ILLINOIS POLLUTION CONTROL BOARD
November 7, 2013

ESTATE OF GERALD D. SLIGHTOM,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 11-25
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J.A. Burke):

The Estate of Gerald D. Slightom (Estate) appeals an October 29, 2010 determination of the Illinois Environmental Protection Agency (Agency) denying the Estate's request for reimbursement from the Leaking Underground Storage Tank (UST) Fund (Fund). The Estate's application concerns property at 103 North Third Street, Girard, Macoupin County.

On September 10, 2013, the Agency filed a motion to dismiss this case, which the Estate opposes. After considering all filings by both parties, for the reasons below, the Board denies the Agency's motion to dismiss.

PROCEDURAL HISTORY

On December 6, 2010, the Estate filed a petition asking the Board to review the Agency's October 29, 2010 determination applying a $100,000 deductible to its reimbursement claim. The Estate amended its petition (Pet.) on January 12, 2011. On January 20, 2011, the Board accepted the amended petition for hearing.

On June 16, 2011, the Agency filed the Agency record accompanied by a motion for summary judgment. On June 29, 2011, the Estate requested an extension of time to respond to the Agency's motion for summary judgment along with a motion to compel deposition. The Agency filed its objection to the motion for an extension of time and motion to compel deposition on July 8, 2011.

On July 18, 2011, the Estate filed a notice of deposition. The Agency filed a motion to quash the subpoena on July 19, 2011. The Estate filed a reply in support of its motion to compel deposition on July 29, 2011. The Agency filed a sur-objection to the Estate's motion to compel on August 8, 2011. On August 10, 2011, the hearing officer issued an order denying the Estate's motion to compel deposition and granting the Agency's motion to quash the subpoena.

On September 6, 2011, the Estate moved for interlocutory appeal seeking Board review of the August 10, 2011 hearing officer order denying the motion to compel deposition. Also on

September 6, 2011, the Estate responded to the Agency's motion for summary judgment. On September 13, 2011, the Agency filed a reply to the Estate's response to the motion for summary judgment and a response to the Estate's motion for interlocutory appeal.

On September 27, 2011, the Estate moved for leave to file a surreply in opposition to the Agency's motion for summary judgment, along with its surreply. The Agency objected to the Estate's motion for leave to file a surreply on October 3, 2011.

In a November 17, 2011 Order, the Board denied the Agency's motion for summary judgment, denied the motion for interlocutory appeal, and denied the motion to file a surreply.

On December 13, 2011, the Agency moved to reconsider the Board's November 17, 2011 Order denying the Agency's motion for summary judgment. The Estate responded to the motion for reconsideration on December 28, 2011. On January 19, 2012, the Board denied the Agency's motion for reconsideration.

On March 2, 2012, the Agency filed a motion requesting a ripeness finding to seek interlocutory appeal of the Board's January 19, 2012 Order and a motion requesting a ruling on the Agency's motion for summary judgment. The Agency also filed, under objection, a copy of all documents within the Bureau of Land's Underground Storage Section's possession relating to the site. The Estate filed a response to the Agency's motion on March 16, 2012. The Agency filed a reply on March 26, 2012. On April 19, 2012, the Board denied the Agency's motion requesting a ripeness finding and denied the motion for summary judgment.

On May 14, 2012, the Agency filed a new motion for summary judgment. On June 12, 2012, the Estate responded to the Agency's motion. The Agency filed its reply to the Estate's response on June 22, 2012. On June 29, 2012, the Estate moved for summary judgment (Estate SJ). The Agency responded to the Estate's motion on July 10, 2012. On November 1, 2012, the Board denied the cross-motions for summary judgment and directed the parties to hearing.

On September 10, 2013, the Agency filed a motion to dismiss (Mot.). The Estate responded (Resp.) on September 24, 2013. On October 2, 2013, the Agency filed its reply (Reply). On October 11, 2013, the Estate moved for leave to file a surreply (Mot. Sur.) with the Estate's surreply (Sur.) attached.

