

Editor's note: appeal filed, Civ.No. 97-9 (ED KY Feb. 14, 1997); rev'd and remanded to Secy for determination of an appropriate award (Feb. 20, 1998), 997 F.Supp. 814; atty. fees awarded - see 151 IBLA 324

KENTUCKY RESOURCES COUNCIL ET AL.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 94-161

Decided January 17, 1997

Petition for award of costs and expenses, including attorney fees, under section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1994), and 43 CFR 4.1290 through 4.1295.

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: Attorney Fees/Costs and Expenses: Substantial Contribution

A petition for award of costs including attorney fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1994), for participation in an appeal before the Board may be considered when an appeal is dismissed by final order of the Board if the petitioner has achieved at least some degree of success on the merits and made a substantial contribution to a full and fair determination of the issues. Although the final order of the Board need not address the merits of the controversy, the petitioner must establish that his participation in the appeal to the Board has contributed to resolution of the issues.

2. Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Final Order--Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Substantial Contribution

A petition for award of costs including attorney fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1994), for participation in an appeal before the Board involving a citizen's complaint generally requires a showing of a substantive or procedural infirmity in OSM's response to a citizen's complaint and that the citizen

made a substantial contribution to resolution of the issues as a result of filing an appeal to the Board. A petition is properly denied when the record fails to establish a causal connection between the proceedings before the Board and resolution of the matter by OSM.

APPEARANCES: L. Thomas Galloway, Esq., Washington, D.C., and Walton D. Morris, Esq., Charlottesville, Virginia, for the petitioners; Thomas A. Bovard, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

On December 14, 1993, Kentucky Resources Council, Inc., Kentuckians for the Commonwealth, and National Wildlife Federation filed a petition for award of fees 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 at 43 CFR 4.1290. Petitioners claim they are entitled to such an award as a result of their prosecution of a citizen's complaint before the Office of Surface Mining Reclamation and Enforcement (OSM) which initiated a case that ended when an order of the Interior Board of Land Appeals (IBLA) dismissed the appeal in IBLA 93-669 on November 16, 1993.

Petitioners filed two separate citizen's complaints dated August 19, 1992, with the Lexington Office, OSM, alleging that Branham & Baker Coal Company, Inc., had obtained mining permits despite affiliation with two mining companies (Mid-Mountain Mining Corporation and Deep River Mining Company, respectively) responsible for unabated violations of Kentucky mining and reclamation regulations (Administrative Record (AR) at 187, 199). Petitioners asked OSM to block Branham & Baker from receiving new permits because of links to violators; to rescind permits issued after the date of the earliest unabated violation to Branham & Baker or take enforcement action to require payment of the penalties and abatement of the violations; and to issue citations to Branham & Baker for failure to list Mid-Mountain Mining Corporation and Deep River Mining Company as related entities when filing permit applications. On August 25, OSM's Lexington Office referred the complaints to the Applicant/Violator System Office, OSM; on October 9 the Lexington Office sent a Ten-Day Notice (TDN) (TDN X92-80-221-002) ^{1/} to the State of Kentucky asserting it had reason to believe that the State had improvidently issued certain specified permits to Branham & Baker (AR at 179-81).

^{1/} At the time the TDN was issued, the identifying number was slightly different. The correct number was set forth in a letter to the State dated Oct. 23, 1992 (AR at 177).

On November 6, 1992, the State was granted an extension to respond to the TDN pending a response to its October 30, 1992, letter to Branham & Baker (AR at 176). On January 14, 1993, the State advised OSM that it had concluded that Branham & Baker did not own or control either company (AR at 137-38); however, the Lexington Office provided the State with further information by letter dated February 24 from the Denver Finance Office, OSM, showing that an ownership and control relationship did in fact exist between Branham & Baker and Deep River (AR at 118-19). In a letter dated March 5, 1993, the State informed OSM that it would reevaluate the case, that Branham & Baker had "expressed a desire to resolve the reclamation and civil penalties outstanding at the Deep River Mining site," and that it would "require some time to conduct the on-site investigation and work toward negotiation of an Agreed Order to resolve this issue" (AR at 116). By letter dated March 15, 1993, the Lexington Office of OSM granted a further extension until April 8 to respond to the TDN (AR at 100). 2/

In a letter dated March 15, 1993, petitioners filed the first of two requests for informal review with the Assistant Director, OSM (AR at 101). Petitioners objected to, among other things, the extensions of time granted to the State, asserting that such extensions abused the Department's standards governing extension of time for good cause. By letter dated March 26, 1993, petitioners filed a second request for informal review of the "arbitrary and clearly improper additional extension of time from March 8, 1993, to April 8, 1993," arguing that controlling regulations do not authorize extensions of time to negotiate remedial action (AR at 91-97).

Meanwhile, the Acting Director, OSM, issued a policy memorandum to OSM personnel dated April 5, 1993, stating that investigations of applicant and violator links in ownership or control cases should normally take no more than 30 days and that time extensions should be limited to 15 days (AR at 40-41). Thereafter, on April 13, the Lexington Office found the State had failed to take appropriate action in response to the TDN to prevent further issuance of permits to Branham & Baker and had failed to suspend or revoke improvidently issued permits (AR at 59). On April 29, 1993, the Lexington Office issued a notice to the State specifically advising that OSM had reason to believe that certain specified permits listed on an attachment to the notice had been improvidently issued (or renewed or amended) to Branham & Baker or affiliated firms because "the permittee or an owner and controller of the permittee was, and continues to be, responsible for the outstanding obligations" on a permit (077-5013) issued to Deep River Mining (AR at 48-51). The violations specified in the attachment to the notice included a bond forfeiture, an unabated cessation order (CO), and a civil penalty assessed for a CO.

2/ Counsel for OSM acknowledges that during the proceedings described, the Lexington Office granted four extensions of time to the State of Kentucky to respond to the TDN (OSM Answer at 5).

On April 30, 1993, the Assistant Deputy Director, OSM, issued a decision in petitioners' favor on their requests for informal review. Concluding that too much time had been allowed to the State, she instructed the Lexington Office to conduct an immediate inspection. The Assistant Deputy Director also found that a TDN should have been issued to address possible disclosure violations; such a TDN (93-80-474-2) was issued that same day by the Lexington Office (AR at 43-45). Nonetheless, by letter dated May 10, 1993, petitioners filed a notice of appeal from the Assistant Deputy Director's decision. In that notice, petitioners "defer[red] filing their statement of reasons for this appeal" and requested an extension of time for filing such statement (Notice of Appeal at 2). An extension until December 6, 1993, to file a statement was subsequently granted by the Board. Petitioners stated they were appealing the Assistant Deputy Director's decision because she failed to take remedial action and because she took no action to insure that the cited infraction would not be repeated. Id. at 1.

On May 28, 1993, Branham & Baker entered into a settlement agreement with the State of Kentucky, agreeing to help the State develop a comprehensive list of all related entities and linked violations; agreement was reached also regarding reclamation, abatement, and penalties on all Branham & Baker operations. Petitioners and OSM were not parties to the settlement. On July 27, 1993, the Acting Director, OSM, issued a second memorandum (OSM Answer at Exh. B) confirming policy statements set forth in the April 5 memorandum. On November 8, 1993, petitioners filed a motion to dismiss the appeal, docketed as IBLA 93-669, stating they had achieved the relief they sought. An order dismissing the appeal issued on November 16, 1993.

In their petition for award of attorney fees and expenses under section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1994), petitioners assert that a party successfully prosecuting a citizen's complaint filed under section 521 of SMCRA, 30 U.S.C. § 1271 (1994), is entitled to recover fees regardless of whether the Board ruled on the substantive or procedural issues raised in the complaint. In support, petitioners cite the opinion of the district court in Council of Southern Mountains, Inc. v. Watt, No. 82-45 (E.D. Ky. Oct. 18, 1982), ^{3/} and Donald St. Clair, 84 IBLA 236, 92 I.D. 1 (1985). In its answer to the petition, OSM argues that under the implementing regulations an appeal before the Board (or an administrative proceeding before an Administrative Law Judge) resulting in a final order after a full and fair determination of the issues is a prerequisite for fee recovery. OSM contends that some degree of success in the appeal to the Board is required and that fees are not properly awarded where the appeal itself has no "causal nexus" to the actions of OSM officials. Conceding that if a complainant had to file an appeal in order to cause OSM to comply with the law it is entitled to compensation for work performed on those issues regardless of whether it was before OSM or the Board, OSM argues

^{3/} This unpublished opinion is reported at 13 ELR 20393.

that the filing of an appeal which had no bearing on the actions ultimately taken by OSM officials is not compensable. OSM asserts that a petitioner must be able to show that there was either a substantive or procedural infirmity in OSM's handling of a citizen's complaint and that, as a result of an appeal to the Board, the citizen made a substantial contribution to resolution of the issue. In this case, OSM contends that the actions taken by OSM to resolve the problems in responding to petitioners' citizen's complaints were largely taken before the appeal was filed and that actions on appeal made no contribution to resolution of the issues.

