Commissioner, Indiana Department of Environmental Management,
v.
Glidden Fence Company, Inc.,
IDEM Case No. 2013-21920-A,
Respondent
2015 OEA 1, (14-A-J-4733)

OFFICIAL SHORT CITATION NAME: When referring to 2015 OEA 1 cite this case as ***Glidden Fence*, 2015 OEA 1.**

TOPICS:
open burning
recreational
clean wood products
adequate firefighting equipment
Evidence Rule 408
hearsay
civil penalty policy
history of non-compliance
326 IAC 4-1-2
326 IAC 4-1-3(b)
326 IAC 4-1-3
326 IAC 4-1-3(c)(1)
326 IAC 4-1-3(c)

PRESIDING ENVIRONMENTAL LAW JUDGE:
Catherine Gibbs

PARTY REPRESENTATIVES:
IDEM: Valerie Tachtiris, Esq.; Jessica Reiss, Esq.
Respondent: Richard VanRheenen, Esq.; VanRheenen & Associates

ORDER ISSUED:
January 21, 2015

INDEX CATEGORY:
Air

FURTHER CASE ACTIVITY:
[none]

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STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
COMMISSIONER, INDIANA DEPARTMENT	)	
OF ENVIRONMENTAL MANAGEMENT,	)	
Complainant,	)	
	)	
v.	)	CAUSE NO. 14-A-J-4733
	)	
GLIDDEN FENCE COMPANY, INC.,	)	
IDEM Case No. 2013-21920-A,	)	
Respondent	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came before the Office of Environmental Adjudication (the OEA) for the evidentiary hearing on the Notice and Order of the Commissioner of the Department of Environmental Management. The presiding Environmental Law Judge (the ELJ) having heard the testimony, reviewed the evidence and read the record now enters the following findings of fact, conclusions of law and final order in this matter.

Summary of Decision

The IDEM alleged that Glidden Fence Company, Inc. (the Respondent) violated 326 IAC 4-1-2 on two occasions. The IDEM presented sufficient evidence that the Respondent was in violation of 326 IAC 4-1-2 in that the Respondent failed to comply with 326 IAC 4-1-3(b)(1). Further, the IDEM presented sufficient evidence to prove that the Respondent had a history of non-compliance. The Respondent is assessed a penalty of two thousand, five hundred dollars ($2,500).

FINDINGS OF FACT

1. The Respondent is a fence construction company, located at 17808 Spring Mill Road, Westfield, Hamilton County, Indiana (the Property). Mr. Woodbury T. Glidden is the President of Glidden Fence Company, Inc.

2. A Notice of Violation (the NOV) was issued to the Respondent on October 22, 2013 alleging that the Respondent violated 326 IAC 4-1-2 on two occasions: August 6, 2013 and August 19, 2013.

3. The parties were not able to enter into an Agreed Order resolving the violations.

4. On May 29, 2014, the Indiana Department of Environmental Management (the IDEM) issued a Notice and Order of the Commissioner of the Department of Environmental Management (the CO) to Glidden Fence Company, Inc. (the Respondent). The CO was issued on May 29, 2014, more than sixty (60) days after issuance of the NOV.

5. The NOV and CO were timely issued in accordance with I.C. § 13-30-3 *et seq*.

6. The Respondent timely filed its Petition for Administrative Review and Request for Hearing on June 4, 2014.

7. A hearing was held on December 9, 2014.

8. The Westfield Fire Department responded to a fire at the Property on August 6, 2013 and August 19, 2013.

9. In both instances, the fires were small[1] and contained in a small pit, approximately 2 feet in width, and consisted of tree limbs and wood scraps, described as 2 x 2 and 2 x 4 wood scraps. The fire on August 19, 2013 was extinguished with a water can.

10. No one was present when the fire department arrived. The fires were extinguished using fire department equipment as the department was unable to find fire suppression equipment nearby.

11. Mr. Glidden testified and admitted that he started the fires, but contends that these are exempt from the open burning prohibition under 326 IAC 4-1-3(c)(1).

12. Mr. Glidden stated that he burned the wood for his personal enjoyment. Further, he was on the Property during both fires and had fire suppression equipment, such as a shovel and a rake nearby, and a water hose that reached to within twenty (20) feet of the fire.

13. The Respondent disposed of scraps generated by the business in dumpsters that were present at all times in question. The IDEM presented no evidence that Mr. Glidden or the Respondent intended the fires to be a method of disposal.

[1] The IDEM does not contend that the fire exceeded 125 cubic feet in size (see 326 IAC 4-1-3(c)(1)(B)) or consisted of more than 1000 cubic feet of material (see 326 IAC 4-1-3(c)(1)(C)).

14. Westfield Fire Department responded to fires at the Property on January 4, 2008, August 8, 2008, and September 30, 2010. Fire Marshal Garry Harling testified that he had responded to more than one fire at the Glidden Fence property. Upon review of fire run reports for refreshed recollection, Fire Marshal Harling testified that the fire department responded to fires on the Property on August 8, 2007, January 4, 2008, and September 30, 2010. Specifically, Lieutenant Gunning of the Westfield Fire Department testified he had previously responded to a call at the Glidden Fence Property at 17808 Spring Mill Road in Westfield, Indiana on September 30, 2010. Lieutenant Gunning testified that the fire was in an open barrel and included cans and trash, as well as dimensional lumber.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management ("IDEM") is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3.

2. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.

3. This office must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). "*De novo* review" means that "all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings. *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind.Ct.App. 1981).

4. Pursuant to I.C. § 13-30-3-9, the burden is on IDEM as the complainant to show the alleged violations.

5. 326 IAC 4-1-2 states, "Open burning is prohibited except as allowed in this rule."

6. For purposes of this cause, the following terms are defined as follows.

   a. I.C. § 13-11-2-145 defines "open burning" as "the combustion of any matter in the open or in an open dump."
   b. 326 IAC 4-1-0.5(1) defines "adequate firefighting equipment" as "equipment sufficient and appropriate under the circumstances to extinguish the fire."
   c. 326 IAC 4-1-0.5(3) defines "clean wood products" as "wood products, including vegetation, that are not coated with stain, paint, glue, or other coating material."

7. 326 IAC 4-1-3 exempts certain types of open burning from the general prohibition. Pursuant to 326 IAC 4-1-3(c), "The following types of fires are allowed:

   (1) recreational or ceremonial fires, such as fires for scouting activities, and fires used for cooking purposes, such as camp fires, subject to the conditions in subsection (b)(1) through (b)(5) and the following conditions:
      (A) Only the following may be burned:
         (i) clean wood products . . .
      (B) Any person conducting recreational . . . fires shall notify the local fire department . . . prior to burning if the size of the pile being burned is more than One Hundred Twenty five (125) cubic feet. . . .
      (C) The pile to be burned shall be less than or equal to One Thousand (1,000) cubic feet and only (1) pile may be burned at a time.
      (D) The fire shall not be used for disposal purposes.

8. 326 IAC 4-1-3(b)(1) through (5)[2] states:

   (b) The types of fires identified in subsection (c) are allowed under this rule. Unless specified otherwise, the following conditions apply to any fire allowed by this subsection:
      (1) Fires must be attended at all times and until completely extinguished.
      (2) A fire shall be extinguished if at any time it creates a:
         (A) pollution problem;
         (B) threat to public health;
         (C) nuisance; or
         (D) fire hazard.
      (3) No burning shall be conducted during unfavorable meteorological conditions such as any of the following:
         (A) High winds.
         (B) Temperature inversions.
         (C) Air stagnation.
         (D) When a pollution alert or air quality action day has been declared.
      (4) All burning shall comply with other federal, state, and local laws, rules, and ordinances.
      (5) Adequate firefighting equipment shall be on-site for extinguishing purposes during burning times.

[2] The IDEM does not contend that the Respondent failed to comply with 326 IAC 4-1-3(b)(2), (3) or (4).

9. Counsel for the Respondent objected to the admission of the fire run reports, marked as Exhibits 1-5[3], alleging the reports were hearsay. The fire run reports were admitted. Pursuant to Ind. Evidence Rule 803(8)(A),[4] certain public records are exempted from the prohibition on hearsay. The fire run reports are admissible public records because they set out regularly conducted and recorded activities for which Westfield Fire Department ("WFD") has a legal duty to report, and the circumstances of their creation indicate trustworthiness. *Id.*

10. The fire run reports do not fall within the exceptions to the public records exception because they are created by non-party, non-law enforcement personnel to comply with a legal duty, not in anticipation of litigation. Ind. Evidence Rule 803(8)(B).[5] The Indiana Supreme Court applies the following three-step test to determine the admissibility of hearsay evidence under Ind. Evidence Rule 803(8)(B): "1) whether the report contains findings which address a materially contested issue in the case; 2) whether the record or report contains factual findings; and 3) whether the report was prepared for advocacy purposes or in anticipation of litigation." *Bailey*, 806 N.E.2d at 333–34. *See also Pendergrass v. State*, 889 N.E.2d 861, 867 (Ind. Ct. App. 2008), *aff'd*, 913 N.E.2d 703, 708–09 (Ind. 2009), *overruled on other grounds*, *Speers v. State*, 999 N.E.2d 850, 854 (Ind. 2013). While the reports contain factual findings that address materially contested issues in the case, they were not prepared for advocacy purposes or in anticipation of litigation. Therefore, the reports are admissible public records, not subject to the rule against hearsay.

11. Even if the fire run reports did not fall within the public records exemption to the rule against hearsay, the OEA has the authority to admit hearsay. I.C. § 4-21.5-3-26(a). "[I]f the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence." *Id.* Since the content of the reports was corroborated by direct witness testimony, the findings in this Order are not based solely upon the fire run reports.

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[3] Counsel for Respondent did not object to the admission of the fire run report dated August 6, 2013 (Ex. 1), because the author of the report gave direct testimony regarding the report before there was a motion for entry of the report.

[4] (8) Public Records.
(A) A record or statement of a public office if:
(i) it sets out:
(a) the office's regularly conducted and regularly recorded activities;
(b) a matter observed while under a legal duty to [observe and] report; or
(c) factual findings from a legally authorized investigation; and
(ii) neither the source of information nor other circumstances indicate a lack of trustworthiness.

[5] (i) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case;
(ii) investigative reports prepared by or for a public office, when offered by it in a case in which it is a party;
(iii) factual findings offered by the government in a criminal case; and
(iv) factual findings resulting from a special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

12. The Respondent also objected to the introduction of Exhibits 3, 4 and 5 as being irrelevant and as inadmissible under Ind. Evidence Rule 408. Exhibits 3, 4 and 5 were fire run reports for the January 1, 2008, August 8, 2008, and September 30, 2010 runs to the Property. The Exhibits are clearly relevant to the question of whether the Respondent had a history of non-compliance.

13. Ind. Evidence Rule 408 provides that evidence of "(1) furnishing, promising, or offering, or accepting, promising to accept, or offering to accept a valuable consideration in order to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim" is not admissible "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction". Exhibits 3, 4, and 5 do not contain any information regarding settlement of potential claims arising from the documented fires. These are merely reports of observations and actions taken at the Property in response to the fires. The IDEM did not attempt to enter any agreement between itself and the Respondent into evidence.

14. The evidence is clear that the Westfield Fire Department responded to and extinguished fires on the Glidden property on August 6 and 9, 2013 and that no one was present in the immediate vicinity of the fire when the Fire Department arrived. There is no contradictory evidence of these facts.

15. The IDEM did not introduce any evidence that the August 2013 fires were for disposal purposes. Glidden Fence Company, Inc. introduced evidence through the testimony of Mr. Glidden that the fires were for his enjoyment. Also, Glidden Fence Company, Inc. introduced evidence that it disposes of its wood fencing waste with regularly serviced dumpsters, not by burning it. This testimony presents uncontroverted evidence that he started the fires for recreational, not for disposal purposes.

16. Further, the determination that the August 2013 fires were recreational is supported by these facts: (1) the fires were small and contained in an earthen pit; (2) the fires consisted of clean wood products, such as tree limbs; and (3) the Respondent incurred monthly costs associated with disposing of scrap wood generated by the business, thereby supporting the implication that it had no reason to dispose of wood scraps in any other manner.

17. The IDEM presented no evidence that the materials burned on August 6 and 9, 2013 were not clean wood products. Specifically, there was evidence that tree limbs and wood scraps, described as 2 x 2 and 2 x 4 wood scraps, were burned. The IDEM presented no evidence that the wood scraps were not clean wood products.

18. Recreational fires are exempt if the person complies with the requirements of 326 IAC 4-1-3(b)(1) through (5), including the requirement that "Fires must be attended at all times and until completely extinguished." While Mr. Glidden maintained that he was on the Property at all times while the fires were burning, he admits that he was not present at all times the fire was burning. It is also uncontroverted that he was not present when the fire department arrived to extinguish the fires.

19. The Respondent argues that the regulation is not clear. However, this argument is not persuasive. Under the rules of statutory construction, the language of a rule must be given its plain meaning. "However, we will not interpret a statute which is clear and unambiguous on its face; rather, we will give such a statute its apparent and obvious meaning. *Ind. State Bd. of Health v. Journal-Gazette Co,* 608 N.E.2d. 989, 992 (Ind. Ct. App. 1993), adopted, 619 N.E.2d 273 (Ind. 1993)." *United States Steel Corp., et al v. Northern Indiana Public Service Corp*. 951 N.E.2d 542, 552, (Ind. Ct. App. 2011). The Court concludes that the regulatory language that "Fires must be attended at all times and until completely extinguished" is clear and unambiguous on its face and no further analysis is needed. This is sufficient to give an ordinary person notice of the requirements.

20. While the IDEM representative, Mr. Janusz Johnson, testified that fires might not be attended at all times, this does not persuade the ELJ that the regulation is not clear that, in fact, it is a violation if the fire is not attended. Further, case law[6] is clear that Mr. Johnson's assertions regarding discretionary enforcement of the regulation are not binding either on the agency or the OEA.

21. The rule also requires that "adequate firefighting equipment" be present. The fire department did not observe any such equipment and used their own equipment to extinguish the fires. However, Mr. Glidden testified that there was a rake, shovel and water hose nearby. The ELJ finds it credible that a rake and shovel were present on the Property and may be sufficient to extinguish a small fire, but it is less credible that a water hose that does not actually reach the fire could be considered adequate. However, the IDEM presented no rebuttal evidence regarding whether these items were adequate to extinguish the fires. The IDEM has the burden to prove all elements of the violation and it failed to do so for this requirement.

22. Glidden violated 326 IAC 4-1-2 on two occasions, August 6 and August 9, 2013. While the fires were for recreational purposes, the regulation was violated by Mr. Glidden's failure to attend the fires until the fires were extinguished.

[6] *DenniStarr Envtl. v. Indiana Dep't of Envtl. Mgmt.*, 741 N.E.2d 1284, 2001 Ind. App. LEXIS 18 (Ind. Ct. App. 2001); *National Salvage & Service Corp. v. Commissioner of Indiana Dep't of Environmental Management*, 571 N.E.2d 548, 1991 Ind. App. LEXIS 781 (Ind. Ct. App. 1991).

23. The CO requires the Respondent to cease and desist violating of 326 IAC 4-1-2 and to pay a penalty of Five Thousand, Two Hundred, and Fifty Dollars ($5,250.00).

24. I.C. § 13-30-4-1 authorizes the IDEM to assess a penalty of $25,000 per day per violation. The IDEM used the Civil Penalty Policy[7] to determine the appropriate penalty in this matter. According to this policy[8], a civil penalty is calculated by "(1) determining a base civil penalty dependent on the severity and duration of the violation, (2) adjusting the penalty for special factors and circumstances, and (3) considering the economic benefit of noncompliance." The base civil penalty is calculated taking into account two factors: (1) the potential for harm and (2) the extent of deviation.

25. The policy states that the potential for harm may be determined by considering "the likelihood and degree of exposure of persons or the environment to pollution" or "the degree of adverse effect of noncompliance on statutory or regulatory purposes or procedures for implementing the program". There are several factors that may be considered in determining the likelihood of exposure. These are the toxicity and amount of the pollutant, the sensitivity of the human population or environment exposed to the pollutant, the amount of time exposure occurs and the size of the violator.

