

**Editor's note: 92 I.D. 363 Appealed -- aff'd Civ.No. 84-0723 (M.D. Penn. Feb. 11, 1985); aff'd, No. 85-5166 (3rd Cir. Jan. 6, 1986), 780 F.2d 372 cert denied 106 S.Ct. 3294 (1986).**

JAMES E. LEBER  
v.  
GEORGE STERLING, ET AL.

IBLA 85-242

Decided August 29, 1985

Interlocutory appeal from a ruling of Administrative Law Judge Joseph E. McGuire holding state surface mining regulatory agency to be a proper party respondent in an employee protection proceeding. CH 4-1-D.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Discrimination: Generally --  
Surface Mining Control and Reclamation Act of 1977: Employee Protection: Generally

A state agency is not a "person" for purposes of an employee protection proceeding initiated by an aggrieved employee pursuant to sec. 703 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1293 (1982), and the Department has no jurisdiction to adjudicate an application for review of alleged discriminatory acts by that agency.

Leber v. Pennsylvania Department of Environmental Resources, 80 IBLA 200, 91 I.D. 197 (1984), modified to the extent it is inconsistent herewith.

APPEARANCES: William F. Larkin, Esq., Pittsburgh, Pennsylvania, for George Sterling, et al., and Pennsylvania Department of Environmental Resources; Robert P. Ging, Jr., Esq., and Lee R. Golden, Esq., Pittsburgh, Pennsylvania,

for James E. Leber; Lynne N. Crenney, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

#### OPINION BY ADMINISTRATIVE JUDGE GRANT

This case constitutes an interlocutory appeal by the Pennsylvania Department of Environmental Resources (PDER) from an order of Administrative Law Judge Joseph E. McGuire, dated December 27, 1984, ruling that PDER is a "person" for purposes of an employee protection proceeding under section 703 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1293 (1982), and, thus, subject to Departmental jurisdiction. The case was initiated on February 3, 1984, when James E. Leber (applicant herein), formerly a Surface Mine Conservation Inspector with PDER, filed an application for review of alleged discriminatory acts by certain "supervisory personnel" 1/ pursuant to section 703 of SMCRA, and 30 CFR 865.12. 2/ The case was assigned docket number CH 4-1-D in the Hearings Division.

On April 24, 1984, during the pendency of this case, the Board decided Leber v. Pennsylvania Department of Environmental Resources (PDER), 80 IBLA

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1/ In his application, the applicant named as respondents various supervisory personnel purportedly employed by PDER, viz., George Sterling, Walter Dieterle, John Carroll, John Dunn, Leonard Goins, James Chester, and Dennis Farley. By order dated May 1, 1984, Judge McGuire granted a motion by PDER to intervene as a party respondent pursuant to 43 CFR 4.1110. Both the named individuals and PDER are referred to as respondents herein.

2/ Applicant stated that the named individuals had engaged in a "pattern of discriminatory practices," including harassment, transfers, personnel actions and denial of leave, because of applicant's aggressive enforcement of SMCRA and the previous filing of an application for review (CH 3-2-D) under 30 U.S.C. § 1293 (1982). Applicant characterized the alleged discriminatory acts committed by the named individuals as "ultra vires and beyond the scope of their employment as Commonwealth employees."

200, 91 I.D. 197 (1984), aff'd, Civ. No. 84-723 (M.D. Pa. Feb. 11, 1985), appeal filed, Civ. No. 85-5166 (3rd Cir. Mar. 18, 1985), in a related but separate interlocutory proceeding, involving another application for review of alleged discriminatory acts (CH 3-2-D) filed by applicant against PDER. We concluded in Leber that "PDER is not a person for purposes of an employee protection proceeding under 30 U.S.C. § 1293 (1982)." Id. at 206, 91 I.D. at 200. However, we also held "the intent of the regulations was to consider an agency, such as PDER, a 'person' to the extent that it might be conducting surface coal mining operations under the Act." Id. We concluded, based on the record before us, that PDER was "not such a person." Id. at 207, 91 I.D. at 201. Thus, an inference may be drawn from our opinion in Leber that PDER would be considered a "person" for purposes of a section 703 proceeding if it were engaged in surface coal mining operations under the Act. Indeed, this was the apparent understanding of the district court in reviewing Leber.

By order dated April 26, 1984, the Board lifted a previous stay which had been invoked by order dated April 13, 1984, pending the decision in Leber v. PDER, and remanded the case to Judge McGuire for further proceedings in light of our opinion in Leber. On May 21, 1984, the Hearings Division, Office of Hearings and Appeals (OHA), received a copy of interrogatories directed to PDER, concerning whether the Commonwealth of Pennsylvania was then engaged in surface coal mining operations. On May 29, 1984, PDER filed a motion to dismiss applicant's application for review, arguing that PDER is not properly subject to Departmental jurisdiction for purposes of a section 703 proceeding. On June 7, 1984, PDER filed a motion for a protective order

excusing it from answering the interrogatories. By order dated June 21, 1984, Judge McGuire denied the motion for a protective order and instructed PDER to answer the interrogatories in order that he could rule on PDER's motion to dismiss. On June 29, 1984, PDER filed a motion for certification to the Board of Judge McGuire's June 21, 1984, order as an interlocutory ruling pursuant to 43 CFR 4.1124, because a determination by the Board that PDER is not subject to Departmental jurisdiction for purposes of a section 703 proceeding would "materially advance the ultimate disposition of the [case]." By order dated July 9, 1984, Judge McGuire essentially denied the motion for certification and again ordered PDER to answer the interrogatories propounded by applicant, in order that it could be determined whether PDER is engaged in surface coal mining operations and is, thus, subject to a section 703 proceeding.

On July 26, 1984, PDER filed a petition for permission to appeal from Judge McGuire's July 9, 1984, order refusing to certify his June 21, 1984, order as an interlocutory ruling. This petition was docketed by the Board. By order dated October 11, 1984, the Board declined to grant an interlocutory appeal from denial of a protection order which would have allowed PDER to not answer certain interrogatories concerning whether PDER is engaged in surface coal mining. We stated that in Leber the record had not indicated that PDER was engaged in surface coal mining operations and this had been a "material factor in the decision."

On October 25, 1984, PDER submitted answers to applicant's interrogatories, stating it is not engaged, as an operator, in surface coal mining

operations as defined in section 701(28) of SMCRA, 30 U.S.C. § 1291(28) (1982). On November 1, 1984, applicant filed with the Hearings Division, OHA, a second set of interrogatories, a request for the production of certain documents and a request for the admission of the authenticity of certain documents. On December 5, 1984, PDER responded to applicant's second set of interrogatories and request for admission, and submitted numerous documents. In its answer to the interrogatories, PDER stated it had engaged in the dredging of the Schuylkill River in order to control flooding, pursuant to State statute and PDER permit no. 5475714, dated April 26, 1976, which expired on December 31, 1978, and that such dredging had recovered a certain amount of "coal fines," which were processed and transported to certain locations. PDER also stated it has contracted for the removal of coal and other materials from "coal waste banks."

By order dated December 27, 1984, Judge McGuire held that: "Based upon those facts which applicant's discovery methods have adduced, it has been demonstrated that [PDER] has engaged in surface coal mining operations and thus is a 'person' for purposes of this section 703 employee protection proceeding." By order dated January 11, 1985, Judge McGuire granted PDER's motion for certification to the Board of his December 27, 1984, order as an interlocutory ruling, pursuant to 43 CFR 4.1124. The Board accepted the certification of the interlocutory ruling, holding that it is "controlling" because "if it were found to be in error, [PDER] would not be a proper party respondent in this section 703 employee protection proceeding." By order dated February 5, 1985, the Board granted PDER's request for a stay of

further proceedings before Judge McGuire "pending disposition of the interlocutory appeal."

In its brief herein, PDER contends it is not engaged in surface coal mining operations as defined in section 701(28) of SMCRA, where the primary purpose of its dredging operations, undertaken in the Schuylkill River "since the 1940's," <sup>3/</sup> is the removal of accumulated wastes, in order to prevent water pollution and flooding. Thus, PDER submits its operations were aimed at the protection of the public's health, safety, and welfare and not the commercial extraction and sale of coal. In the alternative, PDER argues its dredging activities are exempt from the provisions of SMCRA, including the employee protection provisions of 30 U.S.C. § 1293 (1982), pursuant to section 528 of SMCRA, 30 U.S.C. § 1278 (1982), which excludes in part the "extraction of coal as an incidental part of \* \* \* State \* \* \* government-financed \* \* \* construction." PDER states that coal is extracted as an incidental part of its dredging operations, which constitute the "construction or reconstruction of the river channel." <sup>4/</sup> PDER also contends it is not

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<sup>3/</sup> PDER states the sediment dredged from the river bottom, which contains coal, is placed in various impoundment basins along the river and in some cases an independent contractor removes and processes the sediment, "paying the Commonwealth a royalty on a per ton basis for the coal, sand, and gravel which remains after the material is processed."

<sup>4/</sup> In a brief submitted on behalf of OSM, the Office of the Solicitor argues that PDER is engaged in surface coal mining operations where coal is extracted from the river bottom as a result of its dredging operations, even though this is not the primary purpose of these operations, stating that 545,363.37 tons of coal have been recovered from dredged material "since 1978." The Solicitor cites United States v. H.G.D. & J. Mining Co., 561 F. Supp. 315 (S.D. W.Va. 1983), and United States v. Devil's Hole, Inc., 747 F.2d 895 (3rd Cir. 1984), in support. The Solicitor also cites an opinion, dated Dec. 26, 1978, by Gary L. Martin, Assistant Attorney General, Commonwealth of Pennsylvania, which concluded that PDER's "dredging operation in the Schuylkill River constitutes 'surface mining' under [Pennsylvania's] Surface

subject to Departmental jurisdiction for purposes of a section 703 proceeding because it is not a "person" under that statutory provision or its implementing regulations. Finally, PDER argues that to subject it to Departmental jurisdiction herein would violate the 10th and 11th amendments to the United States Constitution.

In his brief herein, applicant contends PDER's dredging operations constitute surface coal mining operations under SMCRA and such activities are not exempt from the provisions of SMCRA. Applicant also argues that, as defined by regulations of the Department, PDER is a "person" within the meaning of 30 U.S.C. § 1293 (1982), as well as other provisions of SMCRA. Applicant concludes that PDER is subject to Departmental jurisdiction for purposes of a section 703 proceeding, and that there is no violation of the 10th and 11th amendments to the United States Constitution.

[1] Section 703(a) of SMCRA, 30 U.S.C. § 1293(a) (1982), which applicant seeks to invoke, provides that "[n]o person" shall discriminate against any employee by reason of his participation in any proceeding under SMCRA. Any employee who believes he has been illegally discriminated against under that statutory provision may, under the provisions of section 703(b) of

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fn. 4 (continued)

Mining Act." See also Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3rd Cir. 1979), cert. denied, 444 U.S. 1015 (1980); Brentwood, Inc., 76 IBLA 73, 90 I.D. 421 (1983). However, the Solicitor argues PDER is exempt from the provisions of SMCRA pursuant to section 528 of SMCRA, because the extraction of coal is an incidental part of the dredging operations. PDER has filed a reply brief, in response to the Solicitor's brief, reiterating that it is not engaged in surface coal mining operations. In light of our disposition herein, we do not reach the question of whether PDER is engaged in such operations under SMCRA or whether PDER is exempt under section 528 of SMCRA.

SMCRA, 30 U.S.C. § 1293(b) (1982), "apply to the Secretary [of the Interior]" for a review of such alleged discrimination, and the Secretary shall investigate and take certain action as a result of that investigation, including ordering a violating party to engage in "affirmative action to abate the violation." Section 701 of SMCRA, 30 U.S.C. § 1291 (1982), defines the term "person" for "the purposes of the Act." That provision states: "[P]erson' means an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization." 30 U.S.C. § 1291(19) (1982).

We conclude that the term "person" for purposes of SMCRA, including section 703, is clearly defined by the statute. The statutory definition does not specifically include a state or any agency of a state and there is no cited term which arguably encompasses such an entity. As the Court in Colautti v. Franklin, 439 U.S. 379, 392 n.10 (1979), stated, quoting from 2A Sands, Statutes and Statutory Construction § 47.07 (4th ed. Supp. 1978), "[a] definition which declares what a term 'means' \* \* \* excludes any meaning that is not stated." Thus, the term "person" in SMCRA would exclude states or their agencies from its definition. In contrast, the court in Hustead v. Norwood, 529 F. Supp. 323 (S.D. Fla. 1981), concluded a state is a "person" under the Freedom of Information Act because the term is specifically defined at 5 U.S.C. § 551(1) and (2) (1982), to include a "public \* \* \* organization" other than a federal agency. See also 15 U.S.C. § 78c(a)(9) (1982); 42 U.S.C. § 6903(15) (1982).

In United States v. United Mine Workers of America, 330 U.S. 258, 275 (1947), the Supreme Court concluded that the term "persons" in the Norris-La Guardia Act did not include the United States, stating that the "absence of any \* \* \* provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them," even though the United States, as an employer, was engaged in activities which could be subject to regulation by the Act. The term "persons" in the Norris-La Guardia Act was interpreted by the Court to include only "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," as the term is defined in 1 U.S.C. § 1 (1982), in the absence of any contrary provision in the Norris-La Guardia Act.

5/ Similarly, in In re Equity Funding Corporation of America Securities Litigation, 416 F. Supp. 161, 198 (C.D. Cal. 1976), aff'd, 603 F.2d 1353 (9th Cir. 1979), the court held that Congress "literally excluded states from the class of 'persons' who can be sued under [section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982)]," where the term "person" was then defined as "an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or an unincorporated organization," at 15 U.S.C. § 78c(a)(9) (1970), amended by, Act of June 4, 1975, P.L. 94-29, § 3(2), 89 Stat. 97.

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5/ The Act of July 30, 1947, as amended, 1 U.S.C. § 1 (1982), provides that the meaning of the term "person" shall be as quoted supra, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise." The Court in United States v. United Mine Workers of America, supra at 275, also stated that "[i]n common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so," citing United States v. Cooper Corp., 312 U.S. 600, 604 (1941), and United States v. Fox, 94 U.S. 315, 321 (1876).

In contrast, in Georgia v. Evans, 316 U.S. 159, 161 (1942), the Court concluded that, for purposes of the Sherman Anti-Trust Act, the term "person" includes states, stating that "[w]hether the word 'person' \* \* \* includes a State or the United States depends upon its legislative environment," citing Ohio v. Helvering, 292 U.S. 360, 370 (1934). See also Sims v. United States, 359 U.S. 108, 112 (1959). The Court also quoted from United States v. Cooper Corp., *supra* at 604-05, to the effect that

there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.

The term "person" in the Sherman Anti-Trust Act, as defined by Congress, was held sufficiently broad to encompass states given the factors militating in favor of such a construction. <sup>6/</sup> This is properly distinguished from the term "persons" in the Norris-La Guardia Act, as interpreted by the Court in United Mine Workers, applying the definition in 1 U.S.C. § 1 (1982), or the term "person" in SMCRA, given the explicit definition in 30 U.S.C. § 1291(19) (1982). Applying these standards of construction, we find the explicit definition indicates the term "person" in SMCRA should be given a narrow construction, and that states are excluded from its ambit. Accordingly, as we held

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<sup>6/</sup> Section 8 of the Sherman Anti-Trust Act, 15 U.S.C. § 7 (1982), merely defines the term "'person' \* \* \* to include corporations and associations." As the Court stated in Sims v. United States, *supra* at 112, quoting from 26 U.S.C. § 7701(b) (1982), the "terms 'includes' and 'including' when used in [the definition of 'person' in 26 U.S.C. § 7701(a)(1) (1982)] shall not be deemed to exclude other things otherwise within the meaning of the term defined." The Court in Sims concluded that the term "person" in 26 U.S.C. § 6332 (1982) encompasses states, not only because the statutory definition of "person" does not exclude States but also because it is "stated in all-inclusive terms of general application." Sims v. United States, *supra* at 112.

in Leber v. PDER, supra, "the statutory definition of a 'person' does not embrace a governmental agency."  
80 IBLA at 204, 91 I.D. at 199.

