

ILLINOIS POLLUTION CONTROL BOARD  
June 2, 2011

ZERVOS THREE, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 10-54
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by A.S. Moore):

Petitioner Zervos Three, Inc. (ZT or Petitioner) appealed a determination by the Illinois Environmental Protection Agency (Agency or IEPA or Respondent) to deny a request for reimbursement from the Illinois Underground Storage Tank Fund (UST Fund). ZT's request concerns a site known as the Schiller Park Clark Service Station 1516, located at 9999 West Irving Park Road, Schiller Park, Cook County (Site).

On January 20, 2011, the Board issued an interim opinion and order granting ZT's motion for summary judgment and finding that \$97,049.28 in costs were reimbursable from the UST Fund. In the same order, the Board allowed ZT to file a statement regarding legal costs that may be eligible for reimbursement and also allowed the Agency to respond to that statement. *See* 415 ILCS 5/57.8(1) (2008).

On March 7, 2011, ZT timely filed a motion requesting that the Board authorize payment of "legal and expert's fees costs" from the UST Fund (Mot.). The Agency has not responded to ZT's request. For the reasons described below, the Board today grants ZT's request for payment of legal fees and costs, denies ZT's request for payment of experts' fees, and directs the Agency to reimburse ZT \$73,347.88 in legal fees and \$97,049.28 from the UST Fund as corrective action costs.

Below, the Board first reviews the procedural history before summarizing ZT's motion for authorization of payment of attorneys' and experts' fees as costs of corrective action. After providing the legal and statutory background of this case, the Board discusses the issues presented and reaches its conclusion on them before issuing its order.

**PROCEDURAL HISTORY**

On January 25, 2010, ZT filed a Petition for Review of the Agency's December 21, 2009 determination to deny ZT's request for reimbursement of \$97,049.28 of corrective action costs from the UST Fund. In an order dated February 4, 2010, the Board accepted ZT's petition for hearing.

On March 4, 2010, ZT filed a “Motion for Default Judgment and, in the Alternative, for Sanctions” alleging that the Agency had failed to comply with the Board’s order to file the administrative record. On March 25, 2010, the Agency filed the administrative record. In an order dated April 15, 2010, the Board denied ZT’s motion for default judgment or sanctions.

On August 30, 2010, the parties jointly filed a stipulation of facts. Also on August 30, 2010, the Board received a motion for summary judgment both from the Agency and from ZT. On September 17, 2010, the Board received both ZT’s response to the Agency’s motion for summary judgment and the Agency’s response to ZT’s motion for summary judgment.

On January 20, 2011, the Board issued an interim opinion and order granting summary judgment to ZT and finding that \$97,049.28 in costs are reimbursable. The same order allowed ZT to file a statement regarding legal costs eligible for reimbursement. On March 7, 2011, ZT filed a motion for authorization of payment of attorneys’ and experts’ fees as costs of corrective action (Mot.), accompanied by the affidavit of William J. Anaya verifying legal fees (Aff. Anaya) and the affidavit of Thomas Dishno verifying experts’ fees (Aff. Dishno). Attached to the Affidavits are summaries of the fees and costs (Exh. 1 and 2, respectively).

### **SUMMARY OF MOTION FOR AUTHORIZATION OF PAYMENT AND AFFIDAVIT**

In its motion for authorization of payment, ZT requests that the Board authorize payment of \$83,641.92 in legal and experts’ fees from the UST Fund. Mot. at 1, 7.

In support of its motion, ZT emphasizes that, in its January 20, 2011 order, “the Board determined, *inter alia*, that Petitioner was entitled to reimbursement of its entire claim of \$97,049.28 from the UST Fund.” Mot. at 2. ZT cites the Board’s January 20, 2011 interim opinion and order to claim that it had “prevailed before the Board for purposes of Section 57.8(1) of the Act.” *Id.* at 3, citing Zervos Three, Inc. v. IEPA, PCB 10-54, slip op. at 34 (Jan. 20, 2011).

