

ILLINOIS POLLUTION CONTROL BOARD
September 22, 2011

WHEELING/GWA AUTO SHOP,)
)
Petitioner,)
)
v.) PCB 10-70
) (UST Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

Wheeling/GWA Auto Shop (Wheeling) appealed a February 2, 2010 determination of the Illinois Environmental Protection Agency (Agency) concerning a leaking underground storage tank (UST) site known as “GWA Auto Shop,” located at 434 S. Milwaukee Avenue in Wheeling, Cook County. In the determination, the Agency modified Wheeling’s proposed corrective action plan (CAP) budget for purposes of UST Fund reimbursement by deducting \$78,915.02 solely on the ground that the costs were incurred *before* Wheeling submitted an “election to proceed as owner” form. In an interim opinion and order of July 7, 2011, the Board granted Wheeling’s summary judgment motion and denied the Agency’s summary judgment motion, reversing the Agency’s reduction of Wheeling’s CAP budget and remanding the matter to the Agency to consider the merits of that portion of the budget. In doing so, the Board held that there is no requirement that corrective action costs must be incurred *after* submission of the election in order to be eligible for UST Fund reimbursement. See Wheeling/GWA Auto Shop v. IEPA, PCB 10-70, slip op. at 9 (July 7, 2011).

In the interim order, the Board also directed Wheeling to file, by August 8, 2011, a statement of Wheeling’s legal fees and costs incurred in bringing this appeal that may be eligible for UST Fund reimbursement. The Board also required that the statement provide argument as to why the Board should exercise its discretion and direct the Agency to reimburse Wheeling’s legal fees and costs from the UST Fund. The interim order provided the Agency with an opportunity to respond to Wheeling’s statement within 14 days after service of the statement. On August 8, 2011, Wheeling filed its statement in the form of a “Motion for Authorization of Payment of Attorneys’ Fees as Costs of Corrective Action” (Mot.), requesting reimbursement in the amount of \$17,115.06. To the motion, Wheeling attached an affidavit (Affid.) to which was attached an exhibit consisting of billing statements (Exh.). The Agency did not respond to the motion.

Consistent with Section 57.8(l) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(l) (2010)), the Board today grants Wheeling’s motion but deducts \$84.60 from the requested legal fees and costs for reasons detailed in this final opinion. Accordingly, the Board awards legal fees and costs totaling \$17,030.46 from the UST Fund.

The Board's July 7, 2011 interim opinion and order details the procedural history of this appeal until that point. *See Wheeling*, PCB 10-70, slip op. at 1-2. Since the issuance of that decision, aside from Wheeling's motion for legal fees and costs, the only filing from either party is Wheeling's waiver to January 31, 2012, of the Board's statutory deadline for deciding this appeal. Below, in addressing Wheeling's motion, the Board discusses the following: (1) the statutory framework for UST Fund reimbursement of legal fees and costs; (2) whether this appeal is within the scope of Section 57.8(1) of the Act (415 ILCS 5/57.8(1) (2010)), which authorizes the Board to award legal fees and costs in specified circumstances; and (3) whether the Board will exercise its discretion to award Wheeling's requested legal fees and costs.

DISCUSSION

Wheeling seeks reimbursement of legal fees and costs totaling \$17,115.06 from the UST Fund. Mot. at 4, 5. Initially, the Board observes that because the Agency filed no response to Wheeling's motion, the Agency is deemed to have waived any objection to the Board granting the motion. *See* 35 Ill. Adm. Code 101.500(d). The Agency's waiver, however, does not bind the Board in its disposition of the motion. *Id.*

Statutory Framework

Costs associated with "corrective action" may be reimbursed from the UST Fund. 415 ILCS 5/57.9 (2010). "Corrective action" is defined 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, the Leaking UST Program]." 415 ILCS 5/57.2 (2010) (referring to 415 ILCS 5/57.6, 57.7 (2010)). Section 57.8(1) of the Act provides that:

Corrective 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(1) (2010).

Whether this Appeal Falls Within Section 57.8(1) of the Act

"The first question the Board must address is whether or not the proceeding falls within the parameters of the statutory provision." *Illinois Ayers Oil Co. v. IEPA*, PCB 03-214, slip op. at 7 (Aug. 5, 2004). The Board has required the reimbursement of legal fees and costs where the petitioner prevailed in appealing the Agency's rejection of a plan and budget under Section 57.7 of the Act. *See Illinois Ayers*, PCB 03-214, slip op. at 7-8. The Board found in *Illinois Ayers* that obtaining plan and budget approval is a prerequisite to UST Fund reimbursement. *Id.* The Board therefore held that the petitioner was "seeking payment" within the meaning of Section 57.8(1) of the Act. *Id.* at 8.

Here, Wheeling prevailed on summary judgment when the Board reversed the Agency's rejection of a portion of Wheeling's CAP budget and remanded the matter to the Agency. It is undisputed that approval of the CAP budget is a prerequisite to UST Fund reimbursement.

Consistent with Illinois Ayers, the Board finds that Wheeling was “seeking payment” under Title XVI of the Act. *See Zervos Three, Inc. v. IEPA*, PCB 10-54, slip op. at 4 (June 2, 2011) (petitioner awarded legal fees and costs after prevailing on motion for summary judgment). The Board finds that under Section 57.8(1) of the Act (415 ILCS 5/57.8(1) (2010)), the Board may exercise its discretion to authorize payment to Wheeling of legal fees and costs from the UST Fund.

Whether the Board Will Authorize Payment

“Second, the Board must also determine whether or not to exercise [its] discretion” to award legal fees and costs in this case. Illinois Ayers, PCB 03-214, slip op. at 7. In deciding whether to exercise its discretion, the Board considers the reasonableness of requested legal fees and costs before authorizing payment. *See Prime Location Properties, LLC v. IEPA*, PCB 09-67, slip op. at 4 (Nov. 5, 2009), *appeal pending IEPA v. PCB and Prime Location Properties, LLC*, No. 5-10-0072 (5th Dist.); Illinois Ayers, PCB 03-214, slip op. at 8-9; Swif-T-Food Mart v. IEPA, PCB 03-185, slip op. at 3 (Aug. 19, 2004). The party requesting legal fees and costs bears the burden of presenting sufficient evidence from which the Board can render a decision as to their reasonableness. *See Prime Location*, PCB 09-67, slip op. at 4, citing J.B. Esker & Sons, Inc. v. Cle-Pa’s Partnership, 325 Ill. App. 3d 276, 283 (5th Dist. 2001); Sampson v. Miglin, 279 Ill. App. 3d 270, 281(1st Dist. 1996). The 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.”” Prime Location, PCB 09-67, slip op. at 4, quoting J.B. Esker, 325 Ill. App. 3d at 283 (affirming award where attorney “submitted a detailed bill itemizing the time spent in fractions of an hour.”).

Although the 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. *See Prime Location*, PCB 09-67, slip op. at 4, citing Cretton v. Protestant Memorial Medical Center, Inc., 371 Ill. App. 3d 841, 868 (5th Dist. 2007); Sampson, 279 Ill. App. 3d at 281. In determining the reasonableness of Wheeling’s request, the Board may take into account a number 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, PCB 09-67, slip op. at 4, quoting Cretton, 371 Ill. App. 3d at 867-68 (setting forth factors trial court should consider to assess fee reasonableness); *see also Sampson*, 279 Ill. App. 3d at 281 (same).

Here, Wheeling’s motion for legal fees and costs is accompanied by the seven-page affidavit of Jason Guisinger, one of the two attorneys of record for Wheeling, both of whom are with the Chicago law firm of Klein, Thorpe & Jenkins LTD (KTJ). Affid. at 1-2. In his sworn statement, Mr. Guisinger details his own legal background and that of fellow Wheeling attorney Dennis Walsh, the nature and procedural history of the case, and the hourly rates of the attorneys and their support staff. *Id.* at 1-7. Mr. Walsh, a senior partner at KTJ, has been handling environmental law cases for 25 years. *Id.* at 1. He charges his time at \$195 per hour for “Village litigation,” but he billed \$190 per hour before July 1, 2011. *Id.* at 2. Mr. Guisinger has been

handling environmental litigation for five years. *Id.* at 1. He bills his time at \$185 per hour “for handling litigation for the Village,” but he charged \$180 per hour prior to July 1, 2011. *Id.* at 2. Two law clerks and three paralegals assisted the attorneys, with the law clerks’ time billed at \$75 per hour and the paralegals’ time billed at either \$105 or \$110 per hour. *Id.* 4-5. Mr. Guisinger states under oath that all of these hourly rates are comparable to the prevailing rates in the Chicago legal community for individuals with similar background and experience. *Id.* at 5; *see also id.* at 7.

Attached to Mr. Guisinger’s affidavit are the “true and correct billing statements [his] law firm issued to [the] Village.” Affid. at 5. The statements, which cover nine pages, describe the legal work performed and costs incurred between March 2, 2010 and August 8, 2011. *Id.* at 5; Exh. at 1-9. The statements specify the legal services rendered, who performed the work, the date on which the work was performed, the time expended on the work to a tenth of an hour, and the amount charged based on the applicable hourly rates. Exh. at 1-9. Mr. Guisinger represents in his affidavit that each billing statement entry is “fair and reasonable and necessary for the proper prosecution of the Village’s claim in this matter.” Affid. at 6.

The Board finds, as Mr. Guisinger claims, that this appeal involved a large administrative record and presented “an issue of first impression” at the time the cross-motions for summary judgment were filed. Affid. at 3. The Board further finds that the documentation of legal fees and costs presented by Wheeling is similar in specificity to that provided by the prevailing petitioners which were awarded legal fees and costs in Zervos Three (\$73,347.88 awarded), Prime Location (\$10,088.18 awarded), Swif-T-Food Mart (\$11,291.37 awarded), and Illinois Ayers (\$44,456.49 awarded). *See Zervos Three*, PCB 10-54, slip op. at 5-6 (Mar. 7, 2011 filing); Prime Location, PCB 09-67, slip op. at 5-6 (Sept. 17, 2009 filing); Swif-T-Food Mart, PCB 03-185, slip op. at 3 (June 7, 2004 filing); Illinois Ayers, PCB 03-214, slip op. at 9-10 (May 3, 2004 filing). Some of the billing statement entries aggregate the time for multiple tasks on a given day into a single hourly total, but none so as to render the Board unable to assess the reasonableness of the time spent. *See Prime Location*, PCB 09-67, slip op. at 5, citing Sampson, 279 Ill. App. 3d at 281-82 (aggregation alone does not require reversal of fee award where trial court “found itself capable of determining the reasonableness and necessity of all the charges, based on the breakdown of specific tasks and the court’s intimate knowledge of the case.”). For the total billing period of March 2010 to August 2011, there are approximately 90 attorney hours in all (some 92 entries). Exh. at 1-9. The greatest concentrations of attorney time logically centered on responding to the Agency’s summary judgment motion and preparing Wheeling’s ultimately dispositive summary judgment motion. *Id.* at 5, 6. Paralegal and law clerk time totaled roughly 10 hours. *Id.* at 4-7, 9

The hourly rates for the KTJ attorneys and paralegals charged to Wheeling are lower than another Chicago law firm’s rates recently found to be reasonable in Zervos Three, which also involved the “election to proceed as owner” issue. *See Zervos Three*, PCB 10-54, slip op. at 3, 5-6 (attorney rates ranging from \$265 to \$410 per hour; paralegal rates ranging from \$200 to \$240). As in the instant case, the Agency did not respond to the Zervos Three petitioner’s motion for legal fees and costs. *Id.* at 4. Of the requested \$17,115.06 here, Wheeling seeks \$268.76 in photocopying and computerized legal research costs. Exh. at 1-2. The Board has awarded such costs in the past. *See, e.g., Prime Location*, PCB 09-67, slip op. at 5-6 (awarding

\$171.20 in photocopying costs and \$946.70 in computerized legal research costs). Wheeling's request also includes fees incurred in preparing for filing the request for legal fees and costs. Exh. at 7, 9. There is Board precedent for awarding such fees. *See Zervos Three*, PCB 10-54, slip op. at 5-6 (Mar. 7, 2011 filing).

Taking into account the record and the Board's experience and knowledge of the case, as well as the other factors discussed above, the Board finds the requested legal fees and costs to be reasonable, with three exceptions. First, a July 27, 2011 work description entry refers to "[c]ommunications with District re amendments to District policy and issues relating to Pebble Flex." Exh. at 9. For this work, there is a \$58.50 charge for 18 minutes of Mr. Walsh's time. *Id.* As this work description, by its terms, appears unrelated to Wheeling's appeal, the Board finds that without more, the associated \$58.50 fee is ineligible for reimbursement. Second, there is a \$20.70 cost item described as "ConvARCost," which is separate from Wheeling's claimed photocopying and computerized legal research costs. *Id.* at 2. The Board finds that this description is too vague for the Board to assess the reasonableness of the cost. Finally, Wheeling's photocopying and computerized legal research costs total \$263.36, which is \$5.40 less than the claimed total of \$268.76. *Id.* at 1-2.

Based upon the above analysis, the Board exercises its discretion under Section 57.8(1) of the Act and directs the Agency to reimburse Wheeling from the UST Fund for Wheeling's legal fees and costs totaling \$17,030.46. This amount, which is the sum of \$16,767.06 in fees and \$263.36 in costs, reflects the \$17,115.06 requested by Wheeling, less deductions totaling \$84.60 (*i.e.*, \$58.50 plus \$20.70 plus \$5.40).

CONCLUSION

For the reasons discussed in this final opinion, the Board finds that awarding Wheeling's legal fees and costs incurred in bringing this appeal is warranted. The Board therefore grants Wheeling's motion for legal fees and costs but deducts \$84.60 as described above. The Board accordingly directs that \$17,030.46 in legal fees and costs be reimbursed to Wheeling from the UST Fund as corrective action costs. Below, the Board sets forth its order as modified by this award.

The Board incorporates by reference its findings of fact and conclusions of law from the July 7, 2011 interim opinion and order. This final opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board grants Wheeling's motion for summary judgment and denies the Agency's motion for summary judgment. Accordingly, the Board reverses the Agency's February 2, 2010 reduction of \$78,915.86 in Wheeling's CAP budget and remands the matter to the Agency to consider the merits of that portion of Wheeling's budget.

2. The Board directs the Agency to provide Wheeling with reimbursement from the UST Fund for legal fees and costs in the amount of \$17,030.46.

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) (2010); *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 Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on September 22, 2011, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board