Our conclusion is buttressed by another provision of SMCRA, i.e., section 524, 30 U.S.C. § 1274 (1982), which provides that "[a]ny agency, unit, or instrumentality of Federal, State, or local government \* \* \* which proposes to engage in surface coal mining operations which are subject to the requirements of this Act shall comply with the provisions of title V." Title V of SMCRA, 30 U.S.C. §§ 1251-1279 (1982), generally sets forth environmental protection performance standards for surface coal mining operations and the regulatory scheme for achieving compliance with those standards. Thus, section 506(a) of SMCRA, 30 U.S.C. § 1256(a) (1982), provides in general that "no person" shall engage in surface coal mining operations without having obtained a permit and section 515(a) of SMCRA, 30 U.S.C. § 1265(a) (1982), provides that such a permit shall require mining operations to "meet all applicable performance standards of this Act, and such other requirements as the regulatory authority shall promulgate." Other provisions of Title V of SMCRA set forth the duties and obligations of "person[s]" subject to the regulatory provisions of Title V. See, e.g., 30 U.S.C. §§ 1252(a), 1262(a) (1982). In addition, other provisions of Title V of SMCRA set forth the duties and obligations of "permittee[s]," including the maintenance of appropriate records and the reporting of information relative to mining operations to the regulatory authority. See, e.g., 30 U.S.C. § 1267(b) (1982).

In view of the use of the term "person" or appropriate substitutes (e.g., permittee or applicant for permit) in Title V of SMCRA, we must

conclude that section 524 of SMCRA would be superfluous if the statutory definition of "person" is already deemed to encompass states or their agencies. However, it is well settled that a statute "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." 2A Sands, Sutherland Statutory Construction § 46.06 (4th ed. 1984). Therefore, in order to give effect to section 524 of SMCRA, we conclude that it was specifically enacted because the term "person," defined in 30 U.S.C. § 1291(19) (1982), does not include states or their agencies and such entities would not otherwise be subject to the provisions of Title V. The resulting conclusion is that states are not "person[s]" for purposes of an employee protection proceeding under section 703 of SMCRA, although a state is subject to Title V of SMCRA.

We also believe this dichotomy between the regulation of surface coal mining operations under Title V of SMCRA and Section 703 employee protection proceedings, in terms of the applicability of the statutory provisions to states, was preserved in the Departmental regulations implementing the statute. When originally promulgated, such regulations defined the term "person" to mean "an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization," as the term is defined in 30 U.S.C. § 1291(19) (1982). 30 CFR 700.5 (42 FR 62676 (Dec. 13, 1977)). However, effective April 12, 1979, the Department, amended 30 CFR 700.5 to provide that the term "person" also means "any agency, unit, or instrumentality of Federal, State or local government." 44 FR 15314 (Mar. 13, 1979). The Department explained the expanded definition in part as follows: "[S]pecified government agencies are included because under Section 524 of

the Act, they are subject to regulation when engaged in surface coal mining and reclamation operations and because such agencies have definite interests in actions taken under the Act." 44 FR 14912 (Mar. 13, 1979). The Department also rejected a proposed rule which limited the rule only to governmental agencies proposing to conduct surface coal mining operations and further explained the amendment as follows:

The Act mandates the involvement of and close coordination among many different agencies. Various agencies play important roles in the abandoned [lands] program in Title IV of the Act, in the regulatory process in terms of providing data, permit application reviews, performance standards compliance, and in designation of lands unsuitable for all or certain types of surface coal mining operation. (See Sections 503(a)(6), 504(b), 507(b)(11), 508(a)(9), 510(b)(3), 510(c), 515(b)(2)(8), 515(b)(10)(B), 515(b)(12), 515(c), 515(e) and 522 of the Act. \* \* \*

OSM believes the involvement of other State and local agencies, which the Act specifies, establishes an interest on the part of those agencies in actions taken by the regulatory authority under State programs, particularly actions relating to permits and designations. Therefore, OSM believes that inclusion of the government agencies in the definition of "person" is justified. OSM does not intend by this to expand upon an agency's capacity to sue or be sued where the Act does not clearly indicate that the agency has an interest in the actions being taken. In such situations, existing principles of State or Federal law would govern. [Emphasis added.]

