

ILLINOIS POLLUTION CONTROL BOARD  
May 4, 1995

PEOPLE OF THE STATE OF )  
ILLINOIS, )  
 )  
Complainant, )  
 )  
v. ) PCB 92-164  
 ) (Enforcement-Water)  
BERNIECE KERSHAW and DARWIN )  
DALE KERSHAW d/b/a KERSHAW )  
MOBILE HOME PARK, )  
 )  
Respondents. )

SUPPLEMENTAL OPINION OF THE BOARD (by G.T. Girard):

This matter comes before the Board on its own motion. On April 20, 1995, the Board entered its opinion and order upon reconsideration of the penalty. Among other things, the opinion at p. 15 addresses the issue of award of \$5,190.69 in costs and fees to the People. The third sentence of the first paragraph in that portion of the opinion recited that:

Kershaws did not respond directly to Complainant's [May 6, 1993] Affidavit of Costs, but, instead, responded that Kershaws' costs in litigating the attorney disqualification issue should be a mitigating factor in the final penalty assessment. (Resp. Br. at 19). (Opinion of 4/20/95, p. 15)

In making this statement, the Board overlooked a one-page memorandum filed by the Kershaws on May 13, 1993 which does in fact directly respond to the affidavit of costs. In order to cure this omission, the Board hereby vacates that section of its Opinion of April 20, 1995 entitled Costs and Fees, and replaces it with the following discussion. The Board is not today in any way modifying its April 20, 1995 order.

COSTS AND FEES

In the original Board decision order issued April 8, 1993, a Docket B was opened in this proceeding to assess reasonable costs and fees to complainant as provided in Section 42(f) of the Act. Complainant filed an affidavit with the Board on May 6, 1993, which outlined the People's costs in pursuing this matter. On May 13, 1993, the Kershaws filed a one-page memorandum in opposition. Additionally, in their October, 1994 brief, Kershaws argued that their costs in litigating the attorney disqualification issue should be a mitigating factor in the final

penalty assessment. (Res. Br. at 19.)

The expenses presented by the People total \$5,190.69. (Comp. Affid. at 1.) The major cost categories include: \$1,791.39 for attorney's fees; \$3,123.49 for expert witness and consultant fees; \$58.85 for clerical costs; and \$216.96 for other costs. (Comp. Affid. at 1.) The Board notes that attorneys's fees in the People's affidavit are charged at rates ranging from 15 to 53 dollars per hour, which is below the reasonable rate of \$100 per hour as determined in a prior Board opinion. (See, People v. Freedom Oil (May 6, 1994) PCB 93-59, Stip. Op. at 11 and supplemental opinion, People v. Freedom Oil (June 6, 1994) PCB 3-59.)

The respondents have two specific challenges to the costs. The first is that:

Complainants claim attorneys' fees in this matter dating back to October 2, 1986, (Affidavit at 2), and expert witness/consultant costs as early as August 30, 1981 (Id. at 9.) The Complaint in this matter was not filed until October 29, 1992. Preparation of the complaint, according to the Affidavit, commenced on December 28, 1991. Id. at 5. Respondents respectfully request that no award fees or costs be allowed for work which predates this proceeding . . . The state's generalized enforcement program costs, unrelated to the proceeding before the Pollution Control Board, cannot be recovered under § 42(f) of the Environmental Protection Act. (Memo. of 5/13/94, par. 1-3).

Section 42(f) of the Act does not, by its terms, limit a costs and fees award to costs incurred only after the filing of a complaint. To the extent that Kershaws are attempting to make a "statute of limitations" type argument as it relates to costs and fees, the Board rejects it as we did the argument as it related to penalties (see supra, pp. 6-7). The People's affidavit does not claim "generalized enforcement program costs", such as a portion of its office overhead costs. Rather, the affidavit named witnesses/consultants and attorneys who spent time in specific site inspections, travel, meeting with the Kershaws, corresponding with the Kershaws and others, drafting and review of the complaint and other pleadings of this case, and so on. The dates of all of the specific listed activities occur within the time frame covered by the complaint. The Board is not persuaded that the People seek costs and fees in excess of those authorized by Section 42(f).

The Kershaws' second challenge was that:

it is not "reasonable" to assess costs for seven attorneys from the Attorney General's Office to bill on

the case on the same day; See Affidavit at 6. (Memo. of 5/13/94, par. 4)

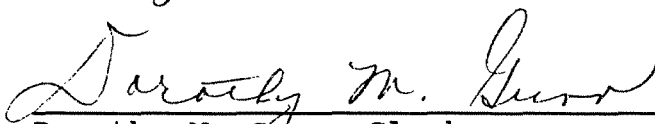
The entry in question is a .75 hour charge made by each of 7 attorneys for activity which occurred on July 30, 1992 which was characterized as "Litigation Committee; review and approval of complaint". The Board does not find it unreasonable for seven attorneys to meet for 45 minutes to discuss a four count complaint alleging violation of two sections of the Act and roughly a dozen regulations, during a time period, covering many years, beginning May, 1983.

In summary, the Board finds the costs and fees's claimed by the People to be reasonable, and will award the Office of the Attorney General five thousand one hundred ninety dollars and sixty nine cents (\$5,190.69). Kershaws will be ordered to pay this sum to the Hazardous Waste Fund, created in Section 22.2 of the Act, as required by Section 42(f) of the Act.

This supplemental opinion constitutes the Board's supplemental findings of fact and conclusions of law in this matter.

Board Member J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify the above supplemental opinion was adopted on the 4<sup>th</sup> day of May, 1995, by a vote of 6-1.

  
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 Dorothy M. Gunn, Clerk  
 Illinois Pollution Control Board