Barker

DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

26394

FILE: B-208637 **DATE:** September 29, 1983

MATTER OF:

Availability of funds for payment of intervenor attorney fees--Nuclear Regulatory Commission

DIGEST:

1. Section 502 of Nuclear Regulatory Commission fiscal year 1982 appropriation act, which prohibits use of funds to "pay the expenses of, or otherwise compensate" intervenors, prohibits NRC from using 1982 funds to pay Equal Access to Justice Act awards to intervenors, to the extent the underlying proceedings were funded under the 1982 appropriation act. However, 1982 appropriation is available to pay award for fees and expenses incurred incident to that portion of a proceeding funded by a prior year's appropriation not subject to section 502.

2. Under section 203 of Equal Access to Justice Act (5 U.S.C. § 504) which authorizes agencies to award attorney fees and expenses to prevailing party upon final resolution of adversary adjudication, the obligation for purposes of 31 U.S.C. § 1501(a) arises when the agency makes the award, that is, when the adjudicative officer renders his decision in response to prevailing party's fee application.

3. Section 207 of Equal Access to Justice Act (EAJA) (5 U.S.C. § 504 note) prohibits use of permanent judgment appropriation established by 31 U.S.C. § 1304 as alternative source of funds for payment of awards newly authorized by EAJA unless and until Congress makes a specific appropriation for that purpose.

This responds to a request by the General Counsel of the Nuclear Regulatory Commission (NRC) for answers to a number of questions concerning the availability of appropriated funds for the payment of awards under the Equal Access to Justice Act (Act) to intervenors in NRC adversary adjudications. Most of the questions center around the issue of whether the NRC may pay such awards in light of section 502 of the agency's fiscal year 1982 appropriation act, the Energy and Water Development Appropriation Act, 1982, Public Law 97-88 (95 Stat. 1135 (1981)). Below, we have stated each question and our answer to it. However, before addressing the specific questions, we believe that a brief discussion of the Act's applicability to intervenors may be helpful.

APPLICABILITY TO INTERVENORS

The Equal Access to Justice Act, Title II of Public Law 96-481, effective October 1, 1981, generally authorizes the awarding of attorney fees, expert witness fees, and other costs to private parties in certain administrative and judicial proceedings against the United States in which they were not previously allowed. Specifically, as relevant to this decision, 5 U.S.C. § 504(a)(1) (added by 203(a)(1) of the Act) provides:

> "An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust."

The Act defines "adversary adjudication" as "an adjudication under section 554 of this title [Administrative Procedure Act] in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license." 5 U.S.C. § 504(b)(1)(C). However, according to the legislative history, the exclusion for licensing hearings does not extend to proceedings involving the suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980); S. Rep. No. 253, 96th Cong., 1st. Sess. 17 (1979). (The NRC had indicated informally that it conducts such proceedings in which intervenors participate and in which the position urged by the intervenors might prevail.)

The Act further defines "party" as a party for purposes of the Administrative Procedure Act, but having a net worth under a specified amount or less than 500 employees. 5 U.S.C. § 504(b)(1)(B). This expressly includes a person "admitted by an agency as a party for limited purposes." 5 U.S.C. § 551(3). This language would seem sufficiently broad to encompass intervenors.

This is also the view of the Administrative Conference of the United States although the Conference believes that intervenors will rarely actually receive awards. The conference acts as consultant to Federal agencies which must establish uniform procedures for awarding fees in their administrative proceedings. 5 U.S.C. § 504(c)(1).

The Conference has published model rules to provide guidance to agencies in establishing their own regulations. 46 Fed. Reg. 32900 (June 25, 1981). The comments preceeding the model rules state:

> "Intervenors: The National Screw Machine Products Association, the National Association of Manufacturers, and DOE suggested that the rules should limit or eliminate the eligibility of intervenors. We don't believe that the Act provides for this. We note, however, that situations in which intervenors actually receive awards will probably be rare. The Act excludes rulemaking, licensing, and ratemaking proceedings, in which voluntary intervention is very likely. In adversary adjudications such as enforcement proceedings, intervention by parties without a direct financial stake in the outcome is relatively infrequent, so the Act seems unlikely to become a substantial source of funds for advocacy organizations promoting generalized points of view in agency proceedings." Id., at 32903.

Thus, if an intervenor qualifies as a "prevailing party" in an adversary adjudication as defined in the Act and its legislative history, it is eligible to apply for a fee award under 5 U.S.C. § 504.

THE SPECIFIC QUESTIONS

Against this background, the questions raised by the NRC and our answers to them are as follows:

> "(1) Does the language of section 502 of the NRC's fiscal year 1982 appropriations measure, Pub. L. No. 97-88, preclude the agency from disbursing NRC fiscal year 1982 appropriated funds to an intervenor who is otherwise found to be entitled to an EAJA award as a prevailing party in an adversary adjudication funded under the fiscal year 1982 appropriations act?"

Restated, the question is whether section 502 overrides the more general authority of the Equal Access to Justice Act with respect to NRC proceedings. We believe it does.

The Energy and Water Development Appropriation Act, 1982, appropriated funds to the NRC to carry out its responsibilities under its major authorizing legislation, the Energy Reorganization

Act of 1974 and the Atomic Energy Act. Pub. L. No. 97-88, 95 Stat. 1135, 1147 (1981). Since, as will be discussed later, agency funds are at present the sole source for EAJA award payments, funds appropriated by Pub. L. No. 97-88 ordinarily would be available for NRC awards, including those made to intervenors. Section 502, however, limits the availability of the NRC's fiscal year 1982 appropriation with respect to intervenors. It provides:

> "None of the funds in this Act shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in this Act." 95 Stat. 1148. (Emphasis added.)

We note that the NRC's 1984 appropriation contains the same prohibition. Energy and Water Development Appropriation Act, 1984, Pub. L. No. 98-50 (July 14, 1983), § 502, 97 Stat. 247, 261. The same appropriation act includes a similar prohibition applicable to the Department of Energy. Pub. L. No. 98-50, § 305, 97 Stat. 259. The Department of Housing and Urban Development-Independent Agencies Appropriation Act, 1984, also includes a similar provision. Pub. L. No. 98-45 (July 12, 1983), § 410, 97 Stat. 219, 239. Thus, the effect of section 502 and similar provisions appears to be a continuing and more general question, apart from the relatively limited scope of the original question NRC raised. While we will respond in terms of NRC's 1982 appropriation, our comments apply to any agency in any fiscal year in which it is subject to a prohibition like section 502.[1/]

We note further that the NRC's "Salaries and Expenses" appropriation for 1982 remains available until expended; that is, it is a no-year appropriation. The same is true for 1984. However, some agencies subject to section 502 or similar restrictions may be operating under one-year appropriations. We will address both situations in the remainder of this decision whenever the distinction is relevant.

The plain terms of section 502, particularly the underscored phrase, unambiguously prohibit the use of appropriated funds for payments of any kind to intervenors. On its face, this would include awards under the EAJA. EAJA payments would constitute a

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[1/] The relevant provision of the Equal Access to Justice Act, 5 U.S.C. § 504, is subject to a "sunset" provision and is scheduled to expire as of October 1, 1984. Legislation to make the Act permanent has been introduced in the 98th Congress (S.919) but has not yet been acted upon.

form of compensation to intervenors and are therefore within the scope of the prohibition.

Thus, section 502 prohibits NRC award payments to intervenors while the EAJA appears to provide for such payments; the issue arises as to which statute is controlling. It is a well-settled principal of statutory construction that specific terms covering a given subject matter will prevail over general language of the same or another statute which might otherwise apply. Kepner v. United States, 195 U.S. 100, 125 (1904); B-152722, August 16, 1965. The EAJA is a general statute. It generally authorizes awards of fees and expenses for prevailing parties in covered proceedings against any governmental agency to which the Act applies. In comparison, section 502 is the more specific provision in that it concerns only payments to intervenors in NRC proceedings funded under the 1982 Energy and Water Development Appropriation Act. Accordingly, section 502 controls and the NRC's 1982 funds are not available to pay intervenor EAJA awards.[2/]

> "(2) To what extent does the language of section 502 of the NRC's fiscal year 1982 appropriations measure, Pub. L. No. 97-88, preclude the agency from disbursing fiscal year 1982 funds to an intervenor as payment of an award for its participation in an adversary adjudication, portions of which were funded under earlier NRC appropriations legislation that did not include the section 502 restriction."

Implicit in this question is the premise that the award is not actually made until fiscal year 1982 or later. This is because the statute does not permit the making of an award prior to final disposition of the adjudication. Also, it should be kept in mind that the following discussion pertains to the NRC, an agency which receives no-year appropriations.

