In the Matter of

INDIAN HUMAN RESOURCE CENTER, INC.

Case No. 83-JTP-4

ORDER

This proceeding arises under the Job Training Partnership Act (JTPA), 29 U.S.C. § 501 et seq., and the Rules and Regulations promulgated thereunder 20 C.F.R. Part 6.

Statement of the Case

On September 12, 1983 Complainant filed a request for hearing with the Office of Administrative Law Judges in order to appeal the Grant Officer's final determination. In his final determination, the Grant Officer awarded California Indian Manpower Consortium (CIMC), rather than Indian Human Resource Center, Inc. (IHRC), a Section 401 JTPA (29 U.S.C. § 1671) grant for the County of San Diego, California for fiscal year 1984.

A hearing on this matter was held on February 6 and 8, 1984. A Decision and Order was issued on May 14, 1984. It was determined that the Department of Labor (DOL) violated the directives of the Solicitation of Notices of Intent (SONI) of its own internal policy by notifying CIMC of its deficient Notice of Intent (NOI) and failing to notify IHRC of its deficient NOI. Furthermore the DOL permitted CIMC to revise its deficient NOI after the deadline for such revisal passed, also in violation of the SONI. It was determined that the DOL departed from its own procedures by convening a panel to review applicants who request a grant in overlapping geographic territories. By virtue of the panel, the selection of Native American grantees under the JTPA evolved into a competitive process, a situation unintended by Congress. Once wrongfully creating the competitive process the DOL failed to follow its own procedure (ET 3-82) for awarding grants under the competitive process by failing to notify the parties of the panel review and award process. The panel members were instructed not to consider any evidence outside the documentation submitted by the applicants in the NOI, a rule unknown to the applicants and which underscores the importance of the disparity of treatment afforded CIMC and IHRC by the DOL in their notifying CIMC of its deficient NO1 and failing to notify IHRC of the same. The Grant Officer's selection of the grant recipient was determined to be arbitrary and capricious and an abuse of discretion-

The case was therefore remanded to the Grant Officer for a redetermination of the proper grantee. IHRC was awarded the grant in issue on June 29, 1984. On June 8, 1984 and July 25, 1984 Complainant filed an application and amended application, respectively, requesting the award of attorney fees and costs. On August 27, 1984 the DOL filed a brief in opposition to Complainant's request, and on October 9, 1984 Complainant filed a reply to the DOL's brief.

Issues

1) Whether the DOL's litigation position was substantially justified; if not,

2) Whether there are special circumstances which make an award of attorney fees unjust; if not,

3) Whether the amount of attorneys' fees and costs requested by IHRC is reasonable.

Findings of Fact and Conclusions of Law

The Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, allows the award of attorney fees and expenses incurred in an adversary proceeding before an administrative agency, unless it is determined that the position of the agency "as a party to the proceeding was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504 (a)(1). The foregoing section, applicable to adjudicatory proceedings, contains relevant language identical to the section allowing the award of fees and expenses incurred at the-appellate court level. 28 U.S.C. § 2412(d)(l)(A). Therefore, for the purposes of deciding the issues in this case, the legislative history and case decisions on the statute pertaining to the appellate level are equally applicable to proceedings at the administrative level.

In determining whether the position of the DOL was "substantially justified," there are two theories that must be considered. There is the "underlying action" theory, in which we look at the DOL's action that precipitated the suit, and there is the "litigation position" theory, in which the justification for the position the DOL assumed during litigation is the relevant inquiry. A review of the legislative history of the Act and case law indicates that, with one exception to be discussed infra, it is the government's "litigation position" that is to be scrutinized in determining whether its action was substantially justified. Spencer . National Labor Relations Board, 712 F.2d 539 (1983). Viewing the government's action at the litigation

level rather than at the underlying action level permits a court to rule that the agency's action, for example the promulgation of a novel regulation, was "arbitrary and capricious," yet their defense of the suit was "substantially justified." Spencer, at 552; Essex Electro Engineers, Inc. v. The United States, 31 CCF 72,000, p. 76, 980 (U.S. Ct.Cl. 1984). To view the action otherwise would make the EAJA an automatic fee-shifting provision, which is clearly inconsistent with Congress' intent in enacting the EAJA. Id. The government's litigation position will usually be that its underlying action was legally justifyable, Spencer, at 553, thus, it is contended, its litigation position was "substantially justified."

