ILLINOIS POLLUTION CONTROL BOARD
July 25, 2013

| | | |
|---|---|---|
| L. KELLER OIL PROPERTIES/FARINA, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | PCB 06-189 |
| | ) | PCB 06-190 |
| ILLINOIS ENVIRONMENTAL | ) | (UST Appeal) |
| PROTECTION AGENCY, | ) | (Consolidated) |
| | ) | |
| Respondent. | ) | |
| | ) | |

OPINION AND ORDER OF THE BOARD (by D. Glosser):

Petitioner L. Keller Oil Properties, Inc. (Keller) appealed two separate May 22, 2006 determinations of the Illinois Environmental Protection Agency (Agency). The Agency issued two "non-LUST determination" letters, rejecting Keller's 45-day reports and removing the leaking underground storage tank (UST) incidents from coverage under the Leaking UST Program. The Agency's determinations concern leaking petroleum USTs at the site of a former gasoline service station owned by Keller and located at 1003 West Washington Avenue in Farina, Fayette County.

In today's order, the Board rules on Keller's September 11, 2006 motion for authorization of settlement, in which Keller requested that the Board authorize the award of attorney fees. The Board first reviews the procedural history and background before summarizing Keller's motion and brief. The Board will then provide the legal and statutory background and explain the Board's reasoning. For the reasons described below, the Board denies the request for attorney fees and authorization of settlement.

## BACKGROUND

On June 23, 2006, Keller timely filed a petition (Pet. 1) for review of two separate May 22, 2006 Agency determinations. The May 22, 2006 Agency determinations were "non-LUST determination" letters, rejecting Keller's 45-Day Reports for Keller's two leaking UST incidents (Incident Numbers 20051539 and 20060153) and concluding that the incidents were ineligible for coverage under the Leaking UST Program. Pet. 1 at 1-2. With the petition, Keller included a motion to consolidate (Mot. 1) the appeals of the two Agency letters. In an order dated July 6, 2006, the Board accepted Keller's petitions for hearing and granted Keller's motion to consolidate. L. Keller Oil Properties v. IEPA, PCB 6-189; 06-190 (cons.) (Jul. 6, 2006).

By August 8, 2006, the parties reported to the Hearing Officer that a settlement had been reached, and that an open waiver of decision deadline would be filed. Pet. Br. at 2. On August 9, 2006, Keller filed an open waiver of the statutory deadline imposed on the Board for decision

on the issues. Keller thereby waived the 120-day statutory decision deadline completely until Keller elects to reinstate the decision period by filing a notice to reinstate.

On September 11, 2006, the Agency filed a Motion for Authorization of Settlement (Mot. 2). On appeal before the Board and as part of the settlement agreement, the Agency agreed that its previous decisions that the incidents were not covered by the Leaking UST Program were erroneous, and thus agreed to issue two new letters reversing the May 22, 2006 determinations. Mot. 2 at 1. The settlement terms also included a request for reimbursement of attorney fees to Keller in the amount of $2,500 from the Leaking UST Fund. *Id*. "As part of settlement and not as an admission by the [Agency] that payment of attorney fees would be applicable *if a hearing were held in this matter*, the [Agency] and the Petitioner agreed to a compromise amount of $2,500." *Id*. (emphasis added). The Agency noted however, to effectuate payment of attorney's fees, the Environmental Protection Act (Act) (415 ILCS 5/57.8(l) (2010) and the Board's rules require the Board to authorize any payment of attorney fees from the Leaking UST Fund. 35 Ill. Adm. Code 734.606(g). *Id*.

In an order dated September 21, 2006, the Board, expressing doubt that it has statutory authority to approve the payment of legal fees under these circumstances, responded to the Agency's motion by reserving ruling on the Agency's motion for authorization. L. Keller Oil Properties v. IEPA, PCB 06-180; 06-190 (cons.), slip op. at 2 (Sept. 21, 2006). Additionally, the Board directed the parties to submit a filing describing the specific legal authority on which the Board might rely in authorizing payment of legal fees in this case in which the petitioner has not yet prevailed at a hearing before the Board. *Id*.

