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

OCTOBER 1, 1990 – SEPTEMBER 30, 1991

**Robert S. Ross, Jr.
Acting Chairman**

September 8, 1992

**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, as amended by Pub. L. 99-80, 99 Stat. 183) provides for the award of fees and expenses to certain litigants who prevail against the United States in adversary agency adjudications or civil proceedings. The Act directs the Chairman of the Administrative Conference of the United States to report annually to Congress on the amount of attorney fees and expenses awarded in agency adjudications under the Act, providing information about the individual awards and the proceedings in which they were made that may be helpful to Congress in evaluating the scope and impact of the Act. 5 U.S.C. 504(e). This is the tenth annual report of the Chairman under the Act, covering the period from October 1, 1990 through September 30, 1991.

Under the Act, as amended in 1985, a party prevailing against the United States is entitled to an award of reasonable attorney fees (ordinarily limited to \$75.00 per hour) and other expenses unless the United States can show that its position 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. Parties eligible to apply for awards include individuals with a net worth of not more than \$2 million; sole proprietors, corporations, partnerships, local governmental units and public or private organizations with a net worth of not more than \$7 million and not more than 500 employees; and 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.

Fee Applications in Fiscal 1991

The 128 fee applications filed in FY91 represent a slight increase from the 104 applications filed in FY90. In fiscal 1991, the Armed Services Board of Contract Appeals (ASBCA) received 59 fee applications, a drop of three from the previous fiscal year. By contrast, the number of fee applications

filed in Board of Contract Appeals proceedings at other agencies increased from 15 in FY90 to 39 in FY91. These include cases at the Department of the Interior, Department of Transportation, Department of Veterans Affairs, General Services Administration, and United States Postal Service. The Board of Contract Appeals at the General Services Administration (GSA-BCA) received, next to the ASBCA, the greatest number of fee applications in FY91, namely 26. This represents a dramatic increase from FY90 in which no applications were filed under the Act with GSA-BCA. The percentage of fee applications filed in contract appeal cases increased for the fourth consecutive year, rising to nearly 77% of the total fee applications in FY91. This represents an increase from nearly 72% in FY90, 55% in FY89, and 24% in FY88.

The National Labor Relations Board (NLRB) received the highest number, 12, of non-contract-related fee applications. These were incident to unfair labor practice proceedings. Prior to FY91, the number of fee applications filed with the NLRB had been decreasing, falling to four in FY90 from eleven in FY89 and twenty-two in FY88. (See Appendix I for data on activity by agency.)

The total number of applications disposed of decreased for the third consecutive year. In FY91, the total number of cases decided decreased to 68, from 70 in FY90 and 108 in FY89. Forty-eight awards were made and 20 applications were denied in FY91, compared to 34 awards and 36 denials in FY90 and 56 awards and 52 denials in FY89. (See Appendix II for a year-by-year comparison of activity.)

Fee Awards

Nine agencies made a total of 48 awards for fees and expenses in administrative adjudications in FY91, for a total of \$433,641.65. (See Appendix III for information on the awards.) The percentage of awards among the total number of cases decided increased to nearly 71% in FY91 from 48.5% in FY90 and 51.8% in FY89.

The total amount (\$433,641.65) awarded in FY91 (which does not include unknown amounts in 19 cases in which entitlement to fees was found but parties were directed to conduct settlement

negotiations as to the amount) is less than half the total amount of \$961,671.52 awarded in FY90. To a significant extent, however, the award figure for FY90 was skewed by an award by the ASBCA of \$475,724.51 to resolve 12 claims that were consolidated into one case. But for the large award, the total amount awarded would have decreased steadily since 1989. Moreover, the average award dropped to \$9,034.20 in FY91 from \$28,284.45 in FY90 (with the large ASBCA award included) or \$14,725.66 (with the large ASBCA award excluded).

Thirty-two of the 48 awards in FY91 were made in Board of Contract Appeals (BCA) decisions. The average award in contract appeal cases in FY91 was \$11,584.02. This represents a large decrease from the average award in BCA decisions in FY90, which was \$52,507.58 (including the large ASBCA award) or \$19,952.40 (excluding the large award). The average award in non-contract appeal cases in FY91, \$3,934.56, also represents a sharp drop from FY90, in which the average was \$27,673.17. (See Appendix VI for further information.)

