

ILLINOIS POLLUTION CONTROL BOARD

May 24, 2018

CITY OF BENTON FIRE DEPARTMENT,)	
)	
Complainant,)	
)	
v.)	PCB 17-1
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

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

The City of Benton Fire Department (Benton Fire) filed a petition asking the Board to review a June 10, 2016 determination of the Illinois Environmental Protection Agency (Agency). The Agency's determination concerns Benton Fire's leaking underground storage tank (UST) site located at 107 North Maple Street in Benton, Franklin County. The Agency approved, with modifications, Benton Fire's Stage 1 Site Investigation Actual Costs. Today, the Board awards legal fees to Benton Fire.

On February 22, 2018, the Board issued an interim opinion and order denying Benton Fire's request to direct the Agency to approve the requested payment. However, the Board reversed parts of the Agency's determination as premature. The Board therefore directed Benton Fire to file a statement of legal fees that may be eligible for reimbursement under Section 57.8(l) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(l) (2016)).

On March 22, 2018, Benton Fire filed its motion for authorization of payment of attorney fees (Mot.), requesting the Board to authorize payment of \$20,357.80 in legal fees. On March 28, 2018, the Agency filed an objection to Benton Fire's attorney fees request (Obj.) and on April 10, 2018, Benton Fire filed response to the Agency's objection (Resp.).

The Board finds that in this appeal, Benton Fire prevailed on at least one significant issue, and the Board, thus, can exercise its discretion under Section 57.8(l) of the Act to award legal fees. 415 ILCS 5/57.8(l) (2016). The Board awards \$20,357.80 in legal fees to Benton Fire, as requested.

In this opinion, the Board first outlines the statutory and regulatory provisions for awarding legal fees in UST appeals. The Board then discusses the applicability of Section 57.8(l) and the reasonableness of the requested fees. This is followed by the Board's conclusions and order.

STATUTORY AND REGULATORY PROVISIONS

Section 57.8(l) of the Act provides that “[c]orrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under this Title [XVI] 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) (2016); *see also* 35 Ill. Adm. Code 734.630(g).

When deciding whether to award legal fees, the Board first must decide whether the proceeding falls within Section 57.8(l). *See Illinois Ayers Oil Co. v. IEPA*, PCB 03-214, slip op. at 7 (Aug. 5, 2004); *see also Abel Investments, LLC. v. IEPA*, PCB 16-108, slip op. at 2 (Mar. 2, 2017). Next, the Board must consider the reasonableness of requested legal fees. *Sharon Burgess v. IEPA*, PCB 15-186, slip op. at 5 (Feb. 4, 2016); *Prime Location Properties v. IEPA*, PCB 09-67, slip op. at 4 (Nov. 5, 2009), *citing Illinois Ayers*, PCB 03-214, slip op. at 8-9; *Swift Food Mart v. IEPA*, PCB 03-185, slip op. at 3 (Aug. 19, 2004). In case the party prevails on some, but not all issues, the Board may decide to reduce the amount of awarded fees. *Abel*, PCB 16-108, slip op. at 3; *Webb & Sons, Inc. v. IEPA*, PCB 07-24, slip op. at 5 (May 3, 2007).

BOARD DISCUSSION

Benton Fire Prevailed on a Significant Issue and Section 57.8(l) Applies

The Board has discretion to award legal fees if the party prevails before the Board. “A prevailing party, for purposes of awarding attorney fees, is one that is successful on a significant issue and achieves some benefit in bringing suit.” *J.B. Esker & Sons v. Cle-Pa’s Partnership*, 325 Ill. App. 3d 276, 280 (5th Dist. 2001), *citing Grossinger Motorcorp, Inc. v. American National Bank & Trust Co.*, 240 Ill.App.3d 737, 753 (1992). The Board has awarded legal fees when a party prevailed on some, but not all issues. *See, e.g., Abel*, PCB 16-108, slip op. at 3; *Webb & Sons*, slip op. at 5; *Illinois Ayers*, PCB 03-214, slip op. at 9. The Board found that if parties prevail on some issues, Section 57.8(l) applies and the Board may award legal fees. *See Abel*, PCB 16-108, slip op. at 2. The Board also found that approval of a plan and budget is a prerequisite to reimbursement from the UST Fund and ordered reimbursement of legal fees where the petitioner prevails when appealing Agency’s rejection of a plan and budget. *See Prime Location*, PCB 09-67, slip op. at 3; *Illinois Ayers*, PCB 03-214, slip op. at 7-8.