PRELIMINARY MATTER

On October 2, 2013, the Agency filed its reply in support of its motion to dismiss. On October 11, 2013, the Estate filed a motion for leave to file a surreply *instanter*. The Estate contends that the Agency's reply contains an evidentiary claim without evidence of same, and also that the reply makes unsupported legal claims. Mot. Sur. at 1. The Estate argues that it would be prejudiced if not provided an opportunity to respond. *Id.*

Section 101.500(e) of the Board's procedural rules states "[t]he moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). The Board had not rendered a decision at the

time of the filing of the Agency's reply or the Estate's surreply. To prevent any material prejudice to either party, the Board accepts the Agency's reply, grants the Estate's motion for leave to file a surreply, and considers the reply and surreply in its decision below.

BACKGROUND

On April 18, 1990, Gerald Slightom registered at least one of the five underground storage tanks at the subject property, which included a heating oil tank, with the Office of the State Fire Marshal (OSFM). Rec. 1 at 24-25.[1] On August 30, 1991, Mr. Slightom reported a release from at least one of the underground storage tanks. Rec. 2 at 14-15. At least one of the tanks was removed on the same day. Rec. 2 at 13. On December 6, 1991, the Agency received an Application for Reimbursement from Gerald Slightom. Rec. 1 at 1-13.

A December 20, 1991 Agency letter determined that the site was eligible to seek reimbursement for corrective action costs, accrued on or after July 8, 1989, in excess of $100,000. Rec. 1 at 13.

Gerald Slightom died on September 5, 2007, and on September 20, 2007, Richard D. Slightom was appointed the executor of the Estate. The Estate contends that it had no record of the December 20, 1991 eligibility and deductibility determination. Estate SJ at 4-5.

On February 6, 2008, the OSFM issued a letter "based upon a Reimbursement Eligibility and Deductible Application they received on January 24, 2008" from the Estate. Rec. 1 at 29-30. The OSFM determined that the five tanks on the site were eligible to seek payment of costs in excess of $10,000. *Id*.

The Estate performed an approved Stage 1 Site Investigation Plan and Budget, and submitted an application for payment for the work on October 20, 2008. Rec. 1 at 55, 82, Rec. 2 at 138-139. On January 29, 2009, the Agency issued a decision letter applying the $10,000 deductible to the Estate's $29,239.08 reimbursement request and noted that the Estate would be reimbursed $19,239.08. Rec. 1 at 47.

The Estate also submitted a series of Stage 3 Site Investigation Plans and Budgets, which the Agency approved. Rec. 2 at 262-264, 347-349, 735-738. The Estate's Site Investigation Completion Report included the actual costs for all Stage 2 site investigation activities. Rec. 2 at 444-738. The Agency approved $82,057.28 requested for the Stage 3 site investigation, plus additional handling charges. Rec. 2 at 438-443.

On July 19, 2010, the Estate filed an application for payment in the amount of $83,912.58. Rec. 1 at 120-215. On October 29, 2010, the Agency issued the letter currently under appeal that noted both the December 20, 1991 determination of a $100,000 deductible and the February 6, 2008 determination of a $10,000 deductible for the site. Rec. 1 at 109. The

[1] The original Agency record was filed on June 16, 2011 and supplemented on December 13, 2011 and March 2, 2012. This order cites to the June 16, 2011 record as "Rec. 1" and the March 2, 2012 record as "Rec. 2."

October 29, 2010 letter applied the $100,000 deductible to the Estate's reimbursement claim. *Id.* The Estate appealed this decision on December 6, 2010, contending that "the proper deductible for this site is $10,000." Pet. at 4.

AGENCY'S MOTION TO DISMISS

The Agency states that, after review of the Estate's appeal of the Agency's October 29, 2010 determination, and a re-review of the Agency's October 29, 2010 decision, the Agency "issued a final decision on September 9, 2013 allowing the deductible of $10,000 to apply to the site and allowed the previously deducted amount of $83,908.73." Mot. at 3-4. Therefore, the Agency contends that the contested issues presented in the Estate's petition for review "have been rendered moot by the September 9, 2013 [Agency] letter." *Id.* at 4.

The Agency argues that the contested issues in this case have been resolved and the case has been rendered moot. Mot. at 4. The Agency states that, "due to the mootness of the issues presented, the case must be dismissed." *Id.*

ESTATE'S RESPONSE TO AGENCY'S MOTION TO DISMISS

The Estate notes that, as part of its prayer for relief, the Estate requested "the Board direct the Agency to approve the payment in full, [and] the Board award payment of attorney's fees." Resp. at 1.