The greatest number of awards in FY91 was made by the ASBCA, which awarded fees and expenses in 20 cases, followed by the GSA-BCA which made seven awards. The awards for which amounts are known ranged from a low of \$300.00 in a social security disability case to a high of \$111,335.81 in a GSA-BCA case. In particular, the percentage of awards of \$10,000 or less increased in FY91, accounting for 54% of the total number of awards in FY91, compared to 35% in FY90. This figure increases to 62% for awards of \$25,000 or less in FY91, as compared to 41% in FY90. The percentage of awards over \$25,000 decreased to eight percent in FY91 from 18% in FY90.¹

In 23 cases for which both the amount sought by the applicant and the amount awarded is known, the award was for less than the amount requested. In six others, the amount awarded was equal to the amount requested. In one case, the amount awarded slightly exceeded the amount sought. All attorney time in the awards by decision was compensated at a rate of \$75 or less per hour; under the Act,

¹No information as to the amount granted was available for 33% of the awards in FY91 and 41% of the awards in FY90. Information pertaining to the amount awarded is most often unavailable in circumstances where an entitlement to fees and expenses is found and parties are instructed to conduct settlement negotiations to determine the quantum amount. See Appendix V for additional information.

agencies can increase this statutory maximum only through rulemaking, and none have done so. No information is available concerning the level of attorney compensation in settled cases.

Applications Denied

In FY91, 10 agencies denied a total of 20 applications for fees. This represents a decrease of nearly 50% from the 36 denials issued in FY90. In fact, denials have dropped for three consecutive years. This reflects a drop in the total number of cases disposed of during this same period. The most frequent basis for rejecting an application (with 12 terminations on his ground) was that the agency position was substantially justified. Two fee applications were withdrawn. Two more were denied because the underlying proceeding was not covered under the Act. Three fee applications were rejected, respectively, because the application was found not to have been timely filed, the applicant did not prevail in the underlying substantive proceeding, or the applicant was found ineligible under the Act. In three remaining cases, information regarding the reason for denial of the fee application was unavailable. (See Appendix IV.) Twenty-two denials are described above even though only 20 fee applications were denied in FY91 because one decision by the National Labor Relations Board and one decision by the Environmental Protection Agency provided multiple grounds for denial.

Conclusion

The data reflect that the level of new applications for fees filed in FY91 has increased moderately from FY90. The overall number of agency dispositions of EAJA cases, however, has decreased slightly, from 70 in FY90 to 68 in FY91. During this same period, however, the number of awards has risen, suggesting that while the total level of activity under the Act is slightly decreasing, the proportion of successful fee applications is rising significantly. In particular, the percentage of awards among the total number of cases decided dramatically increased to nearly 70% in FY91 from 48.5% in FY90. However, the average size of contract and non-contract related fee awards declined considerably in FY91. Likewise, the percentage of awards under \$25,000 increased dramatically. Contract appeal proceedings continue to represent an ever-increasing number of new fee applications

filed, rising from 72% in FY90 to 77% in FY91, and an ever-increasing number of the awards made under the Act, increasing from 64% on FY90 to 74% in FY91.

Appendix I

**AGENCY ACTIVITY UNDER THE
EQUAL ACCESS TO JUSTICE ACT
IN ADMINISTRATIVE ADJUDICATIONS**

October 1, 1990 - September 31, 1991

| <i>AGENCY</i> | <i>FILED</i> | <i>GRANTS</i> | <i>DENIALS</i> | <i>PENDING</i> |
|--|--------------|---------------|----------------|----------------|
| Armed Services Board of Contract Appeals | 59 | 20 | 0 | 39 |
| Commodity Futures Trading Commission | 1 | 0 | 0 | 1 |
| Consumer Product Safety Commission | 0 | 0 | 0 | 0 |
| Department of Agriculture | 0 | 0 | 0 | 0 |
| Department of Commerce | 0 | 0 | 0 | 0 |
| Department of Education | 2 | 1 | 0 | 1 |
| Department of Health & Human Services | 1 | 5 | 1 | 0 |
| Department of Interior, Board of Contract Appeals | 4 | 1 | 1 | 2 |
| Department of Interior, Office of Hearings and Appeals | 4 | 0 | 1 | 12 |
| Department of Justice, Drug Enforcement Agency | 0 | 0 | 0 | 0 |
| Department of Justice, Office of Justice Programs | 0 | 0 | 0 | 0 |
| Department of Labor | 1 | 0 | 2 | 5 |

| <i>AGENCY</i> | <i>FILED</i> | <i>GRANTS</i> | <i>DENIALS</i> | <i>PENDING</i> |
|--|--------------|---------------|----------------|----------------|
| Department of Transportation, Board of Contract Appeals | 6 | 1 | 1 | 7 |
| Department of Treasury | 0 | 0 | 0 | 0 |
| Department of Veterans Affairs | 2 | 1 | 0 | 1 |
| Environmental Protection Agency | 2 | 0 | 1 | 0 |
| Federal Communications Commission | 0 | 0 | 0 | 0 |
| Federal Deposit Insurance Corporation | 1 | 0 | 1 | 0 |
| Federal Maritime Commission | 0 | 0 | 0 | 0 |
| Federal Mine Safety and Health Review Commission | 0 | 0 | 0 | 0 |
| Federal Labor Relations Authority | 0 | 0 | 0 | 0 |
| Federal Reserve Board | 0 | 0 | 0 | 0 |
| Federal Trade Commission | 0 | 0 | 0 | 0 |
| General Services Administration, Board of Contract Appeals | 26 | 7 | 2 | 18 |
| Interstate Commerce Commission | 0 | 0 | 0 | 0 |
| National Aeronautics and Space Administration | 0 | 0 | 0 | 0 |
| National Credit Union Administration | 0 | 0 | 0 | 0 |

| <i>AGENCY</i> | <i>FILED</i> | <i>GRANTS</i> | <i>DENIALS</i> | <i>PENDING</i> |
|---|--------------|---------------|----------------|----------------|
| National Labor Relations Board | 12 | 0 | 5 | 21 |
| National Transportation Safety Board | 22 | 6 | 2 | 14 |
| Occupational Safety & Health Administration | 5 | 4 | 2 | 0 |
| United States International Trade Commission | 0 | 0 | 0 | 0 |
| United States Postal Service, Board of Contract Appeals | 1 | 2 | 1 | 1 |
| United States Postal Service, False Representative Claims | 1 | 0 | 0 | 1 |

* Information not available.

Appendix II

**DISPOSITION OF APPLICATIONS FOR AWARDS OF FEES AND EXPENSES
UNDER THE EQUAL ACCESS TO JUSTICE ACT
IN ADMINISTRATIVE PROCEEDINGS**

October 1, 1990 - September 30, 1991

| <i>Fiscal Year</i> | <i>Applications Filed</i> | <i>Applications Granted</i> | <i>Applications Denied</i> | <i>Amount Awarded</i> |
|--------------------|---------------------------|-----------------------------|----------------------------|-----------------------|
| 1982 | 103 | 0 | 31 | 0.00 |
| 1983 | 88 | 8 | 53 | 35,933.89 |
| 1984 | 146 | 13 | 76 | 121,943.79 |
| 1985 | 56 | 11 | 63 | 200,095.66 |
| 1986 | 128 | 21 | 54 | 107,141.29 |
| 1987 | 267 | 30 | 60 | 214,320.74 |
| 1988 | 210 | 281 | 94 | 513,795.65 |
| 1989 | 102 | 56 | 52 | 577,077.06 |
| 1990 | 104 | 34 | 36 | 961,671.52 |
| 1991 | 128 | 48 | 20 | 433,641.65 |

