BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

CITIZENS AGAINST AMERICAN LANDFILL EXPANSION (C.A.A.L.E), ET AL.	:	Case No. ERAC 765939-765942
	:	Case No. ERAC 765943-765946
STARK-TUSCARAWAS-WAYNE JOINT SOLID WASTE MANAGEMENT DISTRICT	:	Case No. ERAC 795947
	:	Case No. ERAC 795948
	:	Case No. ERAC 766079-766082
Appellants	:	Case No. ERAC 266192-766193
	:	
v.	:	**RULING ON MOTION TO COMPEL AND MOTION FOR CONTEMPT CITATION**
JOSEPH KONCELIK, DIRECTOR OF ENVIRONMENTAL PROTECTION, ET AL.	:	
	:	
Appellees	:	Issued: June 11, 2009

This matter comes before the Environmental Review Appeals Commission ("Commission") on Appellant Stark-Tuscarawas-Wayne Joint Solid Waste Management District's ("District") Motion for Application for Contempt Citation and Motion to Compel Discovery filed on April 30, 2009, Appellee Director of the Ohio Environmental Protection Agency's ("Director," "Ohio EPA") Memorandum In Opposition filed on May 11, 2009, and Appellee American Landfill Inc.'s ("ALI") Memorandum in Opposition filed on May 11, 2009. Oral Argument was conducted on May 28, 2009, wherein the District, Ohio EPA, and ALI were represented by counsel.

In its Motion to Compel, the District seeks to compel Jeff Martin, an employee of Ohio EPA, to answer certain questions posed to him by counsel for the District during his April 23, 2009 deposition. During the deposition, counsel for the Director objected to the questions on the basis of relevancy and instructed the witness not to answer.[1] Mr. Martin declined to answer the questions until ordered to do so by the Commission.

[1] At his deposition, Mr. Martin was represented by E. Dennis Muchinicki, Esq. However, Mr. Muchinicki did not instruct Mr. Martin not to answer the questions at issue.

In particular, the District requests that the Commission compel Mr. Martin to answer questions relating to the practices and procedures of the staff of Ohio EPA's Northeast District Office ("NEDO") in authorizing alternative source determinations regarding exceedances of leachate parameters at Countywide Landfill, a facility that is not the subject of the instant appeal. Ohio EPA NEDO has jurisdiction over both the ALI and Countywide Landfills. Additionally, the District argues that the Director's instruction to Mr. Martin not to answer the questions on the basis of relevancy is contrary to the Commission's rules regarding the procedures to be followed during a deposition when an issue arises as to whether a particular question or line of inquiry is proper. Specifically, the District contends that instead of instructing Mr. Martin not to answer the questions, the proper procedure, as set forth in Ohio Administrative Code ("Ohio Adm.Code") 3746-6-02(I), was for counsel for the Director to suspend the deposition and seek a protective order to limit the scope of discovery.

In response, the Director contends that because the subject matter of the instant appeal is the permit issued to ALI, discovery related to the practices and procedures of Ohio EPA NEDO staff related to Countywide, a separate unrelated landfill, are irrelevant and therefore beyond the scope of permissible discovery. Relying upon *Nord v. McMillan* (Ohio Com.Pl. 1966), 6 Ohio Misc. 25, the Director argues that when a question posed during a deposition seeks information that is outside the scope of discovery, a witness may lawfully refuse to answer the question on the basis of relevancy. The Director also argues that the Commission's rules merely set forth the standards for a protective order and Ohio Adm.Code 3746-6-02 does not indicate either

when, or if, a party is required to file a motion for a protective order. Accordingly, the Director argues that because the language of Ohio Adm.Code 3746-6-02 is permissive, he was not required to suspend the deposition and move for a protective order.

Ohio Adm.Code 3746-6-02(G) governs the manner in which depositions are to be taken and provides that "examination and cross-examination may proceed as permitted in Commission hearings." In addition, Ohio Adm.Code 3746-6-02(H) sets forth the procedure to be followed when an issue exists regarding the proprietary of a particular question or line of inquiry. Pursuant to Ohio Adm.Code 3746-6-02(H), "all objections made at the time of the examination shall be noted upon the deposition" and "evidence objected to shall be taken subject to the objections." Ohio Adm. Code 3746-6-02(I) is identical to Ohio Civil Rule ("Ohio Civ.R") 30(D) and specifies that if counsel or a party believes that a deposition is being taken in an improper manner or for an improper purpose, the procedure to be followed is to file a motion to either terminate or limit the scope of the deposition. Ohio Adm.Code 3746-6-02(I) specifically provides that upon request of the party objecting to the examination, the deposition shall be suspended for the time necessary to make a motion for protective order.

