

ILLINOIS POLLUTION CONTROL BOARD

July 25, 2013

CHICAGO COKE COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 10-75
)	(Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent,)	
)	
NATURAL RESOURCES DEFENSE)	
COUNCIL and SIERRA CLUB,)	
)	
Intervenors.)	

ORDER OF THE BOARD (by D. Glosser):

On March 29, 2010, Chicago Coke Company (Chicago Coke) appealed the Illinois Environmental Protection Agency's (IEPA) determination that Chicago Coke's emission reduction credits (ERCs) are not available as emission offsets. Chicago Coke seeks to sell its ERCs to a buyer located in the same non-attainment area. On January 14, 2011, the Natural Resources Defense Council (NRDC) and the Sierra Club (collectively, NRDC/Sierra Club) filed a motion to intervene, which the Board granted on April 21, 2011. On May 2, 2013, the Board granted Chicago Coke's motion for summary judgment and denied IEPA and NRDC/Sierra Club motions for summary judgment.

On June 10, 2013, Chicago Coke filed a motion asking the Board to modify the final order and grant Chicago Coke attorney's fees pursuant to Section 10-55(c) of the Illinois Administrative Procedure Act (IAPA) (5 ILCS 100/10-55(c) (2010)). On July 9, 2013, Chicago Coke clarified that it was seeking attorney's fees only from IEPA (Mot.). On July 12, 2013, IEPA responded in opposition to the motion to modify (Resp.).

For the reasons described below the Board denies the motion to modify.

PROCEDURAL HISTORY

On May 2, 2013, the Board found that based on the arguments and the record in this proceeding, there were no genuine issues of material fact, and summary judgment was appropriate. Further, the Board found that Chicago Coke established that its ERCs were valid under Illinois law, and the Board granted Chicago Coke's motion for summary judgment. The Board denied IEPA's and NRDC/Sierra Club's motions for summary judgment.

On June 10, 2013, Chicago Coke filed a motion asking the Board to modify the final order and grant Chicago Coke attorney's fees pursuant to Section 10-55(c) of the IAPA (5 ILCS 100/10-55(c) (2010)). On July 9, 2013, Chicago Coke clarified that it was seeking attorney's fees only from IEPA. On July 12, 2013, IEPA responded in opposition to the motion to clarify.

STATUTORY BACKGROUND

Section 1-20 of the IAPA defines "Agency" in part as

each officer, board, commission, and agency created by the Constitution, whether in the executive, legislative, or judicial branch of State government, *but other than the circuit court*; each officer, department, board, commission, agency, institution, authority, university, and body politic and corporate of the State; each administrative unit or corporate outgrowth of the State government that is created by or pursuant to statute, other than units of local government and their officers, school districts, and boards of election commissioners; and each administrative unit or corporate outgrowth of the above and as may be created by executive order of the Governor. 5 ILCS 100/1-20 (2010) (emphasis added).

Section 10-55(c) of the IAPA provides:

In any case in which a party has any administrative rule invalidated by a court for any reason, including but not limited to the agency's exceeding its statutory authority or the agency's failure to follow statutory procedures in the adoption of the rule, the court shall award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees. 5 ILCS 100/10-55(c) (2010).

MOTION TO MODIFY

Chicago Coke argues that pursuant to Section 10-55(c) of the IAPA (5 ILCS 100/10-55(c) (2010)) it is entitled to recover the reasonable expenses of litigation. Mot. at 1-2. Chicago Coke notes that it appealed IEPA's decision that ERCs were not available, and that decision by IEPA was based on IEPA's "five-year limitation". Mot. at 2. Chicago Coke further notes that the Board found that IEPA's five-year guideline was invalid as the guideline had not been properly promulgated as a rule by either the Board or IEPA. *Id.*, citing Chicago Coke v. IEPA et al., PCB 10-75, slip op. 29 and 31 (May 2, 2013).

Chicago Coke maintains that Section 10-55(c) of the IAPA (5 ILCS 110/10-55(c) (2010)) "requires" an award of expenses and is mandatory. Mot. at 2-3, citing Citizens Organizing Project v. Department of Natural Resources, 189 Ill. 2d 593, 727 N.E.2d 195, 244 (2000). Chicago Coke asserts that the Illinois Supreme Court recently interpreted Section 10-55(c) of the IAPA to find that the "'court' invalidating the purported rule is the only appropriate venue for awarding costs and fees." Mot. at 3, citing Illinois Department of Financial and Professional Regulation v. Rodriguez, 2012 IL 113706, 983 N.E.2d 985 (rehearing denied 1/28/13). Chicago Coke indicates that the Court concluded that Section 10-55(c) of the IAPA does not create a

separate cause of action and fee requests must be directed to the “court” that invalidates the purported rule. *Id.* Therefore, Chicago Coke argues the Board is the appropriate place to award fees and costs mandated by Section 10-55(c) of the IAPA (5 ILCS 100/10-55(c) (2010)) and in fact is the only place Chicago Coke can obtain the relief. Mot. at 3, 4.

Chicago Coke argues that the Board awards attorney’s fees under the leaking underground storage tank program pursuant to Section 57.8(1) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(1) (2010)), and although Chicago Coke’s request is pursuant to another statute, the result is the same. Mot. at 4. Chicago Coke maintains that the Board is the exclusive forum for hearing appeals involving IEPA regulations, and therefore the Board “possesses the full authority to proceed as a ‘court’ as contemplated by Section 10-55(c) of the IAPA”. *Id.*

Chicago Coke opines that if the Board were to decide the Board lacks the authority to award costs and fees under Section 10-55(c) of the IAPA, when the Board invalidates an IEPA “rule” the litigants in environmental matters would be unable to recover what the IAPA specifically provides for. Mot. at 5. Chicago Coke asserts:

The purpose of the fee-shifting provisions of the [I]APA is to discourage enforcement of invalid rules. The fee-shifting provision also gives entities subject to invalid rules the incentive and ability to challenge doubtful rules. Mot. at 5, citing Citizens Organizing Project, 189 Ill. 2d 593, 727 N.E.2d 195 (2000).

Chicago Coke provides invoices and an affidavit to support its request for attorney’s fees. Mot. at 5, Exh. C and Group Exh. 1.

RESPONSE

IEPA argues that the Act does not authorize relief for invalidation of a rule and Section 10-55(c) of the IAPA (5 ILCS 100/10-55(c) (2010)) does not apply to Board orders. Resp. at 2. IEPA maintains that the right to recover attorney’s fees does not exist at common law and therefore may only be awarded where there is specific statutory authority or agreement by parties. *Id.*, citing Carson Pirie Scott & Co. v. Illinois Department of Employment, 131 Ill. 2d (1989); Gonzales-Blanco v. Clayton, 120 Ill. App. 3d 848 (1st Dist. 1983); and ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325 (3rd Dist. 1997). Furthermore, IEPA opines that it is well-established that statutes which confer the authority to award attorney’s fees must be strictly construed. *Id.*

IEPA asserts that in construing a statute, the Board must look to the “plain and ordinary meaning as evidenced by the language” of the statute and once the meaning is established give effect to that meaning. Resp. at 2, citing Berrios v. Rybacki, 236 Ill. App. 3d 140, 146-47 (1st Dist. 1992), *appeal denied*, 148 Ill. 2d 639 (1993). IEPA notes that the Board is created under the Act with the powers and authorities described in the Act. Resp. at 3, citing People v. Fiorini, 143 Ill. 2d 318 (Section 31(b) of the Act “provides for the filing of a complaint before the [Board], an administrative agency established under the [A]ct”); Lombard v. PCB, 66 Ill. 2d 503 (“An administrative agency, such as the [Board], has no greater powers than those conferred

upon it by the legislative enactment creating it”). IEPA further notes that this proceeding was brought under Section 40 of the Act (415 ILCS 5/40 (2010)) and that section does not authorize an award of attorney’s fees upon invalidation of an IEPA rule. Resp. at 3.

IEPA maintains that Section 10-55(c) of the IAPA (5 ILCS 100/10-55(c) (2010)) clearly authorizes a “court” to award attorney’s fees, but the Board is not a “court”. Resp. at 3-4. IEPA offers that the IAPA does not define “court” but it does define “agency” and the definition of “agency” specifically includes the Board. *Id.* Furthermore, IEPA states that courts are expressly excluded from the IAPA definition of “agency” and throughout the IAPA, a court of law is distinguished from an administrative agency. Resp. at 4. IEPA states that Chicago Coke’s “argument that the term ‘court’ in Section 10-55(c) includes the Board[,] requires an interpretation that a board is both an ‘agency’ and a ‘court’ under the IAPA, an interpretation that is unsupported by the IAPA.” *Id.*

IEPA opines that Section 10-55 of the IAPA (5 ILCS 100/10-55 (2010)) itself distinguishes between a “court” and boards of the State. Resp. at 4. IEPA states: “[t]he section clarifies that the term ‘court’ means ‘court for judicial review’, which does not include the Board.” *Id.* IEPA claims that Section 10-55(a) establishes criteria for recovery of attorney’s fees in an administrative proceeding while Section 10-55(c) establishes the criteria for recovery of fees in circuit court. *Id.* IEPA further opines that in paragraph (a) the legislature is using the term “court” to refer to a court of law and “agency” to refer to administrative bodies as defined by the IAPA, and in paragraph (c) the term “court” is not distinguished from the use of the term in paragraph (a). *Id.*

IEPA argues:

Under well-established axioms of statutory interpretation, undefined terms in a statute must be given their plain and ordinary meaning and shall be construed with other pertinent statutory provisions. *See e.g. Town & Country Utilities, Inc. v. PCB*, 225 Ill. 2d 103, 117 (2007) (statutory phrases are to be interpreted along with other pertinent provisions of the statute); *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 504 (2000) (“One of the fundamental principles of statutory construction is to view all provisions of an enactment as a whole . . . [w]ords and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute.”) Since the Board is an agency, and not a member of the judiciary, the term “court” as used in Section 10-55 does not include the Board. Resp. at 5.

IEPA asserts that had the legislature wished to allow agencies to award attorney’s fees it could have done so; however the legislature did not include the term “agency” with “court”. *Id.*

In support of its position, IEPA cites to a case by the Illinois Court of Claims, *Ardt v. Illinois*, 48 Ill. Ct. Cl. 429 (Ill. Ct. Cl. 1995). In *Ardt*, the Court of Claims reviewed the jurisdictional scope of Section 10-55(c) of the IAPA (5 ILCS 100/10-55(c) (2010)). Resp. at 7. IEPA explains that in *Ardt* the plaintiff sought litigation expenses against the State and the Illinois Department of Professional Regulation for invalidation of an administrative rule. *Id.*

The Court of Claims found that it lacked jurisdiction because the term “court” was not intended to grant jurisdiction to the Court of Claims, but rather only applied to judicial proceedings. *Id.*

IEPA argues that Chicago Coke’s counsel admits that the circuit court and not the Board is the appropriate forum to seek award of attorney’s fees pursuant to Section 10-55(c). Resp. at 8. IEPA refers to entries in the invoices included with the motion to modify and the motion for declaratory judgment filed in circuit court for support of its assertion. *Id.* IEPA also specifically challenges the request for attorney’s fees arguing that more detail is required and asking for a hearing on reasonableness if the Board decides to grant the motion. Resp. at 9.

DISCUSSION

The Board begins by setting forth the relevant portions of the May 2, 2013 opinion and order in this case. The Board then explains its finding.

May 2, 2013 Opinion

The Board in its May 2, 2013 opinion and order stated:

IAPA defines a rule as “each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy . . .” 5 ILCS 100/1-70 (2010). The law is well settled that a statement of general applicability, not properly adopted under the Illinois Administrative Procedure Act, is invalid. *See Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169, 174-75, 470 N.E.2d 1029, 1032 (1984); *Hernandez v. Fahner*, 135 Ill. App. 3d 372, 380-83, 481 N.E.2d 1004 (1st. Dist. 1985). Where a rule affects the private rights and procedures to persons outside an agency, it constitutes a rule. *Sleeth v. Department of Public Aid*, 125 Ill. App.3d 847, 853, 466 N.E.2d 703 (3rd Dist. 1984). In *Kaufman Grain Co., Inc. v. Director, Dept. of Agriculture*, 179 Ill. App. 3d 1040, 1047-48, 534 N.E.2d 1259, the Court found a Department of Agriculture policy under which it adjudicated disputes constituted a rule within the meaning of the IAPA, and the Department’s failure to properly adopt the policy renders the rule invalid. *Kaufman Grain*, 179 Ill. App. 3d at 1047-48.