Appendix III

EQUAL ACCESS TO JUSTICE ACT
AWARD OF FEES AND EXPENSES IN ADMINISTRATIVE PROCEEDINGS

October 1, 1990 - September 30, 1991

| <i>Applicant</i> | <i>Deciding Agency</i> | <i>Paying Agency</i> | <i>Type of Proceeding</i> | <i>Amount Requested</i> | <i>Amount Awarded</i> |
|--------------------------|------------------------|----------------------|---------------------------|-------------------------|-----------------------|
| Aqua Fab | ASBCA | Navy | Contract | N/A* | N/A** |
| Decker & Co. | ASBCA | Army | Contract | N/A* | N/A** |
| DWS, Inc. | ASBCA | Army | Contract | 55,556.80 | N/A** |
| DWS-2 | ASBCA | Army | Contract | 38,273.48 | N/A** |
| Environmental Protection | ASBCA | Army | Contract | N/A* | N/A** |
| Goetz Demolition | ASBCA | Army | Contract | 23,049.00 | 440.00 |
| ISC-Serco | ASBCA | Army | Contract | 6,998.43 | 6,998.43 |
| ISC-Serco-2 | ASBCA | Army | Contract | N/A* | N/A** |
| LBM | ASBCA | Navy | Contract | 7,000.00 | 7,000.00 |
| Lenz GmbH | ASBCA | Army | Contract | 44,742.83 | N/A** |
| Logistical Support | ASBCA | USAF | Contract | 46,785.72 | N/A** |
| Michael, Inc. | ASBCA | Def. | Contract | 21,945.00 | N/A** |
| P.B. Engineering | ASBCA | USAF | Contract | 8,057.48 | 6,307.29 |
| Rex Systems | ASBCA | Navy | Contract | 131,657.86 | 101,952.00 |
| Sage | ASBCA | Navy | Contract | 17,000 | N/A** |
| Tempo, Inc | ASBCA | Army | Contract | N/A* | N/A** |

Appendix III

| <i>Applicant</i> | <i>Deciding Agency</i> | <i>Paying Agency</i> | <i>Type of Proceeding</i> | <i>Amount Requested</i> | <i>Amount Awarded</i> |
|-----------------------|------------------------|----------------------|------------------------------|-------------------------|-----------------------|
| Total Maintenance | ASBCA | Army | Contract | 44,969.14 | 8,944.67 |
| Universal Canvas | ASBCA | Navy | Contract | N/A* | 6,003.99 |
| Viktoria-F.I.T. | ASBCA | Army | Contract | 4,470.23 | 4,470.23 |
| Wagner Smith | ASBCA | USAF | Contract | 33,029.00 | 35,640.98 |
| Stauzenberger College | Education | Educn. | Student Financial Assistance | 21,400.84 | 10,988.34 |
| American Power | GSA-BCA | GSA | Contract | 169,526.26 | 111,335.81 |
| Better Enterprises | GSA-BCA | GSA | Contract | 25,009.26 | 11,233.16 |
| Kentucky Building | GSA-BCA | GSA | Contract | 5,881.19 | 5,131.19 |
| Lorentz Bruun | GSA-BCA | GSA | Contract | 5,002.50 | 5,002.50 |
| Mr. Klean | GSA-BCA | GSA | Contract | N/A* | N/A** |
| Quality Diesel | GSA-BCA | GSA | Contract | 6,745.00 | N/A** |
| Singleton Contracting | GSA-BCA | GSA | Contract | 9,074.02 | 1,967.77 |
| D. Campbell | SSA | HHS | Disability | 814.84 | 400.00 |
| L. Hawthorne | SSA | HHS | Disability | 630.00 | 300.00 |

Appendix III

| <i>Applicant</i> | <i>Deciding Agency</i> | <i>Paying Agency</i> | <i>Type of Proceeding</i> | <i>Amount Requested</i> | <i>Amount Awarded</i> |
|------------------------|------------------------|----------------------|---------------------------|-------------------------|-----------------------|
| W. Jackson | SSA | HHS | Disability | 1,506.00 | 1,500.00 |
| C. Johnson | SSA | HHS | Disability | 315.00 | 175.00 |
| W. Jones | SSA | HHS | Disability | 770.00 | 400.00 |
| White Interior Buffalo | BCA | Inter. | Contract | 13,121.03 | 12,756.85 |
| R.N. Cadwalader | NTSB-ALJ | FAA | License Suspension | N/A* | 6,216.10 |
| K.D. Crittendon | NTSB-ALJ | FAA | License Suspension | N/A* | 2,741.00 |
| J. Kroneberger | NTSB-ALJ | FAA | License Suspension | 3,756.87 | 1,626.67 |
| T. R. Moore | NTSB-ALJ | License FAA | Suspension | N/A* | 6,874.00 |
| G.M. Penketh | NTSB | FAA | License Suspension | 3,612.70 | 3,612.70 |
| J. D. Scrape | NTSB-ALJ | License FAA | Suspension | 5,340.00 | 2,670.00 |
| BVC Construction | OSHRC | OSHA | OSHA Citation | 7,986.46 | 6,623.46 |
| Central Brass | OSHRC | OSHA | Citation | 87,347.13 | 13,520.00 |
| Levi Case Company | OSHRC | OSHA | OSHA Citation | 2,834.90 | 1,132.40 |
| Poudre Plastics | OSHRC | OSHA | Citation | 21,637.49 | 4,173.34 |
| Tom Shaw | DOT-BCA | DOT | Contract | 4,469.35 | 4,469.35 |

Appendix III

| <i>Applicant</i> | <i>Deciding Agency</i> | <i>Paying Agency</i> | <i>Type of Proceeding</i> | <i>Amount Requested</i> | <i>Amount Awarded</i> |
|-----------------------|------------------------|----------------------|---------------------------|-------------------------|-----------------------|
| Engineer- ing Co., | USPS-BCA | USPS | Contract | 13,561.31 | 2,100.00 |
| Adco | USPS-BCA | USPS | Contract | 76,607.78 | 38,934.42 |
| Bromley Construcn. | Veterans (DVA) | DVA | Contract | 55,585.32 | N/A** |

* Information not available.

** Decision found entitlement to fees and expenses; parties were directed to conduct settlement negotiations as to quantum amount.

Appendix IV

REASONS FOR DENIAL OF APPLICATIONS FOR AWARDS UNDER THE
EQUAL ACCESS TO JUSTICE ACT
IN ADMINISTRATIVE PROCEEDINGS

October 1, 1990 - September 30, 1991

| <i>Reason for Denial of Application</i> | <i>Number of Applications</i> |
|---|-------------------------------|
| Proceeding was not a covered "adversary adjudication" | 2 |
| Application not timely filed | 1 |
| Applicant did not prevail | 1 |
| Applicant was not eligible | 1 |
| Government's position was substantially justified | 12 |
| Application was withdrawn | 2 |
| Information unavailable | 3 |

* Twenty applications for fees and expense were denied in FY 1991. Twenty-two denials are listed above because a decision by the National Labor Relations Board and a decision by the Environmental Protection Agency listed each gave two reasons for denying the respective fee applications.

**TABLE OF PERCENTAGE OF AWARDS UNDER THE
EQUAL ACCESS TO JUSTICE ACT
WITHIN SPECIFIED DOLLAR RANGES¹**

October 1, 1990 - September 31, 1991

| <i>Specified Dollar Ranges of Awards</i> | <i><u>FY91</u> Percentage of Awards within Specified Ranges</i> | <i><u>FY90</u> Percentage of Awards within Specified Ranges</i> |
|--|---|---|
| Under \$1000 | 10% | 6% |
| \$1,001 to \$10,000 | 44% | 29% |
| \$10,001 to \$25,000 | 8% | 6% |
| \$25,001 to \$50,000 | 4% | 6% |
| \$50,001 to \$75,000 | 0% | 6% |
| \$75,001 to \$100,000 | 0% | 0% |
| \$100,001 to \$200,000 | 4% | 3% |
| Above \$200,001 | 0% | 3% |
| Amount Awarded Unknown | 30% | 41% |

¹It should be noted that the information as to the amount granted was available in 70% of the awards in FY91 and in 59% of the awards in FY90. The percentages listed in the chart above are based on the number of awards made within specified dollar ranges out of the total number of awards in that fiscal year, including those for which information concerning the amount of the award is unavailable. Information pertaining to the amount awarded is most often unavailable in cases where an entitlement to fees and expenses is found and parties are instructed to conduct settlement negotiations to determine the quantum amount.

Appendix VI

**AVERAGE AWARDS
UNDER THE
EQUAL ACCESS TO JUSTICE ACT
FOR
FY91, FY90, and FY89**

| Type of Average Award | FY91 | FY90 <i>with</i> Large ASBCA Award | FY90 <i>without</i> Large ASBCA Award | FY89 |
|---|-----------|--|---|-----------|
| Average Total Award | 9,034.20 | 28,284.45 | 14,725.66 | 10,304.94 |
| Average Award in Board of Contract Appeal Proceedings | 11,584.02 | 52,507.58 | 19,952.40 | 26,563.01 |
| Average Award in non-Board of Contract Appeal Proceedings | 3,3934.56 | 27,673.17 | 27,673.17 | 12,262.05 |