ZT states that “[t]he party seeking reimbursement has the burden of presenting sufficient evidence with which the Board can determine the reasonableness of the fees.” Mot. at 4, citing Prime Location Properties, LLC v. IEPA, PCB 9-67, slip op. at 4 (Nov. 5, 2009) (Prime Location). ZT further states that the party seeking reimbursement “must set forth with specificity the legal services, an itemization of the time expended for the individual service, and the hourly rate charged.” Mot. at 4, citing Dickerson Petroleum, Inc. v. IEPA, PCB 09-87, 10-5 (cons.), slip op. at 7 (Dec. 2, 2010). ZT adds that “the Board may also consider the entire record and its experience and knowledge of the case in assessing whether the charges are reasonable.” Mot. at 4, citing Dickerson Petroleum, Inc. v. IEPA, PCB 09-87, 10-5 (cons.), slip op. at 7 (Dec. 2, 2010).

In support of its claim that its costs are properly specified, ZT likens itself to Swif-T-Food Mart. Mot. at 5, citing Swif-T-Food Mart v. IEPA, PCB 03-185 (Aug. 19, 2004) (Swif-T). In Swif-T, the Board awarded the petitioner all of the attorneys’ fees after reversing the Agency’s denial of reimbursement. Swif-T, slip op. at 2-4. ZT also cites Illinois Ayers Oil Co.

v. IEPA, PCB 03-214, slip op. at 9-10 (Aug. 5, 2004) (Illinois Ayers), claiming that the Board in that case “reversed the Agency and found that the petitioner was entitled to all of its legal expenses.”

ZT also argues that its fees are reasonable because of the duration of the case and the extensive research required to generate ZT’s claim for reimbursement. Mot. at 5-6. ZT states that its fee request includes specific descriptions of legal services, itemization of time expended, and the applicable hourly rate. *Id.* at 4.

Mr. Anaya’s affidavit elaborates on the requested fees of \$72,400.40 and costs of \$947.38. *See generally* Aff. Anaya. The affidavit lists his professional history and states that he is qualified to handle the case and judge the reasonableness of the fees. Aff. Anaya at 1. He further states that his hourly rate of \$410 per hour is reasonable based on fees he charges similar clients and is consistent with the “prevailing billing rates for legal services and costs [sic] in the Chicago legal community for attorneys with similar background and experience.” *Id.* at 2. The affidavit details his various tasks. *See generally* Aff. Anaya. Mr. Anaya also lists fees for members of his team, which are \$265 per hour for Robert A. McKenzie and \$345 for Raymond M. Krauze, both associate attorney; and \$240 per hour for John C. Fuller and \$200 for Sarah D. Ryczek, both of whom are paralegals. *Id.* at 5.

Mr. Dishno’s affidavit describes Mr. Dishno as an environmental scientist. Aff. Dishno at 1. He states that he assisted Mr. Anaya by providing “background analysis of the iterative dialogue with the Agency, a technical interpretation of the Part 732 and 734 regulations described at issue with the Agency, and support for activities performed and the costs incurred and the notices provided to the Agency by Zervos.” *Id.* at 1-2. Mr. Dishno states that his hourly rate is \$100. The rates of his team are \$45 per hour for Karen Lowthian and \$30 per hour for Brittney Wyatt. *Id.* at 2. Mr. Dishno asserts that the list of fees and calculations are consistent with his company’s usual timekeeping measures, and that his rate and the rates of his assistants are consistent with prevailing billing rates in the Chicago area. *Id.* Mr. Dishno reports in his affidavit that the total fees incurred for his work and his team’s work is \$10,294.04. *Id.* at 3.

### **BOARD DISCUSSION**

As noted above, ZT seeks reimbursement of legal fees and experts’ costs of \$83,641.92 from the UST Fund. Mot. Auth. at 7. The Agency has filed no response to this request.

In the following subsections, the Board first provides the applicable legal background and authorities. The Board then reviews its conclusion that ZT has prevailed pursuant to Section 57.8(1) of the Act before determining whether to exercise its discretion to award ZT’s requested fees and costs.

### **Legal Background and Authorities**

Title XVI of the Act establishes the Leaking Underground Storage Tank Program. 415 ILCS 5/57 (2008). The purposes of Title XVI include administering a UST Fund and establishing requirements for eligible owners to seek reimbursement from it. 415 ILCS 5/57.3,

57.8 (2008). Under Section 57.9 of the Act, an owner or operator may be reimbursed from the Fund for “costs associated with corrective action.” 415 ILCS 5/57.9 (2008). Section 57.2 of the Act defines “corrective action” as “activities associated with compliance with the provisions of Sections 57.6 [early action] and 57.7 [site investigation and corrective action] of this Title [XVI Petroleum Underground Storage Tanks].” 415 ILCS 5/57.2 (2008).

Section 57.8(l) of the Act provides in its entirety that “[c]orrective 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) (2008); *see* 35 Ill. Adm. Code 734.630(g). Because this subsection of the Act provides for the reimbursement of legal fees incurred in prevailing before the Board, 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). This discretion includes determining the reasonableness of the requested fees. *Illinois Ayers*, slip op. at 8 (citations omitted).

### **Prevailing before the Board**

The Board has stated that “[t]he plain language of Section 57.8(l) of the Act . . . guides the Board in our analysis of when to allow the prevailing party to receive legal defense costs. The first question the Board must address is whether or not the proceeding falls within the parameters of the statutory provision.” *Illinois Ayers*, slip op. at 7. In this case, the Board has determined that ZT prevailed before the Board in seeking payment under Title XVI. *Zervos Three*, slip op. at 35 (Jan. 20, 2011); *see* 415 ILCS 5/57.8(l) (2008). Specifically, the Board concluded that, “having granted ZT’s motion for summary judgment and determined that ZT’s request for reimbursement from the UST Fund is deemed approved by operation of law . . . ZT has prevailed before the Board for purposes of the Section 57.8(l).” *Zervos Three*, slip op. at 34 (Jan. 20, 2011).

### **Whether the Board Will Authorize Reimbursement of Attorneys’ Fees**

Having determined that ZT prevailed before the Board for the purposes of Section 57.8(l), the Board turns now to the issue of attorneys’ fees. As noted above, the Agency has filed no response to ZT’s motion for authorization of payment of fees. Section 101.500(d) of the Board’s procedural rules provides in pertinent part that, “[w]ithin 14 days after service of a motion, a party may file a response to a motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion.” 35 Ill. Adm. Code 101.500(d).

ZT’s motion for authorization requests payment of \$83,641.92. Mot. Auth. at 7. \$73,347.88 of that amount represents legal fees and \$10,294.04 of that amount represents experts’ fees. *Id.*; Aff. Anaya at 7; Aff. Dishno at 3.

In determining whether to exercise its discretion to authorize payment, the Board considers the reasonableness of the requested legal fees and costs. Prime Location, slip op. at 4, citing Illinois Ayers, slip op. at 8-9; Swif-T Food Mart v. IEPA, PCB 03-185, slip op. at 3 (Aug. 19, 2004) (Swif-T). As the party seeking reimbursement of fees, ZT has the burden of presenting sufficient evidence with which the Board can determine the reasonableness of the fees. Prime Location, slip op. at 4, citing J.B. Esker & Sons, Inc. v. Cle-Pa's P'ship., 325 Ill. App. 3d 276, 283, 757 N.E.2d 1271, 1277 (5th Dist. 2001) (citation omitted); Sampson v. Miglin, 279 Ill. App. 3d 270,281, 664 N.E. 2d 281, 288-89 (1st Dist. 1996). ZT "must set forth with specificity the legal services provided, the identity of the attorney providing the legal services, an itemization of the time expended for the individual service, and the hourly rate charged." Prime Location, slip op. at 4, citing J.B. Esker, 325 Ill. App. 3d at 283, 757 N.E.2d at 1278 (citation omitted).

