UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| PAUL BURKE,<br><br>Plaintiff,<br><br>v.<br><br>U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,<br><br>Defendant. | ) | Civil Action No. 16-CV-825 (CRC) |

**DEFENDANT'S MOTION TO DISMISS AND**
**OPPOSITION TO PLAINTIFF'S MOTION FOR COSTS**

Defendant respectfully moves to dismiss Plaintiff's complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. In support of this motion, Defendant respectfully refers the Court to the accompanying memorandum of law and the exhibits attached thereto. For the reasons stated in the attached memorandum, the Court should also deny Plaintiff's Motion for Award of Costs, ECF No. 9. Attached is a proposed order.

Dated: July 28, 2016

Respectfully submitted,

CHANNING D. PHILLIPS, D.C. Bar # 415793
United States Attorney for the District of Columbia

DANIEL VAN HORN, D.C. Bar # 924092
Chief, Civil Division

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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|---|---|---|
| PAUL BURKE,<br><br>Plaintiff,<br><br>v.<br><br>U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,<br><br>Defendant. | ) | Civil Action No. 16-CV-825 (CRC) |

**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S MOTION FOR COSTS**

Defendant United States Department of Health and Human Services ("HHS") has tried to resolve this Freedom of Information Act ("FOIA") case without the Court's intervention: HHS released the documents that Plaintiff Paul Burke requested, and offered to reimburse him for the $400 fee he paid to file this action.

On June 30, 2016, purportedly pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure, Burke filed his "Notice of Dismissal of Complaint," ECF No. 8. On July 11, 2016, Burke filed his second motion for $400 in costs "to keep this case moving, in case settlement negotiations fail to resolve the remaining issue of cost." Pl.'s Mot. for Award of Costs, ECF No. 9, at 1; *see also* Pl's Mot. for Partial Voluntary Dismissal & Award of Costs, ECF No. 6.

Burke's "Notice of Dismissal" was ineffective because "notices of dismissal must be unconditional." *Amore v. Accor N. Am.*, 529 F. Supp. 2d 85, 91 (D.D.C. 2008). "Rule 41(a)(1) provides a 'simple, self-executing mechanism,' whereby 'the plaintiff files a notice of dismissal[;] . . . the dismissal takes effect automatically[; and] the trial judge has no role to play

at all.'" *Id.* at 90-91. "Conditional notices of dismissal are not within the scope of Rule 41(a)(1) because 'the clerk will have to construe the condition and perhaps even become a factfinder to determine when the condition is satisfied. This defeats the purpose of Rule 41(a)(1) to provide a quick, automatic means of ending an action.'" *Id.* at 91. Significantly, the Clerk has not closed this case, and should have done so if Burke's "Notice of Dismissal" was effective. *Cf., e.g., Law Office of Joseph D. Glazer, P.C. v. Dep't of Health and Human Servs.*, No. 15-CV-423 (RJL), ECF No. 3.

HHS filed its answer to Burke's complaint yesterday. It now moves to dismiss this case for lack of jurisdiction, and opposes Burke's motion for costs. This case became moot once HHS released the requested records to Burke on June 8, 2016, and thus the Court lacks jurisdiction for this case. The Court should deny Burke's request for costs because, *inter alia*, (i) the released information contributes little to the fund of public knowledge given that Accountable Care Organizations have been making that information available to Medicare patients, (ii) Burke appears to have personal interests that motivate him to bring lawsuits absent the additional incentive of an award of costs, and (iii) HHS took a colorable position on declining to release the requested documents to Burke.

Accordingly, the Court should dismiss this case for lack of jurisdiction and deny Burke's request for costs.

## I. THIS CASE IS MOOT AND THUS THE COURT SHOULD DISMISS IT FOR LACK OF JURISDICTION

"Article III's limitation of federal-court jurisdiction to cases and controversies requires that 'an actual controversy . . . be extant at all stages of review, not merely at the time the complaint is filed.'" *Bayala v. U.S. Dep't of Homeland Sec.*, No. 14-5279, 2016 WL 3524098, at *2 (D.C. Cir. June 28, 2016). "As such, '[i]f an intervening circumstance deprives the plaintiff

of a personal stake in the outcome of the lawsuit, at any point during the litigation, the action can no longer proceed and must be dismissed as moot.'" *Id.* "In the FOIA context, that means that once all the documents are released to the requesting party, there no longer is any case or controversy." *Id.*; *see also Competitive Enter. Instit. v. U.S. Envtl. Prot. Agency*, No. 15-346 (ABJ), 2016 WL 355067, at *3 (D.D.C. Jan. 28, 2016) ("[A]s the D.C. Circuit has explained, however fitful or delayed the release of information under the FOIA may be, once all requested records are surrendered, federal courts have no further statutory function to perform.") (internal quotation marks omitted).

HHS released all responsive documents to Burke on June 8, 2016. Ex. A (Gilmore Decl.) ¶ 19. Burke acknowledges that he received the documents he requested. *E.g.*, ECF No. 6 at 1 ("Plaintiff received the documents specified in the FOIA request by email on June 8[.]"); ECF No. 8 at 1 ("Plaintiff received the documents sought in this case on June 8."). Accordingly, this case is moot, and the Court must dismiss it for lack of jurisdiction.

## II. THE COURT SHOULD DENY BURKE'S MOTION FOR COSTS

"To obtain attorneys' fees [or costs] under FOIA, a plaintiff must satisfy two requirements." *McKinley v. Fed. Hous. Fin. Agency*, 739 F.3d 707, 710 (D.C. Cir. 2014); *see also* 5 U.S.C. § 552(a)(4)(E)(i) (providing that a court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under [the FOIA] in which the complainant has substantially prevailed"). "First, he must be eligible for fees, which requires that he 'substantially prevail' as defined by 5 U.S.C. § 552(a)(4)(E)(ii)." *McKinley*, 739 F.3d at 710. "Second, an eligible plaintiff must demonstrate that he is entitled to fees." *Id.*

A complainant has "substantially prevailed," in relevant part, if "the complaint has obtained relief through . . . a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii). In other words, a plaintiff may claim eligibility for costs if "the litigation *substantially caused* the requested records to be released." *Conservation Force v. Jewell*, No. 12-CV-1665 (KBJ), 2016 WL 471252, at *4 (D.D.C. Feb. 5, 2016) (emphasis added) (internal quotation marks omitted). "[T]he mere filing of the complaint and subsequent release of documents, without more, will *not* suffice to show a causal nexus." *Id.* (internal quotation marks omitted).

The Court need not decide whether this action "substantially caused" the requested records to be released. Instead, the Court may assume *arguendo* that Burke has satisfied the eligibility requirement, and proceed to deciding whether Burke satisfies the entitlement requirement. *See McKinley*, 739 F.3d at 710 (deeming "appropriate" the district court's decision to "assume[] arguendo that [plaintiff] satisfied the eligibility requirement and conclude[] that he nonetheless failed to satisfy the entitlement requirement").

"This circuit has long applied a multi-factor standard for evaluating whether a plaintiff who is eligible for attorneys' fees is also entitled to such fees." *Id.* at 711. "Four non-exclusive factors typically govern the entitlement inquiry: (1) the public benefit derived from the case; (2) the commercial benefit to plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) the reasonableness of the agency's withholding of the requested documents." *Id.* (internal quotation marks omitted). "In practice, [the Circuit] ha[s] often combined the second and third factors into a single factor assessing whether a plaintiff has sufficient private incentive to seek disclosure of the documents without expecting to be compensated for it." *Id.* (internal quotation marks omitted). "No factor is dispositive, and sifting of th[e] criteria over the facts of a case is a

matter of district court discretion." *Conservation Force*, 2016 WL 471252, at *5 (internal quotation marks omitted). "[T]he touchstone is always whether an award of attorney fees [or costs] is necessary to implement the FOIA." *Id.* "[E]ven after finding eligibility and entitlement, district courts retain the discretion to modify a fee [or costs] award based on the reasonableness of the request and the particular facts of the case." *Id.*

"The first factor considers the significance of the contribution that the released information makes to the fund of public knowledge." *Id.* "The public benefit factor weighs in favor of granting attorneys' fees [or costs] 'where the complainant's victory is likely to add to the fund of information that citizens may use in making vital political choices.'" *People for the Ethical Treatment of Animals v. Nat'l Instits. of Health & Human Servs.*, 130 F. Supp. 3d 156, 164 (D.D.C. 2015). The documents that HHS released to Burke contribute little information to the fund of public knowledge because the information contained therein was and is made available to approved Accountable Care Organizations, which then makes such information available to Medicare patients. *See* Ex. A (Gilmore Decl.) ¶¶ 9, 12, 15, 16. While it is arguable that some public benefit might be derived from Burke's case, any such benefit is minimal. *See Tax Analysts v. U.S. Dep't of Justice*, 759 F. Supp. 28, 30 (D.D.C. 1991) ("[E]ven prior to the institution of this litigation, the public had the benefit of access to all or most of this information, albeit not always in the preferred timely fashion. Thus, the Court concludes that while the public does stand to benefit from this litigation, that benefit is less than overwhelming."). Accordingly, the first factor does not favor Burke.

As for the second and third factors, "[t]hey weigh against an award where the plaintiff 'seeks disclosure for a commercial benefit or out of other personal motives.'" *People for the Ethical Treatment of Animals*, 130 F. Supp. 3d at 165. "[E]ven if a party was not motivated by

commercial gain, the Court may consider other personal motives that would serve as an incentive 'to pursue the release of documents regardless of the availability of fees under FOIA.'" *Tax Analysts*, 759 F. Supp. at 30. Here, like the plaintiff in *Tax Analysts*, Burke "was not motivated simply by altruistic instincts, but rather by [his] desire for efficient, easy access to [records]," and "the information was already available." *Id.* at 31. That "certainly is a personal interest which could motivate plaintiff to bring this lawsuit absent the additional incentive of an award of attorney's fees [or costs]." *Id.* In addition, given that HHS already offered to reimburse Burke for the $400 filing fee to moot this case in its entirety, Burke appears to derive psychic pleasure from filing lawsuits. *See* Ex. B (Stewards of the Potomac Highlands, Take Action) at 3 (Paul Burke's Experiences) ("I have filed various legal actions without a lawyer."), http://www.potomacstewards.com/action. That too is a personal interest that could motivate a plaintiff to sue absent the additional incentive of an award of costs. Accordingly, the second and third factors do not favor Burke.

The fourth factor "considers whether the agency's opposition to disclosure had a reasonable basis in law" and "whether the agency had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior." *McKinley*, 739 F.3d at 712 (internal quotation marks omitted). "The government's decision to withhold information may have a reasonable basis in law even if the information was ultimately not found to be exempt." *People for the Ethical Treatment of Animals*, 130 F. Supp. 3d at 165. While HHS' explanation for its initial withholding of the requested documents is not a model of clarity, it essentially declined to release these documents to Burke because it only releases those documents to approved Accredited Care Organizations via a restricted system that requires obtaining and utilizing an user ID and password. *See* Ex. A (Gilmore Decl.) ¶¶ 11, 12. HHS' processing of Burke's

request was delayed because, *inter alia*, the search for responsive records was initially directed to a component that did not have any responsive records, and staffing changes. *Id.* ¶¶ 8, 11. As for Burke's contention that HHS' appeal process is not independent, *see* ECF No. 9 at 5-6, that is belied by Exhibit 4 to his motion, ECF No. 9-1 at 10. Accordingly, the fourth factor does not favor Burke.

Burke fails to meet his burden of showing that he is entitled to costs, or that the Court should exercise its discretion to award him costs. Under these circumstances, the Court should deny Burke's request for costs.

**CONCLUSION**

For the foregoing reasons, the Court should dismiss this case for lack of jurisdiction, and deny Plaintiff's Motion for Award of Costs in its entirety.

Dated: July 28, 2016

Respectfully submitted,

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United States Attorney for the District of Columbia

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# Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| Paul Burke, | ) | |
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| Plaintiff, *pro se* | ) | |
| | ) | |
| v. | ) | Case No. 1:16-cv-00825 (CRC) |
| | ) | |
| U.S. DEPARTMENT OF HEALTH | | |
| AND HUMAN SERVCES | ) | |
| | ) | |
| Defendants. | ) | |
| ____________________________________ | ) | |

**DECLARATION OF HUGH GILMORE**

I, Hugh Gilmore, declare as follows:

1. I am Director of the Freedom of Information Group (FIG), Office of Strategic Operations and Regulatory Affairs, Centers for Medicare & Medicaid Services ("CMS"), U.S. Department of Health and Human Services ("HHS" or "the Department"). In this capacity, I am the Freedom of Information Officer for CMS and have held this position since 2014.

2. My duties include responding to requests made pursuant to the Freedom of Information Act, 5 U.S.C. § 522 ("FOIA"). This entails managing searches for CMS records, determining whether to release or withhold records or portions of records in accordance with FOIA and HHS implementing regulations, and overseeing all FOIA activities within CMS.

3. I make this Declaration based upon my personal knowledge and information available to me in my official capacity. The purpose of this Declaration is to explain the processing of records for a FOIA request that the HHS Office of the Assistant Secretary of Public Affairs of Health and Human Services referred to Centers for Medicare & Medicaid Services and the withholdings made to these records pursuant to FOIA.

4. On or about July 15, 2013, HHS, Office of Assistant Secretary for Public Affairs received a request for copies of language provided by Medicare to Accountable Care Organizations for signs and informing beneficiaries about the Shared Savings program.

5. Accountable Care Organizations (ACOs) are groups of doctors, hospitals, and other health care providers, who come together voluntarily to give coordinated high quality care to their Medicare patients. The goal of coordinated care is to ensure that patients, especially the chronically ill, get the right care at the right time, while avoiding unnecessary duplication of services and preventing medical errors. When an ACO succeeds both in delivering high-quality care and spending health care dollars more wisely, it will share in the savings it achieves for the Medicare program. It is not an HMO or Medicare Advantage Plan.

6. The Medicare Shared Savings Program (Shared Savings Program) was established by section 3022 of the Affordable Care Act. The Shared Savings Program is a key component of the Medicare delivery system reform initiatives included in the Affordable Care Act and is a new approach to the delivery of health care. Congress created the Shared Savings Program to facilitate coordination and cooperation among providers to improve the quality of care for Medicare Fee-For-Service (FFS) beneficiaries and reduce unnecessary costs. Eligible providers, hospitals, and suppliers may participate in the Shared Savings Program by creating or participating in an ACO.

7. On or about July 16, 2013, the HHS Office of the Assistant Secretary of Public Affairs of Health and Human Services referred the FOIA request to CMS for response to the requester.

8. On July 18, 2013, the request was sent for search among CMS components for responsive records. The search first began with a component, Centers for Medicare and Medicaid Innovation (CMMI), which had no records. The request was subsequently referred to another

component, Centers for Medicare Fee-For-Service (CM FFS), in August 2013. The records which consisted of seventeen pages of blank signs/templates of language were received from CM FFS on June 17, 2014. At approximately the same time, I began as the FOIA director at CMS.

9. The purpose of the signs/templates is to notify beneficiaries that their ACO provider/supplier is participating in the Shared Savings Program and of the opportunity to decline claims data sharing. The signs/templates provide notice that the ACO provider/supplier is participating in the Shared Savings Program, and what that means for the care they receive. In addition, the patient is notified of the opportunity to decline claims data sharing. The signs/templates are intended for use by the individual ACO Participants (providers, etc.), and are not to be altered, with the exception of including the provider's contact information and logo.

10. On August 27, 2014, Mr. Burke still expressed interest in the request after contact by the Freedom of Information Group (FIG) staff.

11. On February 25, 2015, after the case was reassigned to another staff member, the agency released its initial response to withhold all 17 pages of responsive signs/templates. The agency invoked Exemption 5 of the Freedom of Information Act to prevent injury to the quality of agency decisions by preserving the ability of agency employees to engage in free and candid discussions on matters of policy under the deliberative process privilege.

12. The CM FFS position was that the records were for the intended use of approved applicant ACO's, were on a restricted enterprise system accessed by user ID and password issued to only approved ACO's, Mr. Burke was not an approved ACO, and the records were made available to the public on ACO websites once an ACO's approved. The signs/templates could potentially be used for fraudulent Medicare billing by providers/suppliers that are not actual ACO Participants, but who obtain the signs/templates and insert their own personal information and logo

into the template. CMS provides these templates to approved ACOs for distribution to ACO Participants. The templates must be accessed through a secure portal that only approved ACOs (and CMS) have access to. Non-ACO Participant providers/suppliers could potentially alter the templates with additional edits designed to deceive CMS and potentially use them for fraudulent Medicare billing.

13. Mr. Burke appealed his denied request on March 24, 2015.

14. CMS CMMI staff expressed concerns with the records being disclosed to the public. The requester was not an ACO applicant, the records are available to approved applicants through password protected user ID access, and public disclosure of the templates may promote fraud. These template records were safeguarded as proprietary and internal deliberative records and not published on public website by CMS.

15. On January 4, 2016, FIG staff contacted the requester, Mr. Burke, to get a written clarification as to why the ACO published statements would not satisfy his needs.

16. On January 5, 2016, the CMS FIG reached out to the component offices to determine if the records could be released through the appeal process. The component offices were unwavering and replied that the records are provided to approve ACO applicants through the CMS Enterprise portal by password protection and an issued user ID. The templates are not available to the public or on the public website. The records are templates for standard required notices that the ACO are required to post in some instances on its website. The ACO completes these templates adding their logos and identifiers after its application is approved. The concern by the program offices was the likelihood of imposters or masqueraders creating illegitimate records to commit fraudulent Medicare billing.

17. On February 24, 2016, the CMS FIG staff began to prepare a proposed FOIA appeal decision package.

18. On May 3, 2016, Mr. Burke filed this complaint.

19. On June 8, 2016, CMS released all responsive records to Mr. Burke without any redaction.

I declare under penalty of perjury that the foregoing to true and correct, to the best of my information and belief. 28 U.S.C. § 1746. Executed this _28th___ day of July, 2016.

Hugh Gilmore

# Exhibit B

Stewards of the Potomac Highlands
PotomacStewards.com

## RIP Bill Howley

The citizens of West Virginia lost a friend in 2015, Bill Howley. We came to know him through his efforts in organizing opposition to the PATH high-voltage powerline proposal in 2009/10. He encouraged and inspired over 100 people to intervene in the case before the WV PSC, and PATH was defeated in WV.

> Bill Howley, 62, of Chloe died on April 23 in a car accident near Exit 79 on I-79. He was on his way to a meeting in his capacity as the recently-hired program director for WV SUN, an organization that promotes self-reliance through solar cooperatives in West Virginia. His last views were almost surely of the beautiful spring leaves and redbud blossoms.

Full obit at http://calhounpowerline.com.

## Tricks of the Trade - Getting Involved

When motivated corporations or agencies want to win government approval of their land-grabbing or -destroying project, they reach into their bag of tricks. Here are some tactics that have been used in in approving windmills, power lines, roads, mines, and subdivisions:

| Their Actions | Possible Responses |
|---|---|
| Hire a lawyer from every law firm in town to do small tasks for them; keeps you from using a local lawyer due to conflict of interest. | Represent yourself or get advice from out-of town lawyer. Most work is done by phone and mail, so they don't have to be local. |
| Send spies to join your group. | Stay honest & legal. Be cagy with your strategy. |
| Hold their own 'public meetings' early in the process to sap your energy before the government hearings. | Don't publicize them. Explain to your supporters these are not the real place to speak or learn honestly about the project. |
| Pack the government public hearings with a paid, pro-development crowd. | Get there early, speak knowledgeably. Most boards will approve unless you can show non-compliance, so research the board's criteria and the relevant law, and submit your points in writing at the hearing. |
| When you file petitions, they mail propaganda to the signers, saying they got the address from you, or that the government asked them to respond. | Be careful about submitting addresses of people with only a slight commitment to your cause. Since legal points are the main way to win anyway, use sign-up sheets instead of petitions to collect contact info. |
| Give verbal assurances that they later renege on | Insist that they put everything in writing up front. |
| Give written assurances, but renege anyway. "Oops! We're sorry. The contractor (or private landowner) did it, not us. Oh well, what's done is done." | Be aware of the specific issues that the government will enforce. Mistrust other written assurances, unless you'll have legal standing to go to court and let them know that you will do so if needed. |
| Say "We'll do some light trimming so our surveyors have clear sightlines." Then they clearcut. | Put it in writing: "No cutting." Be there when they are working. Have a lawyer's phone number. Or don't let them survey before approval. |

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|---|---|
| Say "Everything is preliminary, it's too early for that right now," then later you find out it is too late. | Raise all issues in writing as soon as you find out about them. Know the deadlines for government decisions and for your possible appeal. |
| Tell you it's a done deal, so take what you can get. | Check into the process, then negotiate or appeal to the next level. |
| Tell lies or exaggerations about you and your cause. | Sue for slander/libel (not a nuisance suit, though). Even if you represent yourself, they'll pay a lawyer, and may hesitate next time. |

# Representing Yourself without a Lawyer

Overview

You can save a lot of money in enforcing environmental rules by representing yourself, without a lawyer. If individuals file a case any or all of them can represent themselves. Organizations usually have to be represented by a lawyer, rather than by a non-lawyer.

It's very hard to win with or without a lawyer. It takes time to teach a lawyer all the issues & earn or raise money to pay the endless bills. With a lawyer you often can't afford to go beyond the first level. On your own you can keep going as long as your motivation lasts.

If you can't afford a lawyer, yet have a good case, it's better to do it yourself than not do it at all. At least there's some chance: things may change for the better while the case is in court; you may settle for something; or you may win!

Doing it yourself takes time to watch similar cases, and study their files, so you learn how to write what you need; time to read the rules; time to write, often with 10- to 30-day deadlines, and then a long pause until the next rush. Sometimes you need a couple hundred dollars for filing fees, copying, postage, travel & a hotel if there's a hearing in Charleston. If you can afford a little more, you can pay a lawyer to give you ideas or look at your drafts. If you get to court and a judge orders mediation you would have to pay half the mediator's cost, but presumably you could withdraw your case if the cost was too high.

Citizens have sometimes been sued for damages when they appeal. Then citizens have sometimes settled the original case and paid no damages, or have countersued & won damages rather than paying them. Circuit Judge Wilkes discusses citizen rights to appeal, and some protections from damages in his 4/27/07 ruling for citizens in Jefferson County civil case 04-C-191 pages 15-20. Those citizens defended themselves with a lawyer. By all means consult a lawyer if you are sued. If anyone knows WV cases where environmentalists have ever had to pay damages for their appeals, let us know.

Let us know if it would help you to have a workshop on representing yourself in environmental cases.

What's Involved in an Administrative Appeal?

If the WV Department of Environmental Protection (DEP) makes a decision which does not meet the minimum standards in the law, and if you are affected (e.g. it's your permit, or you swim, boat, fish, or use the water downstream), you can appeal within 30 days of their decision to the WV Environmental Quality Board (46CSR4), Air Quality Board, or Surface Mine Board. Instructions are on their websites. More information is on a separate page.

After the Board decides, either side can (within 30 days) appeal to Kanawha County Circuit Court if necessary, then to the WV Supreme Court, and then to federal courts. Each step takes months. I was involved in one case where the other side appealed to Circuit Court and got no answer for a year. The WV Supreme Court takes seems to take a year or more.

All 3 Boards may refer to the WV Rules of Civil Procedure. and Rules of Evidence.

What's Involved in Court?

The rules above apply to Circuit Courts too, and courts also follow the Rules Governing Administrative Appeals. The WV Supreme Court has its own Rules of Appellate Procedure.

There's no filing fee at the Boards. There's a $150 fee at Circuit Court. There's a fee to copy the file if you go to the WV Supreme Court.

To file at Circuit Court you fill out some cover pages and a statement of your "Complaint." Ask the Circuit Court to see some files on similar cases, and you will start learning how to proceed. You provide multiple copies, and the fees, possible including fees to have the Sheriff serve a copy on the other side.

At Circuit Court, the Judge may order a scheduling conference, and then typically the side appealing to Court writes up its arguments (double-spaced 12 point type, called a Brief, though it may be dozens of pages long), then the other side answers, then the first side makes a final response. When you're appealing from one of the Boards, you can quote the evidence presented to the Board. You usually don't need to and aren't allowed to bring in new evidence, and there is no jury.

