

ILLINOIS POLLUTION CONTROL BOARD
October 21, 1993

SANGAMON COUNTY DEPARTMENT OF PUBLIC HEALTH,)	
)	
Complainant,)	
)	
v.)	AC 92-79
)	Docket B
LEE HSUEH (SPRINGFIELD/HSUEH))	(Administrative Citation)
)	(SCDPH-92-AC-20)
Respondent.)	

ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on "Motion to Reconsider" filed on October 1, 1993 by the Sangamon County Department of Public Health (Sangamon County). Sangamon County seeks reconsideration of the Board's August 26, 1993 order.

On July 1, 1993, the Board found, in Docket A of this appeal, Mr. Lee Hsueh in violation of section 21(p)(1) of the Environmental Protection Act (Act). (415 ILCS 5/21(p)(1) (1992).) The Board imposed a penalty of \$500 against Mr. Hsueh for this violation and also ordered him to pay hearing costs. The Board instructed the Clerk of the Board and Sangamon County to submit affidavits of hearing costs. On July 12, 1993, Sangamon County filed an affidavit of costs claiming \$250.00 in attorney fees and \$55.00 in witness fees. In its August 26, 1993 order the Board found that the costs in the affidavit submitted by Sangamon County did not represent recoverable hearing costs and ordered Sangamon County to resubmit its affidavit of costs. Sangamon County requests the Board to reconsider this order which found the costs claimed by Sangamon County were not recoverable.

In its motion for reconsideration, Sangamon County contends that it was denied an opportunity to argue its position on hearing costs before the Board. Sangamon County also argues that the affidavit as submitted is similar to affidavits submitted by Sangamon County in other administrative citation proceedings in which the costs have been awarded.

The recovery of costs is entirely dependent on statutory authorization. (Ritter v. Ritter (1943) 381 Ill. 549, 552, 46 N.E. 2d 41, Wintersteen v. National Cooperage & Woodenware Co. (1935), 361 Ill. 95, 108, 197 N.E. 578.) Section 42(b)(4) of the Act specifies the penalty to be applied to administrative citations as a "penalty of \$500 for each violation of each such provision, plus any hearing costs incurred by the Board or the Agency." The Board has previously held that units of local government bringing an administrative citation were also entitled to recover hearing costs because the unit of local government was

acting on behalf of the Agency pursuant to the delegation provision of Section 4(r) of the Act. (In the Matter of: Bi-State Disposal, Inc., (February 23, 1989), AC 88-33.)

While the Act does not define "hearing costs" the Board has addressed the issue of which costs are recoverable in other Board opinions.

Although Section 42(b)(4) of the Act does not define "hearing costs," the term "costs" has acquired a fixed and technical meaning in the law. "Costs are allowances in the nature of incidental damages awarded by law to reimburse the prevailing party, to some extent at least, for the expenses necessarily incurred in the assertion of his rights in court." (Galowich v. Beech Aircraft Corp., 92 Ill. 2d 157, 441 N.E.2d 318, 321 (1982).) "A successful litigant, however, is not entitled to recover the ordinary expenses of litigation and trial preparation, and only those items designated by statute to be allowable can be taxed as costs." (Id., 441 N.E.2d at 322.) Attorneys' fees are separate and distinct from costs and are not recoverable as such. (Meyer v. Marshall, 62 Ill. 2d 435, 343 N.E. 41 (1943) [sic]; Ritter v. Ritter, 381 Ill. 549 46 N.E. 2d 41 (1943).) Additionally, an expert witness' fees for testifying are not recoverable as "costs." (Naiditch v. Schaf Home Builders, Inc., 160 Ill. App. 3d 245, 512 N.E.2d 486, 498 [sic] (2d Dist. 1987).) County of DuPage v. E & E Hauling, Inc. (February 8, 1990), AC 88-76, AC 88-77.)

The Board also notes that the Act allows the Board to "award costs and reasonable attorney's fees" to the State's Attorney or Attorney General against a person who has committed a wilful, knowing or repeated violation. (415 ILCS 5/42(f) (1992).) The Board interprets the language of this section to indicate that the legislature views costs and attorney's fees as separate items. Further, the Board construes the language of the statute to indicate that where the legislature allowed for the recovery of "hearing costs" in administrative citations it did not intend to include attorney's fees as part of the hearing costs.

The Board is not persuaded by the arguments presented by Sangamon County. The Act provides for the recovery of hearing costs in general terms and does not specify which costs are considered "hearing costs". In administrative citations the Board orders the Agency or the unit of local government to submit an affidavit specifying the costs incurred at hearing. The respondent may contest the costs by the filing of a reply or objection. The Board does not typically conduct a separate hearing on the issue of costs. Any arguments concerning the costs can be presented in the affidavit, the objection or a reply

to the objection.