As indicated in our answer to question 1, by enacting section 502 Congress clearly intended to insure that none of the Commission's fiscal year 1982 appropriated funds would be paid to intervenors. In view of the definitive nature of this limitation,

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[2/] For FY 1983, NRC did not receive a "regular" appropriation but has been operating under a continuing resolution. Pub. L. No. 97-377 (December 21, 1982), § 101(f), 96 Stat. 1830, 1906. It is clear from the conference report that conditions in the 1982 appropriation act were intended to remain applicable. H.R. Rep. No. 980, 97th Cong., 2d Sess. 184 (1982).

we conclude that funds restricted by section 502 may not be used to satisfy an award in an adversary adjudication regardless of the fact that part of the proceeding was conducted in an earlier "unrestricted" fiscal year. Section 502 thus precludes the NRC from disbursing fiscal year 1982 appropriated funds to an intervenor to satisfy an award stemming from participation in an adversary adjudication which was funded in part by an earlier unrestricted appropriation.

On the other hand, the Commission may make and pay such an award from the earlier unlimited appropriation provided funds are still available for obligation from that appropriation at the time the Commission makes its award. An earlier appropriation not limited by section 502 may be used to pay awards to intervenors. The fact that the Commission issues an award during a restricted fiscal year does not prevent its being paid out of a previous fiscal year's appropriation so long as part of the proceeding giving rise to the award was funded by an unrestricted appropriation.3/

As noted, generally, the Commission annually receives a no-year appropriation which "remains available until expended." For the purposes of determining the availability of funds to make awards of the type in question, the Commission should consider that it obigates its funds in the order in which they are appropriated. Under this approach, the Commission should subtract its total obligations since the effective date of the earlier appropriation from the amount of that appropriation. If the amount of funds obigated is less than the amount of the unrestricted appropriation, then the Commission should consider the difference as the amount of the unrestricted appropriation still available for obligation to pay the award. The award may be satisfied up to the amount of the difference. Conversely, the Commission should consider itself as operating on restricted funds if the obligated amount is greater than the unrestricted appropriation and the award should not be made.

> "(3) Does the EAJA's alternative provision for payment of an NRC award out of the permanent judgment fund now provide a source of funds in the absence of a specific appropriation to that fund for the payment of EAJA awards?"

3/ This of course would not be true if we were dealing with annual appropriations because the prior appropriation would have expired for obligational purposes.

No. Another provision of the EAJA, section 207 (classified to 5 U.S.C. § 504 note) clearly prohibits the use of the judgment appropriation for the payment of awards unless Congress makes a specific appropriation for that purpose or otherwise amends the legislation.

The "alternative payment provision" refers to the second sentence of 5 U.S.C. § 504(d)(1). Subsection 504(d)(1) provides:

> "Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by an agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made pursuant to section 2414 of title 28, United States Code."

The permanent indefinite appropriation established by 31 U.S.C. § 1304 (formerly 31 U.S.C. § 724a) is generally the source of payment of final judgments covered by 28 U.S.C. § 2414.

In a letter to the Administrative Conference of the United States, B-40342.1, May 15, 1981, we noted that the report of the House Judiciary Committee on the bill that became the Equal Access to Justice Act states "Funds may be appropriated to cover the costs of fee awards or may otherwise be made available by the agency (e.g., through reprogramming)." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 16 and 18 (1980). We concluded that agency operating appropriations were available to pay EAJA awards without the need for specific appropriations.

Read alone, 5 U.S.C. § 504(d)(1) would appear to make the judgment appropriation available as a back-up in limited situations. 4/ However, section 207 of the EAJA negates this possibility. Section 207 provides:

> "The payment of judgments, fees, and other expenses in the same manner as the payment of final judgments as provided in this Act is effective only to the extent and in such amounts as are provided in advance in appropriation Acts."

4/ The Conference Report on the EAJA stated "The conference substitute directs that funds for an award * * * come first from any funds appropriated to any agency * * *." H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 24 and 26 (1980). One of the major concerns leading to the inclusion of the judgment appropriation as a limited back-up was to prevent a small agency from being "disassembled" by a very large award. See Cong. Rec., October 1, 1980 (daily ed.), H-10223 (remarks of Rep. Kastenmeier).

