

ILLINOIS POLLUTION CONTROL BOARD
May 3, 2007

WEBB & SONS, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 07-24
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

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

In an interim opinion and order dated February 15, 2007, the Board partially affirmed and partially reversed a determination of the Illinois Environmental Protection Agency (Agency) to modify a budget proposed by Webb & Sons, Inc. (Webb) for the high priority corrective action plan (CAP) for a leaking underground storage tank (UST) site at 1201 DeWitt Avenue, Mattoon, Coles County. Also in that interim opinion and order, the Board reserved ruling on Webb's request for reimbursement of fees.

For the reasons described below, the Board directs the Agency to reimburse Webb from the UST Fund for attorney fees in the amount of \$3,569.63, an amount equal to 45 percent of the legal fees claimed by Webb.

PROCEDURAL HISTORY

On October 13, 2006, the Board received from Webb a petition seeking the Board's review of a September 12, 2006 determination of the Agency. In an order dated November 2, 2006, the Board accepted Webb's petition for hearing. The Agency filed the administrative record on November 28, 2006.

The Board conducted a hearing on December 11, 2006. Mr. Kevin Saylor and Mr. James Malcom testified for Webb. At hearing, Webb filed eight exhibits, each of which was admitted. Transcript at 63-67. Webb filed a post-hearing brief (Webb Br.) on December 29, 2006, and the Agency filed a post-hearing brief on January 12, 2007.

On December 13, 2006, Webb filed a motion to incorporate documents by reference. Accompanying the motion were the documents that Webb sought to incorporate into the record of this proceeding.

In an interim opinion and order dated February 15, 2007, the Board affirmed the Agency's rejection of Webb's proposed budget for personnel for the job titles of senior project manager, professional engineer, and engineer III under the category of High Priority

Investigation and Preliminary Costs and the job title of scientist III under the category of Corrective Action Completion Report (CACR)/Highway Authority Agreements (HAA)/Reimbursements. The Board also affirmed the Agency's modifications to Webb's budget for Investigation Costs, Field Purchases and Other Costs, and Handling Charges, which Webb did not appeal. The Board reversed the Agency's rejection of Webb's proposed budget for the 16 remaining job titles in Webb's personnel budget.

The interim opinion and order noted that Webb requested that the Board award it engineer's fees, attorney's fees, and expenses. The Board noted that the record did not include the amount of any legal fees or costs incurred by Webb in this proceeding. The Board directed Webb to file on or before March 8, 2007, a statement of its legal fees and costs that may be eligible for reimbursement and its argument why the Board could exercise its discretion to direct the Agency to reimburse from the UST Fund those costs relating to this docket. The Board allowed the Agency to respond to Webb's statement and arguments by filing a response with the Board on or before March 29, 2007. The interim opinion and order also granted Webb's motion to incorporate specified documents by reference into the record of this proceeding.

On March 8, 2007, Webb timely filed its petitioner's supplemental brief in support of reimbursement of petitioner's legal fees (Pet. Br.). On March 29, 2007, the Agency timely filed its response to petitioner's supplemental brief in support of reimbursement of petitioner's legal fees (Agency Br.).

WEBB'S BRIEF IN SUPPORT OF REIMBURSEMENT OF LEGAL FEES

Webb argues that both the Act and the Board's UST regulations allow the payment of legal fees if the UST owner prevails before the Board and the Board authorizes payment. Pet. Br. at 4, citing 415 ILCS 5/57.8(1) (2004), 35 Ill. Adm. Code 732.606(g); *see also* 35 Ill. Adm. Code 734.630(g). Webb further argues that the Board has previously decided that "a petitioner can recover attorney's fees as a result of prevailing in the appeal of a rejection of a Corrective Action Plan and/or Budget by the Agency." Pet. Br. at 4, citing Swif-T Food Mart v. IEPA, PCB 03-214, slip op. at 2-3 (Aug. 19, 2004), Illinois Ayers Oil Co. v. IEPA, PCB 03-185, slip op. at 8-9 (Aug. 5, 2004).

Webb claims that it "did prevail before the Board in significant part" because the Board reversed the Agency's denial of \$46,563 in personnel costs for sixteen job titles. Pet. Br. at 4. Webb acknowledges that its budget proposal contained "insufficient information" to determine whether costs proposed for three other positions were reasonable. *Id.* at 5; *see* Webb Br. at 12.

Webb claims that "[w]here a plaintiff's claims of relief involve a common core of facts or are based on related legal theories, such that much of his attorney's time is devoted generally to the litigation as a whole, a fee award should not be reduced simply because all requested relief was not obtained." Pet. Br. at 5, citing Becovic v. City of Chicago, 296 Ill. App. 3d 236, 242, 694 N.E.2d 1044, 1048 (1st Dist. 1998). Webb claims that its appeal involves a common core of facts and legal theory: the Agency's experienced UST project managers "have a very good understanding as to what is an appropriate range for each and every personnel cost that comprises a Corrective Action Plan Budget." Pet. Br. at 5. Webb suggests that the Board has

accepted this legal theory by reversing the Agency's rejection of sixteen job titles in Webb's personnel budget. *Id.* Webb acknowledges that its budget proposal contained insufficient information for three job titles and that the Board affirmed the Agency's rejection of the proposed budget for them, but Webb claims that this "does not affect the amount of attorney's fees that should be awarded to Petitioner." *Id.* at 6.

With its brief, Webb filed the affidavit of its counsel, including an exhibit "specifying the legal services provided by description, hour, and hourly rate, all of which counsel for Petitioner believes to be reasonable." Pet. Br. at 6. On the basis of that information, Webb requests reimbursement of \$7,932.50 in legal fees. *Id.* at 7.

Webb notes that its original petition for review also sought reimbursement of engineer's fees incurred in this appeal. Pet. Br. at 6, citing 35 Ill. Adm. Code 732.605(a)(15). Webb filed the affidavit of the senior project manager for the remediation of its site, including an exhibit specifying the engineer's fees incurred in the course of this budget appeal. On the basis of that information, Webb seeks reimbursement of \$3,687.50 in engineer's fees. Pet. Br. at 7.

AGENCY RESPONSE TO WEBB'S BRIEF IN SUPPORT OF REIMBURSEMENT OF LEGAL FEES

The Agency acknowledges that the Act allows the Board to authorize payment of legal fees to a UST owner that prevails before the Board in seeking payment through the UST program. Agency Br. at 2, citing 415 ILCS 5/57.8(l) (2004). The Agency characterizes this provision as a "fee-shifting" statute. Agency Br. at 2, citing Illinois Ayers, PCB 03-214, slip op. at 8 (Aug. 5, 2004). The Agency argues that "[s]uch statutes must be strictly construed since they are in derogation of common law." Agency Br. at 2, citing Globalcom, Inc. v. Illinois Commerce Comm'n., 347 Ill. App. 3d 592, 618, 806 N.E.2d 1194, 1214 (1st Dist. 2004), Miller v. PCB, 267 Ill. App. 3d 160, 171, 642 N.E.2d 475, 485 (4th Dist. 1994).

The Agency claims that "[t]he Board has broad discretionary powers concerning the amount of fees to be awarded." Agency Br. at 2, citing Swif-T, PCB 03-185, slip op. at 3 (Aug. 19, 2004). The Agency further claims that "Illinois courts have recognized the general principle that a party is not entitled to fees on unsuccessful claims." Agency Br. at 2, citing Globalcom, 347 Ill. App. 3d at 618, 806 N.E.2d at 1214. The Agency argues that, "when courts can identify and separate claims, fees are awarded only on the successful claims for which fees are allowed." Agency Br. at 2, citing Franz v. Calaco Development Corp., 352 Ill. App. 3d 1129, 1151-52, 818 N.E. 2d 357, 377-78 (2nd Dist. 2004).

The Agency states that "[t]he level of success achieved by Webb in the instant appeal is not difficult to measure." Agency Br. at 3. After noting that the Board had affirmed it with regard to four job titles accounting for 55% of the total personnel hours requested, the Agency states that "Webb prevailed on the remaining job titles that represent 45% of the total personnel costs sought." *Id.*

The Agency distinguishes this case from three previous cases in which the Board awarded all of the attorney fees requested in a UST appeal: Swif-T, Illinois Ayers, and Ted

Harrison Oil Co. v. IEPA, PCB 99-127 (Oct. 16, 2003). The Agency states that “[in] [Ted] Harrison and Swif-T, the petitioner prevailed on all of the dollar amounts at issue in the appeal.” Agency Br. at 3. In Illinois Ayers, the Board found that Ayers had prevailed “in significant part” after restoring budget reductions of \$29,603.19 and affirming reductions of \$690.00. Agency Br. at 3, citing Illinois Ayers Oil Co., slip op. at 8 (Aug. 5, 2004). Suggesting that Webb has not prevailed to the same extent as petitioners in these three cases, the Agency argues that “[i]t is appropriate and consistent with the legal precedent cited herein to award Webb no more than 45% of the legal fees it claims.” Agency Br. at 3.

The Agency discounts Webb’s reliance on the analysis in Cannon. Agency Br. at 3, citing Cannon v. William Chevrolet/GEO, Inc., 341 Ill. App. 3d 674, 794 N.E.2d 843 (1st Dist. 2004). The Agency claims that, under Cannon, when discrete claims cannot be identified, a “court must evaluate whether the claims (1) involved a common core of facts or related legal theories and (2) whether the plaintiff achieved a level of success making it appropriate to award attorney fees for hours reasonably expended on the unsuccessful claims as well.” Agency Br. at 2, citing Cannon, 341 Ill. App. 3d at 687, 794 N.E.2d at 854. The Agency argues that the Board need not perform this evaluation because Webb’s proposed budget includes “[r]eadily identifiable, discrete and separate costs.” Agency Br. at 3. The Agency suggests that, even if the Board did perform this evaluation, Webb’s level of partial success makes it inappropriate to award fees for time spent on unsuccessful claims. Agency Br. at 4.

Referring to Webb’s request for reimbursement of engineer’s fees, the Agency notes that the Board in Ted Harrison, Illinois Ayers, and Swif-T specifically awarded attorney fees or legal fees. Agency Br. at 4. The Agency argues that “Webb provides no legal authority for interpreting Section 57.8(1) or past Board precedent as allowing the award of engineer fees.” *Id.*, citing 415 ILCS 5/57.8(1) (2004). Restating its argument that this fee-shifting statute must be strictly construed, the Agency claims that “these fees should not be awarded to Webb.” Agency Br. at 4.

DISCUSSION

Attorney Fees

Title XVI of the Act establishes the Leaking Underground Storage Tank Program. 415 ILCS 5/57 (2004). 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(4) (2004). Section 57.8(1) of the Act provides that the Board “may authorize payment of legal fees” if the owner prevails before the Board in seeking payment under Title XVI. 415 ILCS 5/57.8(1) (2004). 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*, 347 Ill. App. 3d at 618, 806 N.E.2d at 1214 (citations omitted). This discretion includes determining the reasonableness of the requested fees. Illinois Ayers, PCB 03-214, slip op. at 8 (Aug. 5, 2004)

(citations omitted). “[T]he general rule is that a party is not entitled to fees for its unsuccessful claims.” Globalcom, 347 Ill. App. 3d at 618, 806 N.E.2d at 1214 (citation omitted).

In an interim opinion and order dated February 15, 2007, the Board affirmed the Agency’s rejection of Webb’s proposed budget for personnel for the job titles of senior project manager, professional engineer, and engineer III under the category of High Priority Investigation and Preliminary Costs and for the job title of scientist III under the category of CACR Report/HAA/Reimbursements. In the same interim opinion and order, the Board reversed the Agency’s rejection of Webb’s proposed budget for the 16 remaining job titles in Webb’s personnel budget. This outcome differs from the outcomes in Ted Harrison, Illinois Ayers, and Swif-T, in each of which the Board awarded the entire amount of the legal fees requested after the petitioners prevailed on all or on virtually all of the amounts contested in those appeals. In this case, the Board upheld the Agency with regard to 55% of the total personnel costs sought by Webb in its proposed budget. In seeking payment from the UST Fund, Webb prevailed before the Board to the extent of 45% of the personnel budget it had proposed.

Unlike cases which “cannot be perceived as a series of discrete claims” (Cannon, 341 Ill. App. 3d at 687, 794 N.E.2d at 854), the Board in this case has reversed the Agency’s rejection of proposed hours for sixteen job titles comprising 45% of the budget for personnel. Based on the record in this proceeding and on the Agency’s concurrence that it is neither inappropriate nor inconsistent with precedent to do so, the Board directs that Webb be reimbursed \$3,569.63, an amount equal to 45 percent of the legal fees claimed by Webb.

Engineer Fees

Section 57.8(1) of the Act does not by its plain language require or even permit the Board to consider the reimbursement of engineer’s fees incurred in the course of preparing an appeal of an Agency budget determination. *See* 415 ILCS 5/57.8(1) (2004). Webb has cited no Board precedent requiring or even permitting the Board to order the reimbursement of those fees. Although Webb has cited language from the Board’s UST regulations (35 Ill. Adm. Code 732.605(a)(15)), the Board cannot conclude that this language allows the Board to direct the reimbursement of engineering fees incurred in preparing an appeal of an Agency budget determination. Having been cited to no authority allowing it to do so in this case, the Board declines to require the reimbursement of Webb’s engineering fees.

CONCLUSION

The Board finds that, based on the facts of this case and on the Agency’s position that it is not inappropriate or inconsistent with precedent, partial reimbursement of legal fees is warranted. The Board further finds that it does not have authority to direct the Agency to reimburse engineer fees sought by Webb. Therefore, the Board directs that Webb be reimbursed \$3,569.63, an amount equal to 45 percent of the legal fees claimed by Webb. The Board sets forth its entire modified order below.

ORDER

1. The Board affirms the Agency's rejection of Webb's proposed budget for personnel for the job titles of senior project manager (453 hours), professional engineer (84 hours), and engineer III (68 hours) under the category of High Priority Investigation and Preliminary Costs and the job title of scientist III (16 hours) under the category of CACR Report/HAA/Reimbursements.
2. The Board reverses the Agency's rejection of Webb's proposed budget for the 16 remaining job titles in Webb's personnel budget. Specifically, under the category of High Priority Investigation and Preliminary Costs, the Board reverses the Agency's rejection of Webb's proposed personnel budget for the job titles of senior scientist (150 hours), scientist III (102 hours), scientist I (21 hours), draftsperson (6 hours), and technician I (9.5 hours).

Under the category of CAP Implementation (dig and haul), the Board reverses the Agency's rejection of Webb's proposed personnel budget for the job titles of senior project manager (8 hours), professional engineer (4 hours), senior scientist (16 hours), scientist III (30 hours), and technician I (70 hours).

Under the category of Additional Well Monitoring/Well Replacement/TACO sample collection, the Board reverses the Agency's rejection of Webb's proposed personnel budget for the job titles of senior scientist (8 hours), scientist III (42 hours), and environmental technician I (42 hours).

Under the category of CACR Report/HAA/Reimbursements, the Board reverses the Agency's rejection of Webb's proposed personnel budget for the job titles of senior project manager (8 hours), professional engineer (32 hours), and senior scientist (92 hours).

3. The Board directs that Webb be reimbursed \$3,569.63, an amount equal to 45 percent of the legal fees claimed by Webb.

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) (2004); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rules 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 May 3, 2007, by a vote of 4-0.

A handwritten signature in black ink, reading "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board