The Estate states that, on September 4, 2013, the Agency "unilaterally issued a new determination" which stated in part that "a voucher for $89,908.73 will be prepared for submission to the Comptroller's Office for payment." Mot. at 2. The Estate continues that the Agency subsequently "unilaterally issued a new determination" on September 9, 2013, which revised the dollar amount to $83,908.73. *Id.* The Estate argues that the original payment request was for $83,912.58 and that, while the payment amount "is substantially what was requested, it is not in fact what was requested." *Id.*

The Estate further notes that its petition requested attorney's fees that total over $30,000 to date. Mot. at 2. Therefore, the Estate argues "not all issues presented have been rendered moot." *Id.* The Estate notes that the Illinois Supreme Court has "explained that the legislature's purpose in providing attorney fee awards is to encourage parties to bring lawsuits." *Id.* at 5. The Estate cites a number of instances in which courts refused to dismiss for mootness cases arising from relatively small claims. *Id.* The Estate argues that this is because, if a defendant were allowed to unilaterally moot a lawsuit after an attorney had been retained, then "the purpose of the fee-shifting provision to encourage suit would be lost." *Id.* The Estate notes that the Board "has made numerous rulings in this case" and compares the instant case to Dickerson Petroleum v. IEPA, (PCB 09-87, slip op. at 15 (Sept. 2, 2010)), stating that "the implications of the Board's orders defeated the Agency's planned approach to the dispute." *Id.* at 6-7.

The Estate therefore asks that the Board deny the motion to dismiss and to allow the Estate to submit proof of reasonable attorney's fees in a matter consistent with the procedural approach taken in Dickerson. Resp. at 7.

AGENCY'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

The Agency states that it intends to grant the Estate the full dollar amount that is the subject of this case and notes the previously incorrect dollar amounts resulted from continued clerical errors in this matter. Reply at 1.

The Agency contends that

> [t]he Board's rules provide that "legal fees or costs, including but not limited to, legal fees or costs for seeking payment under this Part, unless the owner or operator prevails before the Board and the Board authorizes payment of such costs" are ineligible for reimbursement. Reply at 1-2, citing 35 Ill. Adm. Code 734.650(d)(6).

The Agency argues that "legal fees are expressly ineligible unless there is a finding by the Board that authorizes such payment" and that the "award of legal fees should be an extraordinary relief with a higher burden of proof on the claimant and strict scrutiny by the Board." *Id.* at 2. The Agency questions whether such awards would be "quasi-punitive." *Id.* The Agency does not believe that awarding attorney's fees is justified in a case where the Agency "has made good faith efforts to settle the case" and has allowed the total reimbursement amount. *Id.* The Agency states that an award of attorney's fees would create a scenario where the Agency may take all cases to hearing because "there is no incentive for [the Agency] to settle a case." *Id.*

ESTATE'S SURREPLY IN OPPOSITION TO AGENCY'S MOTION TO DISMISS

The Estate disagrees with the Agency that awarding attorney's fees is "quasi-punitive." Sur. at 1, 2 (citation omitted). Further, the Estate contends that the Agency's argument that the Board should consider the Agency's "good faith efforts to settle the case" is irrelevant because the fee-shifting statute "makes no reference to good faith or bad faith." *Id.* at 2, citing 415 ILCS 5/57.8(l) (2012). The Estate further states that there is no evidence other than the Agency's own claims that the Agency negotiated in good faith, noting that the Agency

> only sought to capitulate after almost all issues had been briefed and argued, and the only matter remaining was a short hearing in which [t]he Estate would call representatives from the [Agency] and the [Office of State Fire Marshall] regarding the substance of their communications during the application review process. *Id.* at 2-3.

The Estate argues that, if the Board denied its request for attorney's fees, "then future petitioners will have greater incentive to avoid settlement and go straight to hearing." *Id.*at 3.