The Board's September 21, 2006 order was followed by a period of almost seven years, during which no filings were made by either party. Throughout the course of this period the parties participated in periodic status conferences with the Hearing Officer at intervals of about two months, during which the parties considered the best manner in which to respond to the Board's order and continued to seek resolution of the issue without hearing. No other substantive filings or progress were made during this interim period.

On May 29, 2013, Keller filed a brief in support of its motion for authorization of settlement (Pet. Br.), providing its interpretation of the Board's authority to authorize attorney fees. The Agency has not submitted any filings in response to the Board's September 21, 2006 order.

## KELLER'S MOTION AND BRIEF

Keller states that under Sections 57.8(l) and 57.9(b) of the Act, (415 ILCS 5/57.8(l), 57.9(b) (2010)) legal costs of seeking payment from the Leaking UST Fund are eligible for reimbursement if the UST owner prevails before the Board. Pet. Br. Keller argues that it has prevailed before the Board within the meaning of the statute, and thus the Board has the authority to approve the payment of legal fees. *Id*. at 7. Keller maintains that the Agency's statement that the settlement is not "an admission by the [Agency] that payment of attorney fees would be applicable if a hearing were held in this matter" does not mean that the Agency

believes the Board is without authority to grant the motion for authorization of settlement. *Id*. at 4.

In support of its argument Keller first analogizes this case to Dickerson Petroleum v. IEPA, PCB 09-87; 10-5 (cons.) (Sept. 2, 2010). Keller maintains that in Dickerson, similar to the case here, the Agency issued non-LUST determination letters in response to 45-day reports. Pet. Br. at 5. On remand in Dickerson, the Agency approved reimbursement for most of the corrective action costs sought. Keller explains that the Board ultimately approved the payment of attorney fees, finding that the absence of a final ruling on the competing claims did not preclude payment of attorney fees in that case. *Id*. at 6. The Board in Dickerson stated that "[e]ven in the absence of an explicit reversal, the Board's February 4, 2010 order resulted in relief including reimbursement substantially as sought by Dickerson." Dickerson, PCB 09-87; 10-5 (cons.), slip op. at 8. Keller argues that, similar to the petitioner in Dickerson, it has prevailed before the Board despite the absence of an explicit reversal or full adjudication of the claims because it has obtained substantially all the relief it sought. Pet. Br. at 6-7.

Keller next points to Maher v. Gagne, 448 U.S. 122 (1980), to support its claim that the Act does not condition an award of attorney fees on full litigation of the issues. Keller states that Maher involved the interpretation of 42 U.S.C. § 1988 in determining whether to award attorney's fees to the prevailing party. Keller maintains that in Maher, similar to Dickerson, the trial court found that the plaintiff was a prevailing party because she had been awarded "substantially all of the relief originally sought in her complaint." Maher v. Gagne, 448 U.S. 122, 127 (1980). Furthermore, Keller cites to the U.S. Supreme Court's ruling in Maher that "[t]he fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees." *Id*. at 129.

Finally, Keller argues that its situation is distinguishable from the "catalyst" theory, a theory that the U.S. Supreme Court rejected in Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001). Under the "catalyst" theory a losing party should be considered to have prevailed if, by bringing the action, he is a catalyst for policy changes. Pet. Br. at 8. Keller maintains that the case here is distinguishable from cases under the "catalyst" theory because leaking UST appeals seek some coercive relief from the Board, whereas the "catalyst" theory has generally been applied in civil rights lawsuits, many of which seek a change in public policy through declaratory relief rather than compensatory relief. *Id*. at 8-9. Keller argues that it has prevailed before the Board because it sought recognition as the owner and operator of a leaking UST incident that is eligible for reimbursement from the Leaking UST Fund, and the pending motion seeks the Board's approval of a settlement agreement which would provide that relief to Keller.

Keller contends that the case law it identifies, including U.S. federal case law, should be persuasive in interpreting the prevailing party language, and finding that Keller has prevailed before the Board by receiving substantially all that it sought in its petition. Therefore, Keller argues the Board has sufficient authority to grant the reimbursement of attorney fees in this case.

