



COALEX STATE INQUIRY REPORT - 281

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TOPIC: ELIGIBILITY FOR ATTORNEY'S FEES

INQUIRY: Please locate any cases on the following three issues regarding eligibility for attorney's fees:

1. Can the agreement between an attorney and the client which provides for pro bono services constitute a waiver of the client's rights to petition for fees? Can cases other than civil rights cases be identified?
2. Does a settlement agreement which is silent on costs constitute a waiver of the client's right to petition for costs?
3. The state appellate court approved the client's petition for attorney's fees for the administrative and judicial proceedings and remanded the case to the administrative agency for a determination of the fees for both the administrative and judicial proceedings. Does the agency have the authority to determine fees incurred in the judicial arena?

SEARCH RESULTS: Research was conducted using the COALEX Library, LEXIS publicly available materials, a survey of state attorneys in Illinois and Ohio and existing COALEX Reports.

General information on attorneys' fees appears below, followed by search results for each issue of the Inquiry. Copies of the materials listed below are attached. PLEASE NOTE: Copies of COALEX Reports are included, here, without attachments.

GENERAL INFORMATION

COALEX STATE INQUIRY REPORT - 266, "Attorneys' fees (Updates: Reports 120, 163, 180 and 220)" (1993) identified cases that address such issues as qualification for attorney's fees for services rendered in administrative proceedings and petitions for costs and fees under SMCRA Sec. 525(e).



COALEX STATE INQUIRY REPORT - 233, "Suspension or revocation of permit for insufficient information; liability for attorney's fees" (1992) adds some additional material.

The following is enclosed for background:

1. SMCRA sec. 525(e) [30 USC 1275(e)]. Review by the Secretary.
2. 43 CFR 4.1290 et seq. (1992). Petitions for award of costs and expenses under section 525(e) of the Act.
3. 5 USCS sec. 504 (1993). Costs and fees of parties [under EAJA]. In particular see No. 3 "Application to legal services and pro bono cases" under "Interpretive Notes and Decisions".

ISSUE 1: PRO BONO SERVICES

No SMCRA or EPA related cases were identified; however, the general view is that the rulings in civil rights cases carry over into other arenas and are applicable to this issue.

CORNELLA v SCHWEIKER, 728 F 2d 978 (8th Cir 1984).

The court reversed the district court ruling that Cornella did "incur" attorney's fees within the meaning of the Equal Access to Justice Act even though he was represented by a pro bono organization.

[Note: Subsequent case and Auto-Cite findings are also attached.]

ISSUE 2: SETTLEMENT AGREEMENTS

No SMCRA cases were identified on this issue. Ohio and Illinois differed on the state's "philosophy" as to eligibility for attorney's fees when a consent decree or settlement agreement is silent on costs and fees: Ohio understands the silence to mean that the right to fees is open; Illinois' view is that a settlement agreement means each side bears their own costs. Federal civil rights cases have held that claims for attorney's fees may be awarded in consent decree cases.

MAHER v GAGNE, 448 US 122 (1980).

Held: "2. The fact that respondent prevailed through a settlement rather than through litigation does not preclude her from claiming attorney's fees as the 'prevailing party' within the meaning of Sec. 1988 [Civil Rights Attorney's Fees Award Act of 1976, 42 USC Sec. 1988]."

ISSUE 3: FEES FOR ADMINISTRATIVE & JUDICIAL PROCEEDINGS.



SMCRA Sec. 525(e) states that "costs and expenses...may be assessed against either party as the court, resulting from judicial review, or the Secretary, resulting from administrative proceedings, deems proper. 43 CFR 1290 et seq. regulates petitions for award of costs and expenses "in an administrative proceeding" under 525(e).

A survey of state regulations currently available in COALEX indicated that 16 states have statutes and/or regulations that mirror the federal statute and rules. The language used in the statutes of Wyoming and three other states varies slightly from SMCRA Sec. 525(e) but is "substantially identical" to it.

BEST v CALIFORNIA APPRENTICESHIP COUNCIL, 240 Cal Rptr 1 (Ca Ct App 1987).

"The judgment is affirmed as to the award of attorney's fees for the judicial proceedings. The judgment is reversed as to the denial of attorney's fees for the administrative proceedings, as remanded for a determination of the amount. The trial court should also consider an award of attorney's fees for the appeal."

MUSKINGUM MINING, INC. v DIVISION OF RECLAMATION AND DELBERT E. LACY, Ohio Reclamation Board of Review Case No. RBR-4-87-265 (1992).

In the Interlocutory Order on Cost Petition, the Board stated:

"In determining that Mr. Lacy has made a substantial contribution, the Board has looked only to Mr. Lacy's contribution before this Board. The Board's finding does not address, or encompass, the participation of Mr. Lacy before the Court of Appeals. Significantly, O.R.C 1513.13(F) independently enables the appellate courts to award costs and expenses for a party's participation in the judicial review of proceedings initiated under Chapter 1513. The petitioner's contribution before the court, and the results obtained in that forum, will be reflected in any award made by the court under subsection (F). Therefore, a decision by an appellate court upon the merits of a case initiated before the Board, should not impact the Board's evaluation of the contribution petitioner made before the Board."

Ruling on the question of whether the Board is barred from acting on the cost petition by virtue of the fact that the Court of Appeals denied Mr. Lacy's cost petition, the Board ruled:

"As the standard for entitlement in the Court of Appeals is not identical to that applied by this Board, the Board FINDS that the Court's decision has no preclusive effect upon the Board."

VILLAGE OF PLEASANT CITY AND R.T.G., INC. v DIVISION OF RECLAMATION, Ohio Reclamation Board of Review Case No. RBR-4-89-190 & 191 (1992).



The Board found that the Village "substantially contributed to a full and fair determination of this matter."

ORC Ann. sec. 1513.13 (1994) and Ohio reg. sec. 1501:13-14-04 (1987) are attached for background.

ATTACHMENTS

- A. COALEX STATE INQUIRY REPORT - 266, "Attorneys' fees" (1993). (Includes copies of Reports 120, 163, 180 and 220).
- B. COALEX STATE INQUIRY REPORT - 233, "Suspension or revocation of permit for insufficient information; liability for attorney's fees" (1992).
- C. SMCRA sec. 525(e) [30 USC 1275(e)]. Review by the Secretary.
- D. 43 CFR 4.1290 et seq. (1992). Petitions for award of costs and expenses under section 525(e) of the Act.
- E. 5 USCS sec. 504 (1993). Costs and fees of parties [under EAJA].
- F. CORNELLA v SCHWEIKER, 728 F 2d 978 (8th Cir 1984).
- G. CORNELLA v SCHWEIKER, 741 F 2d 170 (8th Cir 1984).
- H. MAHER v GAGNE, 448 US 122 (1980).
- I. BEST v CALIFORNIA APPRENTICESHIP COUNCIL, 240 Cal Rptr 1 (Ca Ct App 1987).
- J. MUSKINGUM MINING, INC. v DIVISION OF RECLAMATION AND DELBERT E. LACY, Ohio Reclamation Board of Review Case No. RBR-4-87-265 (1992).
- K. VILLAGE OF PLEASANT CITY AND R.T.G., INC. v DIVISION OF RECLAMATION, Ohio Reclamation Board of Review Case No. RBR-4-89-190 & 191 (1992).
- L. ORC Ann. sec. 1513.13 (1994).
- M. Ohio reg. sec. 1501:13-14-04 (1987).