



LLC v. IEPA, PCB 09-67 (Nov. 5, 2009). Neither party moved the Board to reconsider or modify its final action.<sup>1</sup>

The Agency sought judicial review of the Board's decision denying the Agency's dismissal motion, reversing the Agency's determination and remanding with instructions, and awarding legal fees to Prime. In a March 2, 2012 order filed pursuant to Supreme Court Rule 23(b), the Fifth District Appellate Court affirmed the Board in all respects. *See Illinois Environmental Protection Agency v. Illinois Pollution Control Board*, 2012 IL App (5th) 100072-U. On April 11, 2012, the Appellate Court's mandate was issued. Neither the Fifth District's Rule 23 order nor its mandate refers to a "remand" to the Board. The mandate states: "It is the decision of this Court that the judgment on appeal be AFFIRMED."

Through the motion filed on May 11, 2012 (Supp. Mot.), Prime requests UST Fund reimbursement for additional legal fees incurred during the Board proceeding (\$4,213.98), as well as for legal fees incurred during the appeal before the Fifth District (\$8,287.17). The Agency response filed on May 18, 2012 (Resp.), opposes Prime's motion.

On July 12, 2012, the Board issued an order directing the parties to address whether, upon issuance of the Appellate Court's mandate, the Board was revested with jurisdiction over the case to rule upon Prime's motion for supplemental legal fees. *See Prime Location Properties, LLC v. IEPA*, PCB 09-67, slip op. at 3 (July 12, 2012). Specifically, the Board ordered briefing on the potential applicability of Illinois Supreme Court Rule 369(b) (Ill. Sup. Ct. R. 369(b) (eff. July 1, 1982)), in conjunction with Illinois Supreme Court Rule 335(i)(1) (Ill. Sup. Ct. R. 335(i)(1) (eff. Feb. 1, 1994)). *Id.* Prime timely filed its brief on August 17, 2012 (Br.), and the Agency timely filed its response brief on September 10, 2012 (Resp. Br.).

### **LEGAL FRAMEWORK**

Section 57.8(l) of the Environmental Protection Act (Act) reads as follows:

Corrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under this Title unless the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees. 415 ILCS 5/57.8(l) (2010).

Section 41(a) of the Act provides in pertinent part:

Any party to a Board hearing . . . may obtain judicial review, by filing a petition for review within 35 days from the date that a copy of the order or other final action sought to be reviewed was served upon the party affected by the order or other final Board action complained of, under the provisions of the Administrative Review Law, as amended and the rules adopted pursuant thereto, except that

---

<sup>1</sup> Any motion by a party asking the Board to reconsider or modify a final Board order must be filed within 35 days after the order is received by the party. *See* 35 Ill. Adm. Code 101.520(a).

review shall be afforded directly in the Appellate Court for the District in which the cause of action arose and not in the Circuit Court. 415 ILCS 5/41(a) (2010).

Illinois Supreme Court Rule 335 addresses statutory direct review of administrative agency orders by the Appellate Court. Rule 335(i)(1) states: “Insofar as appropriate, the provisions of Rules 301 through 373 (except for Rule 326) are applicable to proceedings under this rule.” Ill. Sup. Ct. R. 335(i)(1) (eff. Feb. 1, 1994). In turn, Rule 369(b) provides that “[w]hen the reviewing court dismisses the appeal or affirms the judgment and the mandate is filed in the circuit court, enforcement of the judgment may be had and other proceedings may be conducted as if no appeal had been taken.” Ill. Sup. Ct. R. 369(b) (eff. July 1, 1982).

## **PARTIES’ ARGUMENTS**

### **Prime’s Position**

Prime argues that the language of Section 57.8(l) of the Act does not limit legal fees to those incurred in proceedings before the Board. Supp. Mot. at 3. Instead, Prime continues, Section 57.8(l) authorizes the award of all legal fees for seeking payment from the UST Fund “on the condition that the owner or operator prevails before the Board.” *Id.* at 3-4. Prime also asserts that its legal fees should be awarded because, by prevailing before the Board and helping to obtain affirmance on appeal, Prime assisted in the formulation of policies that will benefit many others in the future even though it might have been less costly for Prime to “do nothing.” *Id.* at 5.

