ILLINOIS POLLUTION CONTROL BOARD
January 23, 2014

ESTATE OF GERALD D. SLIGHTOM,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 11-25
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J.A. Burke):

The Estate of Gerald D. Slightom (Estate) appeals an October 29, 2010 determination of the Illinois Environmental Protection Agency (Agency) denying the Estate's request for reimbursement from the Leaking Underground Storage Tank (UST) Fund (Fund). The Estate's application concerns property at 103 North Third Street, Girard, Macoupin County.

On December 19, 2013, the Estate filed a motion requesting the Board to reconsider its November 7, 2013 Board order (Mot.) denying the Agency's motion to dismiss this appeal.[1] The Agency has not filed a response. The extensive procedural history and factual background of this case is discussed in prior opinions and not repeated here. *See*, *e.g.*, Estate of Slightom v. IEPA, PCB 11-25, slip op. at 1-4 (Nov. 7, 2013).

For the reasons below, the Board denies the Estate's motion for reconsideration. The Estate is entitled to a hearing on the merits of its petition to review the Agency's October 29, 2010 determination, if it decides to proceed to hearing.

SUMMARY OF THE BOARD'S NOVEMBER 7, 2013 ORDER

On September 10, 2013, the Agency filed a motion to dismiss this proceeding (Mot. Dismiss). The Agency stated that, after review of the Estate's appeal of the Agency's October 29, 2010 determination, and a re-review of the Agency's October 29, 2010 decision, the Agency "issued a final decision on September 9, 2013 allowing the deductible of $10,000 to apply to the site and allowed the previously deducted amount of $83,908.73." Mot. Dismiss at 3-4. The Agency stated that the contested issues presented in the Estate's petition for review "[had] been rendered moot" and the case must therefore be dismissed. *Id.* at 4.

[1] The motion refers to the Board's "November 14, 2013 order." The Board notes that the order was issued on November 7, 2013, and the Estate received the order on November 14, 2013. Mot. at 2.

The Estate responded to the Agency's motion to dismiss on September 24, 2013 (Resp. Dismiss), requesting that the Board deny the motion to dismiss and allow the Estate to submit proof of reasonable attorney's fees consistent with Dickerson Petroleum v. IEPA, PCB 09-87, slip op. at 15 (Sept. 2, 2010). Resp. Dismiss at 7.

By order of November 7, 2013 (Order), the Board denied the motion to dismiss. The Board stated that the Act does not allow the Agency to "re-review" its final decision. Order at 7. This was because the Appellate Court, in Reichold Chemicals, Inc. v. PCB, held that the Agency lacks authority to change or reconsider its final determinations. *Id.*, citing Reichold Chemicals, Inc. v. PCB, 204 Ill. App. 3d 674, 677-78, 561 N.E.2d 1343, 1345-46 (3d Dist. 1990), *appeal denied* 136 Ill.2d 554, 567 N.E.2d 341 (1991). The Board determined that the information relied upon by the Agency in its September 9, 2013 determination was the same information relied upon by the Agency in its October 29, 2010 determination, or at the very least was available to the Agency at the time of its October 29, 2010 determination. Order at 8. Reichold therefore required "the Board to find that the Estate is entitled to a hearing on its petition." *Id.*

The Board also distinguished the instant case from Dickerson in that, unlike that case,

> here the Board has not conducted a hearing and has not ordered the Agency to reissue its determination letter. Further, the Board has not made a finding on the merits of the petition for review. The Agency issued the September 9, 2013 letter without any direction from the Board. Accordingly, Dickerson does not apply at this point in the case. Order at 8.

At the time of issuing its order, the Board recognized the procedural impact that its decision could have, noting

> [t]he Board appreciates both parties' concerns as to the possible chilling impact of this statutory scheme on settlements and negotiations between the Agency and reimbursement applicants. Reichhold also recognized this concern when the Court explained "[r]equests to modify or reconsider are not permissible under the present statutory scheme. Any hardships resulting from this arrangement should be redressed by the Illinois Legislature." Reichhold, 204 Ill. App. 3d at 680. Order at 8.

The Board concluded that the Agency was not authorized to "re-review" its prior final determination and that the Agency's September 9, 2013 letter did not render this case moot. Order at 8. The Board therefore found the Estate was entitled to a hearing on the merits of its petition and denied the Agency's motion to dismiss.

MOTION FOR RECONSIDERATION

On December 19, 2013, the Estate requested the Board to reconsider its November 7, 2013 order. The Estate stated that, on September 4, 2013, and September 9, 2013, the Agency "unilaterally issued a new determination, approving substantially the $83,912.58 originally requested in 2010." Mot. at 1. Shortly after these determinations were made, the State of Illinois

issued a check for $83,908.73 to CSD Environmental, Inc., the consultant that performed the work approved by the Agency. *Id.* The Estate requests the Board reconsider its decision because "the Board was not appraised of the fact of actual payment to the consultant, and because the Board addressed a legal theory not addressed in the briefing of the parties." *Id.*at 2.