44 FR 14912 (Mar. 13, 1979).

While the definition of "person" in 30 CFR 700.5 currently encompasses states and their agencies, we conclude that the broadening of the statutory definition by regulation had a very limited purpose and, moreover, must be construed to be consistent with the terms of the statute. The preamble to the revision of the regulation, quoted above, indicates that states were

included in the definition of "person" because of the obligations imposed upon the states under Title V of SMCRA, by virtue of section 524 of SMCRA. Further, the preamble discloses the intent to allow state agencies to become involved in proceedings where agencies have "definite interests in actions taken under the Act." 44 FR 14912 (Mar. 13, 1979). However, the preamble only identifies two areas where states have an interest in actions taken under the Act, viz., the abandoned mine lands program under Title IV of SMCRA, 30 U.S.C. §§ 1231-1243 (1982), and the control of the environmental impacts of surface coal mining operations under Title V of SMCRA. There is no indication of an intention to subject state agencies to section 703 employee protection proceedings. Moreover, the preamble states that the amended rule is not intended to "expand upon an agency's capacity to \* \* \* be sued." 44 FR 14912 (Mar. 13, 1979).

In addition, the regulations at 30 CFR Part 865 governing employee protection proceedings bear out this conclusion. The prefatory sentence to 30 CFR Part 700.5 states that "[a]s used throughout this chapter, the following terms have the specified meaning except where otherwise indicated." (Emphasis added.) We conclude that the regulations in 30 CFR Part 865 (Protection of Employees) indicate that the term "person" in that context has a different meaning. 30 CFR 865.11(a) reiterates the statutory prohibition that "[n]o person" shall discriminate against any employee who has engaged in certain actions, including "[r]eporting alleged violations or dangers to the Secretary, the State Regulatory Authority, or the employer or his representative" (30 CFR 865.11(a)(1)(i)). This regulation indicates that a state regulatory authority, such as PDER, as well as the Secretary, is distinguished from an employer in a case of employee discrimination.

Finally, it is important to realize that Mr. Leber has other remedies available to him. Indeed, in OSM's brief in Leber, quoted by PDER in its brief herein at 30, OSM, which had promulgated 30 CFR 700.5, stated that:

It was not the intent of the Act, nor was it the intent of the Secretary in promulgating regulations to implement the [Act], to create a forum for review of actions taken by states in implementing and enforcing state employment policies, rules, and regulations. Existing forums, including federal and state civil service commissions (i.e., 71 P.S. 741.1 et seq.) and federal antidiscrimination statutes (i.e., 42 U.S.C. § 1983) provide the necessary safeguards and forums to protect the government employee from non-meritorious or discriminatory acts committed by a governmental employer. [Emphasis in original.]

The Board in Leber v. PDER, supra at 206, 91 I.D. at 200, essentially concurred in this assessment. Moreover, in Sterling v. Clark, Civ. No. 84-0500 (M.D. Pa. Apr. 27, 1984), which was a proceeding initiated April 12, 1984, by the individual respondents herein for a temporary restraining order preventing the Department from conducting a section 703 investigation on behalf of applicant against the plaintiffs (individual respondents herein) or PDER, Judge Rambo quoted from the Board's decision in Leber to the effect that any remedy available to applicant must rely on other federal or state law, in holding the Department was precluded from conducting an investigation and, hence, the case was moot.

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7/ However, Judge Rambo stated that our opinion Leber v. PDER had "clearly established that \* \* \* so long as PDER's activities remain outside the scope of the expanded definition of 'person' in 30 CFR 700.5, regulation by the [Department] under section 703 is unauthorized and improper." We herein correct the intimation left by our decision in Leber that the expanded definition in 30 CFR 700.5 applies to section 703 proceedings. A state agency, regardless of whether it is engaged in surface coal mining operations, is not properly subject to such a proceeding.

We, therefore, conclude that PDER is not a "person" for purposes of a section 703 employee protection proceeding and, thus, the Department does not have jurisdiction to adjudicate applicant's claim brought under 30 U.S.C. § 1293 (1982). We expressly modify our decision in Leber v. PDER, supra, to the extent that it indicated a state agency engaged in surface coal mining operations could be subject to a section 703 employee protection proceeding.

PDER also raises a number of constitutional challenges to the invocation of Departmental jurisdiction in the present context. However, as we have often said, it is not within the jurisdiction of this Board to adjudicate the constitutionality of an act of Congress. E.g., Andy D. Rutledge, 82 IBLA 89 (1984).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the interlocutory ruling appealed from is reversed and the case is remanded to Judge McGuire for further proceedings consistent herewith.

C. Randall Grant, Jr.  
Administrative Judge

We concur:

Wm. Philip Horton  
Chief Administrative Judge

Bruce R. Harris  
Administrative Judge

