on the ACHD when it issues an order or assesses a civil penalty. Art. XI, § 1105(C)(7)(a). As this case involves an appeal of the Department's enforcement order which imposes a civil penalty, the ACHD bears the burden of proving by a preponderance of the evidence that the issuance of the civil penalty was lawful. *See, e.g., In re: Vilka Bistro*, No. ACHD-18-003 at 3 (January 2, 2019).²

A. Solid Waste

This tribunal finds that the Department has proved by a preponderance of the evidence that the Foxes violated ACHD Rules and Regulations, Article VIII ("Solid Waste and Recycling Management"), and that the civil penalty assessed against the Foxes was reasonable.

1. Article VIII Violations

The Department asserts that the Foxes committed several violations of Article VIII. These include violations of Article VIII § 810.A (Operating a municipal waste disposal facility without an operating permit); § 813.B (Operating a solid waste disposal facility without complying with Article VIII or DEP rules); § 813.C (Un-permitted disposal of solid waste on public or private property); and § 813.E (Failure to obtain a professional certification for operating a solid waste facility). (*ACHD Brief* at 7-12). The Department also contend that the Foxes violated the

² Available at

https://www.alleghenycounty.us/uploadedFiles/Allegheny_Home/Health_Department/Resources/Legal/Vilka-Bistro-Administrative-Decision.pdf.

July 19, 2017 Notice of Violation by continuing to allow the dumping of solid waste material on their property despite the Department ordering them to cease and desist from doing so. (*ACHD Brief* at 13; Ex. D11).

The Foxes argue that they did not need an operating permit for waste disposal on their property because under Article VIII, a permit is not required for the “use of clean fill” or for “use in, on, or around the home garden.” (*Fox Brief* at 4-6) (citing Art. VIII §§ 810.A(4)-(5), 813.B(4)-(5), 813.C(4)-(5), 813.E(4)-(5)). The Foxes contend that they were not operating a solid waste facility, but rather merely using the grass clippings, wood chips, and leaves for a home garden or as clean fill. (*Fox Brief* at 4-6; H.T. at 181).

This tribunal finds that the ACHD has proved by a preponderance of the evidence that the Foxes violated the above-listed provisions of Article VIII. Section 810.A states in relevant part: “No person may own or operate a municipal waste disposal facility[...] unless the person has obtained and is in possession of an unrevoked or unsuspended annual operating permit for the facility from the Department.” (Art. VIII § 810.A).

Article VIII defines municipal waste as:

“Any garbage, refuse, lunchroom or office waste and other material including solid, liquid, semisolid, or contained gaseous material resulting from the operation of residential, municipal, commercial, or institutional establishments, including hospitals, nursing homes, orphanages, schools, universities, day care facilities, and personal care boarding homes, and from community activities, and any sludge not meeting the definition of residual or hazardous waste under 25 Pa. Code, Chapter 271 from a municipal, commercial or institutional water

supply treatment plant, waste water treatment plant, or air pollution control facility.” (Art. VIII § 804).

It is undisputed that the Foxes did not have an annual operating permit from either the ACHD or the DEP. (Ex. D19 at Admis. No. 1; H.T. at 170). Further, it is undisputed that for nearly 15 years, the Foxes were paid by landscapers to dump municipal waste, such as grass clippings, wood chips, leaves, and dirt, on the Fox Property. (Ex. D3 at ACHD-0016; Ex. D22—Appellants’ Answers to 2nd Set of Interrog.; Ex. D23; H.T. at 31, 32, 48).

At the hearing, the ACHD presented the testimony of Barbara Zirngibl (“Ms. Zirngibl”), an Environmental Health Specialist II in the ACHD’s Water Pollution Control and Solid waste Management Program. (H.T. at 150). When asked how the ACHD interprets “municipal waste” under Article VIII, she illustrated it as “anything from an orange peel to yard waste to demolition material.” (H.T. at 168). On July 17, 2017, Ms. Zirngibl went to the Fox Property to investigate the fire. (H.T. at 152). She testified that she observed “a large amount of vegetative material, grasses, mulch, tree branches” that appeared to have been dumped from the Fox Property. (H.T. at 153-54).