However, the standard of "substantially justified" is unclear. It has been defined as a test of reasonableness; to avoid fees and costs being assessed against it, the government must show that its case had a reasonable basis for its position both in law and fact. H.R. Rep. No. 1418, 96th Cong. 2d Sess. 8-10, 11 (1980), 1980 U.S. Code Cong. & Admin. News 1980, at 4989. Spencer at 548. However the Senate Judiciary Committee considered and rejected a bill that would have changed the standard from "substantially justified@' to "reasonably justified" S. Rep. No. 253, 96th Cong., 1st Sess. 1, 4 (1979). The Senate's rejection of the bill "suggests that the test should, in fact, be slightly more stringent than 'one of reasonableness'" Spencer, at 558, citing, NRCD v. EPA, 703 F.2d at 721 n. 7 (1980).

In enacting the EAJA, Congress was solely concerned with irresponsible government decisions to initiate or continue litigation:

> A court should look closely at cases . . . where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim had been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litisation.
>
> The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing.
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> H.R. Rep. No. 1418, supra note 20 at 11; S.Rep. No. 253, supra note 20, at 6-7 (emphasis added) U.S. Code Cong. & Admin. News 1980, at 4989. [Footnote omitted)

In sum, in deciding whether to award attorney fees and costs to the IHRC, the question must be asked: Was the DOL substantially justified, not in its initial action in denying IHRC the award, but in persisting in its defense of that action?

Three factors should be considered in answering this question: (1) the clarity of the governing law; (2) foreseeable length and complexity of the litigation; and (3) the consistency of the government's position. Spencer, at 559.

Spencer noted that @'the more clearly established are the governing norms, and the more clearly they dictate a result in favor of the private litigant, the less 'justified' it is for the government to pursue or persist in litigation."

In this'case, although JTPA was a new statute and the DOL therefore had little experience with the program, the violations by the DOL of its own policies and directives, discussed infra, with which they have experience, is inexcusable. The guidelines in which the DOL was to operate were clear cut and unambiguous. The DOL contends that it was confused as to the method by which to choose a grantee in overlapping regions. I have already decided that it is clear that Congress did not intend the selection of Native American grantees to be competitive. The DOL nonetheless chose to deviate from precedent and make the process competitive, yet failed to even follow: the guidelines applicable to the competitive process, in particular ET 3-82. It is not within the agency's discretion to choose not to follow its own policies. If in fact the regulations were confusing and the suit by IHRC helped clarify the-applicable law, IHRC should not be required to subsidize the clarification. In fact, that is one of the situations the EAJA sought to prevent. See, Spencer.

The second factor to consider is the foreseeable length and complexity of the litigation. In the categories of cases which tend to entail a substantial investment of effort and money, "the government should be obligated to make an especially strong showing that its persistence in litigation was justified." Spencer, at 560.

In this case, the proceeding was not unduly protracted, although it may have involved a substantial amount of effort, in particular as regards obtaining documents through discovery. But that a case may be simplistic and resolved expeditiously does not grant a license for the government to pursue spurious defenses. The yovernment must still show that its action was "substantially justified."

The third factor to consider, the consistency of the government's position, is the only instance in which the government's underlying position, rather than its litigation position, is the relevant timeframe. In enacting the EAJA, *Congress* was of the opinion that frequently agencies and officials operate under a general policy in dealing with a variety of cases, but for unexplained reasons, take a different position in one or a few cases. One of the evils the EAJA sought to eliminate was the ability of the government "to use its superior resources to beat into submission the hapless victims of such deviations from customary practices." Spencer, at 560. The classic scenario is that of agency officials abusing their authority when dealing with small business people who lack the money and knowledge necessary to protect themselves. See, e.g., H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9 (1980).

