

ILLINOIS POLLUTION CONTROL BOARD

October 16, 1997

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| ELOUISA FARRALES, |) | |
| |) | |
| Petitioner, |) | |
| |) | PCB 97-186 |
| v. |) | (UST - Reimbursement) |
| |) | |
| OFFICE OF THE STATE FIRE MARSHAL, |) | |
| |) | |
| Respondent. |) | |
| |) | |

OPINION AND ORDER OF THE BOARD (by K.M. Hennessey):

This case involves petitioner Elouisa Farrales's attempt to obtain reimbursement for the costs of cleaning up a leaking underground storage tank (UST) at a facility in Oak Park, Illinois. Ms. Farrales applied to the Office of State Fire Marshal (OSFM) for a determination that she was eligible for reimbursement of her cleanup costs under Section 57.9 of the Illinois Environmental Protection Act (Act), 415 ILCS 5/57.9 (1996). OSFM denied Ms. Farrales's request for reimbursement on the grounds that her UST was not registered with OSFM. Ms. Farrales appealed OSFM's eligibility determination to the Board under Section 57.9(c) of the Act, 415 ILCS 5/57.9(c) (1996).

Ms. Farrales also attempted to register the UST with OSFM under Section 4 of the Gasoline Storage Act (GSA), 430 ILCS 15/4 (1996). OSFM refused to register Ms. Farrales's UST on the grounds that it had been taken out of service before 1974 and the GSA therefore precluded its registration. Under the GSA, decisions on the registration of tanks are appealable to OSFM rather than the Board. As shall be discussed, the record suggests that Ms. Farrales appealed OSFM's registration decision to OSFM.

On October 3, 1997, OSFM filed a Motion for Summary Judgment (Motion). Petitioner has not responded to the Motion. In the Motion, OSFM asserts that the Board is without jurisdiction to review the eligibility denial. The Board disagrees and further finds that summary judgment would be premature in light of the possibility that Ms. Farrales has a pending appeal of OSFM's registration decision. The Board therefore denies the Motion, but stays all proceedings in this case pending the outcome of that appeal before OSFM. The Board also orders the parties to file a joint status report on the status of the appeal before OSFM.

STATEMENT OF FACTS

On November 14, 1996, the contractor R.W. Collins Co. (Collins) applied to OSFM for a permit to remove one approximately 1,500 gallon heating oil tank from 6555 West North Avenue in Oak Park, Illinois (the facility). Record (R.) at 49-51. The permit application

stated that the tank was last used “prior to 1974.” R. at 49. It also stated that the tank was owned by “Beneficiaries of Tr. #4241 with Corus Bank” and listed Ms. Farrales as the contact person. R. at 49.

OSFM approved the application on November 21, 1996. R. at 49. Collins removed the tank on December 27, 1996, and observed “multiple holes” in the UST, along with soil staining and odors. R. at 45.

Ms. Farrales submitted an eligibility and deductibility application form (eligibility application) to OSFM on or about December 27, 1996. R. at 41-44. This application stated that the UST had been taken out of service before 1974. R. at 44. Ms. Farrales also submitted a notification form for the UST in order to register the UST with OSFM. R. at 31-40.

On January 29, 1997, OSFM returned the eligibility application because it was not accompanied by a complete notification form. R. at 29-30. Ms. Farrales apparently resubmitted the eligibility application, along with the notification form, on February 18, 1997. R. at 41. OSFM again returned the eligibility application on March 4, 1997, because, among other things, the notification form failed to state when the UST was out of service. R. at 27-28. Ms. Farrales apparently resubmitted the eligibility application and notification form on March 15, 1997. R. at 41.

On April 2, 1997, OSFM sent Ms. Farrales an Administrative Order (AO) stating that OSFM would not register the UST because the UST was not in operation any time since January 1, 1974. R. at 24. The letter informed Ms. Farrales that she had ten days to appeal the AO. R. at 24. On April 8, 1997, Ms. Farrales sent a letter appealing the AO to OSFM. R. at 15. OSFM received her letter on April 12, 1997. R. at 15.

On April 17, 1992, OSFM sent a letter to Ms. Farrales, advising her that the Illinois Supreme Court had recently decided the case of First of America Trust Company v. Armstead, 171 Ill. 2d 282, 664 N.E.2d 36 (1996) and that under that case, OSFM believed that OSFM would prevail in Ms. Farrales’s appeal. R. at 1. OSFM invited Ms. Farrales to cancel her appeal, but stated that “you are under no obligation to do so, and if you do not respond, we will presume your request for an administrative hearing remains in effect.” R. at 1. The record does not contain any further information regarding Ms. Farrales’s appeal of the April 2, 1997, AO. Despite these documents, OSFM contends that Ms. Farrales never appealed OSFM’s April 2, 1997, AO. Motion at 4.

On April 3, 1997, OSFM sent Ms. Farrales a letter denying her eligibility application on the grounds that the UST had not been in operation at any time since January 1, 1974. R. at 17-19. This letter notified Ms. Farrales that she could appeal the denial to the Board. R. at 18. Ms. Farrales filed a petition (Pet.) appealing OSFM’s April 3, 1997, letter with the Board on April 25, 1997. Pet. at 1.