While ZT "must present a sufficient basis for determining whether the requested charges are reasonable, the Board may also consider the entire record and its experience and knowledge of the case in assessing whether the charges are reasonable." Prime Location, slip op. at 4, citing Cretton v. Protestant Mem'l. Med. Cent., Inc., 371 Ill. App. 3d 841, 868, 864 N.E.2d 288, 315 (5th Dist. 2007); Sampson, 279 Ill. App. 3d at 281, 664 N.E.2d at 289. In determining whether ZT's request is reasonable, the Board may consider a range of factors, including "the skill and standing of the attorneys employed, the nature of the case, the novelty and difficulty of the issues involved, the degree of responsibility required, the usual and customary charge for the same or similar services in the community, and whether there is a reasonable connection between the fees charged and the litigation." Prime Location, slip op. at 4, citing Cretton, 371 Ill. App. 3d at 867-68, 864 N.E.2d at 315; Sampson, 279 Ill. App. 3d at 281, 664 N.E.2d at 289. The Board may apply its own expertise "to assess the time required to complete particular activities." Cretton, 371 Ill. App. 3d at 868, 864 N.E.2d at 315.

As outlined above, ZT's motion for authorization is accompanied by an affidavit of William Anaya, a 33-page summary of his fees and costs, an affidavit of Thomas Dishno, and an 11-page summary of his fees and costs. *See* Aff. Anaya; Exh. 1; Aff. Dishno; Exh. 2. To date, the Agency has not responded to that motion. The two affidavits specify the rates and hours billed for each of the two of them and their assistants. Applying that background information to the summary, the Board can readily note where listed the identity of the person providing legal services; the date on which the person provided them; a description of those services; the amount of time expended upon them; and the amount, if any, charged for them. Exh. 1; Exh. 2; *see* J.B. Esker, 325 Ill. App. 3d at 283, 757 N.E.2d at 1278 (citation omitted).

The Board's review of the summary of legal fees and costs shows that ZT engaged the services of Mr. Anaya on January 25, 2010, and that Mr. Anaya continued in the same capacity until January 31, 2011. Exh. 1 at 8, 31. The work includes a variety of work performed on ZT's behalf. *See generally* Exh. 1.

The summary of fees and costs includes a total of 114.1 hours for Mr. Anaya, and the remaining hours are attributable to his associates and assistants. Aff. Anaya at 6. The summary of fees describes the work performed and records the time allocated to that work in tenths of an hour. Exh. 1. The Board finds that the listings are itemized specifically enough to assess the

reasonableness of the charges. *See* Prime Location, slip op. at 5, citing Sampson, 279 Ill. App. 3d at 281-82, 664 N.E.2d at 289.

The summary of legal fees and costs submitted by ZT is generally similar in specificity to the information provided by the petitioners in Dickerson, Illinois Ayers and Swif-T. In Dickerson, the petitioner requested reimbursement of \$53,019.29 in attorneys' fees and \$676.29 in costs, and the Board ultimately directed the Agency to reimburse. Dickerson v. IEPA, PCB 09-87, PCB 10-5, (Dec. 2, 2010). In Illinois Ayers, the petitioner requested reimbursement of \$42,744.50 in legal fees and \$1,711.99 in costs (Illinois Ayers (May 3, 2004) (motion for authorization of payment)), which the Board ultimately directed the Agency to provide. Illinois Ayers, slip op. at 10. In Swif-T, the petitioner requested reimbursement of \$10,862.50 in legal fees and \$428.87 in costs (Swif-T (June 7, 2004)) (motion for authorization of payment)), which the Board ultimately directed the Agency to provide. Swif-T, slip op. at 3.

As noted above, the Agency has filed no response to ZT's motion for authorization of payment of fees. The Agency has thus not disputed sworn statements regarding the experience of ZT's attorneys of records in this case or their firm more generally. The Agency has likewise not disputed the reasonableness of the rates of the attorneys or their assistants. *See* Illinois Ayers, slip op. at 9 (approving reimbursement of \$42,744.50 where "[t]he Agency did not challenge the reasonableness of the costs."); *see also* Swif-T, slip op. at 2-3 (approving reimbursement of \$11,291.37 where Agency did not respond to motion for authorization of payment of fees).

