

ILLINOIS POLLUTION CONTROL BOARD
May 21, 2015

ALLEN McAFEE,)
)
 Petitioner,)
)
 v.) PCB 15-84
) (UST Appeal)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

OPINION AND ORDER OF THE BOARD (by D. Glosser):

On October 27, 2014, Allen McAfee (petitioner) timely filed a petition (Pet.) asking the Board to review a September 26, 2014 determination of the Illinois Environmental Protection Agency (Agency). The determination concerned petitioner's site located at 504 South Maple, Brighton, Macoupin County. The Agency approved petitioner's Stage 3 site investigation plan and budget but modified the plan to require the use of a Project Labor Agreement (PLA) when performing site investigation at the underground storage tank (UST) site. On March 5, 2015, the Board found that under Section 57.7 of the Environmental Protection Act (Act) (415 ILCS 5/57.7 (2012)), the phrases "site investigation" and "corrective action" must both be given meaning. Therefore, the phrase "site investigation" is not included in the phrase "corrective action", for purposes of Section 57.7 and PLAs cannot be required for site investigation activities pursuant to Section 57.7(c)(3) of the Act.

Petitioner sought the payment of attorney's fees pursuant to Section 57.8(1) of the Act (415 ILCS 5/57.8(1) (2012)). The Board allowed petitioner to file a statement of legal fees and its argument as to why the fees are eligible for reimbursement. The Agency was allowed to file a response. Petitioner filed a motion requesting \$10,315 in attorney's fees. For the reasons discussed below, the Board exercises its discretion and directs the Agency to reimburse petitioner \$10,315 in attorney's fees.

The opinion begins with the background and continues with a summary of the motion for reimbursement of attorney's fees. After providing the statutory and regulatory background, the Board discusses the issues, decides the motion, and issues its final order in this proceeding.

BACKGROUND

On March 5, 2015, the Board found that the Agency could not require a PLA to be used as a part of site investigations. The Board found that under Section 57.7 of the Act (415 ILCS 5/57.7 (2012)), the phrases "site investigation" and "corrective action" must both be given meaning. Therefore, the phrase "site investigation" is not included in the phrase "corrective action" and PLAs cannot be required for site investigation activities pursuant to Section

57.7(c)(3) of the Act. The Board struck the requirement that a PLA be used for site investigation activities from the Agency's letter modifying petitioner's Stage 3 site investigation plan and budget. The Board remanded the matter to the Agency to issue a decision on the Stage 3 site investigation plan and budget that does not include a requirement for a PLA.

In its petition, petitioner asked that the Board award attorney's fees to petitioner. Section 57.8(l) of the Act provides that corrective action excludes "legal defense costs," which include "legal costs for seeking payment . . . unless the owner operator prevails before the Board in which case the Board may authorize payment of legal fees." 415 ILCS 5/57.8(l) (2012). The amount of legal fees incurred by petitioner, however, was not in the record. The Board therefore reserved ruling on the issue of legal fees. Petitioner was directed to file a statement of its legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to direct the Agency to reimburse those fees from the UST Fund. Petitioner was required to file its statement by March 23, 2015. The Agency was allowed to file a response within 14 days after being served with petitioner's statement.

On March 16, 2015, petitioner filed a motion for authorization of payment of \$10,315 in attorney's fees (Mot.). The Agency has not filed a response, and pursuant to Section 101.500(d), the Agency may be deemed to have waived any objection to the granting of the motion. *See* 35 Ill. Adm. Code 101.500(d).

STATUTORY BACKGROUND

Section 57.2 defines "corrective action" as activities associated with compliance with the provisions of Sections 57.6 and 57.7 of this Title. 415 ILCS 5/57.2 (2012). Section 57.2 defines "site investigation" as activities associated with compliance with the provisions of subsection (a) of Section 57.7. *Id.* Section 57.6 of the Act addresses early action. 415 ILCS 5/57.6 (2012). Section 57.7(a) sets forth requirements for site investigation. 415 ILCS 5/57.7(a) (2012). Section 57.7(b) addresses corrective action. 415 ILCS 5/57.7(b) (2012).

Section 57.7(c) provides requirements for Agency review and approval of any plan and budget. 415 ILCS 5/57.7(c) (2012). Section 57.7(c)(3) of the Act provides:

In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall determine, by a procedure promulgated by the Board under Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title. The Agency shall also determine, pursuant to the Project Labor Agreements Act, whether the corrective action shall include a project labor agreement if payment from the Underground Storage Tank Fund is to be requested. 415 ILCS 5/57.3(c)(3) (2012).

Section 57.8(l) of the Act 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(1) (2012). Section 734.630(g) of the Board’s UST regulations provides that costs ineligible for payment from the UST Fund include, but are not limited to, “[l]egal fees or costs, including but not limited to legal fees or costs for seeking payment under this Part [734] unless the owner or operator prevails before the Board and the Board authorizes payment of such costs.” 35 Ill. Adm. Code 734.630(g).

