

Editor's Note: Reconsideration granted by Order dated Jan. 26, 1998; reversed on reconsideration, Hilton v. OSM, 145 IBLA 167 (Aug 10, 1998).

JERRY HYLTON ET AL.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 96-475

Decided November 19, 1997

Petition for award of costs and expenses, including attorney fees, under 30 U.S.C. § 1275(e) (1994) and implementing rules. IBLA 93-618.

Petition denied.

1. Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Final Order—Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally

A petition for award of costs and expenses including attorney fees is denied when Petitioners fail to show an order issued by IBLA, upon which their petition depends, served to correct an alleged error by OSM in handling their citizen complaint.

APPEARANCES: Walton D. Morris, Esq., Charlottesville, Virginia, and Gary Scott Bradshaw, Esq., Big Stone Gap, Virginia, for Petitioners; J. Nicklas Holt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On July 25, 1996, Jerry and Jenny Hylton filed a petition for award of costs and expenses pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275(e) (1994), and implementing regulations. Petitioners had earlier filed a citizen complaint against Kodiak Mining Company (Kodiak) with the Office of Surface Mining Reclamation and Enforcement (OSM). Their petition for a costs award is predicated on the relevance to their complaint of a decision by the Interior Board of Land Appeals (IBLA), issued following settlement of their dispute with Kodiak. The IBLA decision dismissed an appeal alleging OSM erred in handling their complaint; their appeal was docketed on August 19, 1993, as IBLA 93-618. See Jerry Hylton, 135 IBLA 369, 372 (1996), wherein their appeal was dismissed as moot.

The history of Petitioners' citizen complaint against Kodiak is set out in Jerry Hylton, supra, and will not be repeated in detail; therein, Petitioners sought replacement of an interrupted water supply to a lake. Their complaint, which was filed on July 16, 1992, was prosecuted through several levels of enforcement before State and Federal agencies and also involved proceedings before a Federal district court. The issue presented by Petitioners' appeal to IBLA was limited to a procedural question whether OSM erred by allowing the State time in which to request informal review of a finding by OSM that State inaction on Petitioners' complaint was not justifiable. Id. at 369. As was reported at 135 IBLA 372, the appeal was dismissed when we found that the issue Petitioners sought to raise was academic, there being no effective relief we could grant after the informal review to which they had objected led to an order favorable to them 6 months earlier, on February 18, 1993. Id. at 371.

Meanwhile, on August 16, 1993, payment of \$31,044 for attorney fees was approved in Jerry Hylton v. George W. Barnette, Jr., Civil Action No. 93-0046-B (W.D. Va.), pursuant to an agreed settlement of Petitioners' Federal lawsuit against Kodiak (Barnette Settlement). Three days later, Petitioners filed their appeal to IBLA; their statement of reasons declared the appeal was taken "solely because the decision at issue authorizes the Virginia Division of Mined Land Reclamation to request informal review from OSM's Deputy Director." We found this appeal was not justiciable and dismissed it on June 6, 1996.

The amount now claimed by Petitioners for their fees and expenses is \$24,093.75; they state they will claim more, however, billed at a higher rate, "at the conclusion of all briefing." Beginning their fee itemization in October 1992, Petitioners' attorneys explain there are four elements in their costs claim: (1) initial investigation of the citizen complaint, amounting to 12 lawyer-hours; (2) about 14 hours expended on questions of Virginia law affecting the request for informal review; (3) 71 hours spent contesting the right of Virginia regulators to request informal review; and (4) 29 hours used to prepare the fee petition. The time is billed at \$125 for each hour of attorney Bradshaw's work, and at \$200 for each hour of attorney Morris' work on the first three time categories enumerated above. It is stated that \$225 will be charged for each hour spent by Morris on the fee petition.

The Barnette Settlement recites that Bradshaw was paid an hourly rate of \$125, while Morris received \$200 for work done in connection with the Federal district court action; it also states that Petitioners "agree to release the Barnettes in accordance with the attached general release document upon payment to them of \$17,500.00 in damages and \$31,044.00 for their award of attorneys' fees." (Barnette Settlement at 4, 6.) In an affidavit dated September 27, 1996, and attached to OSM's answer to the fee petition, Dennis Barnette, a Kodiak owner, explains how he paid Petitioners' attorney fees:

I agreed to pay a lump sum for attorney fees to the Hylton's counsel. The Hylton's counsel insisted that the language of the

agreement should reflect an hourly rate of \$200.00 per hour. It was my intention only to pay an agreed lump sum, and I acquiesced in the Hylton's counsel's demand that the settlement agreement language show this sum as having been computed at \$200.00 per hour.

(Affidavit of Dennis Barnette at 2.) Explaining that he is an owner of Kodiak, Barnette says he entered into the fee payment agreement and damage settlement for two reasons: because Petitioners' citizen complaint had caused the State to delay issuance of a needed mining permit to his company; and because he wished to terminate Petitioners' pending action against him in U.S. District Court. According to Barnette, the IBLA appeal (which had not then been filed), played no part in his decision to settle with Petitioners. Id.