The legislative history clearly establishes that section 207 was intended to prevent the expansion of the permanent judgment appropriation. We discussed section 207 and its origin in detail in another letter to the Administrative Conference, B-40342.2, October 21, 1981. The remainder of our response to Question 3 is taken essentially from that letter.

The entire legislative history of section 207 is found in the Congressional Record for October 1, 1980, pages H-10213 through H-10218. (Page references are to the daily edition.)

The conference report on H.R. 5612, which became Pub. L. No. 96-481, was issued on September 30, 1980 (H.R. Rep. No. 96-1434). The conference version of Title II (Equal Access to Justice Act) was identical to the version enacted into law except that it did not include section 207.

The House of Representatives took up its debate on the conference report on October 1, 1980. Representative Danielson raised a point of order, charging that the payment provisions of Title II constituted "an appropriation on a legislative bill, in violation of clause 2 of rule XX of the rules of the House of Representatives." (H-10214). The cited rule prohibits House conferees from agreeing to such a provision without prior authority of the House.

The Chair summarized the provisions in question and then stated:

> "Thus the provision in the Senate amendment contained in the conference report extends the purposes to which an existing permanent appropriation [31 U.S.C. § 1304] may be put and allows the withdrawal directly from the Treasury, without approval in advance by appropriation acts, of funds to carry out the provisions of title II of the Senate amendment." (H-10214)

Accordingly, for the specific reason that the bill would have expanded the availability of the judgment appropriation, the Chair sustained the point of order. Thus, at this point, the bill was dead without some further legislative action.

Representative Smith then offered an amended version of the bill to cure the defect. The Smith amendment was identical to the conference version with the addition of one new section--section 207. Representative Smith explained that his amendment "modifies

those provisions which have been ruled to be an appropriation on an authorization bill. It makes no other changes in the language." (H-10218)

Representative Danielson again raised a point of order, contending that the Smith amendment still amounted to an appropriation on a legislative bill. Representative Smith, arguing against the point of order, offered the following explanation:

> "Mr. Speaker, I think it is very clear the way it [section 207] is worded that it is just an authorization for an appropriation. There has to be a specific appropriation, the same procedure we use in almost all laws around here." (H-10218)

Repesentative McDade then confirmed Representative Smith's statement, pointing out that section 207 "is boilerplate language." (The language has in fact become very common since enactment of the Congressional Budget Act of 1974, and is usually found in cases of contract authority.)

The Chair then overruled the second point of order, the House accepted the conference report with the Smith amendment after some further debate, and the bill was ultimately signed into law with section 207.

Reviewing this legislative history, it seems clear that the purpose of section 207 was to cure the defect which prompted the Chair to sustain Representative Danielson's first point of order--the expansion of the availabililty of 31 U.S.C. § 1304. By virtue of section 207, we view the the Equal Access to Justice Act as neither expanding nor diminishing the availabiilty of the permanent judgment appropriation.

Accordingly, the alternative payment provision, 5 U.S.C. § 504(d)(1), together with section 207, merely authorize funds to be appropriated to the judgment appropriation for the payment of EAJA awards. Since this has not been done, the judgment appropriation is not available as a secondary payment source.

> "(4) If there is no present source of funds for the payment of EAJA awards to NRC intervenors, would an NRC award, issued during a fiscal year in which there is no source of funds, be subject to payment at any time in the future when unrestricted funds are available to the agency or in the permanent judgment appropriation?

The effect of section 502 is to prohibit the obligation of funds for awards to intervenors. At this point, therefore, it is useful to note exactly when an obligation arises under the Equal Access to Justice Act. An award under 5 U.S.C. § 504 is not automatic. Upon final disposition of the adversary adjudication, the party seeking an award must apply to the agency. The application must show that the applicant is a "prevailing party". The agency adjudicative officer must then issue a written decision on the application. An award may be made only if the adjudicative officer finds that the agency's position was not substantially justified and that there are no special circumstances making the award unjust. Also, the award may be reduced or denied if the applicant unduly and unreasonably delayed the final resolution. Under this statutory structure, we think the obligation arises, for appropriations accounting purposes (31 U.S.C. § 1501(a)), when the agency issues its decision on the fee application. See 1 Comp. Gen. 200 (1921); 38 Comp. Gen. 338 (1958); B-174762, January 24, 1972.

It is elementary that an appropriation may be obligated only during its period of availability. Thus, an agency with fiscal year funds would record an obligation in the fiscal year in which it makes the award. If the agency is subject to section 502 or a similar provision, it cannot make a valid obligation for a fee award to an intervenor. Since NRC's 1982 appropriation was a no-year appropriation, the unobligated balance continues to be available for obligation. However, section 502 "runs" with the appropriation also without fiscal year limitation, and thus continues to bar the creation of a valid obligation for the prohibited purpose.

Since an agency obligates its appropriations when it makes an award under the EAJA, the answer to Question 4 is that the NRC could not make an award in a fiscal year in which there was no available source of funds for payment. To do so would violate two statutes -- 31 U.S.C. § 1301(a) (formerly 31 U.S.C. § 628) and the Antideficiency Act, 31 U.S.C. § 1341 (formerly 31 U.S.C. § 665(a)).

The first statute, 31 U.S.C. § 1301(a), restricts the use of appropriations to their intended purposes. An "intended purpose" need not be specified in the appropriation act. It is sufficient that the appropriation be legally available for the item in question. NRC appropriations subject to section 502 are not legally available for EAJA awards to intervenors. Therefore, a purported obligation for such an award would contravene this statute.

The Antideficiency Act prohibits the making of obligations or expenditures in excess of or in advance of appropriations. The applicable principle was stated in a 1981 decision as follows:

> "When an appropriation act specifies that an agency's appropriation is not available for a designated purpose, and the agency has no other funds available for that purpose, any officer of the agency who authorizes an obligation or expenditure of agency funds for that purpose violates the Antideficiency Act. Since the Congress has not appropriated funds for the designated purpose, the obligation may be viewed either as being in excess of the amount (zero) available for that purpose or as in advance of appropriations made for that purpose. In either case the Antideficiency Act is violated." 60 Comp. Gen. 440, 441 (1981).

It would make no difference whether or not the agency actually recorded the obligation pursuant to 31 U.S.C § 1501(a). E.g., 55 Comp. Gen. 812, 824 (1976).

If the NRC actually made the award, the effect would be the same as making an obligation after the applicable appropriation has been exhausted. The obligation, albeit an invalid one, is against funds available for obligation at the time it is made. Should appropriations — either NRC appropriations or the judgment appropriation — subsequently become available for EAJA awards to intervenors, they would still not be available to satisfy the prior invalid award unless the legislative action which made those funds available expressed such an intent.

> "(5) If in answering question 4 you conclude that there is no time limitation on when an award can be paid, can the NRC set a time limitation within which an award must be pesented for payment, even if funds are not presently available for disbursement?

In view of our answer to Question 4, a response to this question is unncessary.

Finally, the NRC asks that we address the same questions as they relate to judicial fee awards under 28 U.S.C. § 2412(d) (added by section 204(a) of the EAJA) to intervenors as a result of their participation in NRC regulatory or adjudicatory proceedings. Judicial awards in this context could come about in one of two ways. First, a party might seek judicial review of the underlying decision of an adversary adjudication. Should the party ultimately prevail, 5 U.S.C. § 504(c)(1) requires that fees be awarded only under the authority of 28 U.S.C. § 2412(d)(3), and the award may

encompass the administrative portion of the proceedings. Second, a party might seek judicial review of an agency's determination on its fee application. 5 U.S.C. § 504(c)(2).

Basically, what we have said above with respect to administrative awards applies equally to judicial awards. Agency operating appropriations are available to make payments unless otherwise prohibited, for example, by a provision such as section 502. Also, for the same reasons set forth in our answer to Question 3, section 207 of the EAJA bars payment from the judgment appropriation absent some further congressional action. There is one significant difference, however. A judicial award would not be viewed as violating either 31 U.S.C. § 1301(a) or the Antideficiency Act. Thus, the result might be a valid award with no available source of funds for payment, leaving little recourse but to attempt to obtain funds from the Congress.

In sum, NRC appropriations provided under an appropriation act which contains the section 502 prohibition are not available to pay EAJA fee awards to intervenors, except to the extent the proceedings were funded under an appropriation not subject to the prohibition. By virtue of section 207 of the EAJA, the permanent judgment appropriation is also not available to pay awards, administrative or judicial, newly authorized by that Act. In the event appropriations--either agency funds or the judgment appropriation — are later made available to pay EAJA awards to intervenors, the applicability to prior time periods would depend on the intent of the legislative action establishing that availability.

for Milton J. Socolar
Comptroller General
of the United States