Prime argues that the Illinois Supreme Court Rules cannot limit the Board’s jurisdiction, which originates in the Act. Br. at 1-2. Prime asserts that Section 57.8(l) of the Act provides the Board with the authority to grant the motion for supplemental legal fees. Br. at 3-6. According to Prime, the Fifth District Appellate Court’s mandate here was silent about remand because the Fifth District was relying upon Supreme Court Rules 335(i)(1) and 369(b). Br. at 6-7. Therefore, Prime continues, the Appellate Court did not intend to preclude “other proceedings” by the Board, post-mandate. Br. at 7-8. It is Prime’s view that the Appellate Court was not required to specify those proceedings, nor should the Appellate Court be expected to have enough familiarity with all regulatory programs in the State to do so. *Id.*

### **The Agency’s Position**

The Agency begins by stressing that the Board has already taken final action in this case, *i.e.*, the Board’s final order of November 5, 2009. Resp. at 2. The Agency argues that the Board therefore lacks jurisdiction to “reopen” the proceeding after issuance of the Fifth District Appellate Court’s mandate, absent any remand from the Appellate Court or provision in the Act for such reopening. *Id.* at 2-3. “The policy arguments” of Prime, according to the Agency, are “self-serving and, without any statutory basis for the relief sought, merely an invitation to error.” *Id.* at 4.

The Agency asserts that, even if the Fifth District’s mandate does not preclude a subsequent award of legal fees, neither Section 57.8(l) nor any other provision of the Act

authorizes the Board to award legal fees incurred before the Appellate Court. Resp. Br. at 3-4; *see also* Resp. at 3-4. The Agency emphasizes further that even if the Board were to exercise jurisdiction now, that exercise would be controlled by the Fifth District’s finding that Section 57.8(l) of the Act must be narrowly construed. Resp. Br. at 3. The Agency maintains that Section 57.8(l), which makes no mention of administrative review, authorizes the Board to award legal fees incurred only in proceedings before the Board. *Id.* at 4-6.

The Agency adds that Section 41 of the Act (415 ILCS 5/41 (2010)), which provides for direct administrative review of Board decisions in the Appellate Court, contains no language authorizing the Board to award legal fees incurred in such an appeal.<sup>2</sup> Resp. Br. at 6.

## **DISCUSSION**

### **Illinois Supreme Court Rules**

Final decisions of the Board under the Act are appealable directly to the Appellate Court. *See* 415 ILCS 5/41(a) (2010). Once a petition for review of a final Board decision is filed in the Appellate Court pursuant to Section 41(a) of the Act (415 ILCS 5/41(a) (2010)), the Appellate Court’s jurisdiction attaches and the Board is divested of jurisdiction.<sup>3</sup> *See, e.g., People v. Community Landfill Co.*, PCB 03-191, slip op. at 4 (Nov. 5, 2009).

In this case, neither the Fifth District Appellate Court’s order nor its mandate makes any mention of a remand to the Board for further action. Under Illinois Supreme Court Rule 369(b), when the Appellate Court issues its mandate affirming the judgment of a Circuit Court, the Circuit Court is revested with jurisdiction, despite the lack of any explicit remand by the Appellate Court. *See, e.g., Stein v. Spainhour*, 196 Ill. App. 3d 65, 68 (4th Dist 1990) (because of Ill. Sup. Ct. R. 369(b), remand order in Appellate Court mandate is not necessary to revest trial court with jurisdiction); *McNeil v. Ketchens*, 2011 IL App (4th) 110253, ¶21 (Ill. Sup. Ct. R. 369(b) “presupposes that after an affirmance, the trial court has jurisdiction over the subject matter and the parties—even absent a remand”).

Only “[i]nsofar as appropriate” (Ill. Sup. Ct. R. 335(i)(1)), Rule 369(b) applies to direct administrative review by the Appellate Court. The Board ordered the parties to address whether it became “appropriate” (Ill. Sup. Ct. R. 335(i)(1)) for the Board to conduct “other proceedings . . . as if no appeal had been taken” once the Fifth District issued its mandate “affirm[ing] the judgment” of the Board (Ill. Sup. Ct. R. 369(b)). *See, e.g., Coldwell Banker Havens, Inc. v. Renfro*, 288 Ill. App. 3d 442, 446-47 (5th Dist. 1997) (once Appellate Court mandate issued, trial court could consider post-mandate motion for attorney fees as “an ‘other proceeding’ under Supreme Court Rule 369(b)”; *Stein*, 196 Ill. App. 3d at 68-69 (after Appellate Court affirmance,

---

<sup>2</sup> The Agency does not explicitly address the Illinois Supreme Court Rules identified by the Board or Prime’s request for an additional \$4,213.98 in legal fees incurred before the Board.

