

ILLINOIS POLLUTION CONTROL BOARD
February 4, 2016

SHARON BURGESS,)	
)	
Petitioner,)	
)	
v.)	PCB 15-186
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

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

On April 22, 2015, Sharon Burgess (petitioner) timely filed a petition (Pet.) asking the Board to review a March 19, 2015, determination of the Illinois Environmental Protection Agency (Agency). The Agency's determination concerns petitioner's leaking underground storage tank (UST) site located at 2835 US Highway 52, Kankakee, Kankakee County.

The Agency approved a corrective action plan and budget but reduced reimbursement amounts to correspond with the rates set forth in the Board's rules. Petitioner appealed this decision, and on November 5, 2015, the Board found that even though the requested reimbursement rates exceeded the maximum payment amounts in Subpart H of the Board's rules, unusual or extraordinary circumstances were present, and the rates should be fully reimbursed under Section 734.860 of the Environmental Protection Act (Act) (415 ILCS 5/57.8(l) (2012)); 35 Ill. Adm. Code 734.860. The Board remanded the case to the Agency to approve the requested amounts.

On December 7, 2015, petitioner filed a timely motion seeking payment of attorney's fees incurred as a result of the successful appeal pursuant to Section 57.8(l) of the Act (415 ILCS 5/57.8(l) (2012)). The Agency was allowed to file a response, but no response was filed. Petitioner requested \$11,304.16 in attorney's fees and litigation costs.

The opinion begins with the background and continues with a summary of the motion for reimbursement of attorney's fees. After providing the statutory and regulatory background, the Board discusses the issues, decides the motion, and issues its final order in this proceeding.

BACKGROUND

On November 5, 2015, the Board found that the application as submitted does not violate the Act or Board regulations. Specifically, the Board found that the reimbursement costs are eligible for reimbursement because the costs incurred are a result of unusual or extraordinary circumstances. The Board held that unusual or extraordinary circumstances were present

because statutory amendments that occurred subsequent to the adoption of Subpart H resulted in the maximum rates being out of date.

Specifically, the Economic Development Act of 2013 (P.A. 98-109) was adopted and required petitioner to pay labor wages at least equal to the prevailing wage rates in Kankakee County. The prevailing wage rates in Kankakee County significantly exceeded the maximum wages allowed under Subpart H. As a result, petitioner was forced to pay the wages that exceed the maximum rates under Subpart H. The Board held that this discordance in statutory obligations resulted in unusual or extraordinary circumstances, and therefore reimbursement of rates beyond the maximum rates allowed under Subpart H was permitted under Section 734.860 (35 Ill. Adm. Code 734.860).

The Board further found that petitioner's plan and budget are seeking prevailing wage rates and the rates are reasonable. Therefore, the Board reversed the Agency's finding and remanded the case to the Agency to approve the requested amounts.

In its petition, petitioner asked that the Board award attorney's fees. Section 57.8(l) of the Act provides that corrective action excludes "legal defense costs," which include "legal costs for seeking payment . . . unless the owner operator prevails before the Board in which case the Board may authorize payment of legal fees." 415 ILCS 5/57.8(l) (2012). The amount of legal fees incurred by petitioner, however, was not in the record. The Board therefore reserved ruling on the issue of legal fees. Petitioner was directed to file a statement of its legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to direct the Agency to reimburse those fees from the UST Fund. Petitioner was required to file its statement by December 15, 2015. The Agency was allowed to file a response within 14 days after being served with petitioner's statement.

On December 7, petitioner filed a motion for authorization of payment of \$11,200.00 in attorney's fees and \$104.16 in costs. The Agency has not filed a response, and pursuant to Section 101.500(d), the Agency may be deemed to have waived any objection to the granting of the motion. See 35 Ill. Adm. Code 101.500(d).

STATUTORY BACKGROUND

Section 57.2 defines "corrective action" as activities associated with compliance with the provisions of Sections 57.6 and 57.7 of this Title. 415 ILCS 5/57.2 (2012). Section 57.2 defines "site investigation" as activities associated with compliance with the provisions of subsection (a) of Section 57.7. *Id.* Section 57.6 of the Act addresses early action. 415 ILCS 5/57.6 (2012). Section 57.7(a) sets forth requirements for site investigation. 415 ILCS 5/57.7(a) (2012). Section 57.7(b) addresses corrective action. 415 ILCS 5/57.7(b) (2012).

Section 57.7(c) provides requirements for Agency review and approval of any plan and budget. 415 ILCS 5/57.7(c) (2012). Section 57.7(c)(3) of the Act provides:

In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall determine, by a procedure promulgated by the Board under

Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title. The Agency shall also determine, pursuant to the Project Labor Agreements Act, whether the corrective action shall include a project labor agreement if payment from the Underground Storage Tank Fund is to be requested. 415 ILCS 5/57.3(c)(3) (2012).

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) (2012). Section 734.630(g) of the Board’s UST regulations provides that costs ineligible for payment from the UST Fund include, but are not limited to, “[l]egal fees or costs, including but not limited to legal fees or costs for seeking payment under this Part [734] unless the owner or operator prevails before the Board and the Board authorizes payment of such costs.” 35 Ill. Adm. Code 734.630(g).

PETITIONER’S MOTION

Petitioner notes that the Board reversed the Agency’s decision to reduce the reimbursement amount and remanded the case to the Agency to approve the requested amounts. Mot. at 1. Petitioner also notes that the Board directed petitioner to file a statement of of legal fees that may be eligible for reimbursement and arguments in favor of the Board exercise of its discretion to direct the Agency to award those fees. *Id.* at 2. Petitioner states that all of the legal costs sought were incurred “seeking payment under Title XVI and the plain language of Section 57.8(1) of the Act allows for the awarding of legal fees.” *Id.* at 5, citing Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 8 (Aug 5, 2004).

Petitioner asserts that the Board historically initially considers the reasonableness of the claimed legal defense costs in exercising its discretion to authorize their payment. Mot. at 5, citing Evergreen FS. v. IEPA, PCB 11-51 (Sept. 6, 2012). Petitioner attaches an affidavit of its attorney, Patrick D. Shaw that documents the legal costs totaling \$11,304.16. *Id.* at 3. Petitioner asserts that the affidavit is modeled on previous affidavits filed by Mr. Shaw in cases where the Board has found the affidavit sufficient to award costs. *Id.*, referring to Prime Location Properties v. IEPA, PCB. 9-67, slip op. at 5 (Nov. 5, 2009), aff’d IEPA v. PCB, 2012 IL App (5th) 100072-U. Further, petitioner maintains that the Board has previously recognized Mr. Shaw’s experience and approved the legal defense costs requested in prior cases. Mot. at 4, citing Prime Location Properties slip op. at 6. Petitioner offers that Mr. Shaw’s rate is \$200 an hour. Mot. at 4.

Petitioner maintains that the award of legal costs is discretionary and that the Board has awarded reasonable legal defense costs “in all cases where it has evaluated its discretion.” Mot. at 8, citing Estate of Gerald D. Slightom v. IEPA, PCB 11-025 (Nov. 5, 2015); Chatham BP v. IEPA, PCB 15-173 (Sept.3, 2015); McAfee v. IEPA, PCB 15-84 (May 21, 2015); Piasa Motor Fuels, Inc. v. IEPA, PCB 14-31 (Mar.19, 2015); PAK-AGS v. IEPA, PCB 15-14(Mar. 5 ,2015); Chatham BP v. IEPA, PCB 14-1 (Feb.5,2015); Wheeling/GWA Auto Shop v. IEPA, PCB 10-70

(Sept.22,2011); Evergreen FS v. IEPA, PCB 11-51 (Sept. 6, 2012); Zervos Three, v.IEPA, PCB 10-54 (June 2, 2011); Dickerson Petroleum v. IEPA, PCB 09-87(Dec.2,2010); Prime Location Properties v. IEPA,PCB 9-67 (Nov. 5,2009); Swif-T Food Mart v. IEPA, PCB 03-185 (Aug. 19, 2004); Illinois Ayers Co. v. IEPA, PCB 03-214 (Aug 5, 2004); Ted Harrison Oil Co.v. IEPA, PCB 99-127 (Oct.16, 2003). Petitioner further argues that the Board has generally awarded litigation costs whenever the “case raised important issues regarding Agency determinations on reimbursements from the UST fund. Mot. at 6., citing PAK- slip op. at 7.

Petitioner asserts that the issues raised in the underlying proceedings are important issues regarding reimbursements from the UST fund. Mot. at 7. Specifically, petitioner states that for the past decade, consultants and contractors have been sued by the State of Illinois for “failing to comport with the Prevailing Wage Act when performing work under the LUST Program.” *Id.* Petitioner claims that prevailing wages can increase the costs of corrective action by one-third. *Id.* Petitioner further alleges that “[t]he disparities between prevailing wage and Subpart H rates could only be expected to increase over time, so long as the Agency refuses to open a rulemaking to address changing circumstances.” *Id.* Petitioner argues that by prevailing in the underlying case, “petitioner helped create a body of precedent that will help others subject to these regulations in the future.” *Id.*

For these reasons, petitioner requests that the Board authorize payment of legal fees from the UST Fund in the amount of \$11,304.16.