26. The policy further states that the extent of deviation relates to the degree to which the requirement is violated. A moderate extent of deviation is defined as "The violator significantly deviates from the requirements of the regulation, permit, or statute or only some of the requirements are implemented".

27. The IDEM assessed the penalty on the basis that the violations had a minor potential for harm and minor extent of deviation. The civil penalty policy provides that the penalty range for a minor/minor violation is $1000 to $2000. The IDEM selected $1500 as the base penalty. The penalty is multiplied by the number of violations.[9] The penalty was then adjusted upward by 75% due to the Respondent's history of non-compliance.[10] The total calculated penalty is $5,250.00.[11]

[7] IDEM's Civil Penalty Policy is a non-rule policy document, ID No. Enforcement 99-0002-NPD, originally adopted on April 5, 1999 in accordance with I.C. § 13-14-1-11.5.
[8] The OEA may use the Civil Penalty Policy in accordance with the Court of Appeals' decision in *IDEM v. Schnippel Construction Inc.*, 778 N.E.2d 407 (Ind. Ct. App. 2002).
[9] 2 x $1500 = $3000.
[10] 75% of $3000 = $2250.
[11] $3000 + $2250 = $5250.

28. The ELJ agrees with the IDEM's assessment of this violation as minor/minor. These were small, contained fires of natural wood; the fires did not present any immediate danger to any persons or property; and they were exempt as recreational fires. The only violation was Mr. Glidden's failure to remain with the fires until they were extinguished. The potential for harm was minor and the extent of deviation was minor. The range of penalty that may be assessed for a minor/minor violation is $1000 to $2000. The IDEM presented no reason for assessing the penalty from the middle of the range.

29. The policy also allows for the upward adjustment of the penalty if there has been a history of non-compliance[12]. One of the factors that should be considered in adjusting the penalty is whether the previous violations were within the last 5 years.[13] Further the policy considers how the prior violations were handled. "The adjustment should be toward the lower end of the range if the prior violation(s) was handled in an informal manner . . . and toward the upper end of the range if the prior violation(s) was handled in a formal manner."[14]

30. The IDEM introduced testimony and documentation to support its determination to adjust the penalty due to the Respondent's alleged history of non-compliance. The testimony and Exhibits 3, 4 and 5 regarding previous fires on January 1, 2008, August 8, 2008, and September 30, 2010 at the Property are admissible. Each witness testified about his observations regarding the fires on these dates.

31. The IDEM presented sufficient evidence that the Respondent was in violation of 326 IAC 4-1-2 in that the Respondent failed to comply with 326 IAC 4-1-3(b)(1). Further, the IDEM presented sufficient evidence to prove that the Respondent had a history of non-compliance.

32. In calculating the penalty, the IDEM provided no support for selecting the middle of the range as the base penalty; therefore, the base penalty is assessed at $1,000. There were 2 violations of the regulations (2 x $1,000 = $2,000).

33. The IDEM presented no evidence that the prior violations were handled in a formal manner thereby justifying using the upper end of the range for a history of noncompliance. In addition, the January 1, 2008 fire occurred more than five (5) years before the violations in question and should not be considered. Considering a history of 2 previous violations, the penalty will be adjusted upward by 25% ($500).

34. The penalty is two thousand, five hundred dollars ($2,500).

[12] IDEM's Civil Penalty Policy Sections 2.2 and 4.3.
[13] IDEM's Civil Penalty Policy, Section 4.3, page 8.
[14] IDEM's Civil Penalty Policy, Section 4.3, page 9.

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FINAL ORDER

AND THE ELJ, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that judgment is entered in favor of the Indiana Department of Environmental Management. The Commissioner's Order to Comply issued on June 21, 2013 is **AFFIRMED as to all terms and conditions except for the amount of the penalty. The penalty is $2,500.00**. **The penalty shall be paid in accordance with the terms and conditions in the CO.**

You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 21st day of January, 2015 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge