

11-0749

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

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WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Petitioner,

v.

Civil Action No. 10-AA-102
Judge Tod J. Kaufman

HOMINY CREEK PRESERVATION
ASSOCIATION, INC.,

Respondent,

and

GREEN VALLEY COAL COMPANY,

Intervenor.

FINAL ORDER

Before the Court is Petitioner's Petition for Appeal, filed July 7, 2010, in which the Petitioner, West Virginia Department of Environmental Protection ("WVDEP"), appeals the April 14, 2010, Final Order of the Surface Mine Board ("SMB"). At issue in the appeal is whether the SMB erred when awarding Respondent Hominy Creek Preservation Association ("Hominy Creek") attorney fees and expenses. Briefs and responses have been filed on the amount of attorney fees and costs awarded to Respondent.

This Court reviewed and carefully considered the issues involved. The complexity, magnitude, and the volume, of the legal process was such that the Court felt further examination needed to be done by an experienced and able attorney to make a recommendation on these fees to the Court. Therefore, the Court appointed Sprague Hazard, an attorney with thirty-four years

of experience, as an independent commissioner of the Court to review the matter of attorney fees, expenses, and costs and to make a recommendation to the Court on the same. This Court received Mr. Hazard's report on March 22, 2011.

Standard of Review

This Court's review is governed by the West Virginia Administrative Procedures Act, W.Va. Code § 29A-5-1 *et seq.* West Virginia Code § 29A-5-4(g) states

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Court must give deference to the administrative agency's factual findings and reviews those findings under a clearly wrong standard. Further, the Court applies a *de novo* standard of review to the agency's conclusions of law. *Muscatell v. Cline*, 474 S.E.2d 518, 525 (W.Va. 1996).

Discussion

Hominy Creek filed a Motion to Dismiss based upon the untimely filing of Petitioner's appeal. SMB's Final Order is dated April 16, 2010, and Petitioner's appeal was filed on July 7, 2010. However, WVDEP's Motion requesting clarification from the SMB to address additional

arguments required another “Final Order” from the SMB. Thus, SMB’s Order dated June 9, 2001, denying that Motion became the “Final Order” triggering the 30-day requirement to appeal the SMB Final Order. As a result, WVDEP’s appeal filed on July 7, 2010, was timely... “within the 30 days after the date upon which such party received notice of the final order of the decision of the agency.” W.Va. Code § 29A-5-4(b). The WVDEP filed a Motion for Supplemental Order, not a “letter for clarification” and, as such, Moten v. Stump, 220 W.Va. 652, 648 S.E.2d 639 (2007), is distinguishable and thus not controlling. Hominy Creek’s Motion to Dismiss is hereby denied.

In its Petition for Appeal, Petitioner alleges the following assignments of error;

(1) The SMB was incorrect as a matter of law in ruling that Hominy Creek had prevailed in either matter.

(2) The SMB was incorrect as a matter of law and arbitrary and capricious in awarding fees and costs for years of work performed prior to the agency decision appealed.

(3) The SMB was incorrect as a matter of law and arbitrary and capricious in awarding fees for time prior to when Hominy Creek’s counsel was admitted to practice in West Virginia.

(4) The SMB’s Order was incorrect as a matter of law and arbitrary and capricious by its failure to properly explain if counsel for Hominy Creek had calculated his entitlement to pre-judgment interest.

(5) The SMB was incorrect as a matter of law and arbitrary and capricious in refusing to address the WVDEP’s arguments in a manner sufficient to enable this Court to conduct judicial review.

W.Va. C.S.R. §38-23-20.12 is the regulation that authorizes the award of costs and expenses in administrative proceedings. In particular, “[c]osts and expenses including attorneys’ fees may be awarded to: 20.12.a.1. Any participating party against the violator upon a finding that there is a violation of the Act, the regulations, or the permit has occurred, and there is a determination that the party made a significant contribution to a full and fair determination of the issues.” W.Va. C.S.R. §38-2-20.12.a.1. As discussed above, the evidence does not support a finding that Hominy Creek was successful in finding that WVDEP was a violator of any act, regulation, or permit. The changes made in each appeal order are not the result of Hominy Creek contributing to the determination that WVDEP was a violator but instead, result from agreements made between Hominy Creek and Green Valley. As a matter of law, Hominy Creek cannot recover fees from WVDEP without a finding that WVDEP was a violator and furthermore, that Hominy took part in determining such. Hominy Creek did not prevail in proving that nor on the merits of this case and thus, the WVDEP is not required to pay their attorney fees and expenses.

After carefully reviewing decisions below, the record, the relevant law, and the Commissioner’s report, the Court hereby REVERSES the decision of the SMB and denies HPCA any award of attorney fees, costs, and expenses in Appeal Nos. 2003-46-SMB and 2005-12-SMB.

Commissioner’s Fees

The Court has considered Commissioner Hazard’s work, the number of hours he worked on this case (29 hours up to March 22), his thirty four years of litigation experience in West Virginia Courts, and finds a \$250.00 per hour rate to be reasonable for his legal services rendered. Therefore, the Court hereby awards Mr. Hazard \$7,250.00, for 29 hours at a rate of

\$250.00 per hour, based on his experience, expertise, and customary fees and rates in this area of the law. The costs of this commissioner shall be paid by the West Virginia Department of Environmental Protection within thirty days of this Order. The Respondent's objections are hereby noted and preserved. This case is DISMISSED and STRICKEN from the docket of the Circuit Court.

The clerk of the court shall distribute copies of this Order to all counsel of record:

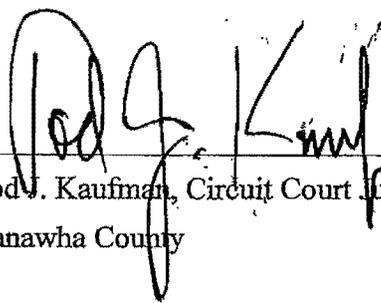
A. M. "Fenway" Pollack, Esquire
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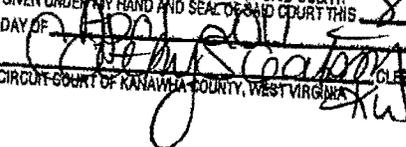
Joseph M. Lovett, Esquire
P.O. Box 507
Lewisburg, West Virginia 24901

Sprague Hazard, Esquire
900 Lee St. E. Ste. 915
Charleston, WV 25301

Enter this Order the 8th day of April, 2011.



Tod J. Kaufman, Circuit Court Judge for
Kanawha County

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF April 2011

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA