

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

MARION SUPERIOR COURT
ENVIRONMENTAL DIVISION
CONSOLIDATED CAUSE NOS.
49F12-0609-MI-039929 / 49F12-0610-MI-040714

HOOSIER ENVIRONMENTAL)
COUNCIL, INC.,)

Petitioner,)

v.)

INDIANA DEPARTMENT OF)
NATURAL RESOURCES,)

Respondent.)

INDIANA DEPARTMENT OF)
NATURAL RESOURCES,)

Petitioner,)

v.)

HOOSIER ENVIRONMENTAL)
COUNCIL, INC.,)

Respondent.)

FILED

(189) JUL 06 2007

Elizabeth A. White
CLERK OF THE MARION CIRCUIT COURT

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This cause comes before the Court on the parties' Verified Petitions for Judicial Review of the Natural Resource Commission's August 30, 2006, "Findings of Fact and Conclusions of Law with Final Order of the Natural Resources Commission" (the "NRC Order"). The parties filed cross-motions for summary judgment and oral arguments were presented to the Court. The issues having been heard before the Court, the Court now enters its Findings of Fact, Conclusions of Law, and Judgment.

A. FINDINGS OF FACT

1. The parties are the Hoosier Environmental Council, Inc. ("HEC") and the Indiana Department of Natural Resources ("IDNR").

2. HEC asserts that it is entitled to attorney's fees, expenses, and litigation costs associated with HEC's participation in administrative and judicial proceedings subsequent to the issuance of an IDNR coal combustion waste ("CCW") disposal permit ("S-312-1") to Foertsch Construction Company (Administrative Cause Nos. 97-065 (original action) and 97-065R (on remand)) in May 1995 ("Foertsch Permit Proceedings"). HEC's "Brief in Support of Motion for Summary Judgment" ("HEC Brief"), p. 2. HEC originally claimed it was entitled to \$168,495.93 for this participation and not the \$90,107.39 (\$78,488.53 less) that the NRC eventually awarded to HEC in the NRC's August 30, 2006, Final Order, which Order the parties challenge in their cross-motions for summary judgment. HEC Brief, p. 3.

3. In the most recent stages of this matter, the NRC's administrative law judge, Sandra L. Jensen, issued her "Findings of Fact and Conclusions of Law with Non-Final Order of Administrative Law Judge." Record, pp. 107-148. In her non-final order, she determined that HEC was entitled to \$74,884.61 for the Administrative Review Phase and \$15,045.44 for the Fee Petition Phase for a total proposed award of \$89,930.05. Record, pp. 142-147. The Record indicates that the NRC's AOPA Committee met on July 13, 2006, to discuss the HEC case. Record, pp. 532-535. On August 9, 2006, the ALJ issued her "Amended Findings of Fact and Conclusions of Law with Non-Final Order of Administrative Law Judge Following Remand by the AOPA Committee of the Natural Resources Commission." Record, pp. 473-523. She concluded that HEC was entitled to \$90,107.39 in costs and expenses, a slight adjustment upward from her earlier non-final order. Record, p. 523. On August 23, 2006, the AOPA Committee affirmed the award to HEC in the amount of \$90,107.39 as provided in the ALJ's amended order. Record, pp. 455-457. On August 30, 2006, the NRC formally notified the parties of the award of \$90,107.39 to HEC in the NRC's "Findings of Fact and Conclusions of Law with Final Order of the Natural Resources Commission" in this matter, which final order the parties challenge through their Petitions for Judicial Review and Motions for Summary Judgment in these consolidated cases. Record, pp. 399-454.

4. To the extent any of these findings of fact are construed to be conclusions of law, they are hereby included as additional conclusions of law. To the extent that the conclusions of law are construed to be findings of fact, they are hereby included as additional findings of fact.

B. CONCLUSIONS OF LAW

1. Summary judgment is appropriate if the designated evidentiary matter shows that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Wade v. Norfolk and Western Railway Company*, 694 N.E.2d 298, 301 (Ind. App. 1998). Generally, the moving party bears the burden of establishing the propriety of summary judgment, and all facts and inferences to be drawn therefrom are viewed in a light most favorable to the non-moving party. *State v. Livengood*, 688 N.E.2d 189, 192 (Ind. App. 1997). Mere assertions of opinions or conclusions of law will not suffice to create a genuine issue of material fact to preclude summary judgment. *Sanchez v. Hamara*, 534 N.E.2d 756, 759 (Ind. App. 1989); *McMahan v. Snap On Tool Corporation*, 478 N.E.2d 116, 122 (Ind. App. 1985).

2. The NRC is the ultimate authority for IDNR, assigned the duty to review IDNR's non-final agency actions, and the duty to make the final decision for what IDNR requires. Ind. Code § 4-21.5-7-5. The NRC's order disposing of a proceeding is the final order of IDNR. Ind. Code § 4-21.5-3-27.

3. In reviewing the NRC's Order in this judicial review proceeding, this Court is required to apply a deferential, appellate standard of review. *Indiana Department of Natural Resources v. United Refuse Company, Inc.*, 615 N.E.2d 100, 104 (Ind. 1993); Ind. Code § 4-21.5-5-14.

4. Ind. Code §§ 4-21.5-5-14 and 15 define the scope of the Court's review of the NRC Order and the nature of the remedy it is authorized to direct should it conclude that the Order is in error. *South Newton School Corp. v. South Newton Classroom Teachers Ass'n*, 761 N.E.2d 115, 118 (Ind. Ct.App.2001), *trans. denied*, 774 N.E.2d 507 (Ind.2002) (Table).

To conclude that the NRC Order is in error, the Court must find that the Order is:

- (1) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) Contrary to constitutional right, power, privilege, or immunity;
- (3) In excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (4) Without observance of procedure required by law; or

(5) Unsupported by substantial evidence.

Ind. Code § 4-21.5-5-14.

5. This Court will only reverse the NRC's Order if one or both parties demonstrate that the NRC's Order is arbitrary and capricious. Ind. Code § 4-21.5-5-14. An agency's action is "arbitrary and capricious when it is made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision . . ." *Indiana Dept. of Env'tl Mgmt. v. Lake County Solid Waste Mgmt. Dist.*, 847 N.E.2d 974, 983 (Ind. Ct. App. 2006) (emphasis added) (quoting *Ind. Dept. of Env'tl Mgmt. v. Schnippel Constr., Inc.*, 778 N.E.2d 407, 412 (Ind. Ct. App. 2002)). In addition, "an administrative agency's interpretation of a statute that the agency is charged with enforcing is entitled to great weight . . ." *Peabody Coal Co. v. Indiana Dept. of Natural Resources*, 606 N.E.2d 1306, 1308 (Ind. Ct. App. 1992).

6. In reviewing HEC's entitlement to fees and expenses in this matter, the Court is guided by the language of one applicable statute and one rule. Ind. Code § 14-34-15-10 states in pertinent part:

Whenever an order is issued:

(1) Under this chapter or under IC 13-4.1-11 (before its repeal); or (2) As a result of an administrative proceeding under this article or under IC 13-4.1 (before its repeal) instituted at the request of a person; the court, resulting from judicial review, or the commission may assess against either party to the proceeding an amount of money, determined by the commission, equal to the aggregate amount of all costs and expenses, including attorney's fees, reasonably incurred by the person for or in connection with the person's participation in the proceedings, including any judicial review of agency actions. [Emphasis added.]

312 IAC 3-1-13 states in pertinent part:

* * *

(d) Appropriate costs and expenses, including attorney fees, may be awarded under IC 14-34-15-10 only as follows:

* * *

(2) To a person from the department, other than to a permittee or the permittee's authorized representative, who initiates or participates in a proceeding 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. [Emphasis added.]

7. Additionally, the Court is guided by the decision of the Indiana Court of Appeals, issued in an earlier stage of these proceedings, which decision reversed a trial court order in HEC's favor regarding HEC's eligibility versus its entitlement to the fees, costs, and expenses it seeks. *Indiana Department of Natural Resources v. Hoosier Environmental Council, Inc.*, 831 N.E.2d 804 (Ind. Ct. App. 2005), *rehearing denied*. Essentially, the Court of Appeals found IDNR conceded the issue of HEC's eligibility so the only issue left for consideration was HEC's entitlement to fees under Ind. Code § 14-34-15-10; however, because the NRC had not yet interpreted or applied the entitlement criteria, the NRC erred by simply finding that HEC was not eligible for an award. Therefore, the Court of Appeals reversed the trial court's order with respect to the entitlement issue and remanded the matter to the NRC to conduct further proceedings consistent with the Court of Appeals' decision. This remand resulted in the NRC Order being challenged today.

8. The Court on summary judgment should determine whether HEC is a "prevailing party" for the purposes of the statute and rule based upon a review of the Record in this matter.

9. Only prevailing parties are entitled to costs or fees. The U.S. Supreme Court has defined "prevailing party" for attorney's fees purposes as one who succeeds on any significant issue in litigation which achieves some of the benefit the party sought in bringing suit. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

10. The initial fees sought for pursuing a fee petition must be reasonable and proportional to the success obtained in the underlying case and that any award for time spent in pursuing motions for fees must not be excessive in relation to the award actually obtained and only time spent seeking fees that were actually awarded is to be compensated. *Utah International Inc. v. Department of Interior*, 643 F. Supp. 810, 831 (D. Utah 1986).

11. A trial court's determination to award attorney's fees is reviewed for abuse of discretion. *Countrywide Home Loans, Inc. v. Rood*, 784 N.E.2d 1050, 1055 (Ind. App. 2003), *transfer denied*; *Kovenock v. Mallus*, 660 N.E.2d 638, 643 (Ind. App. 1996), *transfer denied*. An abuse of discretion exists when "the trial court's decision is against the logic and effect of the facts and circumstances before it." *Joyner v. Citifinancial Mortgage Co.*, 800 N.E.2d 979, 981 (Ind. App. 2003).

12. The NRC awarded HEC all of the attorney's fees and expenses which it found to be reasonable in type and amount for the Administrative Review Phase of the Foertsch Permit Proceedings. Under the plain meaning of Ind. Code § 14-34-1-1 *et seq.*, then, a prevailing party is eligible for and entitled to an award of the "entire amount" or "complete whole" of its fees and expenses which have been reasonably incurred in the course of its participation in the relevant proceedings. In the NRC Order, the NRC applied the correct legal standard and expressly made the findings required for an award to HEC of all of its fees and expenses reasonably incurred in the Administrative Review Phase of the Foertsch Permit Proceedings. HEC is entitled to an award of the aggregate amount of fees and expenses it reasonably incurred in litigating all ten issues in the Administrative Review Phase of the Foertsch Permit Proceeding. The NRC correctly reached this conclusion.

13. The NRC Order disallows in their entirety HEC's fees and expenses for its challenge to the NRC's non-final permit order (the so-called "Objections Phase") and its further challenge before the Daviess Circuit Court (the "Judicial Review Phase"). *See Findings Nos. 131, 142, Order at 24-25, 27 (R. 424-25, 427).* Citing *Utah International*, the NRC Order justifies these disallowances on the grounds that HEC "failed to achieve any additional accomplishments . . . and was even unsuccessful in fully defending its prior success" during the Objections Phase and "was entirely unsuccessful in accomplishing any of its additional objectives" in the Judicial Review Phase. *See Findings Nos. 130, 139, Order at 24, 27 (R. 424, 427).*

14. This Court does not read the *Utah International* decision to stand for the proposition that HEC should be denied fees and expenses for the "Objections" and "Judicial Review" phases of the Foertsch Permit Proceedings because it did not achieve *additional* success in those phases of the Proceedings beyond that achieved during the "Administrative Review" phase. Instead, this Court reads *Utah International* to stand for the proposition that a fee petitioner under federal and state SMCRA statutes is not entitled to fees and expenses for phases of proceedings in which it was aligned with the government agency paying the fees and expenses. *See 643 F. Supp. at 820.* Here, the record clearly reflects that HEC was *not* aligned with DNR during either the "Objections" or the "Judicial Review" phases of the Foertsch Permit Proceedings, so *Utah International* simply is not authority for disallowing HEC's recovery during those phases of the proceedings.

15. The issues litigated in the Objections and Judicial Review Phases of the Foertsch Permit Proceedings were identical to those litigated in the Administrative Review Phase. The NRC expressly found that all of the issues litigated in the Administrative Review Phase arose from the same common core of facts and under related legal theories and thus were related for purposes of a fee and expense award. This Court does not read *Utah International* to stand for the proposition that HEC's failure to achieve additional success in the Objections and Judicial Review Phases beyond that realized in the Administrative Review Phase warrants disallowing in their entirety HEC's fees and expenses for the two later phases.

The relevant SMCRA authority for the circumstances here is *Save Our Cumberland Mountains v. Hodel*, 651 F. Supp. 1528 (D.D.C. 1986). In that case, the Court ruled that what mattered was whether the group had achieved the requisite degree of success for an award of fees "in the end," not whether it had achieved success at each stage of the case along the way. *Id.* at 1533. Here, HEC is entitled to recover its reasonable fees and expenses for all phases and not merely the "Administrative Review" phase of the Foertsch Permit Proceedings.

16. Having protected and preserved during the "Objections" and "Judicial Review" phases enough of the permit modifications it originally obtained during "Administrative Review" to achieve sufficient success "in the end" to be eligible for and entitled to an award, HEC should receive an award sufficient to fairly compensate its counsel Mr. Goodwin for his time and expense in all three phases of the Foertsch Permit Proceedings. The failure of the NRC Order to do so is an error of law.

17. In its Order, the NRC determined that all of the attorney's fees and litigation expenses claimed by HEC in both the Foertsch Permit proceedings and the HEC Fee Proceeding were reasonable in type and amount and thus properly includable in an award, except that (a) HEC's former attorney, Max E. Goodwin of the Mann Law Firm, should be compensated at the lower (\$150 per hour) rather than the higher (\$225 per hour) of the two hourly rates which he presented for NRC consideration; and (b) Mullett & Associates, the law firm of HEC's present attorney, Michael A Mullett, should not be compensated for the initial retainer (\$5,000) it charged HEC in addition to its hourly rates for its work in the HEC Fee Proceeding. Both HEC and DNR challenge this determination on judicial review.

18. The NRC disclaimed adherence to any general rule for the award of employee salaries and expenses and instead based its decision to allow recovery of the fees and expenses

here on the grounds that it had elected to compensate Mr. Goodwin at an hourly rate of \$150.00 which, on the record before it, did *not* include provision by his firm of the paralegal services instead provided by the HEC employees. Given this explanation by the NRC, it is clear that the NRC committed no error when it followed well-settled Indiana law in awarding compensation for paralegal services. *See, e.g., Shell Oil Co. v. Meyer*, 684 N.E.2d 504, 525 (Ind. Ct. App. 1998), *summarily aff'd on this issue*, 705 N.E.2d 962, 981 (Ind. 1999).

19. However, the Court believes the NRC properly analyzed the evidence HEC produced on the retainer and found it lacking. Record, p. 46. The NRC found "Mullett's affidavit with respect to the retainer is the only evidence in the record on this issue and that evidentiary material is simply insufficient evidence upon which to base an award of \$5,000 to HEC." *Id.* The NRC also applied the case law upon which HEC had been relying, and reasonably found that the claimed retainer had no place as fees or expenses subject to recovery. As a result, the Court finds that the NRC's decision on the retainer is not (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. Ind. Code § 4-21.5-5-14(d).

20. The NRC did not limit the total amount of the fees and expenses allowable in the HEC Fee Proceeding, either in absolute terms or as a percentage of the award made for the Foertsch Permit Proceedings. DNR objects as excessive to the total amount of fees and expenses awarded to Mullett & Associates for its representation in the HEC Fee Proceeding, claiming that the NRC should not have awarded fees for more than "5% of the hours allowed in the main case if a trial is held." (DNR Memo: 13, 15). The Court finds that the NRC did not err in declining to limit Mullett & Associates' fees and expenses in the HEC Fee Proceeding to five percent of HEC's award for the Foertsch Permit Proceedings.

21. The Court has determined that the NRC erred as a matter of law when it awarded no compensation to HEC for the Objections and Judicial Review Phases of the Foertsch Permit Proceedings. This error is prejudicial rather than harmless to HEC.

22. The Court finds that the denial of HEC's petition in part was arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, short of statutory right, and unsupported by substantial evidence, in that, on the record in Administrative Cause No. 97-065R

and according to applicable legal precedent, HEC made the necessary showing that it was both eligible for and entitled to an award of attorney's fees and expenses pursuant to Ind. Code § 14-34-15-10 and 312 IAC 3-1-13(d) for all phases of the Foertsch Permit and HEC Fee Proceedings.

C. JUDGMENT

For all the reasons above, this Court vacates the NRC's August 30, 2006, Final Order, and remands this matter to the NRC for further proceedings consistent with this Court's Findings of Fact and Conclusions of Law.

SO ORDERED this 6TH day of July, 2007.

Michael D. Keele
Judge, Marion Superior Court
Civil Division, Room No. F12

Distribution:

Michael A. Mullett
Mullett & Associates
309 West Washington Street, Suite 233
Indianapolis, IN 46204

Steven D. Griffin
Office of the Attorney General
Indiana Government Center South - Fifth Floor
302 West Washington Street
Indianapolis, IN 46204