<sup>3</sup> There is an exception, not at issue here, under which the Board retains jurisdiction to rule upon a motion for stay of the Board’s final order during the pendency of the appeal. *See* 35 Ill. Adm. Code 101.906(c) (stays pending appeal are governed by Illinois Supreme Court Rule 335(g)).

trial court proceedings to award attorney fees incurred on appeal were “other proceedings” pursuant to Ill. Sup. Ct. R. 369(b)).

The Board recognizes that unlike a Circuit Court, the Board “lacks inherent or common law authority to exercise jurisdiction not conferred upon it by legislative enactment.” Villegas v. Board of Fire & Police Com’rs of Village of Downers Grove, 167 Ill. 2d 108, 126 (1995); *see also* Business & Professional People for the Public Interest v. Illinois Commerce Commission, 136 Ill. 2d 192, 243 (1989). Further, the Board is a “creature of statute” and the Board’s authority accordingly must “find its source within the provisions of the statute by which it is created.” County of Knox v. The Highlands, LLC, 188 Ill. 2d 546, 554 (1999), quoting Bio-Medical Laboratories, Inc. v. Trainor, 68 Ill. 2d 540, 551 (1977). The Board also recognizes that the terms “‘jurisdiction’ and ‘authority’ are used interchangeably in certain administrative law contexts” and that “jurisdiction” may be used to designate an agency’s “scope of authority under the statutes.” Business & Professional People, 136 Ill. 2d at 243.

Based upon these propositions, none of which are disputed by the parties, the Board finds that it would be “appropriate” (Ill. Sup. Ct. R. 335(i)(1)) to apply Supreme Court Rule 369(b) to the Fifth District’s mandate, so as to revest the Board with jurisdiction, *only if* there is authority *under the Act* for the Board to grant Prime’s post-mandate motion for supplemental legal fees. Accordingly, for purposes of this order, the Board need not resolve Prime’s claim that the Illinois Supreme Court cannot by procedural rule limit the jurisdiction granted to the Board by the General Assembly.

### **The Act**

Section 57.8(l) of the Act authorizes the Board to award UST Fund reimbursement of legal fees incurred by an owner or operator who prevails before the Board. Because the UST Fund “does not have a broad remedial purpose,” Section 57.8(l) must be “construed narrowly.” IEPA v. PCB, 2012 IL App (5th) 100072-U, ¶26, citing Township of Harlem v. IEPA, 265 Ill. App. 3d 41, 44 (2nd Dist. 1994); *cf., e.g., Maschhoff v. Klockenkemper*, 343 Ill. App. 3d 500, 504-05 (5th Dist. 2003) (statute’s broad remedial purpose militated in favor of interpreting statute to authorize trial court’s award of attorney fees incurred on appeal).

Of the requested \$12,501.15 in UST Fund reimbursement, Prime’s motion seeks \$8,287.17 in legal fees incurred during the Agency’s appeal before the Fifth District, as well as \$4,213.98 in additional legal fees incurred during the company’s appeal before the Board. Whether such fees are available under Section 57.8(l) has never before been decided by the Board.

### **Legal Fees Incurred During the Appellate Court Proceeding**

Prime requests legal fees incurred during the appeal before the Fifth District. In Section 57.8(l) of the Act, however, the only proceeding identified is the one “before the Board” and the only legal fees identified are the “legal costs for seeking payment under this Title [XVI ‘Petroleum Underground Storage Tanks’].” 415 ILCS 5/57.8(l) (2010). It is Title XVI, Section

57.7(c)(4), under which appeals of Agency UST determinations may be taken to the Board (415 ILCS 5/57.7(c)(4) (2010)).

Not mentioned in Section 57.8(l) are legal fees incurred before the Appellate Court in defending the Board's decision to award payment. Appeals to the Appellate Court of Board decisions may be taken not under Title XVI of the Act, but under Title XI, "Judicial Review," Section 41(a) (415 ILCS 5/41(a) (2010)). Nowhere does Section 41(a) provide for an award of legal fees incurred during judicial review of final Board action.