Benton Fire did not prevail before the Board on all issues. In its interim opinion and order, the Board denied Benton Fire’s request to direct the Agency to approve the requested payment. The Board found that the Agency cannot approve or modify actual costs at this stage. The Board also found that Benton Fire did not submit an “application for payment” and noted that once Benton Fire submits it, “[o]nly as part of such review, the Agency has authority to determine reasonableness of consultants’ materials costs that do not have maximum amounts set in Subpart H of Part 734 of the Board rules and request information to demonstrate their reasonableness.” *City of Benton Fire Department v. IEPA*, PCB 17-01, slip op. at 6 (Feb. 22, 2018). In this docket, the Board does not and cannot determine whether the costs as submitted are reasonable.

The Board, however, reversed the parts of the Agency's determination that approved with modifications actual costs of the Stage 1 Site Investigation. The Board found the approval to be premature. The Board explained that "[b]ecause neither the Act nor the Board regulations require a UST owner or operator to address its actual costs in its site investigation completion report, but rather in an application for payment, the Agency must determine costs' reasonableness required by Section 734.850(b) when it receives the application for payment." City of Benton, PCB 17-01, slip op. at 5.

Because the Agency's determination is reversed, Benton Fire will now be able to submit its application for payment for Stage 1 Site Investigation costs, including consultant materials cost, anew, without concern over the Agency denying the costs based on its June 10, 2016 determination. The record also reveals the parties' uncertainty as to how and when the Agency reviews Stage 1 Site Investigation costs. City of Benton, PCB 17-01, slip op. at 6. Benton Fire's appeal, thus, was necessary to clarify this review and guide both the Agency and UST owners and operators.

Accordingly, the Board finds that Benton Fire prevailed on a significant issue and Section 57.8(l) of the Act applies. The Board may exercise its discretion to award legal fees under Section 57.8(l).

Benton Fire's Legal Fees Are Reasonable

In exercising its discretion, the Board must consider whether the requested legal fees are reasonable. In deciding this, the Board previously considered "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, PCB 09-67, slip op. at 4, *citing* Cretton v. Protestant Memorial Medical Center, Inc., 371 Ill. App. 3d 841, 867-68 (5th Dist. 2007). The courts recognize that the Board may also consider the entire record and its own expertise "to assess the time required to complete particular activities." Cretton, 371 Ill. App. 3d at 868; PAK-AGS v. IEPA, PCB 15-14, slip op. at 6 (Mar. 5, 2015); Prime Location, PCB 09-67, slip op. at 4, *citing* Sampson v. Miglin, 279 Ill. App. 3d 270, 281 (1st Dist. 1996).

Benton Fire has the burden of proving the reasonableness of the fees. Abel, PCB 16-108, slip op. at 2; Prime Location, PCB 09-67, slip op. at 4, *citing* J.B. Esker, 325 Ill. App. 3d at 283. 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." PAK-AGS, PCB 15-14, slip op. at 6; Sharon Burgess, PCB 15-186, slip op. at 5; Prime Location, PCB 09-67, slip op. at 4, *citing* J.B. Esker, 325 Ill. App. 3d at 283.

Benton Fire's motion is accompanied by an affidavit of Patrick D. Shaw (Aff.), Benton Fire's legal counsel, and a detailed invoice of legal fees (Aff. Exh. A). The affidavit and invoice provide sufficiently detailed descriptions of services, indicating the date of each service, its duration, and its rate. *See* J.B. Esker, 325 Ill. App. 3d at 283. Mr. Shaw's services began on June 15, 2016 and continued to March 22, 2018. Aff. Exh. A. They comprise 102.6 hours billed

at a rate of \$200 per hour, for total of \$20,420. *Id.* at 6. They also include \$77.80 in additional charges for the filing fee and copying. *Id.* The Board finds these documents sufficient to assess the reasonableness of the charges. *See Abel*, PCB 16-108, slip op. at 3; *Prime Location*, PCB 09-67, slip op. at 5. These documents are also generally similar to those provided by petitioners in other UST appeals in which the Board found the legal fees to be reasonable. *See, e.g., Abel*, PCB 16-108, slip op. at 3; *Sharon Burgess*, PCB 15-186, slip op. at 5-6 (Feb. 4, 2016), *citing PAK-AGS*, PCB 15-14, slip op. at 7; *Swif-T*, PCB 03-185, slip op. at 2-3.