Although not strictly bound by the Ohio Civil Rules, the Commission may look to decisional law interpreting the Ohio and federal civil rules for guidance in how to apply similar language in its own discovery rules. *Waste Mgmt. of Ohio, Inc. v. Board of Health of the City of Cincinnati* (Sept. 29, 2005), ERAC Case Nos. 315713, 315743. It is not the prerogative of counsel, but of the Commission or court, to rule on objections. *Smith v. Klein* (1985), 23 Ohio App. 3d 146, 493 N.E. 2d. 852, citing *Shapiro v.*

Freeman (S.D. N.Y. 1965), 38 F.R.D. 308. Therefore, as a general rule, instructions not to answer are not favored. *Montgomery v. Zacher* (Sept. 24, 1991), Franklin App. No. 91 AP-55. Accordingly, "a witness who is not a party to a legal proceeding has no right, upon the taking of his deposition in such a proceeding, to refuse to answer any question upon the advice of his counsel merely because such counsel believes that the testimony sought is irrelevant, incompetent, or immaterial." *Ex Parte Oliver* (1962), 173 Ohio St. 125; *Roseman v. Roseman* (1975), 47 Ohio App. 2d 103, 352 N.E. 2d. 149 ("it is improper for counsel to instruct a deposed party not to answer a question propounded at a deposition.") See also, *Barnes v. Bd. of Ed.* (S.D. Ohio 2007), Case No. 2:06-CV-0532, 2007 U.S. Dist. LEXIS 30886 ("It is improper to instruct a witness not to answer a question simply because the information called for may be irrelevant.").

In this case, the Commission first notes that prior to the deposition, the Director neither filed written objections to the District's Notice of Deposition nor filed a motion to quash the subpoena issued by the Commission. In addition, during the oral argument, counsel for the Director acknowledged that although he was aware that the scope of the District's inquiry of Mr. Martin was likely to include information regarding the alternative source determination at the Countywide Landfill, the Director did not file a motion for protective order, as authorized by Ohio Adm.Code 3746-6-07, to limit the scope of the examination or to prohibit the District from questioning Mr. Martin regarding practices and procedures of Ohio EPA NEDO staff regarding other landfill facilities.[2] Finally,

[2] Although the filings of both the District and Director reference a telephone conference regarding Mr. Martin's deposition, no affidavit of counsel or other evidence was presented to the Commission regarding the parties' informal efforts prior to the deposition to resolve the issues related to the scope of examination of Mr. Martin. See, Ohio Adm.Code 3745-6-08(B).

counsel for the Director acknowledged that the court in *Nord v. McMillan*, did not address the procedures for objections to questions at a deposition as set forth in either Ohio Adm.Code 3746-6-02 or Ohio Civ.R. 26.

The Commission finds that the court's holding in *Nord v. McMillan* is not controlling, and based upon well-established law, it was improper for counsel to instruct Mr. Martin not to answer questions posed during the deposition on the basis of relevancy. Pursuant to Ohio Adm.Code 3746-6-02(I), if counsel for the Director believed that questions posed to Mr. Martin were improper, counsel should have suspended the deposition and filed a motion for protective order to either terminate the examination or limit the scope of the questions to be asked.

Notwithstanding the Commission's determination that the challenged instructions not to answer were improper, the Commission will address whether the questions posed to Mr. Martin are within the scope of discovery in this appeal.

One issue in this appeal is whether the Director lawfully and reasonably determined the extent of any leachate exceedances at the ALI Landfill. Based upon information contained in a newspaper article and statements obtained from Ohio EPA employees, the District seeks discovery from Mr. Martin concerning practices used by Ohio EPA NEDO staff relating to alternative source determinations at the Countywide Landfill. The District believes that Mr. Martin's knowledge regarding the practices and procedures used by Ohio EPA NEDO staff in making alternative source determinations at Countywide, including allegations that evidence related to groundwater contamination was concealed, is reasonably calculated to lead to the discovery of admissible evidence

related to Oho EPA NEDO staff's handling of such alternative source determinations at the ALI Landfill. The District also believes that evidence of the practices and procedures of Ohio EPA NEDO staff in making alternative source determinations at Countywide will refute the Director's and ALI's claims that there was no leachate contamination at the ALI Landfill.

In contrast, the Director argues that because the District has appealed the permit issued to ALI, discovery related to practices and procedures used by Ohio EPA NEDO staff at Countywide, a separate facility not at issue in this appeal, including alternative source determinations, are irrelevant and cannot lead to the discovery of admissible evidence. The Director further contends that the District's "broad assertions of corruption at Ohio EPA based on unsubstantiated hyperbole published in the press" is not sufficient to justify probing into practices and procedures at Countywide simply because Countywide and ALI are both within the jurisdiction of Ohio EPA NEDO.