The Board concludes that this appeal presented a significant issue regarding Agency determinations in the UST process and the regulatory requirements applicable to them. Based on its review of the record, the absence of an Agency response, and prior Board decisions, the Board finds ZT's requested legal fees and costs to be reasonable. Accordingly, the Board will exercise its discretion under Section 57.8(l) of the Act to direct the Agency to reimburse ZT from the UST Fund for legal fees in the amount of \$72,400.50 in legal fees and \$947.38 in legal costs for a total reimbursement of \$73,347.88.

### **Whether the Board Will Authorize Reimbursement of Experts' Fees**

Having determined that ZT has under the facts and circumstances of this case prevailed for the purposes of Section 57.8(l) of the Act (415 ILCS 5/57.8(l) (2008)) and should be awarded legal fees, the Board turns to determining whether the Board has discretion to direct the Agency to reimburse experts' fees.

Section 57.8(l) provides in its entirety that "[c]orrective 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) (2008); *see* 35 Ill. Adm. Code 734.630(g). Based on the plain language of the rule, "legal fees" alone are eligible for reimbursement. There is no indication in Mr. Dishno's affidavit or summary of fees that the work that he and his associates performed was legal in nature.

Although the Board has not previously address reimbursement of fees beyond those that are legal in nature, appellate decisions provide guidance. In Falkenthal v. Pub. Bldg. Comm. of Chicago, the court held that “only those costs specifically designated by statute are recoverable by prevailing party to lawsuit.” Falkenthal v. Pub. Bldg. Comm. of Chi., 444 N.E.2d 498, 504 (Ill. App. Ct. 1982). In Myers v. Bash, the court held that “nonstatutory fees were not proper subject for award of costs.” Myers v. Bash, 778 N.E.2d 320, 374 (Ill. App. Ct. 2002). In light of these authorities, the Board concludes that experts’ fees sought by ZT as reimbursement for the services of Mr. Dishno and his associates are not eligible for reimbursement. Specifically, the Board finds that ZT’s experts’ fees in the amount of \$10,294.04 are not reimbursable and declines to direct the Agency to reimburse them from the UST Fund.

An examination of Mr. Dishno’s affidavit and summary of the experts’ fees supports this finding. *See* Aff. Dishno; Exh. 2. The affidavit indicates that Mr. Dishno is an environmental scientist and that he provided technical counsel to Mr. Anaya. Aff. Dishno at 1. The affidavit also sets out hourly rates for Mr. Dishno and his associates and states that these rates are consistent with prevailing billing rates for consulting services in the Chicago area. *Id.* at 2, 3. Although a summary of consulting fees and costs lists the name of the person performing a task, the hours in half-hour increments, the hourly rate, and the total amount for the task, the summary does not describe in detail the tasks performed by Mr. Dishno and his assistants. *See* Exh. 2.

On the basis of this summary, the Board cannot confidently discern the specific nature of the work performed by Mr. Dishno for Mr. Anaya on behalf of ZT. The absence of this specific information lends additional support to the Board’s conclusion above that the requested experts’ fees are not eligible for reimbursement.

### **CONCLUSION**

In its interim opinion and order on January 20, 2011, the Board concluded that ZT was entitled to deem its application for reimbursement from the UST Fund approved by operation of law. The Board accordingly granted ZT’s motion for summary judgment, denied the Agency’s motion for summary judgment, and directed the Agency to reimburse ZT in the in the amount of \$97,049.28.

For the reasons discussed above, the Board today concludes to exercise its discretion under Section 57.8(1) of the Act to grant ZT’s motion for authorization of payment of legal fees. The Board denies ZT’s motion to the extent that it seeks authorization of payment of experts’ fees. Specifically, the Board directs that \$73,347.88 in legal fees and costs be reimbursed to ZT from the UST Fund as corrective action costs.

### **ORDER**

1. The Board grants ZT’s motion for authorization of payment of legal fees but denies ZT’s motion for authorization of payment of experts’ fees.

2. The Board directs the Agency to provide ZT with reimbursement for legal fees and costs in the amount of \$73,347.88 from the UST Fund as corrective action costs.

IT IS SO ORDERED.

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 T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 2, 2011, by a vote of 5-0.



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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board