

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In re Application No. GA-079254 of

KLEEN ENVIRONMENTAL  
TECHNOLOGIES, INC.

For a Certificate of Public Convenience and  
Necessity to Operate Motor Vehicles in  
Furnishing Solid Waste Collection Service

DOCKET NO. TG-040248

RESPONSE OF COMMISSION STAFF  
TO STERICYCLE OF WASHINGTON  
INC.'S MOTION FOR AWARD OF  
ATTORNEYS' FEES AND COSTS

**I. INTRODUCTION**

1 Protestant Stericycle of Washington, Inc. (“Stericycle”) has filed a motion asking the Commission to require the Applicant in this proceeding, Kleen Environmental Technologies, Inc. (“Kleen”) to pay Stericycle a total of \$59,969.00 in attorneys’ fees. *See Declaration of Stephen B. Johnson in Support of Protestant Stericycle of Washington, Inc.’s Motion for Award of Attorneys’ Fees and Costs, at ¶¶ 23, 26-27.* Stericycle contends that the Commission has authority “under RCW chapters 80 and 81 and its inherent powers as an adjudicative tribunal” to award attorneys’ fees. After reviewing the motion and the legal arguments therein, however, Staff concludes that under Washington law, the Commission does not have the authority to make such an award. Staff, therefore, recommends that the motion should be denied.<sup>1</sup>

**II. ARGUMENT**

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<sup>1</sup> Staff addresses only Stericycle’s legal arguments in this response to the motion for attorneys’ fees. Staff does not address Stericycle’s factual contentions.

**A. The Commission’s authority consists of powers expressly granted, together with those necessarily implied from such grants.**

2 The Legislature has conferred a broad array of statutory authority upon the Commission, pursuant to Titles 80 and 81 RCW. Nevertheless, as an administrative agency, the Commission’s authority under Washington law extends only to those powers that are expressly granted, together with those that are necessarily implied from such statutory grants. *Tuerk v. Dep’t of Licensing*, 123 Wn. 2d 120, 124-25, 864 P. 2d 1382 (1994). Thus, in order for the Commission to award attorneys’ fees incurred in a contested proceeding, there must exist some express or implied statutory power to do so.

3 Stericycle contends that the Commission may require Kleen to pay Stericycle its attorneys' fees, on the grounds that Kleen has acted in bad faith. In Washington, attorneys’ fees may be awarded only if authorized by contract, statute, or [some] recognized ground in equity. *Bowles v. Department of Retirement Systems*, 121 Wn. 2d 52, 70, 847 P. 2d 440 (1993); *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 926-27, 982 P. 2d 131 (1999). Stericycle is correct that “bad faith” has been recognized as an equitable basis for an award of attorneys’ fees. *In re Recall of Pearsall-Stipeck*, 136 Wn. 2d 255, 266-67 & n. 6, 961 P. 2d 343 (1998); *Rogerson Hiller, supra*. However, the Washington cases concerning “bad faith” have all involved attorney fee awards by the courts.

4 In fact, all of the Washington cases cited by Stericycle in its motion, with one exception (*Cohn v. Department of Corrections*, 78 Wn. App. 63, 895 P. 2d 937 (1995)), concern the power of the *courts*, not administrative agencies, to award attorneys’ fees. *In re Recall of Pearsall-Stipeck*, 136 Wn. 2d 255, 961 P. 2d 343 (1998); *Wilson v. Henkle*, 45 Wn. App. 162, 724 P. 2d 1069 (1986); *Rogerson Hiller, supra*; *Seals v. Seals*, 22 Wn. App. 652, 590 P. 2d 1301 (1979); *Hsu Ying Li v. Tang*, 87 Wn. 2d 796, 557 P. 2d 342 (1976); *Watson*

v. *Maier*, 64 Wn. App. 889, 827 P. 2d 311 (1992); *State v. S.H.*, 102 Wn. App. 468, 8 P.3d 1058 (2000). Some of these cases rely on the “inherent power” of the court to make such an award. See *Pearsall-Stipeck*, 136 Wn. 2d at 267 & n. 6; *Wilson*, 45 Wn. App. at 174-75; *State v. S.H.*, 102 Wn. App. at 474. Some cases rely upon Civil Rule 11, which allows for impositions of sanctions for improper conduct in court proceedings. See *Pearsall-Stipeck*, *supra*; *Watson v. Maier*, 64 Wn. App. at 891. Others do not cite the specific authority for the court’s awarding of fees. Nevertheless, none of these cases involve the awarding of fees by an administrative agency.<sup>2</sup>

5           This is a critical distinction, because, as set forth below, two recent Washington cases have held that the authority of administrative agencies to award attorneys’ fees is more limited than that of the courts.

**B.    In *Trachtenberg v. Department of Corrections* and *Cohn v. Department of Corrections*, the Court of Appeals held that an administrative agency’s statutory adjudicative authority did not include the authority to award attorneys’ fees.**

6           Stericycle cites only briefly to *Cohn v. Department of Corrections*, 78 Wn. App. 63, 895 P. 2d 857 (1995), and does not refer at all to *Trachtenberg v. Washington State Dep’t of Corrections*, 122 Wn. App. 491, 93 P. 2d 217 (2004). However, Staff believes these cases are highly significant for their rulings on the scope of an administrative agency’s authority to award attorneys’ fees.

7           Both cases involved petitioners who appealed disciplinary actions taken against them to the State Personnel Appeals Board (“the Board”). Although their appeals were successful,

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<sup>2</sup> Stericycle also cites to a number of federal cases involving the awarding of attorneys’ fees by the courts. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S. Ct 2455, 65 L. Ed. 2d 488 (1980); *Bower v. Weisman*, 674 F. Supp. 109, 112, (S.D.N.Y. 1987). Again, these cases do not address the question of whether an administrative agency may award such fees.

resulting in restatement to their positions and back pay, the Board held that it did not have statutory authority to award the petitioners attorneys' fees, as they had requested. The Court of Appeals agreed in both instances.

8 In *Trachtenberg*, 122 Wn. App. at 492, the Court noted:

The State Personnel Appeals Board (Board) has exclusive jurisdiction to hear civil service employee disciplinary appeals. As an administrative agency, the Board has only the authority delegated to it by the legislature. The legislature did not include attorney fees in the enumerated list of remedies available for Board appeals.

The employees in *Trachtenberg* and *Cohn* had sought attorneys' fees pursuant to RCW 49.48.030, which provides in pertinent part:

In any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer[.]

9 Even though in *Trachtenberg* and *Cohn* there was a statute expressly providing for attorneys' fees in certain instances (in contrast to here, where there is none), and even though RCW 49.48.030 was a remedial statute which is therefore liberally construed to effectuate its purpose, *International Ass'n of Fire Fighters Local 46 v. City of Everett*, 146 Wn. 2d 29, 41, 42 P. 3d 1265 (2002), the court nevertheless found that the Board lacked authority to award attorneys' fees. A Board appeal was not an "action" for a "judgment for wages" under the statute.

10 Furthermore, the Personnel Appeals Board, even though it does have adjudicatory authority—as does the Commission—nevertheless operates pursuant to a statutory framework. Both *Cohn* and *Trachtenberg* confirm this. In *Cohn*, 78 Wn. App. at 67, the court noted that "Chapter 41.64 RCW and Title 358 WAC governs the actions of the Board,

whose purpose is ‘to provide a system of adjudication of appeals for eligible state employees.’” *Cohn* continues:

WAC 358-01-030 provides that the Board’s general duties are to hear appeals and issue findings, conclusions, and orders; establish general policies, rules, and regulations; maintain a record of all official actions; and “[p]erform all the powers and duties specified by chapter 41.64 RCW or as otherwise provided by law.” Neither WAC 358-01-030 nor any provision in chapter 41.64 explicitly furnishes the Board with the power to award attorney fees or even mentions attorney fees.

*Id.* at 67-68. The court concluded that “[s]ince agencies do not have implied authority to determine issues outside of that agency’s delegated functions or purpose,” the Board lacked both express or implied authority to award attorneys’ fees. *Id.* at 68.

11            *Trachtenberg* analyzed the issue in similar fashion. It noted that under the Personnel Appeals Board statutes, the Board may grant several remedies to the employee, including restoration of back pay, sick leave, vacation accrual, and retirement credits. However, “[a]ttorney fees are notably absent from the enumerated remedies available. If the legislature had intended attorney fees to be available for Board appeals, the logical place to include that would be in the statutes governing the Board.” *Trachtenberg*, 122 Wn. App. at 496. The court further ruled that despite the Board’s adjudicatory authority to hear appeals and issue orders, “administrative appeals . . . are not substitutes for independent court proceedings. Additionally, administrative agencies, like the Board, do not have authority to determine issues outside of their delegated functions.” *Id.* at 497. Thus, the Board did not have authority to award attorneys’ fees.

12            Stericycle contends that the court in *Cohn* held that an award of attorneys’ fees “was not warranted under the facts presented,” suggesting that the Board could have granted fees

upon some “recognized equitable ground,” which would presumably include bad faith. (Stericycle Motion at 30-31.) Staff believes that this misreads the holding of the court. The *Cohn* court did make initial reference to the “American rule,” which permits attorneys’ fees only if authorized by statute, by agreement of the parties (contract), or upon a recognized ground in equity. However, the remainder of the opinion focuses entirely on the statutory authority—or lack of authority—of an administrative agency to award attorneys’ fees. Indeed, as *Trachtenberg* stated, “the central holding of *Coh[n]* is that attorney fees cannot be awarded under RCW 49.48.030 for an appeal of a disciplinary action to the Board because of the limited statutory authority of the Board.” *Trachtenberg*, 122 Wn. App. at 495 & n. 1.

**C. The rulings in *Trachtenberg* and *Cohn* are applicable to the Commission in this case.**

13 The Commission, like the Personnel Appeals Board, has both rulemaking and adjudicatory functions. Like the Board, it can hold hearings, and issue findings, conclusions, and orders. It likewise has statutory authority to order certain remedies (*see, e.g.*, RCW 81.04.220 and RCW 81.04.240, which authorize the Commission to order reparations or refunds for company overcharges), and to issue penalties for violations of laws, rules, or orders. RCW 81.04.380-.405.

14 No Commission statute, however, provides for the award of attorneys’ fees. Stericycle has not cited to any Commission case in which such fees have been awarded, nor has Staff located any such case.<sup>3</sup> Moreover, *Trachtenberg* and *Cohn* held that an agency’s

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<sup>3</sup> The Commission has, in a previous case, noted limitations on its remedial authority. *See* Docket No. UT-900603, *Sharad M. Bhatnagar v. US West Communications*, Second Supplemental Order, at 5 (June 5, 1991) (“The Commission does not have jurisdiction to

adjudicatory authority was not a sufficient basis from which to infer the authority to award attorneys' fees.

15 Stericycle cites two cases from Colorado and Delaware, in which the courts found that administrative agencies in those states did have the authority to award attorneys' fees. *Hawes v. Colorado Div. Of Insurance*, 65 P. 3d 1008 (Colo. 2003);<sup>4</sup> *Brice v. State Dep't of Correction*, 704 A. 2d 1176 (Del. 1998). However, Staff notes that other states have not agreed with this view. Most notably, in *Oregon Occupational Safety and Health Div. v. Don Whitaker Logging, Inc.*, 861 P. 2d 368 (Or. App. 1993), the court held that the Oregon Workers' Compensation Board lacked authority to award attorneys' fees in contested citation hearings. The court found that that the Board lacked express statutory authority, and that a statute authorizing it to "[t]ake any. . .action necessary for a full and fair disposition of the case" did not provide the necessary authority. The Board continued:

Employer next argues that the Board had discretion to award attorney fees under the "equitable exception" to the general rule. The basis of that exception is the inherent power of courts of equity to award attorney fees in some circumstances, even in the absence of specific statutory authority. Administrative agencies, however, are creatures of statute and do not have the powers of a court of equity. Rather, they are limited to the authority conferred on them by statute. The Board did not err in denying employer's request for attorney fees and costs.

*Id.* at 369 (citations omitted). *See also Laborer's Int'l Union of North America, Local 478 v. Burroughs*, 541 So. 2d 1160 (Fla. 1989) (County fair housing and employment appeals

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award money damages, but does have jurisdiction to assess a penalty against the company in the event of a wrongful disconnect").

<sup>4</sup> Two justices dissented from the ruling in *Hawes*, and would have ruled that the administrative agency lacked express or implied authority to award attorneys' fees.

board lacked statutory authority to award attorneys fees in employment discrimination cases; administrative agencies can award such fees where authorized by statute).

16           In any event, however, regardless of the rulings of the courts of other states, the decisions in *Trachtenberg* and *Cohn*, construing Washington law, have held that administrative agencies having adjudicatory power similar to the Commission's lacked express or implied statutory authority to award attorneys' fees. Those decisions appear to apply to the Commission in this case as well.

### III. CONCLUSION

17           For the reasons set forth above, Staff recommends that the motion for attorneys' fees and costs should be denied.

DATED this 13<sup>th</sup> day of December, 2004.

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