BOARD DISCUSSION

The issue presented to the Board is whether the contested issues presented in the Estate's petition for review have been rendered moot by the Agency's issuance of the September 9, 2013

determination letter. Mot. at 4. The Agency filed its motion pursuant to Sections 101.500, 101.506 and 101.508 of the Board's procedural rules. Mot. at 2, citing 35 Ill. Adm. Code 101.500, 101.506, 101.508. Section 101.506 of the Board's procedural rules allows motions to dismiss a pleading within 30 days after service of the challenged pleading, unless the Board determines that material prejudice will result. 35 Ill. Adm. Code 101.506. In appeals of final Agency decisions, the Board's procedural rules also provide that a petition is subject to dismissal if the Board determines that (a) the petition does not comply with informational requirements, (b) the petition is untimely, (c) the petitioner fails to timely comply with Board orders, (d) the petitioner does not have standing, or (e) other grounds bar the petitioner from proceeding. 35 Ill. Adm. Code 105.108.

In addition, the Board looks to Illinois civil practice law for guidance when considering motions to dismiss pleadings. 35 Ill. Adm. Code 101.100(b); s*ee also* United City of Yorkville v. Hamman Farms, PCB 08-96, slip. op. at 14-15 (Oct. 16, 2008). In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* In re Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). "[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003).

As an initial matter, the Agency's motion to dismiss was filed approximately twenty months after the Estate filed its amended petition, which is well beyond the time allowed for motions to dismiss under Section 101.506 of the Board's procedural rules.[2] However, the Agency cites to Section 105.108 of the Board's procedural rules in its motion. Although the Agency did not argue that Section 105.108 authorizes its motion and did not specify which subsection applies, the Board understands that the Agency moves to dismiss the petition under Section 105.108(e).[3]

The Agency, in its motion to dismiss, states that after review of the Estate's appeal and re-review of its October 29, 2010 decision, the Agency issued a final decision on September 9, 2013, applying the $10,000 deductible to the site. Mot. at 3-4. As a result of the Agency's "re-review," the Agency concludes that the September 9, 2013 letter "addresses all issues presented in the aforementioned appeal in favor of the applicant." Mot. Attachment 1. The Agency argues that, because the contested issues in the appeal have been resolved, the appeal is moot and must be dismissed. Mot. at 4.

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[2] 35 Ill. Adm. Code 101.506 requires all "motions to strike, dismiss, or challenge the sufficiency of any pleadings filed with the Board must be filed within 30 days after the service of the challenged document, unless the Board determines that material prejudice would result."

[3] 35 Ill. Adm. Code 105.108(e) states that a petition is subject to dismissal if the Board determines that "[o]ther grounds exist that bar the petitioner from proceeding."

The Agency's September 9, 2013 letter stated that re-review of the Agency's October 29, 2010 decision "is warranted under information presented in an appeal filed with the Illinois Pollution Control Board [on] December 6, 2010." Mot. Att. 1. More specifically, the Agency based its letter on information described as follows:

> This information is dated July 14, 2010 and was received by the [Agency] on July 19, 2010. The application for payment covers the period from May 19, 2008 to June 30, 2010. The amount requested is $83,908.73. Mot. Att. 1.

The Agency states in its reply that it intends "to grant [the Estate] the full dollar amount that is the subject of this case and it apologizes for the continued clerical errors in this matter that have gotten the correct dollar amount wrong." Reply at 1. The amount sought by the Estate is $83,912.58. Resp. at 2.

However, the Act does not allow the Agency to "re-review" its October 29, 2010 final decision. The Appellate Court, in Reichhold Chemicals, Inc. v. PCB, held that the Agency lacks authority to change or reconsider its final determinations. 204 Ill. App. 3d 674, 677-78, 561 N.E.2d 1343, 1345-46 (3d Dist. 1990), *appeal denied* 136 Ill.2d 554, 567 N.E.2d 341 (1991). That Court explained that the "Illinois Supreme Court has held that an administrative agency has no inherent authority to amend or change a decision and may undertake a reconsideration of a decision only where authorized by statute." Reichhold, 204 Ill. App. 3d at 677 (citations omitted). Even assuming that a later Agency project reviewer believes prior Agency action was wrong, the Agency is not allowed to reconsider prior final Agency determinations. A&H Implement Co. v. IEPA, PCB 12-53, slip op. at 7 (May 17, 2012), citing Tolles Realty Co, v. IEPA, PCB 93-124, slip op. at 4-5 (June 5, 1997) (discussion of cases applying Reichhold even when the Agency has made an error in its decision).

