



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES  
2120 L STREET, N.W., SUITE 500  
WASHINGTON, D.C. 20037-1568  
(202) 254-7020

OFFICE OF  
THE CHAIRMAN

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

**OCTOBER 1, 1992 -- SEPTEMBER 30, 1993**

**THOMASINA V. ROGERS  
CHAIRMAN**

**FEBRUARY 22, 1995**

**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 twelfth annual report of the Chairman under the Act, covering the period from October 1, 1992 through September 30, 1993.

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**

The number of applications for fees and expenses filed with agencies increased very slightly in fiscal 1993, up to 100 from 97 in FY 1992, but still below FY 1991's 128 applications. Over all, filings with contract appeals boards comprised the majority of applications in 1993; 60 applications (60% of the year's total) were filed with the various boards (including the ASBCA, the General Services Board of Contract Appeals and the Department of Veterans Affairs Board of Contract Appeals). This percentage is somewhat lower than those of the previous three years, in which contract appeals cases have hovered near 75% of the total.

An increase in filings with the National Transportation Safety Board (26, up from 13 in FY92) accounts for much of the change. The NTSB received the largest number of non-contract related fee applications in FY93. These were filed in proceedings in which individuals (or occasionally small

businesses) appeal Federal Aviation Administration actions suspending licenses or imposing sanctions for alleged violations of flight safety or other regulations.

In all, agencies disposed of 76 fee applications in fiscal 1993, compared with 82 in FY92, 68 in FY91 and 70 in FY90. The FY93 total includes 33 applications formally granted, 26 denied, eight settled applications, six withdrawn applications, and three dismissed without prejudice because they were filed prematurely.

### **Fee Awards**

Seven agencies granted a total of 33 fee awards in administrative adjudications in fiscal 1993, down significantly from the 57 awards made in fiscal 1992. Not surprisingly, the drop in the number of awards was accompanied by a drop in the total awarded in cases for which information on the amount of the award was available. In 26 of the cases, the awards made totaled \$346,494.51, down from \$734,433.61 in 29 cases in FY92<sup>1</sup>. In the other seven cases, agencies ruled that an applicant was entitled to an award, but instructed the parties to negotiate a settlement as to the amount. An additional eight fee applications were settled by the parties before a finding of entitlement; the terms of these settlements are unknown.

The largest numbers of awards in FY93 were made by the National Transportation Safety Board, with 12, and the Armed Services Board of Contract Appeals, with 11.<sup>2</sup> Considered together, the 16 awards made by contract appeals boards represent almost half the total; the boards also disposed of seven of the eight settled cases.

The awards for which amounts are known ranged from a low of \$25.08 in a General Services Board of Contract Appeals case to a high of \$37,156.84 in an ASBCA case, with a mean average award of \$13,084.10. This average is also down from FY92's \$25,325.30. Fifty percent of the awards for which the amount is known were under \$10,000; this percentage, however, includes two supplemental awards made by the National Transportation Safety Board to reflect increases in permissible hourly rates for attorneys after the Board's 1992 rule change authorizing inflation-based increases in the \$75 hourly ceiling for attorneys' fees.<sup>3</sup>

---

<sup>1</sup>Large awards in a few contract appeals (including one for \$185,699.43) raised the FY92 total considerably.

<sup>2</sup>By the ASBCA's own count, it awarded fees in 21 proceedings in FY93; however, several of these involved multiple claims by the same party decided in the same proceeding. For purposes of this report, awards made to a single party are counted as single awards unless they were made in separate decisions.

<sup>3</sup>Under the Act, fees greater than \$75 per hour may be awarded in administrative proceedings only when an agency has provided for such increases by rulemaking; the NTSB is the only agency to have done so.

The 33 awards made in FY93 represent 55% of the applications formally disposed of by agencies, down from the previous two years, in which awards constituted 69% and 70% of dispositions, respectively.

### **Applications Denied**

Seven agencies denied a total of 26 applications for fees in FY93. In 18 cases, the agency ruled that the government's position had been substantially justified. Other applications were denied because the party did not prevail (2), the application was not timely (1), the proceeding was not an adversary adjudication under the Act (1), or there were special circumstances that made an award unjust (1) (in this case, the applicant's failure to cooperate in an investigation, which resulted in the government's not having evidence that might have caused it not to proceed against the applicant).<sup>4</sup> In addition to the applications that were formally denied, six fee applications were withdrawn (all at the ASBCA) and three were dismissed without prejudice because they had been filed prematurely (also at the ASBCA).

### **Conclusion**

Over all, the level of Equal Access to Justice Act activity in administrative proceedings has remained fairly steady over the past few years, after a burst of activity in the mid-1980's following enactment of a statutory amendment concerning the Act's applicability to contract appeals. While there was a drop in awards, and a concomitant drop in the amount awarded, in FY93, there is no evidence of an emerging trend. Instead, the levels have fluctuated. This is especially true of the total amount awarded, where one or two large awards can skew the data significantly.

One trend that is clear is concentration of agency-level EAJA activity at a few agencies, particularly boards of contract appeals, the NTSB and the Occupational Safety and Health Review Commission. These agencies have in common the authority to make independent decisions that are not reviewed by the agencies subject to them. It is perhaps not surprising that most administrative level awards are made in situations where the agency that decides is different from (or a fairly independent branch of) the one that will have to pay the award. Interestingly, however, the effect is not limited to fee awards. These agencies also receive and deny the largest numbers of fee applications over all.

---

<sup>4</sup>This case involved dual grounds for denial -- both substantial justification and special circumstances. In four other cases, information about the reason for denial is unavailable.

APPENDIX I  
 AGENCY ACTIVITY UNDER THE EQUAL ACCESS TO JUSTICE ACT IN ADMINISTRATIVE ADJUDICATIONS  
 FISCAL 1993

AGENCY	FILED	GRANTS	DENIALS	SETTLED	PENDING
ASBCA	32	11	5 <sup>1</sup>	4	23
Commerce	0	0	0	0	0
Environmental Protection Agency	0	0	0	0	2
Federal Communications Commission	1	0	1	0	0
Federal Deposit Insurance Corporation	0	0	0	0	1 <sup>2</sup>
Federal Maritime Commission	0	0	0	0	0
Federal Mine Safety and Health Review Commission	0	0	0	0	0
Federal Trade Commission	0	0	0	0	0
General Services Board of Contract Appeals	6	4	0	0	2 <sup>3</sup>
Department of Health and Human Services	2	0	0	0	2
Department of the Interior	1	0	1	0	8
Interstate Commerce Commission	1	0	0	0	1
Department of Justice	0	0	0	0	0
Department of Labor	0	0	0	0	0

<sup>1</sup> The ASBCA also disposed of 9 other applications. Six were withdrawn and three dismissed without prejudice (because they were filed prematurely).

<sup>2</sup> Case is stayed pending judicial review.

<sup>3</sup> Includes one case stayed pending judicial review of the merits.

AGENCY	FILED	GRANTED	DENIED	SETTLED <sup>4</sup>	PENDING
National Credit Union Administration	0	0	0	0	0
National Labor Relations Board	2	1	4	0	unknown
National Transportation Safety Board	26	12 <sup>5</sup>	13	1	16
Occupational Safety and Health Review Commission	5	3	1	0	7 <sup>6</sup>
Department of Transportation Board of Contract Appeals	0	0	0	0	1
United States Postal Service	2	2	1	0	3
Department of Veterans Affairs	22	0	0	3	21
<b>TOTALS</b>	<b>100</b>	<b>33</b>	<b>26</b>	<b>8</b>	<b>87</b>

<sup>4</sup> This category includes applications that were settled before a determination of whether the applicant was entitled to an EAJA award. Applications that were settled as to amount after a determination of entitlement are listed as grants.

<sup>5</sup> Includes one settlement for an unknown amount.

<sup>6</sup> Includes two cases stayed pending judicial review of the merits.

APPENDIX II

AWARDS OF FEES AND EXPENSES IN ADMINISTRATIVE PROCEEDINGS

October 1, 1992 - September 30, 1993

Deciding Agency	Applicant	Paying Agency	Proceeding Type	Amount Awarded
ASBCA	Hart's Food Service, Inc.	Army	contract appeal	N/A
ASBCA	Decker & Co. GmbH	Army	contract appeal	\$ 25,565.95
ASBCA	Decker & Co. GmbH	Army	contract appeal	\$ 900.00
ASBCA	Logistical Support, Inc.	Air Force	contract appeal	N/A
ASBCA	AST Anlagen-und Sanierungstechnik GmbH	Army	contract appeal	\$ 8,383.50
ASBCA	R & B Bewachungsgesellschaft	Army	contract appeal	N/A
ASBCA	R & B Bewachungsgesellschaft	Army	contract appeal	N/A
ASBCA	Charles G. Williams Construction, Inc.	Army	contract appeal	\$ 3,891.96
ASBCA	MVI Precision Machining, Ltd.	Navy	contract appeal	\$ 28,925.00
ASBCA	International Foods Retort Co.	Defense Department	contract appeal	\$ 37,156.84
ASBCA	R.J. Crowley, Inc.	Army	contract appeal	N/A
GSSBCA	Universal Development Corp.	GSA	contract appeal	\$ 2,891.00
GSSBCA	Giancola & Associates	GSA	contract appeal	\$ 25.08
GSSBCA	Quality Diesel Engines, Inc.	Commerce Department	contract appeal	\$ 9,227.92
GSSBCA	Security Services, Inc.	GSA	contract appeal	\$ 21,107.70
NLRB	M.P.C. Plating, Inc.	NLRB	unfair labor practice	\$ 28,201.08

Deciding Agency	Applicant	Paying Agency	Proceeding Type	Amount Awarded
NTSB	Eric C. Nicolai	Federal Aviation Administration	aviation enforcement	\$ 29,626.04
NTSB	Stephen M. Carter	FAA	aviation enforcement	\$ 3,885.62
NTSB	Harold M. Gay	FAA	supplemental award	\$ 3,252.06
NTSB	John W. Cronin	FAA	supplemental award	\$ 1,001.26
NTSB	William L. Gray	FAA	aviation enforcement	\$ 13,478.29
NTSB	Lew V. Adams	FAA	aviation enforcement	\$ 11,375.02
NTSB	Robert K. Williams	FAA	aviation enforcement	\$ 8,939.41
NTSB	Orco, Inc., dba Riverside Aviation	FAA	aviation enforcement	\$ 7,615.50
NTSB	Allan R. Calder	FAA	aviation enforcement	\$ 4,318.64
NTSB	Mark Hunter	FAA	aviation enforcement	\$ 14,438.92
NTSB	Clarence Patterson	FAA	aviation enforcement	N/A
NTSB	Richard C. Rees	FAA	aviation enforcement	\$ 2,152.56
OSHRC	Asbestos Abatement, Consultation & Engineering Associates	Labor Department	OSHA enforcement	N/A
OSHRC	Consolidated Construction, Inc.	Labor Department	OSHA enforcement	\$ 27,871.37
OSHRC	Capitol Tunneling, Inc.	Labor Department	OSHA enforcement	\$ 10,280.64
US Postal Service	Nello Construction Co.	US Postal Service	contract appeal	\$ 24,460.65
US Postal Service	Equisystems California, Inc.	US Postal Service	false representation enforcement	\$ 17,122.50



**APPENDIX III**

**EQUAL ACCESS TO JUSTICE ACT APPLICATIONS IN ADMINISTRATIVE PROCEEDINGS  
SETTLED BEFORE FORMAL DECISION ON ENTITLEMENT TO AN AWARD, FISCAL 1993**

<b>Presiding Agency</b>	<b>Applicant</b>	<b>Settling Agency</b>
ASBCA	Industrial Pump and Compressor, Inc.	Department of Defense
ASBCA	Texas Painter Craft, Inc.	Air Force
ASBCA	Technical Communication Electronic Consultants, Ltd.	Army
ASBCA	Western States Management Services, Inc.	Army
NTSB	Richard Pine and William TerKeurst	Federal Aviation Administration
Department of Veterans Affairs Board of Contract Appeals	Alert Care Ambulance Service	Department of Veterans Affairs
VABCA	Montgomery Ross Fisher, Inc. & H. A. Lewis, Inc., Joint Venture	Department of Veterans Affairs
VABCA	Morgen & Oswood Construction Company, Inc.	Department of Veterans Affairs

**APPENDIX IV**

**REASONS FOR DENIAL OF APPLICATIONS FOR FEES AND EXPENSES  
IN ADMINISTRATIVE ADJUDICATIONS, FISCAL 1993**

<b>Reason</b>	<b>Number of Cases</b>
Agency position was substantially justified	18
Proceeding was not a covered adversary adjudication	1
Application was not timely filed	1
Applicant was not a prevailing party	2
Special circumstances made an award unjust	1
Unknown	4

APPENDIX V  
DISPOSITION OF APPLICATIONS FOR AWARDS OF FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT IN  
ADMINISTRATIVE PROCEEDINGS, FISCAL 1993

Fiscal Year	Applications Filed	Applications Granted	Applications Denied	Amount Awarded
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	\$963,624.04
1991	128	48	20	\$433,641.65
1992	97	57	25	\$734,433.61
1993	100	33	26	\$346,494.51