## STATUTORY BACKGROUND

Title XVI of the Act sets forth the provisions for the administration and oversight of the Leaking UST Program, which includes the Leaking UST Fund. 415 ILCS 5/57 (2010). Title XVI also establishes the requirements for eligible owners to seek reimbursement from the Leaking UST Fund. 415 ILCS 5/57 (2010). If an owner or operator plans to seek reimbursement, the owner or operator must comply with the provisions of Title XVI. 415 ILCS 5/57.5(a) (2010). Section 57.7 sets forth requirements for remediation of a site where a leaking UST is removed, including the submission of a corrective action plan. 415 ILCS 5/57.7 (2010).

Section 57.8 of the Act sets forth the terms for when an owner or operator may seek reimbursement "after completion of the requirements of Sections 57.6 and 57.7, or after completion of any other required activities at the UST site." 415 ILCS 5/57.8 (2010). Section 57.8 of the Act also includes the timeframes for Agency determinations and the right to appeal a decision to the Board. 415 ILCS 5/57.8(a)(1) (2010). Section 57.8 of the Act addresses indemnification and what steps an owner or operator may take if the Leaking UST Fund lacks sufficient funds to be reimbursed for the activities. 415 ILCS 57.8(a)(5) (2010).

Section 57.8(l) of the Act provides:

> 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).

Finally, Section 734.630(g) of the Board's rules sets forth the requirement that the Board approve any payment of legal fees from the Leaking UST Fund. Legal fees or costs are ineligible for payment from the Leaking UST Fund, "unless the owner or operator prevails before the Board and the Board authorizes payment of such costs." 35 Ill. Adm. Code 734.630(g).

## DISCUSSION

Keller seeks reimbursement of $2,500 in attorney fees from the Leaking UST Fund. Mot. 2 at 1. In determining whether to award Keller attorney fees, "[t]he first question the Board must address is whether or not the proceeding falls within the parameters of the statutory provision." Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 7 (Aug. 5, 2004). Only after determining that Keller has prevailed before the Board will the Board address the second question of whether or not to exercise its discretion and award legal fees to Keller. *Id*. Thus, the critical question here is whether Keller has prevailed before the Board within the meaning of Section 57.8(l) of the Act. The Board will begin by addressing whether Keller "prevailed" before the Board. Then, if necessary, the Board will discuss whether the Board should, in its discretion, award attorney fees in this case.

Section 57.8(l) of the Act provides that the Board "may authorize payment of legal fees" only if the owner or operator "prevails before the Board" under Title XVI of the Act. 415 ILCS 5/57.8(l) (2010); *see* 35 Ill. Adm. Code 732.606(g). This subsection of the Act provides for the reimbursement of legal fees incurred in prevailing before the Board, and thus it constitutes a "fee-shifting" statute. *See* Brundidge, *et al*. v. Glendale Federal Bank, F.S.B. 168 Ill.2d 235,

245, 659 N.E.2d 909, 914 (1995). The Board must strictly construe fee-shifting statutes, and the amount of fees to be awarded lies within the broad discretionary powers of the Board. *See* Globalcom, Inc. v. Illinois Comm. Comm'n., 347 Ill. App. 3d 592, 618, 806 N.E.2d 1194, 1214 (citations omitted). The Board has stated that "[t]he plain language of Section 57.8(l) of the Act … guides the Board in [its] analysis of when to allow the prevailing party to receive legal defense costs." Illinois Ayers Oil Co., PCB 03-214, slip op. at 7. Therefore, the Board here must determine whether the record demonstrates that Keller has prevailed before the Board in seeking payment under Title XVI. *See* 415 ILCS 5/57.8(l) (2010).

Keller appealed two "non-LUST determination" letters issued by the Agency, claiming that, contrary to the Agency's determination, the incidents at issue are covered by the Leaking UST Program. However, the parties in this case reached a settlement agreement before any hearing by the Board or substantive briefing of the issues took place. The terms of the settlement agreement are as follows:

1. The [Agency] sent two letters to [Keller] on May 22, 2006 that were incorrect. As part of the settlement in this case, two new letters were issued to replace those issued on May 22, 2006.

2. During settlement negotiations, [Keller] requested reimbursement for attorney fees. As a part of settlement and not as an admission by the [Agency] that payment of attorney fees would be applicable if a hearing were held in this matter, the [parties] agreed to a compromise amount of $2,500.00.

