

ILLINOIS POLLUTION CONTROL BOARD
December 15, 2022

RELIABLE STORES, INC.,)
)
 Petitioner,)
)
 v.) PCB 19-2
) (UST Appeal)
 OFFICE OF THE STATE FIRE MARSHAL,)
)
 Respondent.)

OPINION AND ORDER OF THE BOARD (by B.F. Currie):

Reliable Stores, Inc. (Reliable) appealed a decision of the Office of the State Fire Marshal (OSFM) denying eligibility for reimbursement from the State’s Underground Storage Tank (UST) Fund. On cross-motions for summary judgment, the Board entered summary judgment for Reliable in a final order, reversing OSFM’s determination and remanding the matter to OSFM to determine Reliable’s applicable UST Fund deductible. OSFM appealed the Board’s final order. The Appellate Court affirmed the Board’s Order.

Reliable now requests that the Board authorize payment of its legal fees. The Board finds that Reliable’s appeal sought payment from the UST Fund and that it prevailed before the Board under Section 57.8(l) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(l) (2020)). The Board exercises its discretion to award legal fees and directs the Illinois Environmental Protection Agency (IEPA) to reimburse Reliable \$33,106.65 from the UST Fund.

PROCEDURAL BACKGROUND

On April 1, 2021, the Board issued its final order. For the procedural background of the case up to that point, please refer to the final order. On May 4, 2021, OSFM petitioned the First District Appellate Court for direct administrative review of the final order.

On May 5, 2021, Reliable filed its legal fees motion with the Board (Mot). Attached to the motion was an affidavit from Reliable’s attorney, Patrick D. Shaw (Aff. 1). Along with the affidavit was Exhibit A, an invoice of legal costs incurred from August 22, 2018 through May 5, 2021 (Exh. A 1). On June 24, 2021, OSFM filed a motion to stay the proceedings before the Board while the appellate case proceeded. On July 8, 2021, Reliable filed a response opposing OSFM’s stay motion. On December 2, 2021, the Board issued an order finding that it retained jurisdiction over the issue of legal fees as they were collateral or incidental to the final order before the Appellate Court.

On September 30, 2022, the First District Appellate Court issued an opinion which affirmed the Board’s final order in this case. Office of the State Fire Marshal v. Illinois Pollution

Control Board, 2022 IL App (1st) 210507. OSFM did not appeal this decision and the Appellate Court issued its mandate on November 18, 2022, pursuant to Supreme Court Rule 368.

On November 21, 2022, Reliable filed a supplemental motion for attorney fees which added fees incurred during the appellate process (Supp. Mot.). Attached to the supplemental motion was a supplemental affidavit from Patrick Shaw (Aff. 2). Included with the affidavit was Exhibit A, an invoice of legal costs incurred from May 14, 2021 through September 30, 2022 (Exh. A 2). OSFM did not file a response to the supplemental motion.

STATUTORY AND REGULATORY AUTHORITIES

Section 57.8 of the Act addresses reimbursement from the UST Fund, and subsection (l) provides:

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(l) (2020)

Section 734.625(a)(15) of the Board's regulations on underground storage tanks provides, in relevant part:

- (a) Types of costs that may be eligible for payment from the Fund include those for corrective action activities and for materials or services provided or performed in conjunction with corrective action activities. Such activities and services may include, but are not limited to, reasonable costs for:

- (15) Costs associated with obtaining an Eligibility and Deductibility Determination from the OSFM or the Agency... 35 Ill. Adm. Code 734.625(a)(15).

Section 734.630(g) of the Board's regulations on underground storage tanks provides, in relevant part:

Costs ineligible for payment from the Fund include, but are not limited to:

- (g) 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... 35 Ill. Adm. Code 734.630(g).

BOARD DISCUSSION

Below, the Board first addresses whether this appeal falls within the scope of Section 57.8(l) of the Act and, if it does, whether the Board will exercise its discretion to award Reliable's requested legal fees and costs.

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." Knapp Oil Co. v. IEPA, PCB 16-103, slip op. at 2 (Nov. 17, 2016), *citing* Ill. Ayers Oil Co. v IEPA, PCB 03-214, slip op. at 7 (Aug. 5, 2004) (Ill. Ayers).

Reliable argues that, "[o]nce the OSFM issued final decision denying eligibility, the only way for Petitioner to seek and receive reimbursement for corrective action costs was to file this appeal under Title XVI of the Act. Therefore, pursuant to the holding in Illinois Ayers, Petitioner has prevailed before the Board in seeking payment under Title XVI." Mot. at 3.

Looking to Ill. Ayers, Reliable argues that a party is "seeking payment under this Title" whenever it appeals a decision under Title XVI of the Act, because "the provisions of Title XVI are necessary steps an owner or operator must first follow in order to later seek reimbursement from the UST Fund." Id. at 3., *citing* Ill. Ayers at 8. In Ill. Ayers, the Board found that these ancillary steps are part of the process of obtaining reimbursement from the Fund and therefore legal fees incurred in that process are appropriate for reimbursement. Id. at 8-9.

The Board, in the past, has found that payment of legal defense costs incurred during an appeal to the Appellate Court are reimbursable under the Act. In Estate of Slightom v. IEPA, the Board authorized payment of \$79,455.26 for legal fees and costs incurred before the Board and the Appellate Court regarding UST Fund eligibility and deductible decisions. Estate of Slightom v. IEPA, PCB 11-25, slip op. at 2 (Nov. 5, 2015).