Though the Foxes argued that the grass clippings, leaves, wood chips, and dirt on the Fox Property were merely “clean fill” for farming or a home garden, the Foxes did not offer any evidence or testimony to support this claim.

Moreover, the testimony and evidence from the hearing demonstrates that the Foxes did not meet either the clean fill or home garden exceptions to the permit requirement. Article VIII requires that “clean fill” be “[u]ncontaminated...non-

decomposable material.” Art. VIII § 804. Clearly, wood chips, grass clippings, and leaves do not qualify as “non-decomposable.” (H.T. at 179). And the massive amount of material dumped on the Fox Property is not consistent with someone using the material for a home garden. (*Id.*).

2. Violation of the July 19, 2017 NOV and Order

On July 19, 2017, the ACHD’s Waste Management Program issued a Notice of Violation (“NOV”) and Order against Appellants regarding the illegal dumping of mulch material on the Fox Property. (Ex. D11). The NOV included the following order: “[Y]ou are Ordered to perform the following corrective actions:

Immediately upon receipt of this Order, **Cease and Desist** all activities constituting illegal disposal of solid waste.” (Ex. D11) (emphasis in original). The Foxes filed their Notice of Appeal on July 21, 2017, which indicates that they received this Order as of July 21, 2017. (Ex. D25).

The evidence presented at the hearing demonstrates that the Foxes continued to dump solid waste material, including grass clippings, leaves, wood chips, and dirt, after receiving the July 19, 2017 NOV and Order. Ms. Zirngibl testified that she re-inspected the Fox Property on August 15, 2017 and observed fresh grass and brush that had recently been dumped there. (H.T. at 163). Ms. Zirngibl spoke to Mr. Fox when she did the re-inspection, and Mr. Fox admitted that he allowed material to be dumped on his property and would continue to allow dumping. (H.T. at 164). This clearly shows that Appellants violated the July 19,

2017 NOV and Order by continuing to allow solid waste to be dumped on the Fox Property after July 19, 2017.

3. Reasonableness of the Civil Penalty for Violations of Article VIII

The ACHD issued an Administrative Order against the Foxes on October 10, 2017 and assessed a revised penalty of \$3,020. (Ex. D14). ACHD Rules and Regulations require the following factors be considered in assessing civil penalties:

In determining the amount of civil penalties to be assessed, the Director shall consider the economic benefit gained by such person by failing to comply with the Article, the willfulness of the violation, the actual and potential harm to the public health, safety and welfare and to the environment, the nature, frequency and magnitude of the violation, and any other relevant factors.” (ACHD Art. VI, § 1605.C (“Environmental Health and Civil Penalties”).

The civil penalty for Article VIII violations in this case was assessed by ACHD Environmental Health Administrator II Joy Smallwood (“Ms. Smallwood”). At the hearing Ms. Smallwood itemized the amount of the civil penalty assessed against the Foxes, explaining that the Department assessed a penalty of \$350 for each violation of the July 19, 2017 NOV and order, for a total of \$700. (H.T. at 199). The Department assessed a civil penalty of \$200 for each of the four Article VIII violations, for a total of \$800. The Department assessed a \$160 penalty for the Foxes’ willfulness in dumping materials on their property. (H.T. at 200-01). Lastly, the Department assessed an economic benefit penalty of \$1,360, based on the Foxes not paying an annual \$136 permit fee for ten years. (H.T. at 201).

The Foxes argue that the \$1,360 economic benefit penalty is erroneous because “the statute of limitations would prohibit Allegheny County from

retroactively assessing a fine for ten (10) years ago, or any length of time in excess of the appropriate statute of limitations.” (*Fox Brief* at 7). However, the Pennsylvania Solid Waste Management Act, under which Article VIII was promulgated, states that actions for civil penalties “may be commenced at any time within a period of 20 years from the date the offense is discovered.” 35 P.S. § 6018.617. Therefore, the ACHD was within its rights to assess an economic benefit penalty against Appellants for not paying a permit fee for 10 years.