3. In order to effectuate payment of the agreed settlement amount from the Leaking Underground Storage Tank Fund, the parties must have [Board] authorization. Pursuant to Section 732.606(g) payments of attorney fees must be authorized by the Board. Without this authorization, the case cannot be settled. Mot. 2 at ¶1-¶3

Keller presented several authorities in support of its argument that it has prevailed before the Board here, despite the fact that a hearing before the Board was not held and only a settlement agreement with the Agency was reached. However, none of Keller's authorities are persuasive given the particular facts of this case, and Keller cannot be said to have prevailed before the Board within the meaning of the Act.

Keller first cites to Dickerson, where the Board found that the petitioner prevailed before the Board despite the absence of a final ruling on the competing claims. Dickerson, PCB 09-87; 10-5 (cons.), slip op. at 8. In Dickerson the Board found that, "[e]ven in the absence of an explicit reversal, the Board's … order resulted in relief including reimbursement substantially as sought by [the petitioner]." *Id*. Accordingly, Keller argues that "[a] final hearing adjudicating the competing claims of the parties is not required under Dickerson to vest the Board with authority to award legal fees." Pet. Br. at 7.

Dickerson, however, is distinguishable from the case here in several ways, and is thus unpersuasive in supporting Keller's argument. Dickerson is similar to the case here because neither case involved a final ruling by the Board on the parties' competing claims. However, in

Dickerson the Board, upon initial appeal, held a hearing, considered the case after full briefing and then remanded the case to the Agency. The Board's review found that the denial letters failed to comply with the statutory requirements in 35 Ill. Adm. Code 734.505(b). On February 4, 2010 the Board issued an order, directing the Agency to cure the deficiencies in its letters and to "re-issue determinations consistent with this order and with applicable statutory and regulatory requirements within 30 days of the date of this order." Dickerson Petroleum, Inc. v. IEPA, PCB 09-87; 10-5 (cons.), slip op. at 29 (Feb. 4, 2010).

Upon remand, the Agency reconsidered its issuance of the non-LUST determination letters and, as originally requested by the petitioner, issued a No-Further Remediation (NFR) Letter and approved reimbursement of most of the corrective action costs sought by the petitioner. Dickerson, PCB 09-87; 10-5 (cons.), slip op. at 2. Only upon reconsideration, following these issuances by the Agency as directed by the Board, did the Board feel that it was appropriate to find that the petitioner had prevailed before the Board by receiving substantially all that it originally requested in its complaint.

The Board stated in its subsequent September 2, 2010 order for Dickerson that its decision setting a 30-day deadline for the Agency to cure its errors led directly and without delay to an NFR letter and reimbursement. Dickerson, PCB 09-87; 10-5 (cons.), slip op. at 8. Therefore, in Dickerson the Board, in determining that the petitioner had prevailed before the Board, found it significant that, although there was no final ruling on the parties' competing claims, a Board order directly led to the petitioner being awarded substantially all the relief it requested in its complaint. In contrast with Dickerson, here there has been no Board order awarding relief to Keller or directly resulting in relief to Keller. Furthermore, there has been no hearing before the Board in this case. Here, following the Board's acceptance of Keller's petition for review, the Agency, on its own initiative, admitted its previous determinations were erroneous and agreed to issue new determination letters as a part of a settlement agreement. This is not equivalent to the situation in Dickerson, where the Board ordered the agency to issue new determinations, which directly resulted in the relief awarded to the petitioner that led the Board to determine that the petitioner prevailed before the Board. Therefore, Dickerson is unpersuasive in supporting Keller's argument that it has prevailed before the Board.

Next, Keller argues that the situation here is similar to that in Maher v. Gagne, 448 U.S. 122 (1980), where the court interpreted a similar fee-shifting provision in 42 U.S.C. § 1988. The relevant language in 42 U.S.C. § 1988, concerning civil rights proceedings, states that "the court, in its discretion, may allow the prevailing party … a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). The court in Maher ruled that "[t]he fact that the respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees." Maher v. Gagne, 448 U.S. 122, 129 (1980). Further, the court stated that "[n]othing in the language of [42 U.S.C.] § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Id*.

Keller argues that the operative language in § 1988 mirrors that of the Act, and thus the reasoning in Maher should apply here. However, Maher is distinguishable from the case here in meaningful ways. First, Maher involved settlement by means of entry of a consent decree,

whereas the parties here independently arrived at a settlement agreement. This is significant because a consent decree generally is entered by the court, requires court approval, and is considered a judgment by the court. Furthermore, when a settlement is entered as a consent decree, the court retains the power to supervise the agreement's implementation, including the power to find a party in contempt of court for failure to obey the agreement. Conversely, a settlement agreement often requires no input or approval by the presiding court and generally is not considered a judgment by the court. Therefore, the disposition of a case by consent decree is more indicative of a situation in which a party can properly be found to have prevailed before the presiding court than disposition by settlement agreement.

Additionally, similar to Dickerson, in Maher there was a hearing before the court adjudicating the issues, including a trial court hearing, district court hearing, and a U.S. Supreme Court hearing. Accordingly, Maher is meaningfully distinguishable from the case here, and it would be improper for the Board to adopt Maher's reasoning here in finding that Keller has prevailed before the Board.

Finally, the Board's opinion in Phillips 66 Company v. IEPA, PCB 12-101 (Mar. 21, 2013), further supports the Board's view that Keller has not prevailed before the Board by resolving an appeal of an Agency determination through a settlement agreement. In Phillips 66 Company, the petitioner, under Section 40 of the Act (415 ILCS 5/40 (2010)), sought review of an NPDES permit determination made by the Agency. Ultimately, the parties in Phillips 66 Company sought Board approval of a stipulation agreement, which would impose modifications on the petitioner's permit. The Board concluded that "stipulations regarding permit conditions are not appropriate in the context of a permit appeal." Phillips 66 Company, PCB 12-101, slip op. at 28. Specifically, the Board in Phillips 66 Company cited its rationale as previously articulated in Electric Energy v. IEPA, PCB 85-14 (June 13, 1985):

> The Board has had difficulty in dealing with settlements in permit appeal cases which involve Agency issuance of negotiated permits containing conditions for which no record exists 'setting out sufficient technical facts and legal assertions to allow the Board to exercise its independent judgment and to make proper findings of fact and conclusions of law.' Electric Energy v. IEPA, PCB 85-14, Interim Order, slip op. at 1 (June 13, 1985) (citation omitted).

The instant case is an appeal of an Agency decision that leaking USTs were ineligible for coverage under the Leaking UST Program which, similar to Phillips 66 Company, is a proceeding under Section 40 of the Act. 415 ILCS 5/57.7(c)(4). The Board in Phillips 66 Company found it relevant in declining to approve the settlement agreement that there was not a sufficient record of the facts and legal assertions supporting the proposed permit terms on which the Board could rely in exercising its judgment and discretion. Therefore, here, where there is similarly no record of facts or legal assertions, the Board cannot grant the motion to authorize the settlement. For this and the other reasons explained in Phillips 66 Company, the Board is not authorized to accept settlements of UST appeals. *See* Phillips 66 Company, PCB 12-101, slip op. at 28. Because the Board cannot authorize the proposed settlement, it cannot and has not entered judgment in favor of either party, and Keller has not prevailed before the Board.

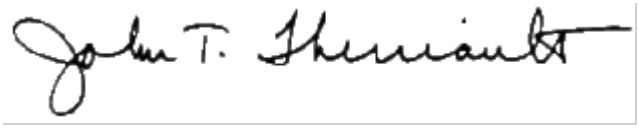
Based on the above reasoning, the Board finds that Keller has not presented convincing authority on which the Board may award attorney fees in this case. Therefore, the Board finds that Keller has not prevailed before the Board and declines to award Keller the requested attorney fees. Consequently, the Board does not address the questions of whether to exercise its discretion to award attorney fees here or whether the requested amount of attorney fees is reasonable.

## CONCLUSION

The Board finds that Keller has not prevailed before the Board. The Board therefore finds that it does not have the statutory authority to grant an award of legal fees to Keller in this case. Furthermore, the Board finds that it cannot accept a settlement in this proceeding and the motion is denied.

IT IS SO ORDERED.

I, John Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on July 25, 2013, by a vote of 4-0.



John Therriault, Clerk
Illinois Pollution Control Board