Ohio Adm.Code 3746-6-01(A)(2) governs the scope of discovery in appeals before the Commission and mirrors the language of Ohio Civ.R. 26(A). In particular, Ohio Adm.Code 3746-6-01(A)(2) provides, in relevant part:

> * * * any party to an appeal may discover any matter, not privileged, which is relevant to the subject matter of the appeal. It is not grounds for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. * * *

The general rule regarding relevancy is described in *Dennis v. State Farm Ins. Co.* (2001), 143 Ohio App. 3d 196, as follows:

> The concept of relevancy as it applies to discovery is not to limit it to the issues in the case, but to the subject matter of the action, which is a

> broader concept. *Nilavar v. Osborn* (2000), 137 Ohio App. 3d. 469, 499, 738 N.E.2d 1271, 1292-1293; *Tschantz v. Ferguson* (1994), 97 Ohio App. 3d 693, 715, 647 N.E. 2d 507, 521-522. The rule permits discovery of information so long at it is 'reasonably calculated to lead to the discovery of admissible evidence.' Civ. R.26(B)(1).

As to what evidence is "relevant" to the subject matter involved in the pending action, it is generally held that relevancy is broadly construed at the discovery stage of an action and that the discovery rules are to be accorded liberal treatment. *Gruebel v. Gruebel* (July 20, 1987), 4th Dist. Nos. 85-CA-39, 85-CA-40. As noted by the court in *Commercial Union v. Wheeling Pittsburgh* (1995), 106 Ohio App. 3d 477, 666 N.E. 2d 571, based upon the liberal discovery standard, the scope of information sought in discovery can be broader than the scope of the issues actually being litigated.

Based upon a review of the pleadings filed herein and the liberal philosophy of discovery, the Commission finds that the District has demonstrated that the practices and procedures used by Ohio EPA NEDO staff concerning alternative source determinations at the Countywide Landfill is reasonably calculated to lead to the discovery of admissible evidence. Accordingly, the Commission finds that the District is entitled to complete the deposition of Mr. Martin to discover the extent to which this witness has knowledge of the practices and procedures used by Ohio EPA NEDO staff concerning alternative source determinations at Countywide. However, the Commission's decision herein should not be construed to permit Appellants to engage in broad discovery of the Countywide Landfill. Appellants remain obligated to demonstrate to the Commission that any additional discovery related to landfills that are not the subject of the instant appeal is reasonably calculated to lead to the discovery of

admissible evidence regarding the permit issued by the Director to ALI. Accordingly, the Commission finds that the District's Motion to Compel is GRANTED.

Finally, the Commission will address the District's Motion for Application for a Contempt Citation pursuant to Ohio Adm.Code 3746-6-06(D). Ohio Adm.Code 3746-6-06(D) provides:

> In the case of disobedience or refusal of any subpoena served on any person, the court of common pleas of the county in which the disobedience or refusal occurs, or any judge thereof, on application of the Commission, may compel obedience by finding the person to whom the subpoena is directed in contempt.

In this case, the Commission finds that while Mr. Martin declined to answer certain questions at his deposition, he was not in disobedience or refusal of the subpoena issued by the Commission. As commanded, Mr. Martin attended the deposition on the date and at the time set forth in the subpoena. In addition, Mr. Martin answered a substantial number of questions generally related to the manner in which Ohio EPA NEDO staff makes alternative source determinations. Thus, with the exception of the questions specifically related to the practices and procedures used by Ohio EPA NEDO staff regarding alternative source determinations at the Countywide Landfill, Mr. Martin answered all of the questions posed to him. Accordingly, the Commission finds that the extraordinary remedy of contempt is not appropriate in this instance and the District's Application for a Contempt Citation is not well-taken and is DENIED.

Finally, the Commission notes that the parties have not complied with the Commission's April 2, 2009 Order in which a Joint Case Management Schedule was to

be filed on or before April 13, 2009. The parties are ORDERED to file a Joint Case Management Schedule on or before June 30, 2009.

THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

Entered in the Case File
of the Commission this 11th
day of June, 2009.

Lisa L. Eschleman, Chair

Toni E. Mulrane, Vice-Chair

Melissa M. Shilling, Member

COPIES SENT TO:
D. David Altman, Esq.
Amy J. Leonard, Esq.
Victor R. Marsh, Esq.
Thomas W. Connors, Esq.
Kristin R. Zemis, Esq.
Terrence M. Fay, Esq.
Steven W. Wesloh, Esq.
Jeffrey G. Rupert, Esq.
Robert E. Leininger, Esq.
Nicholas Bryan, Esq.
Robert James, Esq.
Kate Monti Barcalow, Esq.
Thadeus H. Driscoll, Esq.
Maureen Brennan, Esq.
Jason Perdion, Esq.