



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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OFFICE OF
THE CHAIRMAN

REPORT OF THE CHAIRMAN
OF THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
ON
AGENCY ACTIVITIES UNDER
THE EQUAL ACCESS TO JUSTICE ACT
OCTOBER 1, 1982 - SEPTEMBER 30, 1983

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CHAIRMAN

DECEMBER 30, 1983

**REPORT OF THE CHAIRMAN OF THE ADMINISTRATIVE CONFERENCE
OF THE UNITED STATES ON AGENCY ACTIVITIES
UNDER THE EQUAL ACCESS TO JUSTICE ACT**

The Equal Access to Justice Act, Title II of Pub. L. 96-481, 94 Stat. 2325, directs the Chairman of the Administrative Conference of the United States ("ACUS") to report annually to Congress on the amount of attorney fees and expenses awarded under the Act to litigants who prevail against the United States in agency adjudications. 5 U.S.C. §504(e). This is the second annual report of the Chairman under the Act, covering the period from October 1, 1982 through September 30, 1983.

Terms of the Equal Access to Justice Act

The Equal Access to Justice Act, which became effective October 1, 1981, provides for the award of fees and expenses to certain litigants who prevail against the United States in agency adjudications or civil court proceedings. Under the Act, a prevailing party is entitled to an award of reasonable attorney fees (ordinarily limited to \$75 per hour) and other expenses unless the United States can show that its position in the litigation was substantially justified. A fee award may be reduced or denied when the party seeking it has caused undue delay, or when special circumstances would make an award unjust.

To qualify for an award, a party must meet the financial eligibility requirements of the statute, designed to target the Act's benefits toward those who would face significant financial obstacles in pursuing or defending litigation against the

government. Eligible parties include sole proprietors, corporations, partnerships, and public or private organizations with a net worth of not more than \$5 million and not more than 500 employees, tax-exempt organizations under 26 U.S.C. §501(c)(3) and agricultural cooperatives under 12 U.S.C. §1141j(a) with not more than 500 employees, regardless of net worth, and individuals with a net worth of not more than \$1 million.

The provisions of the Act covering agency proceedings, codified in 5 U.S.C. §504, limit the applicability of the Act to formal hearing proceedings under Section 5 of the Administrative Procedure Act, 5 U.S.C. §554, in which the position of the United States is represented by counsel or otherwise, excluding ratemaking and licensing proceedings. The agencies themselves are to decide whether fee awards are warranted in particular cases, and the Act directs the agencies to establish uniform procedures for the consideration of applications for awards of fees and expenses after consultation with the Chairman of ACUS. 5 U.S.C. §504(c)(1). The Chairman's first annual report described ACUS' development of model agency rules for implementation of the Act and the agencies' adoption of their own rules; 32 agencies have now issued rules implementing the Act, almost all of which follow the ACUS model in substantial measure.

As noted above, the Act also directs the Chairman of ACUS to report annually to Congress on the amount of fees and expenses awarded in administrative proceedings under the Act, providing information about the individual awards and the proceedings in which they were made in order to help Congress evaluate the scope and impact of the Act. 5 U.S.C. §504(e).

Agency Activity Under the Equal Access to Justice Act

As in fiscal 1982, the level of activity under the Equal Access to Justice Act in administrative proceedings has remained low in fiscal 1983. Eighty-eight applications for attorney fees under the Act were filed in administrative proceedings during the year,

while agencies completed over 10,000 proceedings falling within the Act's definition of adversary adjudications.¹ Agencies disposed of 61 applications for fees during the year, and another 91 remained pending (or stayed pending review of the underlying proceeding) as of September 30, 1983.² (Appendix I contains data on fee applications, by agency, for fiscal 1983; Appendix II contains the corresponding data for 1982.)

The National Labor Relations Board ("NLRB") continues to be the largest locus of EAJA activity at the administrative level. The NLRB received 52 of the 88 applications filed in fiscal 1983 and made 37 of the decisions. In addition, 47 applications are still pending at the NLRB. This high level of activity is consistent with the Board's high volume of covered cases decided — 5,059, or almost half the decided cases reported by all agencies in fiscal 1983. Not all agencies with high caseload levels have equivalently high levels of Equal Access to Justice Act activity, however; the Federal Mine Safety and Health Review Commission, for example, has received only one application for attorney fees since passage of the Act, although it concluded 1,461 covered proceedings in fiscal 1983.

Applicants received awards totalling \$35,933.89 in eight proceedings. (See Appendix III for complete data on the awards.) Seven of these involved the Department of Labor: two proceedings before the Occupational Safety and Health Review Commission ("OSHRC") and five proceedings within the Labor Department, three involving audits of Comprehensive Employment and Training Act ("CETA") grantees, and two enforcement proceedings under the Farm Labor Contractor Registration Act. In both of the OSHRC cases, the Department negotiated settlements for amounts less than

^{1/} As noted in last year's report, agencies have found it difficult to identify and tabulate all proceedings potentially covered by the Equal Access to Justice Act, and some agencies have not provided figures of this type. Thus this figure probably understates the actual volume of activity.

^{2/} These figures total more than 88 because many fee applications filed in fiscal 1982 remained pending at the beginning of fiscal 1983.

the total fee request, paying \$6,800 of \$9,741.64 requested by Ennis Automotive, Inc. and \$1,375 of \$1,659 requested by Fogel-Anderson Construction Company. In the three CETA cases, the Department chose not to contest the fee applications and paid the full amount of the award: \$441.20 to Indian Development District of Arizona, \$6,074.63 to Wisconsin Winnebago Business District, and \$5,887.50 to New England Farmworkers Council, Inc. In one of these cases, the administrative law judge had stated that the grant officer's position leading to the litigation had been groundless. In another, the parties had settled most issues in the underlying litigation, but the Department stated its intent to pursue one interest claim. The Department did not follow up, however, and the claim was dismissed after the applicant had filed lengthy pleadings. The Labor Department contested the applications in the two Farm Labor Contractor Registration Act proceedings, but in each case the administrative law judge ruled without much discussion that the applicant was entitled to fees. Mary Ellen Bryant was awarded \$698.60 (the entire amount of her request less \$68.00 in expenses disallowed because they were not expressly enumerated in the Act) and David Ransome was awarded \$1,040 (his entire request less \$91 in disallowed expenses).

The other award was made by the National Transportation Safety Board against the Federal Aviation Administration. Catskill Airways, Inc. and one of its pilots were each awarded \$6,808.44 in a case in which they had been charged with violations of minimum visibility rules for takeoff. The administrative law judge who heard the case found substantial justification for the FAA's position, but on review the NTSB disagreed. In the case of the pilot, the NTSB ruled that an investigator's assumption that visibility was inadequate, based on observations at a different part of the airport from the takeoff point, was insufficient to support the charge. As to the airline, the NTSB found that the FAA was unreasonable in proposing to limit the airline's authority to make its own weather observations and then presenting no evidence challenging its competence to make these observations.

Awards in four of the proceedings were made at the statutory maximum hourly rate of \$75 per hour. In the Bryant and Ransome cases, the applicants requested and received \$65.00 per hour for attorney fees. No hourly rate can be determined for the two settled cases.

Fifty-three applications for awards were denied by agencies, over half (28) because the agency's position was deemed to be substantially justified. Twenty-two of these decisions were made by the National Labor Relations Board, often on the grounds that the outcome of the underlying case turned on questions of witness credibility. NLRB opinions in these cases stress the principle that it is not the role of the General Counsel to resolve credibility questions before bringing a complaint unless the testimony of the complainant is patently unbelievable. Several other cases in which the government's position was found to be substantially justified, at the NLRB and elsewhere, involved close questions of law and interpretation of ambiguous precedents.

The next largest group of applications, seven in all, were dismissed because the applicants did not meet the Act's eligibility standards, or because they failed to provide sufficient evidence of their eligibility. Other applications were denied because the applicant did not prevail (five), because the case was not covered by the Act (four), because the application was not timely filed (four), or because proper jurisdiction was in an appellate court (three). One application was withdrawn before decision. (See Appendix IV for data on the reasons for denial of applications.)

APPENDICES

- APPENDIX I Agency Action on Applications for Awards of Fees and Expenses Under the Equal Access to Justice Act in Administrative Proceedings, October 1, 1982 - September 30, 1983
- APPENDIX II Agencies Receiving Applications for Awards of Fees and Expenses Under the Equal Access to Justice Act in Administrative Proceedings, October 1, 1981 - September 30, 1982
- APPENDIX III Data on Granted Applications for Awards of Fees and Expenses, October 1, 1982 - September 30, 1983
- APPENDIX IV Reasons for Denial of Applications, October 1, 1982 - September 30, 1983

Agency Action on Applications for Equal Access to Justice Act Proceedings October 1, 1982 - October 30, 1983

APPB

Agency	Total Covered Proceedings Declined ^{1/}	Applications Pending or Stayed on 9/30/82	Applications Received	Applications Granted	Applications Denied or Disposed of Without Award	Applications Pending or Stayed on 9/30/83
Department of Agriculture	245	1	0	0	1	0
Department of Commerce	200	0	1	0	0	1
Environmental Protection Agency	300	1	0	0	0	1
Federal Communications Commission	10	0	1	0	1	0
Federal Labor Relations Authority	13	0	1	0	0	1
Federal Mine Safety & Health Review Commission	1,461	0	1	0	0	1
Department of Health & Human Services	Not Available	3	2	0	1	4
Department of the Interior	248	8	2	0	3	7
Interstate Commerce Commission	2	0	1	0	0	1
Department of Labor	1,354	5	12	5	1	11
National Labor Relations Board	5,059	32	52	0	37	47
National Transportation Safety Board	Not Available	3	7	1	3	8
Nuclear Regulatory Commission	Not Available	1	0	0	0	1
Occupational Safety & Health Review Commission	1,235	6	5	2 (by settlement w/Labor Dept)	1	6
Postal Service	364	0	2	0	1	1
Securities & Exchange Commission	46	0	1	0	0	1
Department of Transportation	398	2	0	0	2	0
TOTAL: All Agencies	10,932^{2/}	64^{3/}	88	8	53	91

^{1/} These figures, where available, are approximate.

^{2/} An additional 274 covered proceedings were reported to AIGUS by agencies that received no applications.

^{3/} This figure is not identical to the corresponding figure in last year's report. Sixteen applications pending at boards of contract appeals were dismissed when the United States Court of Appeals for the Federal Circuit decided, in *Fidelity Construction Co. v. United States*, 700 F.2d 1379 (Fed. Cir. 1983), that contract appeals boards lack authority to make awards under the Equal Access to Justice Act. A few other agency figures have been corrected since last year's report.

Appendix 11

Agencies Receiving Applications for Awards of Fees and Expenses Under the Equal Access to Justice Act in Administrative Proceedings October 1, 1981 - September 30, 1982

Agency	Total Covered Proceedings Decided 1/	Total Applications Received	Applications Granted	Applications Denied or Disposed of Without Award	Applications Pending or Stayed on September 30, 1982
Department of Agriculture	255	2	0	1	1
Armed Services Board of Contract Appeals	not available	15	0	5 (1 withdrawn or dismissed w/o decision)	10
Department of Commerce	95	1	0	1	0
Environmental Protection Agency	34	2	0	1 (settled w/o award)	1
Federal Communications Commission	24	1	0	1	0
General Services Board of Contract Appeals	not available	6	0	0	6
Department of Health and Human Services	not available	2	0	0	2
Department of the Interior	553	5	0	1	4 2/1
Department of Labor	154	2	0	1 (settled w/o award)	1
National Labor Relations Board	7,338	49	0	17	32 3/1