In Reichhold, the Agency denied an operating permit to a facility. Reichhold, 204 Ill. App. 3d at 676. The facility asked the Agency to reconsider the permit denial based on information previously submitted to the Agency and the Attorney General. *Id.* The Agency did not respond and the facility petitioned the Board to review the Agency's permit denial. *Id.* The Board dismissed the petition on the ground that the Agency was reconsidering its denial of the operating permit. *Id.* at 677. The Appellate Court reversed the Board and remanded the matter to the Board to decide the merits of the facility's petition. *Id.* at 680. The Court explained that when the Agency denies an application, "the applicant's only options are to start over with a new application or file a petition for review." *Id.*

In this case, the Estate appeals an October 29, 2010 Agency determination applying the $100,000 deductible. That October 29, 2010 letter states

> This information is dated July 14, 2010 and was received by the [Agency] on July 19, 2010. The application for payment covers the period from May 19, 2008 to June 30, 2010. The amount requested is $83,912.58. Pet. Exh. A.

This language describing the basis for the Agency's original decision is nearly identical, except for the exact dollar amount, to the more recent September 9, 2013 letter. The Board, therefore,

can only conclude that the information relied upon by the Agency in its September 9, 2013 determination is the same information relied upon by the Agency in its October 29, 2010 determination. Even if the information was not entirely the same, the information appears to have been available to the Agency before the Agency made its October 29, 2010 determination. The Agency expressly stated that information referred to in the September 9, 2013 letter "was received by the Agency on July 19, 2010." Mot. Att. 1.

The Estate's position here is similar to the one in Reichhold, in that the Agency has not been presented with new information on which to base its September 9, 2013 determination. In both the October 29, 2010 letter and the September 9, 2013 letter, the Agency referenced only information dated July 14, 2010 and received on July 19, 2010. Under these circumstances, Reichhold requires the Board to find that the Estate is entitled to a hearing on its petition. Reichhold explained that "to hold otherwise is to deprive [petitioner] of the right to review of the ruling here in dispute." Reichhold, 204 Ill. App. 3d at 680.

The Board appreciates both parties' concerns as to the possible chilling impact of this statutory scheme on settlements and negotiations between the Agency and reimbursement applicants. Reichhold also recognized this concern when the Court explained "[r]equests to modify or reconsider are not permissible under the present statutory scheme. Any hardships resulting from this arrangement should be redressed by the Illinois Legislature." Reichhold, 204 Ill. App. 3d at 680. The Board can do no more to remedy the situation than agree with the Court.

In opposing the Agency's motion to dismiss, the Estate requests that "the motion to dismiss be denied, at least in part, to allow the Estate to submit proof of reasonable attorney's fees incurred in this appeal" consistent with Dickerson. Resp. at 7. In Dickerson, the Agency issued UST determination letters denying reimbursement from the Fund and the applicant petitioned the Board for review. After hearing, the Board remanded the case to the Agency because the denial letters failed to comply with statutory requirements. The Board ordered the Agency to cure the deficiencies in the letters. After remand, the Agency approved most of the reimbursement request. The petitioner then requested attorney's fees. The Board awarded fees upon finding that the petitioner prevailed before the Board by receiving substantially all that it originally requested in its petition.

The Board finds this situation is distinguishable. Unlike Dickerson, here the Board has not conducted a hearing and has not ordered the Agency to reissue its determination letter. Further, the Board has not made a finding on the merits of the petition for review. The Agency issued the September 9, 2013 letter without any direction from the Board. Accordingly, Dickerson does not apply at this point in the case.

The Agency was not authorized by Board order or Illinois law to "re-review" its prior final determination to apply the $10,000 deductible to the Estate's reimbursement claim. Accordingly, the Agency's September 9, 2013 letter does not render this case moot. The Board finds that the Estate is entitled to a hearing on the merits of its petition to review the Agency's October 29, 2010 determination. For these reasons, the Board denies the Agency's motion to dismiss.

CONCLUSION

The Board denies the Agency's motion to dismiss this proceeding.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 7, 2013, by a vote of 4-0.

John T. Therriault, Clerk
Illinois Pollution Control Board