As previously stated, in this case the DOL inexplicably changed their grantee selection method, and treated the grantees inequitably, to the detriment of IHRC. Such arbitrary action is not to be tolerated and a private litigant should not bear the expense of forcing the agency to operate within established bounds. As previously stated, the EAJA was enacted primarily to encourage impecunious private parties to pursue their rights by removing the financial obstacles in litigation.

I am of the opinion that the award of attorney fees and costs in this case will further the purpose of the EAJA: (1) The award will enable IHRC to have vindicated its rights without assuming enormous financial burdens; (2) the DOL will be more cautious in following the appropriate rules and regulations in the future; and (3) the correct..procedures to follow under JTPA have been clarified.

The EAJA provides that even though the government may not have been "substantially justified" in pursuing the litigation, making an award of attorney fees and costs proper, such costs are not to be assessed when "special circumstances make an award unjust." S U.S.C. § 504(a)(1). Situations which have constituted "special circumstances@' include the good faith advancement of novel but credible interpretations of the law, H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11, reprinted in 1980 U. S. Code Cong. & Admin. News 4953, 4990, time constraints imposed on the government during litigation resulted in legitimate confusion as to the proper position to assume in litigation, AABCO, Inc. v. United States, 3 Cl. Ct. 700 (1983), the government was a nominal party, S. H. Riggers & Erectors, Inc. v. OSHRC, 672 F.2d 426 (1982), or when the individual engaged in previous violations which prompted the ayency's action of

contesting the individual's more recent action. Oguachusa v. INS, 706 F.2d 93 (1983). It suffices without further elaboration to say that none of the four exceptions are present in this case. Therefore the award of attorney fees and costs is proper.

The. only issue that remains is the amount of attorney fees and costs to be awarded. The EAJA provides for the award of fees and other expenses to the prevailing party. 5 U.S.C. § 504(a)(1). Fees and other expenses are defined as:

> * * * the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulations that an increase in the cost of living or a special factor, such as the limited availaility of qualified attorneys or agents for the proceedings involved, justifies a higher fee);

5 U.S.C. § 504(b)(1)(A).

Counsel- for Complainant requests $5,856.00 in attorney fees and $1,261.20 in costs for a total of $7,117.70. The request is supported by affidavits, and the services rendered are itemized. The DOL contests only the travel, parking, airfare, hotel and transcript fees as not within the meaning of the statue. I am of the opinion that the expenses relating to travel, parking, airfare and hotel, for a total of $775.00, are not within the meaning of "other expenses." NAACP v. Donovan, 554 F.Supp. 715, 719 (1982). The Act provides that $75.00 per hour is the maximum amount to be awarded as attorneys fees unless special factors are present. 28 U.S.C. § 2412(a). It has been noted "that this amount is undoubtedly substantially less than that usually charged by [attorneys]." NAACP, at 718. Counsel for Complainant, in its affidavit, stated its normal hourly rate is $85.00 to $100.00. Counsel requests $85.00 per hour and the DOL does not challenge the

amount. In considering the novelty and complexity of the case, the preclusion of other employment by the attorney due to acceptance of the case, the time limitations imposed by the case, the result obtained, Kerr v. Screen Extras Guild, Inc., 526 F.2d 69 (9th Cir. 1975), I find that the time spent on the case, 68.9 hours, for a total of $6,342.70 in attorney fees and expenses is reasonable.

Accordingly I hereby award the Complainant's attorney fees in the amount of $5,856.00 and costs in the amount of $486.20 for a total of $6,342.70.

E. EARL THOMAS
Deputy Chief Judge

Dated: 15 NOV 1984
Washington, D. C.

EET/MB/tt

SERVICE SHEET

Case No.: 83-JTP-4

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