[1] This case raises the issue of whether, in appropriate circumstances, filing an administrative appeal to the Board of Land Appeals may form a basis for an award of costs and expenses including attorney fees under section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1994), notwithstanding the fact that the appeal is subsequently dismissed by appellant resulting in issuance of a final Board order dismissing the appeal. The implementing regulations specify who may file a petition for award of costs and expenses: "(a) Any person may file a petition for award of costs and expenses including attorneys' fees reasonably incurred as a result of that person's participation in any administrative proceeding under the Act which results in— * * * (2) A final order being issued by the Board." 43 CFR 4.1290(a). The right to recovery from OSM is further limited by regulation to a person other than a permittee who "initiates or participates in any proceeding under the Act, and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that the person made a substantial contribution to a full and fair determination of the issues." 43 CFR 4.1294(b). The analysis of the question of whether costs and expenses may be awarded in this case is facilitated by explicit recognition that these two elements must both be present to support an award.

There is nothing in the language of the regulations which requires that the final order of the Board address the legal merits of the appeal or approve the terms of a settlement addressing the merits of the appeal. To the contrary, the preamble to the final rulemaking promulgating this regulation specifically responded to a comment expressing the concern that this regulation might be construed in such a way as to preclude an award in cases which were settled after an appeal was filed:

One problem area pointed out by the commenters was that of a settlement. The commenters complained that an award might be appropriate in such a case, yet could not be approved under their reading of the proposed rules. However, a case which is settled

while pending in the Office of Hearings and Appeals will be disposed of by final order. In fact all cases docketed with the Office of Hearings and Appeals will be disposed of by some type of "final order." Therefore, awards will not be precluded strictly because of the manner of disposition.

43 FR 34385 (Aug. 3, 1978); see Donald St. Clair, *supra* at 270, 92 I.D. at 20 (Harris, A.J., concurring). This point is important because, when appeals pending before the Board are settled by the parties, a motion to dismiss the appeal is commonly granted without review of the terms of the settlement. To require a Board order addressing the merits would have the negative effect of discouraging settlement of controversies and requiring Board review of the merits of every appeal.

Upon careful analysis, the decision in Council of Southern Mountains, Inc. v. OSM, 3 IBSMA 44, 88 I.D. 394 (1981), fails to provide good precedent for a contrary holding. This decision actually consists of three separate opinions. After noting that a substantial contribution to a full and fair determination of the issues was required under the terms of 43 CFR 4.1294, that a statement of reasons was never submitted, and that the dispute was settled in negotiations between the appellant and the operator in which neither OSM nor the Office of Hearings and Appeals (OHA) was involved, the lead opinion of Judge Mirkin stated that a final order adjudicating the merits of the controversy was required to support an award. The lead opinion also found that where a dispute between a prospective petitioner and OSM is resolved by negotiations between petitioner and a third party without the substantive involvement of OHA (*e.g.*, approval of the settlement), no basis for an award is established. 3 IBSMA at n.5, 88 I.D. at 398, n.5. Nevertheless, Judge Mirkin held that petitioner had made a separate contribution on appeal to development of standards for award of costs and expenses which was compensable. There was no majority, however, supporting the requirement of an order adjudicating the merits of the controversy. Judge Irwin dissented from the holding requiring that settlements be submitted to or approved by OHA on the ground that this was not required by the language of the regulation and was expressly rejected in the preface to the rulemaking. 3 IBSMA at 58-59, 88 I.D. at 401-02. Judge Frishberg found in his concurring and dissenting opinion that in the filing and subsequent dismissal of the appeal no issues were presented or joined before OHA which could constitute a substantial contribution to a full and fair determination of the issues under 43 CFR 4.1294. 3 IBSMA at 66, 88 I.D. at 406. On balance, the three opinions may establish that some form of proceedings before the Board such as a briefing of the merits are required to support an award, but we find no majority holding that an order addressing the merits of the case or approving a settlement on the merits is required.

Similarly, the district court in Council of Southern Mountains, Inc. v. Watt, No. 82-45 (E.D. Ky. Oct. 18, 1982), focussed on the lack of any proceedings before OHA. Noting that the negotiations between petitioner and the operator did not involve either OSM or OHA, the court held that the filing and subsequent withdrawal of the unperfected appeal did not result

in a final order or a fair and full determination of the issues. 13 ELR at 20395. ^{4/} On judicial remand, jurisdiction was assumed by the Under Secretary for the purpose of reviewing the propriety of the IBSMA decision awarding attorney fees for briefing the Board on the issue of the standards applicable to the award of attorney fees where such awards are proper. See 43 CFR 4.5. The Under Secretary reversed the IBSMA ruling to the extent it authorized an award of attorney fees to Council on this basis. Council of the Southern Mountains, Inc. v. OSM, IBSMA 80-34 (Jan. 26, 1984). Although the opinion quoted with approval Judge Mirkin's opinion that an award requires a final order by the Board setting forth a judgment on the merits of the proceeding, the Under Secretary's holding dealt with the award of fees for briefing the Board on a matter not at issue before OSM. Thus, we find it distinguishable from the case before us. ^{5/}

[2] We find nothing in the regulations requiring a final Board order addressing the merits of the dispute. Indeed, this goes beyond the position taken by counsel for OSM in this case. It is contended by OSM that eligibility for a fee award requires that a citizen "show success on the merits of the Board appeal, i.e., that there was either a procedural or a substantive infirmity in OSM's handling of a citizen's complaint (or both) and that, as a result of the citizen's filing an appeal with the Board, the citizen made a substantial contribution to the resolution of the issues" (OSM Answer at 29). If subsequent to the filing of an appeal, but before the Board addresses the merits of the controversy, OSM takes some of the action requested by appellant, OSM concedes fees could be awarded if a causal nexus can be shown between the prosecution of the appeal and the action taken by OSM. We find this to be consistent with the prior Board decision in St. Clair. Allowance of an award of fees where citizens have commenced a proceeding, but the action or inaction which is the subject of the complaint has been corrected without any formal judgment, has been found consistent with the regulatory standard where a showing has been made that the corrective action was taken as a result of the citizens' complaint. Donald St. Clair, supra at 265-66, 270-71, 92 I.D. at 17-18, 19-20. ^{6/}

^{4/} To the extent that the district court opinion upheld an award on the distinct basis that petitioner precipitated the issuance of enforcement orders by OSM not involving any proceeding before OHA, this would appear inconsistent with the regulatory requirements at 43 CFR 4.1290 and 4.1294. This Board may decline to follow a district court ruling in other cases where it would be disruptive to Departmental policies and programs and a reasonable prospect exists that other Federal courts might arrive at a differing conclusion. Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186, 190 (1984).

^{5/} We note that since this opinion is unpublished it may not generally be relied upon as precedent against a party adversely affected. 30 U.S.C. § 552(a)(2) (1994).

^{6/} The Board had previously issued a decision on the merits adverse to petitioner in the St. Clair case and, thus, the existence of a final order on the merits was not an issue. Rather, the lead opinion focussed on

Applying that standard to the record in this case, the issue is whether the petitioner has shown a causal nexus between its actions in prosecuting an appeal to the Board and the corrective actions taken by OSM in response to the citizen's complaints. It appears from the record before us that the actions taken by OSM including the April 30, 1993, decision of Nina Rose Hatfield, Assistant Deputy Director of OSM, essentially complied with the petitioner's requests. This decision predated petitioner's appeal. Further, OSM points out that of the two procedural directives regarding standards for future handling of citizen's complaints, one preceded the appeal and the other was clearly in development prior to the appeal. With respect to substantive enforcement actions, OSM notes that no substantive enforcement action relating to the issues raised in petitioner's complaint was taken after the appeal to the Board. Under these circumstances, we find that petitioner has failed to support an award.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for award of costs including attorney fees is denied.

C. Randall Grant, Jr.
Administrative Judge

I concur.

Gail M. Frazier
Administrative Judge

fn. 6 (continued)
whether petitioner had made a showing that they achieved some degree of success in prosecuting the appeal. Donald St. Clair, supra at 249-50, 92 I.D. at 8-9.

ADMINISTRATIVE JUDGE ARNESS CONCURRING SPECIALLY:

I agree the petition for costs and expenses must be denied. We may not do so by evaluating the merits of the petition presently before us, however, because Departmental regulations require that, before we may proceed on the merits, there must exist a final order by the Board or an Administrative Law Judge leading to a "full and fair determination of the issues." See 43 CFR 4.1294(a)(1) and 4.1290. No such order exists here.

This is so because the appeal by petitioners in IBLA 93-669, upon which they rely for the relief they now seek, was voluntarily withdrawn by them before it was acted upon. Petitioners have not shown that the filing of their appeal had any effect upon their pending citizen's complaint. The record indicates that it did not, and that the appeal was filed pro forma, in an attempt to provide facial compliance with the costs and expenses regulations, after the relief sought by petitioners had already been provided.

Petitioners' costs are not compensable under 43 CFR 4.1290 because no final order affecting the abatement action that was the subject of petitioner's citizen's complaint ever issued from an Administrative Law Judge or the Board. Voluntary withdrawal of the appeal in IBLA 93-669 did not satisfy the regulatory requirement that there be a final order issued by the Board resolving an underlying issue on the merits ("substantial contribution to the full and fair determination of the issues"). No final order, as that term is defined by Departmental regulations 43 CFR 4.1294 and 4.1290 ever having issued in this case, there can be no award of costs to petitioners.

Accordingly, I agree that the petition for costs and expenses must be denied in this case.

Franklin D. Arness
Administrative Judge