DISCUSSION

The Board allowed petitioner to file a statement of legal fees and its argument as to why the fees are eligible for reimbursement by December 7, 2015. The Board allowed the Agency 14 days after being served with petitioner’s statement to file a response. As noted above, the Agency did not respond to petitioner’s motion. Therefore, the Agency waived objection to the Board granting the motion; however, the waiver of objection does not bind the Board in its disposition of the motion. *See* 35 Ill. Adm. Code 101.500(d).

Whether Section 57.8(l) Applies

“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 Illinois Ayers, the Board found that an appeal of the Agency’s decision on a plan and budget is within the parameters of Section 57.8(l) of the Act (415 ILCS 5/57.8(l) (2012)). *Id.* at 8. Thus, the Board has found that obtaining plan approval is a prerequisite to seeking reimbursement from the UST Fund and has ordered reimbursement of legal fees where petitioner prevails in appealing the Agency’s rejection of a plan under Section 57.7 of the Act. Prime Location Properties v. IEPA, PCB 09-67, slip op. at 3 (Nov. 5, 2009); Illinois Ayers, slip op. at 7-8. In this case, petitioner sought review of the Agency’s decision to reduce the amount of reimbursement petitioner was eligible to receive from the UST Fund. The Board reversed the Agency’s reduction of the reimbursement amount because unusual or extraordinary circumstances were present.

The Board finds that under Section 57.8(1) of the Act, petitioner's appeal falls within the parameters of the statute and petitioner prevailed before the Board. Therefore, the Board may consider exercising its discretion and award legal fees.

Whether to Award Fees

In determining whether to exercise its discretion to authorize payment, the Board considers the reasonableness of the requested legal fees and costs. PAK-AGS, slip op. at 6; Prime Location, slip op. at 4, citing Illinois Ayers, slip op. at 8-9; Swif-T Food Mart slip op. at 3. As the party seeking reimbursement of fees, petitioner has the burden of presenting sufficient evidence with which the Board can determine the reasonableness of the fees. PAK-AGS, slip op. at 6; 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); Sampson v. Miglin, 279 Ill. App. 3d 270, 281, 664 N.E. 2d 281, 288-89 (1st Dist. 1996). Petitioner "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." PAK-AGS, slip op. at 6; Prime Location, slip op. at 4, citing J.B. Esker, 325 Ill. App. 3d at 283, 757 N.E.2d at 1278.

While petitioner "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." PAK-AGS, slip op. at 6; 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 petitioner's request is reasonable, the Board may consider 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." PAK-AGS, slip op. at 6; 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.

Petitioner's motion is accompanied by an affidavit of petitioner's legal counsel, Mr. Shaw (Aff.), and a summary of fees and costs (Exh. A). From the affidavit and summaries, the Board can determine the rate and hours billed; the person providing legal services; the date on which the person provided them; a description of those services; and the amount charged.

The Board's review of the summary of fees and costs shows that petitioner's legal services began in or around April 16, 2015, and continued to October 5, 2015. Aff. at 1; Exh. A at 1, 3. The summary of fees describes work performed and time allocated to that work in tenths of an hour. Exh. A. 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 submitted by petitioners is generally similar to information provided in UST cases in which the Board has directed the Agency to

reimburse fees and costs. *See, e.g.,* PAK AGS, slip op. at 7; Swif-T, slip op. at 2-3 (Aug. 19, 2004).

The Board finds that petitioner's requested legal fees and costs to be reasonable. The petition for review filed with the Board in this case raised important issues regarding Agency determinations on reimbursement from the UST Fund. These considerations make petitioner's request consistent with other cases in which the Board has directed reimbursement for legal costs. *See, e.g.* PAK AGS; Chatham BP, LLC, v. IEPA, PCB 14-1 (Feb. 5, 2015). Accordingly, the Board will exercise its discretion under Section 57.8(1) of the Act and directs the Agency to reimburse petitioner from the UST Fund in the amount of \$11,304.16 in legal fees and costs. Below, the Board will set forth its order as modified by this award.

The Board incorporates by reference its findings of fact and conclusions of law from the November 5, 2015 interim opinion and order. This final opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board reverses the Illinois Environmental Protection Agency's (Agency) March 19, 2015 decision modifying the Corrective Action Plan and Budget submitted by Sharon Burgess (petitioner). The Board remands the Corrective Action Plan and Budget to the Agency for issuance with the reimbursement amounts corrected.
2. The Board exercises its discretion under Section 57.8(1) of the Act (415 ILCS 5/57.8(1) (2012)) and directs the Agency to reimburse petitioner \$11,304.16 in legal fees and costs from the UST Fund.

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) (2012); *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, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on February 4, 2016 by a vote of 5-0.



John T. Therriault, Clerk

Illinois Pollution Control Board