The courts have held that “not all statements of agency policy must be announced by means of published rule.” *Kaufman Grain*, 179 Ill. App. 3d at 1047-48. When an administrative agency interprets statutory language applied to a particular set of facts, adjudicated cases are a proper alternative method of announcing policies. *Id.*, citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426 (1969); *Board of Trustees, Prairie State College v. Illinois Educational Labor Relations Board*, 173 Ill. App. 3d 395, 412, 527 N.E.2d 538, 549-50 (4th Dist. 1988). *See also Alternat Fuels, Inc. v. Director of IEPA*, 215 Ill.2d 219, 246, 294 (2004) (where an incorrect interpretation of statutory language supporting the issuance of a violation applies only to a single violator, such interpretation of statutory language does not constitute a rule of general applicability). *Chicago Coke v. IEPA et al.*, PCB 10-75 slip op. at 28-29 (May 2, 2013).

The Board continued and found that:

IEPA's policy is not an interpretation of statutory language applying to a single source. IEPA states that this is a policy applied to all sources. Clearly IEPA has a policy of general applicability, which has not been adopted under the provisions of the IAPA. Therefore, the Board finds that IEPA's five-year guideline is invalid. *Id.*

Board Finding

Based on the Board's decision, Chicago Coke argues that pursuant to Section 10-55(c) of the IAPA, Chicago Coke is entitled to attorney's fees. Specifically Chicago Coke maintains that the Board declared IEPA's rule invalid, and thus Chicago Coke is entitled to attorney's fees. In contrast, IEPA disagrees that Chicago Coke is entitled to attorney's fees, maintaining that the Board is not authorized to grant such relief under the IAPA. Thus, the issue before the Board is whether or not the Board is authorized to award attorney's fees to Chicago Coke pursuant to the provision of the IAPA.

When dealing with an issue of statutory interpretation, the Illinois Supreme Court has stated:

The fundamental principle of statutory construction is to ascertain and give effect to the legislature's intent. The language of the statute is the most reliable indicator of the legislature's objectives in enacting a particular law. We give statutory language its plain and ordinary meaning, and, where the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction. We must not depart from the plain language of the Act by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent. Moreover, words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute. Town & Country Utilities, Inc. v. IPCB, 225 Ill.2d 103, 866 N.E.2d 227 (2007) (internal citations omitted).

Applying the fundamental principle of statutory construction, the Board finds that the IAPA does not grant the Board the authority to authorize reimbursement to Chicago Coke for its costs of litigation. The IAPA, at Section 1-20 defines "Agency" in part as

each officer, board, commission, and agency created by the Constitution, whether in the executive, legislative, or judicial branch of State government, *but other than the circuit court*; . . . each administrative unit or corporate outgrowth of the State government that is created by or pursuant to statute, . . . (emphasis added) 5 ILCS 100/1-20 (2010).

Thus the plain language of the IAPA specifically excludes a circuit court from the definition of "agency". See 5 ILCS 100/1-20 (2010).

Furthermore, Section 10-55(a) of the IAPA provides that in contested cases initiated “by any agency that does not proceed to court for judicial review . . . any allegation made by the agency without reasonable cause found to be untrue,” subjects that agency to the payment of reasonable expenses. 5 ILCS 100/10-55(a) (2010). The IAPA uses “court” and “agency” as two separate and distinct phrases in Section 10-55(a). Then in Section 10-55(c) of the IAPA (5 ILCS 100/10-55(c) (2010)), the IAPA uses both “court” and “agency” again in providing for the reimbursement of attorney’s fees. *See* 5 ILCS 100/10-55(c) (2010). Therefore, it is clear that the IAPA does not use “court” and “agency” interchangeably and a different meaning must be ascribed to both. The Board therefore finds that Section 10-55(c) of the IAPA grants courts the authority to award attorney’s fees when a court invalidates a rule; however, by definition the Board is not a court under the IAPA. The Board finds that it lacks the authority under Section 10-55(c) of the IAPA (5 ILCS 100/10-55(c)(2010)) to award attorney’s fees.

The cases cited by Chicago Coke do not persuade the Board that the Board’s reading of Section 10-55(c) of the IAPA is incorrect. Chicago Coke relies on cases that indicate the request for attorney’s fees must be made at the time the rule is invalidated and with that court, while that court retains jurisdiction. Rodriguez, 2012 IL 113706 ¶15. As the Board reads Section 10-55(c) to apply only to courts and not the Board, which is an “agency” as defined by the IAPA, the Board’s decision is not contrary to Rodriguez.

CONCLUSION

While the Board found that IEPA’s use of a five-year guideline was invalid, the Board is not authorized under the IAPA to award attorney’s fees to Chicago Coke. Therefore, Chicago Coke’s motion to modify the Board’s final order is denied.

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) (2010); *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 Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on July 25, 2013, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board