Because Reliable prevailed when it sought payment from the UST Fund, the Board finds that this appeal falls within the scope of Section 57.8(l) of the Act. Accordingly, the Board may exercise its discretion to determine whether to award Reliable legal fees and costs requested in its motion.

Whether to Exercise the Board's Discretion to Award Fees

Reliable argues that, in earlier cases, the Board considered the "reasonableness" of the claimed legal defense costs before exercising its discretion to authorize their payment. Mot. at 4, *citing* Evergreen FS v. IEPA, PCB 11-51, slip op. at 4 (Sept. 6, 2012). The Board agrees. *See* City of Benton Fire Dept. v. IEPA, PCB 17-1, slip op. at 3 (May 24, 2018); Prime Location, slip op. at 4, *citing* Swif-T Food Mart v. IEPA, PCB 03-185, slip op. at 3 (Aug. 19, 2004); Ill. Ayers, slip op. at 8-9.

As the party seeking reimbursement, Reliable has the burden of presenting sufficient evidence with which the Board can determine the reasonableness of the fees. Abel Investments v. IEPA, PCB 16-108, slip op. at 2 (Mar. 2, 2017); Prime Location, slip op. at 4, *citing* J.B. Esker & Sons 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 (1st Dist. 1996). Reliable "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, slip op. at 4, *citing* J.B. Esker & Sons, 325 Ill. App. 3d at 283. While Reliable 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. Prime Location, slip op. at 4, *citing* Cretton v. Protestant Mem'l. Med. Cent., 371 Ill. App. 3d 841, 868, 864 N.E.2d 288,315; Sampson, 279 Ill. App. 3d at 281, 664 N.E.2d at 289.

In determining whether Reliable'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." 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.

Because its appeal involved a number of legal issues, including an issue of first impression to the Board, and resulted in a published opinion from the Appellate Court, Reliable argues this supports the position of the importance of the issues in this case. Supp. Mot at 3.

Reliable further argues that the Board has recognized Mr. Shaw's experience in UST appeals. Mot. at 4, *citing* Prime Location, slip op. at 6. Reliable adds that the Board has accepted Mr. Shaw's hourly billing rate as reasonable in earlier awards of legal fees. Supp. Mot. at 4-5, *citing* Knapp Oil v. IEPA, PCB No. 16-103, slip op. at p. 3 (Nov. 17, 2016).

Mr. Shaw's first affidavit is accompanied by a six-page summary of fees and costs. Aff. 1; Exh. A 1. Mr. Shaw's second affidavit is accompanied by a seven-page summary of fees and costs. Aff. 2; Exh. A 2. From the affidavits and summaries, the Board can determine the date of services; a description of services; the hours and hourly rate billed; and the fee charged. Mr. Shaw's services began on August 22, 2018, a short time after OSFM issued its eligibility denial determination. His services continued to November 21, 2022, the date on which he filed the pending motion.

Mr. Shaw's summary from both affidavits totals 166 billed hours for total fees of \$32,700. Exh. A 1 at 6; Exh. A 2 at 6. The summary describes work performed and the time allocated to that work in tenths of an hour. Exh. A 1 and Exh. A 2. The summary also includes \$406.65 of itemized costs for copying, the Board's filing fee, travel costs and computer research via LEXIS. Exh. A 2 at 7. 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 Reliable is generally similar to information provided in other UST cases in which the Board has directed IEPA to reimburse legal fees. *See, e.g., Burgess v. IEPA*, PCB 15-186, slip op. at 5-6 (Feb. 4, 2016) (Burgess). As noted above, IEPA has not filed a response or disputed the reasonableness of the requested fees and costs.

The Board concludes that this appeal presented significant issues regarding OSFM's eligibility determinations under the UST program. Burgess, slip op. at 6, citing Pak-Ags, slip op. at 7; Chatham BP v. IEPA, PCB 14-1, slip op. at 6 (Feb. 5, 2015). Based on its review of the record and authorities including prior Board decisions, as well as the absence of an OSFM response to the motion, the Board finds Reliable's requested legal fees and costs to be reasonable. Accordingly, the Board will exercise its discretion under Section 57.8(l) of the Act to grant Reliable's unopposed motion and direct IEPA to reimburse Reliable \$33,106.65 in legal fees and costs.

The Board incorporates by reference its findings of fact and conclusions of law from its April 1, 2021, final order. This final opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board grants Reliable's motion to authorize payment of attorney's fees and directs IEPA to reimburse petitioner \$33,106.65 in legal fees from the UST Fund under Section 57.8(l) of the Act. 415 ILCS 5/57.8(l) (2020).

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) (2020); *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. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

| Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court | |
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| Parties | Board |
| Patrick D. Shaw Law Office of Patrick D. Shaw 80 Bellerive Road Springfield, Illinois 62704 pdshaw1law@gmail.com | Illinois Pollution Control Board Attn: Don A. Brown, Clerk 60 East Van Buren Street, Suite 630 Chicago, Illinois 60605 don.brown@illinois.gov |
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I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 15, 2022, by a vote of 4-0.



Don A. Brown, Clerk
 Illinois Pollution Control Board