Agency	Total Covered Proceedings Decided	Total Applications Received	Applications Granted	Applications Denied or Disposed of Without Award	Applications Pending or Stayed on September 30, 1982
National Transportation Safety Board	127	5	0	0	5
Nuclear Regulatory Commission	not available	1	0	0	1 4/
Occupational Safety and Health Review Commission	2,485	8	0	2	6
Postal Service	127	1	0	0	1
Department of Transportation	497	2	0	0	2
Department of the Treasury	26	1	0	1 (withdrawn by counsel)	0
Total: All Agencies	11,715 5/	103	0	31	72

- 1/ These figures, where available, are approximate.
- 2/ These applications are stayed pending issuance of Interior Department rules for the processing of applications for awards. In the one case decided by the Interior Department, it was held that the proceeding concluded before October 1, 1982 and thus was not covered by the Act.
- 3/ Thirty of these applications are pending at the agency and two are stayed pending judicial review.
- 4/ This application is stayed pending a ruling from the General Accounting Office on whether a provision in the Nuclear Regulatory Commission's appropriation legislation prohibits awards to intervenors under the Equal Access to Justice Act.
- 5/ An additional 1,259 covered proceedings were reported to ACUS by agencies that received no applications.

APPENDIX III

Data on Granted Applications for Awards of Fees and Expenses
October 1, 1982 - September 30, 1983

<u>Applicant</u>	<u>Deciding Agency</u>	<u>Paying Agency</u>	<u>Type of Proceeding</u>	<u>Amount Requested</u>	<u>Amount Received</u>
Catskill Airways and Stephen C. Low	National Transportation Safety Board	Department of Transportation (Federal Aviation Administration)	Regulatory enforcement (license suspension)	\$20,425.44 (for 3 applicants)	\$13,616.96 (\$6,808.48 to each of 2 applicants)
Ennis Automotive, Inc.	Occupational Safety and Health Review Commission*	Department of Labor	OSHA enforcement	\$9,741.64	\$6,800.00 (compromise settlement)
Fogel-Anderson Construction Co.	Occupational Safety and Health Review Commission*	Department of Labor	OSHA enforcement	\$1,659.00	\$1,375.00 (compromise settlement)
Indian Development District of Arizona	Department of Labor*	Development of Labor	CETA audit dispute	\$441.20	\$441.20
Wisconsin Winnebago Business Committee (governing body of Indian tribe)	Department of Labor*	Department of Labor	CETA audit dispute	\$6,074.63	\$6,074.63
New England Farmworkers Council, Inc.	Department of Labor**	Department of Labor	CETA audit dispute	\$5,887.50	\$5,887.50
Mary Ellen Bryant	Department of Labor	Department of Labor	Farm Labor Contractor Registration Act enforcement proceeding	\$766.60	\$698.60 (expenses disallowed)
David Ransome	Department of Labor	Department of Labor	Farm Labor Contractor Registration Act enforcement proceeding	\$1,131.00	\$1,040.00 (expenses disallowed)

* Award operated by settlement, not by decision.

** Application unopposed by paying agency.

APPENDIX IVReasons for Denial of Applications^{1/}
October 1, 1982 -- September 30, 1983

	Number of Applications
Proceeding not a covered "adversary adjudication"	5
Application not timely filed	4
Applicant did not prevail	5
Applicant not eligible ^{2/}	7
Application withdrawn	1
Proper jurisdiction in court, not agency	3
Government's position was substantially justified	28
	<u>53</u>

^{1/} In a few cases, alternative reasons have been offered for denial. These cases have been counted as denials for the reason that would ordinarily be reached first. For example, if the application was not timely and the government's position was substantially justified, the denial has been listed as one for the former reason.

^{2/} This includes both cases in which an affirmative finding of ineligibility was made and those in which the applicant failed to provide adequate evidence of eligibility.