DISCUSSION

Summary judgment should be granted when the pleadings, depositions, and affidavits reveal “no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Balla v. Gambro, Inc., 145 Ill. 2d 492, 508, 584 N.E.2d 104, 112 (1991). Here, OSFM argues that summary judgment should be granted to it as a matter of law because the Board lacks jurisdiction over Farrales’s appeal. Motion at 6-7; Respondent’s Memorandum of Law in Support of its Motion for Summary Judgment (Mem.) at 12.

First, OSFM argues that the Board lacks authority to review or reverse OSFM’s decisions regarding registration of USTs, citing Divane Bros. Electric Co. v. IEPA (Nov. 9, 1993), PCB 93-105 and Village of Lincolnwood v. IEPA (June 4, 1992), PCB 91-83. Mem. at 11. OSFM further argues that Ms. Farrales never appealed OSFM’s April 2, 1997, AO (denying her request for registration) and that the Board cannot review OSFM’s registration decision in this proceeding. Motion at 4; Mem. at 3, 12.

The Board agrees that it lacks authority to review OSFM’s registration decision. Section 4 of the GSA requires owners of certain USTs to register them with OSFM. 430 ILCS 15/4 (1996). OSFM has adopted rules providing for the appeal of registration decisions to OSFM. See 41 Ill. Adm. Code 170.Subpart D. After appeal to OSFM, such decisions may then be reviewed in the circuit court under the Administrative Procedure Act. 430 ILCS 15/2(3)(e) (1996); 735 ILCS 5/3-101 (1996). The Board has previously held that it may not review OSFM’s registration decisions. See Divane Bros., PCB 93-105, slip op. at 6.

As OSFM concedes (Mem. at 12), the Board does have authority to review OSFM’s decisions on eligibility. See 415 ILCS 5/57.9 (1996). OSFM notes, however, that a UST is only eligible for reimbursement if it is registered. See 415 ILCS 5/57.9(a)(4). OSFM argues that because it denied registration of Ms. Farrales’s UST, and Ms. Farrales never appealed that denial, her UST is not registered and therefore not eligible for reimbursement of cleanup costs under Section 57.9(a)(4) of the Act. Motion at 4, 6; Mem. at 3, 6. In this situation, OSFM argues, the Board has no jurisdiction.

The record contradicts OSFM’s claim that Ms. Farrales never appealed OSFM’s April 2, 1997, AO. The record includes a letter in which she states that she is appealing that AO. R. at 15. The record also includes a letter from OSFM to Ms. Farrales in which OSFM asks her to consider withdrawing her appeal. R. at 1. Nothing in the record suggests that she did withdraw her appeal, or that her appeal has been dismissed or otherwise decided. The Board finds that at the very least, the record that OSFM has submitted raises a genuine issue of fact as to whether Ms. Farrales appealed OSFM’s April 2, 1997 AO.

The Board notes that the cases that OSFM relies upon in support of its Motion did not involve appeals pending simultaneously before the Board and OSFM. See Divane, PCB 93-105; Martin Oil Marketing, #64 v. IEPA (August 13, 1992), PCB 92-53; Village of Lincolnwood, PCB 91-83; Stroh Oil Company v. OSFM (July 20, 1995), PCB 94-215, *aff’d*, 281 Ill. App. 3d 121, 665 N.E.2d 540 (4th Dist. 1996). In cases like the instant case, in which it appears that simultaneous appeals may be pending, the Board has stayed proceedings

pending the outcome of the OSFM appeal. See, *e.g.*, Connecticut Mutual Life Ins. Co. v. IEPA (September 9, 1993), PCB 93-165; Weyerhaeuser Co. v. IEPA (May 20, 1993), PCB 92-105.¹

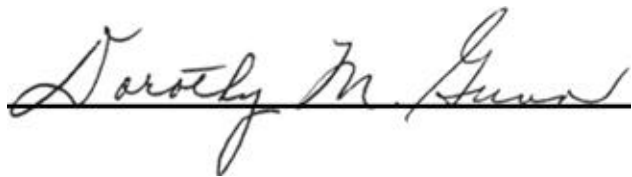
Given the possibility that Ms. Farrales has a pending appeal before OSFM, the Board finds that it would be premature to grant summary judgment in this case. Under Section 57.9(a)(4) of the Act, 415 ILCS 5/57.9(a)(4) (1996), which provides that only registered USTs are eligible for reimbursement, the outcome of an appeal of OSFM's registration decision is critical to the Board's review of OSFM's eligibility determination. Therefore, the Board denies the Motion. However, the Board will stay all proceedings in this case pending the final resolution of Ms. Farrales's OSFM appeal, if any. The parties are directed to file, within 30 days from the date of this order, a joint status report with the Board that informs the Board of the status of the OSFM appeal and any other relevant developments in that appeal.

ORDER

1. Respondent's Motion for Summary Judgment is denied.
2. The parties are directed to file, within 30 days from the date of this order, a joint status report with the Board that informs the Board of the status of any appeal by Ms. Farrales of OSFM's April 2, 1997 Administrative Order and any other relevant developments in that appeal.
3. All proceedings in this matter are stayed pending the resolution of any appeal by Ms. Farrales of OSFM's April 2, 1997 Administrative Order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 16th day of October 1997, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

¹ Several of the cases cited in this paragraph were decided under provisions of the Act or GSA that were repealed or modified; however, these various changes in the Act or GSA are not material with respect to the issues in this case.