The Board's review of the record in this appeal and its own expertise in similar cases indicate that the rate and hours billed are reasonable and generally consistent with fees reimbursed in other UST appeals.

Benton Fire Is Entitled to the Full Amount of Legal Fees

Because Benton Fire did not prevail on all claims before the Board, the Board must decide whether to award the full, rather than partial, amount of requested legal fees. *See, e.g., Webb & Sons*, PCB 07-24, slip op. at 5 (awarding partial amount); *see also Abel*, PCB 16-108, slip op. at 3-4 *and Illinois Ayers*, PCB 03-214, slip op. at 9 (awarding entire amount). Because the statute is silent on partial reimbursement of legal fees, the Board looks to Illinois case law in deciding whether to reduce the amount of legal fees when the party prevails on some, but not all issues. *See, e.g., Abel*, PCB 16-108, slip op. at 3.

The courts generally recognize that a party is not entitled to fees for unsuccessful claims and traditionally exclude hours spent on unsuccessful claims from the awarded fees. *Globalcom, Inc. v. Illinois Commerce Comm'n.*, 347 Ill. App. 3d 592, 618 (1st Dist. 2004), *citing Becovic v. City of Chicago*, 296 Ill. App. 3d 236, 242 (1st 1998); *Cannon v. William Chevrolet/Geo, Inc.*, 341 Ill. App. 3d 674, 686 (1st Dist. 2003), *citing Hensley v. Eckerhart*, 461 U.S. 424 (1983). The courts, however, also agree that "[w]here a plaintiff's claims of relief involve a common core of facts or are based on related legal theories, such that much of [the] attorney's time is devoted generally to the litigation as a whole, a fee award should not be reduced simply because all requested relief was not obtained." *Becovic*, 296 Ill. App. 3d 236, 242, *citing Riverside v. Rivera*, 477 U.S. 561, 575-76 (1986); *Hensley*, 461 U.S. 424, 434-35; *Berlak v. Villa Scalabrini Home for the Aged*, 284 Ill. App. 3d 231, 238-39 (1st Dist. 1996).

In this appeal, the Board finds that Benton Fire prevailed on a significant issue for the Agency's reviews and determinations under the UST program. The Board also finds that the issues Benton Fire did and did not prevail on are based on the same core facts and legal theories. Thus, the Board finds it unjustified to reduce the requested legal fees and awards Benton Fire the full amount.

CONCLUSION

The Board finds that, because Benton Fire prevailed on a significant issue – reversal of Agency's determination with respect to actual costs – Section 57.8(l) of the Act applies. Based on the review of the record and its own expertise, the Board finds Benton Fire's requested legal fees to be reasonable. Because Benton Fire's unsuccessful claim is based on the same core facts

and legal theories as its successful claim, the Board finds that reducing the requested amount of legal fees is unwarranted and awards the full amount to Benton Fire. Under Section 57.8(l) of the Act, the Board therefore directs the Agency to reimburse Benton Fire legal fees in the amount of \$20,357.80, as requested.

The Board incorporates by reference its findings of fact and conclusions of law from its February 22, 2018 interim opinion and order. This final opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board denies Benton Fire's request to direct the Agency to approve the application for payment as submitted because the approval violates the Act and Board rules.
2. The Board strikes as premature the parts of the Agency's June 10, 2016 determination that approve Stage 1 Site Investigation Actual Costs with modifications.
3. The Board grants Benton Fire's motion to authorize payment and directs the Agency to reimburse Benton Fire \$20,357.80 in legal fees from the UST Fund under Section 57.8(l) of the Act. 415 ILCS 5/57.8(l) (2016).

IT IS SO ORDERED.

Section 41(a) of the 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) (2016); *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.

Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court	
Parties	Board
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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 May 24, 2018 by a vote of 5-0.



Don A. Brown, Clerk
Illinois Pollution Control Board