Petitioners contend that they are both eligible for and entitled to the requested costs and expenses under regulations implementing section 525(e) of SMCRA and relevant case law. Their petition is opposed by OSM as unauthorized and incomplete under Departmental regulations governing such awards and because it allegedly fails to state a valid claim for attorney fees. We find the fee petition presents a question whether, on the facts of this case, Petitioners qualify for an award of costs and expenses including attorney fees. We conclude that they do not.

Section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1994), authorizes the Secretary of the Interior to make an award of costs including attorney fees to any person "[w]hen an order is issued * * * as a result of any administrative proceeding * * * as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings." Implementing this provision, 43 C.F.R. § 4.1294(b) authorizes an award from OSM to anyone who "prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues." When applying these rules to a costs petition's validity that depends on an order issued by IBLA, there must be a showing that OSM committed some error in handling a citizen complaint that the appeal to IBLA helped correct. Kentucky Resources Council v. OSM, 137 IBLA 345, 352 (1997).

[1] No such showing has been made in this case. While it is clear that Petitioners were successful in using their citizen complaint and Federal court action to block issuance to Kodiak of a permit necessary to enable them to continue their business, that success was unrelated to, and preceded the filing of their appeal to IBLA. The only issue raised by their IBLA appeal was procedural; it concerned whether OSM should have allowed the State time to request informal review of an adverse ruling. This issue was not decided by our 1996 opinion, the question long before then having ripened into an order favorable to Petitioners; because the question was never fairly before us, our order dismissing Petitioners'

appeal did not result in any further enforcement action on their complaint, and, so far as is known, there has been none since our Decision was belatedly issued on June 6, 1996. See Jerry Hylton, supra, at 372. Although Petitioners argue that their IBLA appeal "contributed significantly to their ability to obtain redress from Kodiak," (Petition at 7), they do not explain how this result was obtained, and no objective evidence of the fact alleged appears in the record. While Petitioners speculate that the IBLA appeal may have some future effect, no explanation of that conclusion is offered, and none is apparent. It is concluded that their appeal was without foundation when it was taken, as we found when we dismissed it in 1996, and can provide no foundation for an award of costs and expenses. See 43 C.F.R. § 4.1294(b); Kentucky Resources Council, supra.

Moreover, the work reported by the fee petition includes monitoring enforcement action by Virginia against Kodiak, preparing for, and attending State administrative and Federal judicial hearings, reviewing Virginia water policy, and investigating other violations by Kodiak, (Petition at 16, 18, 19). There is no apparent connection between the activities described and the procedural question they ostensibly presented for IBLA review. But assuming that such a connection exists, there has been no showing, as required by 43 C.F.R. § 4.1292(a)(1), that the attorney fees billed were reasonably incurred for, or in connection with, Petitioners' participation in a related administrative proceeding before the Department.

Under SMCRA section 525(e), the Secretary makes costs awards only for administrative proceedings before the Department; awards for costs incurred in judicial proceedings are handled by the courts. See 30 U.S.C. § 1275(e) (1994). Petitioners' citizen complaint provided a foundation for proceedings before the State of Virginia and the Federal court as well as before OSM. As both Petitioners and OSM have shown, Petitioners were successful in combining their complaint with a court proceeding to force State action so as to ultimately obtain restoration of their lake. The court action ended in a settlement that included payment of damages and attorney fees, which, on their face, appear to include much of the same work for which they have now billed the Department. Their litigation tactics did not include an appeal to IBLA until after the Barnette Settlement was accomplished. But while their efforts were successful, they have nonetheless failed to show that the billing now submitted to the Department is for work done on administrative proceedings somehow influenced by the IBLA appeal, which they must do if they are to be entitled to an award of costs under 43 C.F.R. § 4.1292(a)(1). See Kentucky Resources Council, supra, at 352. What the record before us shows, instead, is that the principal thrust of the work done by Petitioners' lawyers went into using the district court and Virginia regulators to force Kodiak's surrender. Having obtained relief by use of these means, Petitioners properly obtained payment of costs and expenses, including attorney fees, under the court's aegis.

Under the circumstances, their bill for legal work is not further compensable under regulations implementing SMCRA section 525(e). It is

not disputed by OSM that if, as a result of the IBLA appeal, OSM had been moved to take some action sought by Petitioners, then their fees reasonably incurred in so doing would have been payable by the Department. This has not, however, been shown to be the case here; the burden to make such a showing of accomplishment rests, of necessity, with Petitioners. Because they have not shown that their IBLA appeal had any effect on their citizen complaint, they have not shown themselves to be entitled to an additional award of costs and expenses under 43 C.F.R. § 1294(b) and SMCRA section 525(e).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, their petition for costs and expenses is denied.

Franklin D. Arness
Administrative Judge

I concur.

Gail M. Frazier
Administrative Judge