Sangamon County contends that it was denied procedural due process in that it was not provided an opportunity to argue its position as to costs before the Board. In filing this motion for reconsideration Sangamon County was able to present its arguments on hearing costs to the Board. In addition, Sangamon County could have requested a hearing to be held but no such request was made by Sangamon County.

Sangamon County contends that section 47 of the Fees and Salaries Act provides that every witness attending in any county upon trials in the courts shall be entitled to receive the sum of \$20.00 for each day of attendance. (55 ILCS 45/47 (1992).) However, this provision does not explain the \$55.00 costs claimed as witness fees in Sangamon's affidavit. Sangamon County called one witness and the hearing was one day. According to section 47 of the Fees and Salaries Act the amount to be paid to one witness for appearing one day would be \$20.00. The Board finds this amount to be distinguishable from "expert witness fees" which have been determined not to be recoverable as costs. (See Naiditch v. Schaf Home Builders, Inc. (2d Dist. 1987), 160 Ill. App. 3d 245, 512 N.E.2d 1027, 1040.) Any witness appearing is entitled to the payment of the \$20.00 fee as compensation for attending as a witness under the Fees and Salaries Act.¹ The Board finds that a \$20 fee is reasonable to compensate the witness for any incidental expenditures that the witness may have incurred due to appearing as a witness.

Further, the Board is not persuaded by Sangamon County's claim that similar costs have been allowed in other administrative citations.² Even if similar costs were previously allowed by the Board such costs are clearly inconsistent with the Board's prior holdings concerning recoverable hearing costs. In the cases specified by Sangamon County the Board did not provide any reasoning why the costs were allowed. A review of the cases referenced by Sangamon County leads the Board to conclude that these costs were allowed in error and not intended to modify the Board's prior holdings concerning the recovery of attorney's

¹ Section 101.260 of the Board's procedural rules allows for payment of witness fees to a subpoenaed witness in accordance with the Fees and Salaries Act. (35 Ill. Adm Code 101.260.)

² The Board notes that there are differences in the affidavits submitted in the prior cases and the affidavit submitted in the present case. In Sangamon County v. Delmar Donley (December 3, 1992), AC 92-48 and Sangamon County v. Gerald Miller (June 3, 1992), AC 92-37, the fee for witnesses was equivalent to \$20 per witness.

fees. The Board will not exacerbate such errors by continuing to allow the recovery of costs that are inconsistent with prior holdings.

As Sangamon County did not submit a revised affidavit, the Board will assume that there are no additional costs that were incurred by Sangamon County. The Board will adjust the costs in the affidavit in accordance with the above. The Board will not order Mr. Hsueh to pay the attorney's fee and will reduce the fee for the witness to \$20.00. Therefore, the total costs incurred by Sangamon County is twenty dollars (\$20.00).

The Clerk of the Board filed its affidavit of costs on July 12, 1993 in the amount of one thousand three hundred four dollars and twenty-five cents (\$1304.25). Therefore, the total hearing cost to be imposed against the respondent is one thousand three hundred twenty-four dollars and twenty-five cents (\$1324.25).

ORDER

1. It is hereby ordered that within 30 days of the date of this order, Lee Hsueh shall, by certified check or money order payable to the State of Illinois, designated for deposit to the General Revenue Fund, pay as compensation for hearing costs incurred by the Board, the amount of one thousand three hundred four dollars and twenty-five cents (\$1304.25) which is to be sent by First Class mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
P.O. Box 19276
Springfield, IL 62794-9276

2. It is hereby ordered that within 30 days of the date of this order, Lee Hsueh shall, by certified check or money order payable to the County of Sangamon, pay as compensation for hearing costs incurred by the County of Sangamon, the amount of twenty dollars (\$20.00) which is to be sent by First Class mail to:

James D. Stone, Director
Sangamon County Department of Public Health
200 South Ninth, Room 301
Springfield, Il 62701

3. Respondent shall write the case name and number and social security or federal Employer Identification Number on the certified check or money order.

Penalties unpaid after the due date shall accrue interest

pursuant to Section 42(g) of the Illinois Environmental Protection Act.

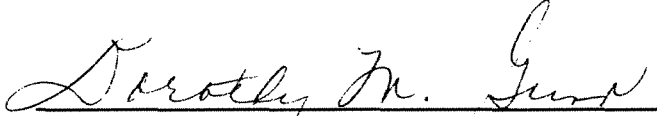
4. This docket is hereby closed.

IT IS SO ORDERED.

J. T. Meyer dissented.

Section 41 of the Environmental Protection Act, (415 ILCS 5/41 (1992)), provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 21st day of October, 1993, by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board