

ILLINOIS POLLUTION CONTROL BOARD
October 20, 2022

KB SULLIVAN, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 21-78
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by J. Van Wie):

KB Sullivan, Inc. (petitioner) appealed a decision of the Illinois Environmental Protection Agency (IEPA) denying in full a request for partial reimbursement of \$2,125.96. On August 11, 2022, the Board granted petitioner’s motion for summary judgment. The Board also denied IEPA’s cross-motion for summary judgment as a matter of law, because IEPA’s position relied on statutory and regulatory provisions not encompassed in IEPA’s denial letter.

Petitioner now requests that the Board authorize payment of its legal fees. The Board finds that petitioner’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 IEPA to reimburse petitioner \$7,860 from the UST Fund.

The Board’s order begins below with an abbreviated procedural history. After providing the statutory and regulatory background, the Board discusses the issues, reaches its conclusion, and issues its order.

ABBREVIATED PROCEDURAL HISTORY

On August 11, 2022, the Board granted the petitioner’s request for summary judgment, and denied the IEPA’s cross-motion. The Board directed petitioner to file a statement of legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to reimburse those fees by September 15, 2022. Petitioner timely filed its motion for authorization of payment of fees (Mot.) on September 15, 2022. Attached to the motion was the affidavit of Patrick D. Shaw (Aff.), petitioner’s attorney.

The Board’s interim opinion and order allowed IEPA to respond within 14 days after being served with petitioner’s statement, but IEPA did not respond. Because it did not file a response to petitioner’s motion, IEPA is deemed to have waived objection to the Board granting the motion. 35 Ill. Adm. Code 101.500(d).

STATUTORY AND REGULATORY AUTHORITIES

Costs associated with “corrective action” may be reimbursed from the UST Fund. 415 ILCS 5/57.9(a)(7) (2020). “‘Corrective action’ means 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 Petroleum Underground Storage Tanks].” 415 ILCS 5/57.2 (2020).

Section 57.8 of the Act addresses reimbursement from the UST Fund, and subsection (l) provides in its entirety that “[c]orrective 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); *see also* 35 Ill. Adm. Code 734.630(g).

BOARD DISCUSSION

Petitioner states 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 3, citing Evergreen FS v. IEPA, PCB 11-51, 12-61 (cons.), 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 Ill. Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 8-9 (Aug. 5, 2004); Swif-T Food Mart v. IEPA, PCB 03-185, slip op. at 3 (Aug. 19, 2004).

As the party seeking reimbursement, petitioner 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 Properties v. IEPA, PCB 09-67, slip op. at 4 (Nov. 5, 2009) (Prime Location), 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). 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, slip op. at 4, citing J.B. Esker & Sons, 325 Ill. App. 3d at 283. While 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. 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 petitioner’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.

Petitioner argues that the costs were incurred in seeking payment under the provisions of the Act and that petitioner prevailed completely. Mot. at 2, 4. Petitioner notes that the legal fees are less than sought in other cases. Mot. at 4. Petitioner argues that the Board's decision is significant in that the Board reiterated that IEPA decisions must be based upon statutory and regulatory provisions. *Id.* Petitioner further argues that the Board has recognized Mr. Shaw's experience in UST appeals. Mot. at 2, citing Prime Location, slip op. at 6. Petitioner adds that the Board has accepted Mr. Shaw's hourly billing rate as reasonable in earlier awards of legal fees. Mot. at 2, citing City of Benton Fire Dept. v. IEPA, PCB 17-1, slip op. at 3 (May 24, 2018).

Petitioner points out that Mr. Shaw's affidavit is modeled on previous affidavits submitted to the Board and found to be sufficient. Mot. at 2 -3, citing Prime Location, slip op. at 5. His affidavit is accompanied by a four-page summary of fees and costs. Aff.; Exh. A. From the affidavit and summary, the Board can determine the date of services; a description of services; the hours and hourly rate billed; and the fee charged. *Id.* Mr. Shaw's services began on February 24, 2021, and include services to September 12, 2022. They comprise 37.9 billed hours for total fees of \$7,580. Exh. A at 3; *see* Aff. at 2. The summary describes work performed and the time allocated to that work in tenths of an hour. Exh. A. The summary also includes \$280 of itemized costs for computer research and the Board's filing fee. *Id.* at 8. 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 Petitioner 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 IEPA's review and determinations under the UST program. Burgess, slip op. at 6, citing Pak-Ags v. IEPA, PCB 15-14, slip op. at 7 (Mar. 5, 2015); 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 IEPA response to the motion, the Board finds petitioner'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 Petitioner's unopposed motion and directs IEPA to reimburse Petitioner \$7,860 in legal fees and \$2,125.96 in partial costs.

ORDER

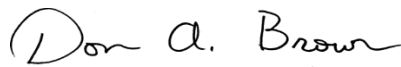
1. The Illinois Environmental Protection Agency (IEPA) is directed to approve the partial reimbursement of \$2,125.96 for numerous charges over a 5-year period, for consulting costs over that time-period.
2. The Board grants petitioner's motion to authorize payment of attorney's fees and directs IEPA to reimburse petitioner \$7,860 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	
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
Illinois Environmental Protection Agency Attn.: Melanie Jarvis, Assistant Counsel 1021 North Grand Avenue East PO Box 19276 Springfield, Illinois 62794-9276 melanie.jarvis@illinois.gov	

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on October 20, 2022, by a vote of 5-0.



Don A. Brown, Clerk
 Illinois Pollution Control Board