If your complaint is against a company for pollution, rather than against DEP for DEP actions and inactions, then you can give them 60 days notice and sue the company directly in Circuit Court. Minnesota produced a good short guide.

If you lose in Circuit court, you can file more papers to appeal to the WV Supreme Court. If they have a first hearing about whether to hear the case, only the appealer (appellant) can speak. If 3 of the 5 vote to hear the case, the appellant has 30 days to file your Brief, the other side has 30 days to respond, and the appellant haa 15 days for a final response. Then there will probably be a hearing in Charleston where both sides speak, and a written decision.

Paul Burke's Experiences

I have filed various legal actions without a lawyer. In 2003 I appealed the statewide permit controlling storm water running off construction sites, and had 2 days of hearings at the EQB. They denied most of my analysis of how the permit did not protect water from mud, but they did change the permit to require each construction site to have an entrance sign. You may have seen these black and white signs around the state, telling the public what is being built & how to contact DEP and the builder.

In 2004 other citizens and I filed another appeal which resulted in a settlement where DEP set up mailing lists to tell concerned citizens in each county when to comment on pollution permits. You can sign up for these free lists.

In 2000 I "intervened" in a case at the WV Public Service Commission (PSC) on when WV would need a second telephone Area Code. By 2003 the PSC staff and phone companies unanimously recommended to the PSC a second area code which would change the area code for everyone in the northeastern half of the state. I opposed it with some facts in a letter, which the PSC considered enough reason to postpone action until 2008. Then they finally approved an area code only for new phone numbers, not existing phone numbers. By then the PSC staff & phone companies had joined my opposition to requiring half the state to change its area code. Postponing a decision is sometimes enough to win the argument.

In 2000 other citizens and I appealed a county decision to the county's Board of Zoning Appeals and won 2 months later. Soon thereafter the county drastically increased filing fees for those appeals, so another citizen and I appealed the increase to Circuit Court as unreasonable. We won 19 months after the case began.

In 2001 other citizens and I appealed another county decision. We lost at the county's Board of Zoning Appeals in a month, won at Circuit Court 10 months later, and lost at the WV Supreme Court 20 months later, 31 months for the whole process. Some other citizens' appeals have lasted even longer.

Opponent Tactics

Opponents almost always have lawyers who object to what you say, say you haven't served papers properly, aren't personally harmed (lack "standing" to sue), or have no expertise to testify about what you saw. They may depose you under oath, file court documents which you have to answer, and neglect to provide complete documents you're supposed to get.

Judges don't always agree with the other side, so keep going.

Legal Research

You can find a lot of legal cases on the Internet to help your legal research. You can find a lot more at a law library.

The printed laws in a library are full of footnotes saying how courts have interpreted each section. This is far more helpful than the bare legal text on the web. Printed law books are also available at County Clerks' offices and the Martinsburg/Berkeley County Public Library.

Law libraries also have Shepard's Citations, which says which cases cite other cases, so if you find one relevant case you can see if more recent cases have expanded or overruled it.

Law schools, such as WVU & Georgetown, have bookstores full of textbooks on Civil Procedures, Evidence, Environmental Law, etc. The books will cover federal procedures, which are very similar to WV. The book store may sell used copies, or find them on the web.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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|---|---|---|
| PAUL BURKE,<br><br>Plaintiff,<br><br>v.<br><br>U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,<br><br>Defendant. | ) | Civil Action No. 16-CV-825 (CRC) |

**ORDER**

Upon consideration of Defendant's Motion to Dismiss, Plaintiff's Motion for Award of Costs, any opposition papers, and the entire record herein, and for the reasons stated in the accompanying Memorandum Opinion issued on this date, the Court hereby ORDERS that:

1. Defendant's Motion to Dismiss is GRANTED;
2. Plaintiff's complaint is DISMISSED WITH PREJUDICE;
3. Plaintiff's Motion for Award of Costs, ECF No. 9, is DENIED; and
4. Judgment is ENTERED for Defendant as to all Counts.

SO ORDERED.

Date:__________________

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CHRISTOPHER R. COOPER
United States District Judge