The Estate makes two arguments in support of its position:

A. The Agency, through its legal counsel, had inherent authority to pay the amount claimed in order to compromise the litigation. This is the right of legal counsel in general, and the Attorney General in particular, only constrained by the requirement that such payment cannot moot a lawful attorney fee claim.

B. The holding in Reichold Chemicals v. IEPA, 204 Ill. App. 3d 674 (3rd Dist. 1990) only precludes the Board from denying the applicant its statutory right to hearing on the basis of an information reconsideration process not contemplated in the statute. The decision does not preclude the Agency from voluntarily reconsidering its decision. Mot. at 2.

On the first point, the Estate argues that, while the Agency's technical staff may be well equipped to address environmental and administrative tasks, they lack the legal skills required to address and understand the law. Mot. at 4. It is therefore not unreasonable for a situation to arise where a lawyer on behalf of the client may give advice to compromise or capitulate. *Id.* The Estate argues

> there does not appear to be any legal basis that an attorney, particularly one operating on behalf of the Attorney General, can not as a matter of course in the exercise of professional judgment, compromise or refuse to defend a case, or advise their clients to do so. *Id.*

The Estate continues that "[a]ll that is asserted here is the right of a lawyer to compromise or pay a claim as part of an adjudicatory process." Mot. at 5. The Estate contends that, in paying the claim, "the lawsuit is rendered moot, unless there is an attorney-fee provision, in which case only the issue of attorney fees remain [*sic*] to be resolved." *Id.*, citing Hayman v. Autohaus on Edens, 315 Ill. App. 3d 1075, 1078 (1st Dist. 2000).

On the second point, the Estate argues that "the Appellate Court in Reichold did not actually hold that the Agency could not actually reconsider its decision." Mot. at 6. The Estate reasons that

> the proper holding to take from Reichold is not necessarily that the Agency can never reconsider its decision, but that its willingness to do so is not grounds to prejudice the applicant's statutory right to review a final decision. *Id.*

Therefore, while the Agency was authorized to order payment of the claim it had initially approved, it could not do so as to prejudice the Estate's statutory claim to attorney's fees. *Id.*

For these reasons, the Estate asks the Board "to deny the Agency's Motion to Dismiss, give leave for the Estate to file proof of its attorney's fees incurred, and for such other and further relief as it deems meet and just." Mot. at 7.

BOARD DISCUSSION

In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to determine whether the Board's decision was in error. 35 Ill. Adm. Code 101.902. A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence that was not available at the time of hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992). The Board may also reconsider evidence in the record that was overlooked. *See* People v. Packaging Personified, Inc., PCB 04-16, slip op. at 16 (March 1, 2012).

The Estate cites new evidence in that the State of Illinois issued a check for $83,908.73 to CSD Environmental, Inc. Mot. at 1. The new evidence, however, does not alter the Board's previous determination. The Estate further argues that the Board erred in its application of existing law. *Id.* at 2, 6. The Board has long held that Reichold does not allow the Agency to change or reconsider its final determinations. *See* Tolles Realty Co. v. IEPA, PCB 93-124, slip op. at 4-5 (June 5, 1997) (discussing various cases where the Board has disallowed the Agency to reconsider a prior final determination). The Agency has also made this observation. *See* Slightom, PCB 11-25, Agency Response to Petitioner's Motion for Summary Judgment at 4 (July 10, 2012) ("[Reichold] held that the [Agency] has no statutory authority to reconsider a permit decision."). As stated by the Board in Tolles, "it is undeniably true that in some instances, the application of the Reichold principle will deprive the [Agency] of the opportunity to correct mistakes." Tolles, PCB 93-124, slip op. at 9. But the Board cannot grant the Agency that power to reverse itself. *Id.*

Similarly, the Board is not persuaded to reconsider its position in regards to attorney's fees. The Board has not made a finding on the merits of the petition for review, has not conducted a hearing, and has not ordered the Agency to reissue its determination letter. *See* Slightom, PCB 11-25, slip op. at 8, citing Dickerson, PCB 09-87, slip op. at 15. Therefore, the Board cannot at this time find that the Estate has prevailed before the Board and as a result cannot award attorney's fees. The Board notes, however, that the Estate is entitled to a hearing on the merits of its petition to review the Agency's October 29, 2010 determination, if it so chooses. Slightom, PCB 11-25, slip op. at 8.

For these reasons, the Board is not persuaded to reconsider its November 7, 2013 order.

CONCLUSION

The Board denies the Estate's motion for reconsideration of the Board's November 7, 2013 order.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 23, 2014, by a vote of 4-0.

John T. Therriault, Clerk
Illinois Pollution Control Board