

ILLINOIS POLLUTION CONTROL BOARD
February 8, 1990

COUNTY OF DUPAGE,)
Complainant,)
) AC 88-76, 88-77
v.) Docket B
) IEPA Nos. 88-CD-278,
E & E Hauling, Inc.) 88-CD-279
Respondent.) (Administrative Citation)

INTERIM ORDER OF THE BOARD (by M. Nardulli):

On September 13, 1989, the Board found in Docket A of this consolidated appeal, that E & E Hauling Company (E & E) was in violation of section 21(p)(5) of the Illinois Environmental Protection Act (Act) on two occasions, as alleged by the County of DuPage (DuPage). In its accompanying Opinion, the Board requested E & E, DuPage and the Illinois Environmental Protection Agency (Agency) to brief the issue as to whether the Agency or DuPage County may recover hearing costs from E & E. The Board articulated the problem in its Docket A Opinion (p. 7, 8). The Board also ordered the Agency and DuPage to submit affidavits of their hearing costs, but reserved the determination as to whose costs are recoverable to Docket B.

DuPage filed its response on October 16, 1989; DuPage also filed its affidavit of costs on October 13. The Agency filed its response on October 17, 1989, but declined to submit an affidavit of its hearing costs. E & E filed its response, as well as a reply challenging DuPage's requests for costs, on October 30, 1989, having been granted the extended filing time by Board Order of October 18, 1989.

The following two sections of the Act are relevant to this Board's determination of whether DuPage may recover hearing costs.

Section 42(b)(4) of the Act states as follows:

In an administrative citation action under Section 31.1 of this Act, any person found to have violated any provision of subsection (p) or (1) of Section 21 of this Act shall pay a civil penalty of \$500 for each violation of each such provision, plus any hearing costs incurred by the Board and the Agency. Such penalties shall be made payable to the Environmental Protection Trust Fund, to be used in accordance with the provisions of "an Act creating the Environmental Protection Trust Fund", approved September 22, 1979, as amended; except that if a unit of local government issued the administrative citation, 50% of the

civil penalty shall be payable to the unit of local government. (Ill.Rev. Stat. 1987, ch. 111½, par. 1042(b)(4) (Emphasis added).)

Section 4(r) of the Act states in pertinent part:

The Agency may enter into written delegation agreements with any unit of local government under which it may delegate all or portions of it inspecting, investigating and enforcement functions (Ill. Rev. Stat. 1987, ch. 111½, par. 1004(r) (Emphasis added).)

We also note that Section 31.1 of the Act, which articulates procedural requirements for administrative citations, clearly includes units of local government with which the Agency has entered into "Section 4(r)" agreements.

AGENCY'S RESPONSE

As directed by the Board's Order of September 13, 1989, in its response the Agency quoted its delegation agreement with DuPage:¹

When the...(County of DuPage) refers a matter for formal enforcement action..., the case will be prosecuted through the available channels utilized by the Agency for cases developed by Agency personnel or through the DuPage County State's Attorney's office. The parties hereto recognize that the State's Attorney has time and manpower constraints and may therefore be constrained from prosecuting any of all formal enforcement cases. (Agency Res. p.q).,

The Agency asserts that all State's Attorneys in delegated counties expressed concern about staff and budget shortages. Therefore, the delegation agreements provided that Agency attorneys would assist and participate as requested, including trying the case and submitting a brief, as is the case here.

The Agency relies upon Article VII of the Illinois Constitution which provides that units of local government may contract with the State to obtain or share services and the "delegation provision" of section 4(r) of the Act to support its position that DuPage is entitled to recover costs. The Agency asserts that its participation in this case was on behalf of DuPage, that DuPage's inspector conducted the on-site investigation giving rise to the citation and that the case was prepared and filed by DuPage. According to the Agency, since it was not acting

¹ DuPage adopted the Agency's response in its entirety and, therefore, did not file a separate response.

on its own behalf and because DuPage is the real party of interest, DuPage should recover its hearing costs. The Agency points to In the Matter of: Bi-State Disposal, Inc., AC 88-33 Docket B (February 23, 1989) as precedent for a county's recovery of costs where the Agency has delegated its authority to the county pursuant to section 4(r) of the Act.