PETITIONER’S MOTION

Petitioner notes that the Board struck from the Agency’s denial letter the provision requiring a PLA for site investigation activities and directed petitioner to file a statement of attorney’s fees. Mot. at 1. Petitioner further notes that under Section 57.8(1) of the Act, the legal costs for seeking payment under the leaking UST program are reimbursable from the UST Fund if the owner or operator prevails before the Board. *Id.*, citing 415 ILCS 5/57.8(1) (2012). Petitioner asserts it clearly prevailed before the Board, having obtained the relief requested in the petition for review. Mot. at 1. Specifically, petitioner sought removal of the PLA provision and the Board struck that provision. *Id.*

Petitioner argues that a party may prevail before the Board by obtaining reversal of the Agency’s decision on a plan or budget as those are prerequisites to obtaining payment from the UST Fund. Mot. at 2, citing Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 8 (Aug. 5, 2014). Further, petitioner asserts that compliance with PLA obligations is mandatory if payment from the UST Fund is sought. *Id.*, citing 415 ILCS 5/57.5(c)(3) (2012). Petitioner opines that it prevailed on a “meaningful issue” in that using a PLA for site investigation could result in disproportionate costs associated with a PLA versus the costs of the actual site investigation work. Mot. at 2.

Petitioner maintains that the award of legal costs is discretionary with the Board. Mot. at 2, citing Ted Harrison Oil Co. v. IEPA, PCB 99-127 (Oct. 16, 2003). Petitioner opines that the Board appears to have authorized payment of legal defense costs “in all cases where petitioners have prevailed.” Mot. at 2-3, citing PAK-AGS v. IEPA, PCB 15-14 (March 5, 2015); Chatham BP v. IEPA, PCB 14-1 (Feb. 5, 2015); Wheeling/GWA Auto Shop, v. IEPA, PCB 10-70 (Sept. 22, 2011); Evergreen FS v. IEPA, PCB 11-51 (Sept. 6, 2012); Zervos Three v. IEPA, PCB 10-54 (June 2, 2011); Dickerson Petroleum v. IEPA, PCB. 09-87; 10-5 (Dec. 2, 2010); Prime Location Properties v. IEPA, PCB 09-67 (Nov. 5, 2009); Swif-T Food Mart v. IEPA, PCB 03-185 (Aug. 19, 2004); Illinois Ayers Co. v. IEPA, PCB 03-214 (Aug 5, 2004). Petitioner notes that the Board has reduced the amount of recovery, but still awarded substantial legal fees to the prevailing party, in some cases. Mot. at 3, *referring to e.g.* Webb & Sons. v. IEPA, PCB 07-24 (May 3, 2007) (award in proportion to degree of success); Prime Location Properties, PCB 09-67 (Nov. 15, 2012) (post-mandate attorneys fees disallowed).

Petitioner argues that the Board historically considers the reasonableness of the claimed legal cost before exercising its discretion. Mot. at 3, citing Evergreen FS, PCB 11-51. Petitioner attaches an affidavit of its attorney, Patrick D. Shaw that documents that the legal costs are \$10,315. Mot. at 3. Petitioner asserts that the affidavit is modeled on previous affidavits filed by Mr. Shaw in cases where the Board has found the affidavit sufficient to award costs. Mot. at 3, *referring to* Prime Location Properties v. IEPA, PCB. 9-67, slip op. at 5 (Nov. 5, 2009), aff’d

IEPA v. PCB, 2012 IL App (5th) 100072-U. Further, petitioner maintains that the Board has previously recognized Mr. Shaw's expertise and substantially approved the legal defense costs requested in prior cases. Mot. at 3, citing PAK-AGS, PCB 15-14 (awarding \$10,355); Evergreen FS, PCB 11-51 (awarding \$13,473.80); Prime Location, PCB 9-67 (awarding \$10,088.18). Petitioner offers that Mr. Shaw's rate is \$200 an hour. Mot. at 4.

Petitioner argues that the Board has recognized that the adjudication of contested cases is essential in forming policies in the UST program and that petitioner has contributed to that body of case law by challenging the Agency's decision to require a PLA. Mot. at 4. Petitioner notes that there are pending appeals concerning Agency decisions to require a PLA for a site investigation plan. Mot. at 4, citing Rumaneh & Oweisi v. IEPA, PCB 15-095; GBL Properties (6020 State) v. IEPA, PCB 15-163; Darji Enterprise v. IEPA, PCB 15-161; Spicuzza v. IEPA, PCB 15-162. The benefits of this decision will be to future UST Fund recipients who can look to this decision. Mot. at 4.

Petitioner states that:

With respect to the specifics of this appeal, the Board interpreted new statutory language, which poses novel issues pertaining to labor laws for the first time. In the process, the Board determined an important jurisdictional issue pertaining to its authority to review PLA requirements in an Agency determination letter. This case may serve as guidance in future PLA disputes. Mot. at 4.

For these reasons, petitioner requests that the Board authorize payment of legal fees from the UST Fund in the amount of \$10,315.

DISCUSSION

The Board allowed petitioner to file a statement of legal fees and its argument as to why the fees are eligible for reimbursement by March 23, 2015. The Board allowed the Agency 14 days after being served with petitioner's statement to file a response. As noted above, the Agency did not respond to petitioner's motion. Therefore, the Agency waived objection to the Board granting the motion; however, the waiver of objection does not bind the Board in its disposition of the motion. *See* 35 Ill. Adm. Code 101.500(d).

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." Illinois Ayers, slip op. at 7. In Illinois Ayers, the Board found that an appeal of the Agency's decision on a plan and budget is within the parameters of Section 57.8(l) of the Act (415 ILCS 5/57.8(l) (2012)). *Id.* at 8. Thus, the Board has found that obtaining plan approval is a prerequisite to seeking reimbursement from the UST Fund and has ordered reimbursement of legal fees where petitioner prevails in appealing the Agency's rejection of a plan under Section 57.7 of the Act. Prime Location Properties v. IEPA, PCB 09-67, slip op. at 3 (Nov. 5, 2009); Illinois Ayers, slip op. at 7-8. In this case, petitioner sought review of the Agency's decision to condition the petitioner's Stage 3 site investigation

plan and budget by requiring a PLA. The Board struck the requirement to use a PLA when performing site investigation and remanded the plan and budget to the Agency.

The Board finds that under Section 57.8(l) of the Act, petitioner's appeal falls within the parameters of the statute and petitioner prevailed before the Board. Therefore, the Board may consider exercising its discretion and award legal fees.

Whether to Award Fees

In determining whether to exercise its discretion to authorize payment, the Board considers the reasonableness of the requested legal fees and costs. PAK-AGS, slip op. at 6; Prime Location, slip op. at 4, citing Illinois Ayers, slip op. at 8-9; Swif-T Food Mart v. IEPA, PCB 03-185, slip op. at 3 (Aug. 19, 2004). As the party seeking reimbursement of fees, petitioner has the burden of presenting sufficient evidence with which the Board can determine the reasonableness of the fees. PAK-AGS, slip op. at 6; Prime Location, slip op. at 4, citing J.B. Esker & Sons, Inc. 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, 664 N.E. 2d 281, 288-89 (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." PAK-AGS, slip op. at 6; Prime Location, slip op. at 4, citing J.B. Esker, 325 Ill. App. 3d at 283, 757 N.E.2d at 1278.

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." PAK-AGS, slip op. at 6; Prime Location, slip op. at 4, citing Cretton v. Protestant Mem'l. Med. Cent., Inc., 371 Ill. App. 3d 841, 868, 864 N.E.2d 288, 315 (5th Dist. 2007); 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." PAK-AGS, slip op. at 6; 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, 864 N.E.2d at 315.

Petitioner's motion is accompanied by an affidavit of petitioner's legal counsel, Mr. Shaw (Aff.), and two summaries of fees and costs (Exh. 1 and Exh. 2). From the affidavit and summaries, the Board can determine the rate and hours billed; the person providing legal services; the date on which the person provided them; a description of those services; and the amount charged.

The Board's review of the summary of fees and costs shows that petitioner's legal services began in or around October 3, 2014, and continued to March 16, 2015. Aff. At 1; Exh. 1 at 1; Exh. 2. The summary of fees describes work performed and time allocated to that work in

tenths of an hour. Exh. 1 and 2. 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 petitioners is generally similar to information provided in UST cases in which the Board has directed the Agency to reimburse fees and costs. *See, e.g.*, PAK AGS, slip op. at 7; Swif-T, slip op. at 2-3 (Aug. 19, 2004).

The Board finds that petitioner's requested legal fees and costs to be reasonable. The petition for review filed with the Board in this case raised important issues regarding Agency determinations on reimbursement from the UST Fund. These considerations make petitioner's request consistent with other cases in which the Board has directed reimbursement for legal costs. *See, e.g.* PAK AGS; Chatham BP, LLC, v. IEPA, PCB 14-1 (Feb. 5, 2015). Accordingly, the Board will exercise its discretion under Section 57.8(l) of the Act and directs the Agency to reimburse petitioner from the UST Fund in the amount of \$10,315 in legal fees and costs. Below, the Board will set forth its order as modified by this award.

The Board incorporates by reference its findings of fact and conclusions of law from the March 5, 2015 interim opinion and order. This final opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board strikes the requirement that a project labor agreement (PLA) be used for site investigation activities from the Illinois Environmental Protection Agency's (Agency) denial letter. The Board remands the matter to the Agency to issue a decision on the Stage 3 site investigation plan and budget that does not include a requirement for a PLA
2. The Board exercises its discretion under Section 57.8(l) of the Act (415 ILCS 5/57.8(l) (2012)) and directs the Agency to reimburse petitioner \$10,315 in legal fees and costs from the UST Fund.

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) (2012); *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.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on May 21, 2015, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John T. Therriault, Clerk
Illinois Pollution Control Board