Given that the Foxes admitted that they (1) did not have a permit for solid waste disposal, and (2) allowed solid waste dumping even after the July 19, 2017 NOV, this tribunal finds that the civil penalty was reasonable.

B. Air Quality

This tribunal also finds that the ACHD proved by a preponderance of the evidence that the Foxes violated ACHD Rules and Regulations, Article XXI (“Air Pollution Control”), and that the civil penalty was reasonable.

1. Article XXI Violations

The Department contends that the Foxes also violated three sections of Article XXI. These include violations of Article XXI § 2101.11.a.3 (failure to take necessary precautions to prevent air contaminants from being emitted), § 2101.b.1 (allowing the release of air contaminants except as explicitly permitted by Article XXI), and § 2101.11.c (causing a public nuisance from air pollution emissions). The ACHD argues that these violations of Article XXI are a result of illegal dumping of solid waste on the Fox Property which caused the fire. (*ACHD Brief* at 18-19).

Failure to take necessary precautions to prevent air contaminants from being emitted (Art. XXI Section 2101.11.a.3)

Section 2101.11.a.3 states:

“a. It shall be a violation of this Article to fail to comply with, or to cause or assist in the violation of, any requirement of this Article, or any order or permit issued pursuant to authority granted by this Article. No person shall willfully, negligently, or through the failure to provide and operate necessary control equipment or to take necessary precautions, operate any source of air contaminants in such manner that emissions from such source:

3. May reasonably be anticipated to endanger the public health, safety, or welfare.”

The evidence at the hearing shows that air contaminants were being emitted from the Fox Property, in violation of Article XXI Section 2101.11.a.3. ACHD Air Quality Engineer Najeeb Basher (“Mr. Basher”) testified at the hearing that after investigating the Fox Property after the fire, he determined that the fire “was of such magnitude, and because of the incomplete combustion, would necessarily have carbon monoxide and probably odors.” (H.T. at 102). This determination is supported by Allegheny County Deputy Fire Marshal George Hollenberger (“Mr. Hollenberger”), who testified that he recorded readings of 50-70 parts per million of carbon monoxide at the top and bottom of the hillside, which were high enough to be considered harmful for long exposure time.” (H.T. at 20, 55). Due to the smoke and carbon monoxide from the fire, residents near the Fox Property had to be evacuated. (H.T. at 89-90).

The evidence further showed that the Foxes failed to take necessary precautions to prevent these air contaminants from being emitted. Mr. Basher and ACHD Air Quality Enforcement Chief Dean DeLuca (“Mr. DeLuca”) testified at the hearing that during the decomposition of organic material, such as mulch, wood chips, and grass clippings, heat is produced as a result of an exothermic reaction. (H.T. At 94-95, 126). Because of this exothermic reaction, a mulch pile will catch fire if it is not properly turned. (H.T. at 97, 156-57). Because the mulch material was pushed over a hillside by the Foxes, it was not turned. (H.T. at 113, 159). Thus, the Foxes’ failure to turn the mulch pile led to the fire, which released air contaminants such as carbon monoxide.

Allowing the release of non-permitted air contaminants (Art. XXI Section 2101.b.1)

Section 2101.11.b.1 states as follows:

- “b. It shall be a violation of this Article for any person to:
 1. Operate, or allow to be operated, any source in such manner as to allow the release of air contaminants into the open air or to cause air pollution as defined in this Article, except as is explicitly permitted by this Article[.]”

As discussed above, the Department determined that the Foxes failed to properly turn the mulch pile, which caused a fire, releasing air contaminants such as carbon monoxide into the open air. This release of air contaminants was not “explicitly permitted” under Article XXI. (H.T. at 129-30). Therefore, the Foxes violated Section 2101.11.b.1.