E & E'S RESPONSE

E & E argues that section 42(b)(4) of the Act requires a respondent to pay only those "hearing costs incurred by the Board and the Agency." (Ill. Rev. Stat. 1987, ch. 111½, par. 1042(b)(4) (Emphasis added).) The Act expressly refers to units of local government, but only insofar as they are entitled to share in the civil penalty. E & E notes that the Act raises the question of whether a delegation agreement may be used to circumvent the express delegation powers given to the Agency under section 4(r) of the Act. However, E & E asserts that this issue need not be reached in this case since the Agency, not DuPage, was the actual entity which conducted the hearing and filed the briefs.

E & E argues that DuPage's hearing involvement was in name only and that DuPage should not recover hearing costs when it was the Agency that incurred them. E & E argues that this conclusion is entirely consistent with Bi-State Disposal, where it was the County (St. Clair) that prosecuted the action and conducted the hearing, and where the Board allowed the County to recover its hearing costs. However, in the instant proceeding, even though DuPage suggests that it could have exercised its delegated power to prosecute the action, it did not exercise those powers. E & E argues that in this case, "where the Agency is required to function as if it has not delegated any enforcement powers to a local government unit, the Board should conclude that it was not the intent of the legislature to require a respondent to reimburse the County's hearing costs."

Lastly, E & E challenges the costs for which DuPage is seeking reimbursement as not the type of items which are recoverable as "hearing costs".

BOARD'S FINDINGS

This case involves an issue of statutory construction, which presents a question of law. (J.M. Jones v. Department of Revenue, 74 Ill.App.3d 374, 392 N.E. 2d 949 (4th Dist. 1979).) In such a case, this Board's objective must be to ascertain the intent of the legislature in enacting the particular language in question. (People ex rel. Dickey v. Southern Illinois Railway Co., 17 Ill. 2d 550, 162 N.E. 2d 417 (1959).) In giving effect to the legislature's intention, provisions of the statute should be read as a whole and in light of the statute's general purpose. (People v. Jordan, 103 Ill. 2d 192, 469 N.E. 2d 569 (1984).)

Section 42(b)(4) of the Act does not specifically refer to the payment of hearing costs incurred by a unit of local government, but refers only to the Board and the Agency recovering such costs. (Ill. Rev. Stat. 1987, ch 111½, par. 1042 (b)(4).) However, when section 42 (b)(4) of the Act is read in conjunction with the delegation provision of section 4(r) of the Act, the Board finds the legislative intent to be one of compensating a unit of local government, which is placed in the position of the Agency pursuant to a delegation agreement, for its hearing costs. To restrict the recovery of hearing costs to the Board and the Agency, even where the Agency has delegated its enforcement authority to a unit of local government, would be inconsistent with the policy of encouraging units of local government to pursue enforcement actions. This finding is consistent with the Board's holding in Bi-State Disposal, Inc. wherein the Board allowed the county to collect its hearing costs where the Agency had delegated its enforcement functions to the County. Moreover, to restrict recovery of hearing costs to the Agency and Board places facilities under the jurisdiction of units of local government at an advantage. These facilities would be able to petition for review, but would not be subject to hearing costs. Such a result would be unfair.

E & E argues that DuPage should not recover hearing costs because it was the Agency that actually conducted the hearing. The record establishes that both an Agency attorney and DuPage County assistant state's attorney appeared at hearing. (Rep. of Proc. 12/8/88.) However, the Agency attorney presented evidence, conducted cross-examination and filed a post-hearing brief. The record also establishes that a DuPage County inspector investigated the site in question and testified at hearing. (Id. at 32-176.)

Merely because DuPage's attorney did not actively participate in prosecuting this case at hearing does not obviate a finding that DuPage may seek reimbursement of hearing costs. Here, we have a valid delegation of authority from the Agency to DuPage pursuant to section 4(r) of the Act. The Agency states that it was merely assisting DuPage and that DuPage is entitled to seek reimbursement of hearing costs. Although section 4(r) of the Act contemplates a partial delegation of authority from the Agency to the unit of local government, here the Agency does not allege that it is entitled to reimbursement of any costs incurred as a result of the participation at hearing. The Agency's position is underscored by the fact that it has declined from submitting an affidavit of hearing costs. This Board is not presented with a situation where both the Agency and the unit of local government are seeking recovery of hearing costs and, therefore, this issue will not be decided here. Although the Board in its September 13, 1989 Order directed the Agency to submit its affidavit of hearing costs, the Agency failed to do so apparently based upon its belief that DuPage is the entity entitled to reimbursement of hearing costs. The

Board does not look favorably upon the Agency's failure to follow a Board directive. However, the Board sees no reason to pursue the matter further since the Agency has taken the position that it will not seek reimbursement of hearing costs.

The Board concludes that, pursuant to the "delegation provision" of section 4(r) of the Act and the "hearing costs" provision of section 42(b)(4) of the Act, DuPage is entitled to recover hearing costs. However, the Board agrees with E & E that DuPage's affidavit of hearing costs contains items which do not constitute "hearing costs." DuPage's affidavit seeks reimbursement based upon hourly wage rates for Steven K. Dunn, the DuPage County inspector who investigated the site in question and testified at hearing, Keith Trychta, field inspector, Darlene Lynch, Senior Environmental Legal Assistant for DuPage, and Gretta A. Tameling, the assistant state's attorney who appeared at hearing. According to the affidavit and accompanying time sheets, DuPage is seeking reimbursement for the time spent at the December 8, 1988 hearing for these individuals based upon a breakdown of their salaries.

Although section 42(b)(4) of the Act does not define "hearing costs," the term "costs" has acquired a fixed and technical meaning in the law. "Costs are allowances in the nature of incidental damages awarded by law to reimburse the prevailing party, to some extent at least, for the expenses necessarily incurred in the assertion of his rights in court." (Galowich v. Beech Aircraft Corp., 92 Ill. 2d 157, 441 N.E.2d 318, 321 (1982).) "A successful litigant, however, is not entitled to recover the ordinary expenses of litigation and trial preparation, and only those items designated by statute to be allowable can be taxed as costs." (Id., 441 N.E.2d at 322.) Attorneys' fees are separate and distinct from costs and are not recoverable as such. (Meyer v. Marshall, 62 Ill. 2d 435, 343 N.E. 41 (1943); Ritter v. Ritter, 381 Ill. 549 46 N.E. 2d 41 (1943).) Additionally, an expert witness' fees for testifying are not recoverable as "costs." (Naiditch v. Schaf Home Builders, Inc., 160 Ill. App. 3d 245, 512 N.E.2d 486, 498 (2d Dist. 1987).)

The Board finds that DuPage's affidavit of hearing costs improperly seeks reimbursement for attorneys' fees and for expert witness fees for testifying or merely being present at hearing.² DuPage's affidavit departs from prior affidavits of hearing costs submitted in Administrative Citation Docket B proceedings where the Agency or unit of local government (see, Bi-State Disposal, Inc., AC 88-33 Docket B (February 23, 1989) has been reimbursed for the travel expenses of their attorney and inspector. Therefore, DuPage

²Although Steven K. Dunn, landfill inspector for DuPage, testified at the December 8, 1988 hearing, Keith Trychta, field inspector, was merely present at the hearing.

is directed to resubmit its affidavit of hearing costs consistent with this Order.

IT IS SO ORDERED.

Board Member J. Anderson dissented.

Board Members J. Marlin and J. Theodore Meyer concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above Order was adopted on the ___ day of _____, 1990 by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board