The Board's decision in Dickerson Petroleum v. IEPA, PCB 09-87, PCB 10-5 (consol.) (Sept. 2, 2010), cited by Prime (Supp. Mot. at 4), is distinguishable from this case. Dickerson Petroleum did not involve Title XI of the Act, but rather only Title XVI, and posed no question of Board authority. The petitioner's legal fees were awarded in connection with a timely-filed motion for reconsideration, which the Board granted because the Agency, on remand, issued revised determination letters as ordered by the Board. See Dickerson Petroleum v. IEPA, PCB 09-87, PCB 10-5 (consol.) (Sept. 2, 2010, Dec. 2, 2010). The petitioner's legal fees in Dickerson Petroleum are therefore readily considered to have been incurred in "seeking payment under this Title [XVI] . . . before the Board." 415 ILCS 5/57.8(l) (2010).

More illuminating here is the First District Appellate Court's decision in Alexander v. Human Rights Commission, 166 Ill. App. 3d 515 (1st Dist. 1988). The First District was called upon to interpret Section 8-108 of the Illinois Human Rights Act (IHRA), which allowed an administrative agency, the Illinois Human Rights Commission (Commission), to "make the individual complainant whole" and award attorney fees as part of the "costs of maintaining the action." Alexander, 166 Ill. App. 3d at 517. The Appellate Court held that Section 8-108 of the IHRA did not authorize the Commission to award attorney fees incurred during Circuit Court review of the Commission's decision. *Id.* at 518. The First District emphasized that appeal of the Commission's decision was initiated pursuant to a different provision of the IHRA, Section 8-111, which did not mention attorney fees. *Id.*

Construing Section 57.8(l) of the Act "narrowly" (IEPA v. PCB, 2012 IL App (5th) 100072-U, ¶26), the Board finds that this statutory provision does not authorize the Board to award Prime's legal fees incurred before the Appellate Court.

### **Additional Legal Fees Incurred During the Earlier Board Proceeding**

Prime requests additional legal fees incurred during its appeal before the Board. For having prevailed before the Board, Prime was already awarded over \$10,000 in legal fees by the Board, and this ruling was affirmed by the Fifth District. See IEPA v. PCB, 2012 IL App (5th) 100072-U, ¶27.

There is no question that Section 57.8(l) of the Act authorizes the Board to order UST Fund payment of legal fees incurred during the appeal brought to the Board. Section 57.8(l) makes no mention, however, of the Board conducting any further proceedings *after* final Board action is judicially reviewed. The General Assembly has referred to post-judicial review proceedings before the Board, but did not do so here. *Cf.* 415 ILCS 5/22.2d(c)(2) (2010).

Section 41 of the Act contemplates post-judicial review proceedings before the Board, but only “under an order by the Appellate Court.” 415 ILCS 5/41 (2010) (“The Appellate Court shall retain jurisdiction during the pendency of any further action conducted by the Board under an order by the Appellate Court.”). The Fifth District’s order and mandate were silent on any further Board action. Giving Section 57.8(1) of the Act the narrow construction required (IEPA v. PCB, 2012 IL App (5th) 100072-U, ¶26), the Board finds that this statutory provision does not authorize the Board to award Prime, post-mandate, any additional legal fees incurred during the earlier Board proceeding.

Finally, as is its custom, the Board set forth its initial decision in an *interim* order so as to allow the parties to address Prime’s then-unsubstantiated request for legal fees. See Prime Location Properties, LLC v. IEPA, PCB 09-67, slip op. at 34-35 (Aug. 20, 2009). After the parties’ legal-fee filings, the Board issued its final order, which included the award of legal fees to Prime. See Prime Location Properties, LLC v. IEPA, PCB 09-67, slip op. at 6-7 (Nov. 5, 2009). Prior to the Agency’s appeal to the Fifth District, Prime could have sought the Board’s leave to supplement the company’s original legal fee petition. Prime did not do so. To entertain a post-mandate motion for legal fees incurred in an earlier Board proceeding risks fostering piecemeal litigation, both before the Board and the Appellate Court. Even if the Board were to find that it is authorized to grant such a motion, the Board would have misgivings about exercising its discretion to do so. See Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 7 (Aug. 5, 2004) (even if the proceeding falls within the parameters of Section 57.8(1), “the Board must also determine whether or not to exercise our discretion”).

### CONCLUSION

Because the Board has no authority under the Act to grant Prime’s post-mandate motion for supplemental legal fees, the Board finds that it lacks jurisdiction to rule upon that motion. Prime’s policy arguments to the contrary are better directed to the General Assembly.

IT IS SO ORDERED.

Board Member J. O’Leary abstained.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2008); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board’s procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 15, 2012, by a vote of 4-0 .

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

---

John Therriault, Assistant Clerk  
Illinois Pollution Control Board