Causing a public nuisance from air pollution emissions (Art. XXI Section 2101.11.c)

Section 2101.11.c states as follows:

“c. It shall be a violation of this Article for any person to cause a public nuisance, or to cause air, soil, or water pollution resulting from any air pollution emission. No person who operates, or allows to be operated, any air contaminant source shall allow pollution of the air, water, or other natural resources of the Commonwealth and the County resulting from such source.”

The public nuisance violation was based on the mulch fire on the Fox Property causing air pollution. Article XXI defines “air pollution” as “the presence of ambient air of one or more air contaminants in sufficient quantity and of such characteristics and duration which may reasonably be anticipated to have an adverse effect upon the public health, safety, or welfare, human, plant, or animal life, or to property, or which interferes with the comfortable enjoyment of life and property.” (Art. XXI Section 2101.20).

On Friday, July 14, 2017 and Monday July 17, 2017, the ACHD received complaints from Clairton residents, as well as complaint referrals from the DEP and EPA regarding the mulch fire on the Fox Property. (H.T. at 87-88; 125-27). The complainants informed the ACHD that smoke from the fire was crossing into the streets and entering their homes, and that there were odors from the fire. (Ex. D16; H.T. at 126-27). Also, as stated above, the fire emitted the air pollutant carbon monoxide in harmful quantities. (Ex. D3; H.T. at 20, 55). It is evident that smoke from the mulch fire meets Article XXI’s definition of “air pollution”. Because the Foxes caused air pollution from improper dumping, they violated Section 2101.11.c.

2. The Foxes' Counterarguments

The Foxes retort that the violations of Article XXI (as well as violations of Article VIII) should be nullified because the fire did not originate on the Fox Property, and that the ACHD did not sufficiently demonstrate at the hearing that the fire originated on the Fox Property. (*Fox Brief* at 8-9).

Mr. Hollenberger testified that when he arrived on the Fox Property on July 14, 2017, he observed that smoke was coming from "several voids or cracks near the top of the [mulch] pile." (Ex. D3; H.T. at 19, 25, 43, 49, 52). This testimony was buttressed by contemporaneous photographs taken by the Fire Marshal's Office which clearly showed smoke coming from the top of the hill. (Ex. D9 at ACHD-0068, 0071). The location of the smoke was the Fox Property. (Ex. D18).

As part of his official duties as a Deputy Fire Marshal, Mr. Hollenberger was charged with investigating the origin of the fire. (H.T. at 12). He testified at the hearing that based on his investigation, the ignition point for the fire on the Fox Property was the decomposing mulch, leaves, and other solid waste materials that were dumped and pushed over the hillside. (Ex. D3; H.T. at 33-34). Mr. Hollenberger explained that the fire was caused by "decomposition of landscape debris which caused an exothermic reaction which creates a smoldering state....Because the pile is so large, [the smoldering] doesn't reach exterior air when it can cool itself." (H.T. at 33-34). Mr. Hollenberger concluded that there was no evidence of any other ignition source. (H.T. at 45).

The Foxes attempt to discredit Mr. Hollenberger by pointing out that Mr. Hollenberger admitted that he had no specific training for mulch fires. (*Fox Brief* at 8) (citing H.T. at 16). Based on this insight, the Foxes conclude, “Without Mr. [Hollenberger’s] testimony, Allegheny County has absolutely no evidence of the cause of this ‘alleged’ fire, let alone its originating locale.” (*Fox Brief* at 8).

This argument misses the mark for a couple of reasons. First, the Department *does* have Mr. Hollenberger’s testimony. Second, the Foxes’ criticism of Mr. Hollenberger’s credentials is pedantic. Mr. Hollenberger has been the lead investigator in 159 fires in Allegheny County since 2016. Further, he has been an investigator on approximately 140 others throughout his career a Deputy Fire Marshal, including several involving decaying plant material, like the fire at issue here. (H.T. at 14-15). The fact that he doesn’t have specific training for mulch fires does not diminish his overall expertise in fire investigation. Jack Lambert’s expertise in football isn’t diminished because he didn’t have specific training in sacking quarterbacks who weighed precisely 180 pounds.

The Foxes also suggested at the hearing that the fire may have been caused by an underground coal seam. (H.T. at 78-81). But the ACHD convincingly rebutted this argument. At the hearing, the Department presented the testimony of Robert Silvis (“Mr. Silvis”), a civil engineer with the DEP-BAMR, who investigated the Fox Property to see if there was an underground mine fire. (H.T. at 63-64). Mr. Silvis reviewed maps of the area around Clairton to determine the location of coal seams and underground mine fires near the Fox Property. (Ex. D5; H.T. at 66-70). When

Mr. Silvis visited the Fox Property on September 1, 2017, he did not observe any coal refuse or coal waste product, nor did he see or smell any burning coal. (H.T. at 70-72). Based on this investigation, Mr. Silvis determined that there was no evidence of an underground mine fire either under the Fox Property or the neighboring property. (Exs. D5-D7; H.T. at 74-75). The evidence and testimony presented by Mr. Silvis, coupled with the lack of any evidence to the contrary, indicates to this tribunal that it seems highly unlikely that the fire was caused by an underground coal seam.

3. Reasonableness of the Civil Penalty for Violations of Article XXI

On October 10, 2017, in addition to assessing a civil penalty against the Foxes for violations of Article VIII, the Department assessed a civil penalty for \$1,150 for violations of Article XXI. (Ex. D14).

Article XXI, § 2109.06.b.1 requires that the following factors be considered in assessing civil penalties:


“[T]he willfulness of the violation; the actual and potential harm to the public health, safety, and welfare; the damage to the air, soil, water, and another natural resources of the County and their uses; the economic benefit gained by such person by failing to comply with this Article; the deterrence of future violations; the costs of the Department; the size of the source or facility; the compliance history of the source; the nature, frequency, severity, and duration of the violation; the degree of cooperation in resolving the violation; the speed with which compliance is ultimately achieved; whether or not the violation was voluntarily reported; other factors unique to the owners, operators, or other responsible parties of the source or facility; and other relevant factors.”

At the hearing, ACHD Air Quality Enforcement Chief Dean DeLuca (“Mr. DeLuca”) testified that he considered many of the above-listed factors when assessing the penalty, including the significant health effects of the smoke, the duration of the fire, which lasted several days, impact on the public from the smoke, and the fact that the Foxes continued to dump material on their property after the fire. (H.T. at 136-38). Mr. DeLuca also considered that the Foxes were individuals with no prior violations, which lowered the civil penalty. (H.T. at 137).

Considering that the evidence presented at the hearing indicates that the fire originated on the Fox Property from the dumping of solid waste, and that the ACHD only assessed a civil penalty for one of the three Air Quality violations, this tribunal finds that the \$1,150 penalty for violations of Article XXI was reasonable.

V. CONCLUSION

This tribunal finds that the ACHD has met its burden of proving by a preponderance of the evidence that the Foxes committed the above-listed violations of Article VIII and Article XXI. The total civil penalty amount of \$4,170 assessed against the Foxes is sustained. The Foxes’ appeal is therefore dismissed. This decision may be appealed to the Court of Common Pleas of Allegheny County, Pennsylvania.



Max Slater
Administrative Hearing Officer
Allegheny County Health Department

May 14, 2019

Dated: /

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: D. Scott Lautner

Signature: 

Name: D. Scott Lautner

Attorney No. (if applicable): 80134

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY
PENNSYLVANIA**

In the Matter of:

Bruce and Patricia Fox
711 Worthington Avenue
Clairton, PA 15025

Doc. No.: SA 17-001055

CERTIFICATE OF SERVICE

I, D. Scott Lautner, Esquire, certify that a true and correct copy of the within Appeal of Administrative Order Dated May 14, 2019 was served via Email on the 23rd day of May, 2019 to the following:

JEFF BAILEY, ESQUIRE

301 39th Street, Building #7
Pittsburgh, PA 15201-1811

Email: Jeff.Bailey@AlleghenyCounty.US

MAX SLATER

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D. Scott Lautner, Esquire
Attorney for Appellant