



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

**OCTOBER 1, 1993 -- SEPTEMBER 30, 1994**

**THOMASINA V. ROGERS  
CHAIRMAN**

**OCTOBER 31, 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). (The Department of Justice currently has responsibility for reporting on fee awards under the Act in court litigation.) This is the thirteenth annual report of the Chairman under the Act, covering the period from October 1, 1993 through September 30, 1994. It will also be the final report; the Administrative Conference has not received a continuing appropriation for fiscal 1996, and ceases operations on October 31, 1995.

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 decreased in fiscal 1994, to 64 from 100 in FY 1993. Over all, filings with contract appeals boards comprised just over half the applications filed in 1994 (33).<sup>1</sup> This percentage is somewhat lower than those of previous years, in which contract appeals cases have hovered between 65% and 75% of the total.

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<sup>1</sup>This figure may be misleading, however, as at least one contract appeals board (the ASBCA) counts applications based on the number of contract claims involved in the underlying proceeding, rather than the number of applicants seeking fee awards.

In all, agencies disposed of 45 fee applications in fiscal 1994, compared with 76 in FY93, 82 in FY92, and 68 in FY91. The FY94 total includes 12 applications formally granted, 24 denied, and nine settled.

### **Fee Awards**

Four agencies granted a total of 12 fee awards in administrative adjudications in fiscal 1994, continuing a downward trend (from 33 awards in fiscal 1993 and 57 awards in fiscal 1992).<sup>2</sup> 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 nine of the cases, the awards made totaled \$211,543.03, as compared with \$346,494.51 in 26 cases in FY93 and \$734,433.61 in 29 cases in FY92<sup>3</sup>. In two other 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 nine fee applications were settled by the parties before a finding of entitlement; the terms of these settlements are known in only one case, where a fee of \$69,973.52 was paid. The largest numbers of awards in FY94 were made by the National Transportation Safety Board, with 5, and the Armed Services Board of Contract Appeals, with 4.

The awards for which amounts are known ranged from a low of \$2,042.01 in a National Transportation Safety Board case to a high of \$97,610.29 in an ASBCA case.

### **Applications Denied**

Nine agencies denied a total of 24 applications for fees in FY94. In eight 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 (4), the proceeding was not an adversary adjudication under the Act (4), or the applicant was not eligible to receive an award (3). The reason for denial is unknown in three cases.

### **Future Reporting**

Because the Administrative Conference is ceasing operations, the Office of the Chairman will be unable to report to Congress on Equal Access to Justice Act activity for fiscal 1995 and beyond. Congress may wish to assign this reporting responsibility to another agency. Alternatively, Congress might consider whether there is a continuing need for annual reporting on Equal Access to Justice Act activity. In the

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<sup>2</sup>This may be due in part to less complete reporting; as noted elsewhere in this report, the Office of the Chairman has had some difficulty in obtaining data consistently from agencies.

<sup>3</sup>The average award per case, however, increased in FY94: approximately \$23,000 per award, up from approximately \$13,000 in FY93.

experience of the Office of the Chairman, it has been very difficult to obtain complete, accurate data from agencies on their EAJA activity, especially from large, decentralized cabinet departments. And, with the exception of recent months, after legislation amending EAJA were introduced in Congress, demand for these reports and the data they contain has been very low since the 1985 reauthorization of EAJA.

### **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. However, since awards have dropped the past two years, there may be an emerging trend toward a lower level of EAJA activity.

One trend that continues 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.

APPENDIX I

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

FISCAL 1994

AGENCY	FILED	GRANTS	DENIALS	SETTLED
ASBCA	28 <sup>1</sup>	4	2	7
Commerce	0	0	0	0
Commodity Futures Trading Commission	0	0	0	0
Consumer Product Safety Commission	0	0	0	0
Environmental Protection Agency	1	0	0	0
Federal Communications Commission	1	0	1	0
Federal Deposit Insurance Corporation	0	0	0	0
Federal Maritime Commission	0	0	0	0
Federal Mine Safety and Health Review Commission	0	0	0	0
Federal Reserve Board	0	0	0	0
Federal Trade Commission	0	0	0	0
General Services Board of Contract Appeals	5	0	0	2
Department of Health and Human Services	2	0	2	0
Department of the Interior	1	1	1	0
Department of Justice	0	0	0	0
Department of Labor	3	0	1	0

<sup>1</sup> This figure is calculated by ASBCA based on the number of contract claims involved in the relevant cases, rather than the number of EAJA applications filed.

AGENCY	FILED	GRANTED	DENIED	SETTLED <sup>2</sup>
National Credit Union Administration	0	0	0	0
National Labor Relations Board	8	0	3	0
National Transportation Safety Board	N/A	5	6	0
Occupational Safety and Health Review Commission	12	0	6	0
Department of Transportation Board of Contract Appeals	0	0	0	0
United States Postal Service	3	2	2	0
<b>TOTALS</b>	<b>64</b>	<b>12</b>	<b>24</b>	<b>9</b>

<sup>2</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.

APPENDIX II  
 AWARDS OF FEES AND EXPENSES IN ADMINISTRATIVE PROCEEDINGS  
 October 1, 1993 - September 30, 1994

Deciding Agency	Applicant	Paying Agency	Proceeding Type	Amount Awarded
ASBCA	BH Services	Navy	contract appeal	N/A
ASBCA	H. G. Reynolds Company	Navy	contract appeal	\$ 97,610.29
ASBCA	Hettich & Co.	Army	contract appeal	N/A
ASBCA	South Georgia Cleaning Services	Air Force	contract appeal	N/A
GSBCA	Richerson Construction, Inc.	GSA	contract appeal	\$ 69,973.52 <sup>1</sup>
Interior	Robert and Barbara Cosimati	Department of the Interior, Bureau of Land Management	appeal of grazing decision	\$ 22,740.00
NTSB	John H. Gilfoil	DOT, FAA	license revocation	\$ 20,349.19
NTSB	Roger L. Janesky	DOT, FAA	civil penalty proceeding	\$ 2,042.01
NTSB	Eliot C. Jones	DOT, FAA		\$ 5,072.77
NTSB	Keith Franklin Kelly, Jr.	DOT, FAA	license revocation	\$ 4,801.22
NTSB	John M. Smith	DOT, FAA	certificate suspension	\$ 33,245.12
USPS	Computer Power Support, Inc.	USPS	contract appeal	\$ 5,755.20
USPS	Zion's Hope, Inc.	USPS	2nd class mail proceeding	\$ 25,000.00

<sup>1</sup> Amount agreed to through settlement.

### APPENDIX III

#### EQUAL ACCESS TO JUSTICE ACT APPLICATIONS IN ADMINISTRATIVE PROCEEDINGS SETTLED BEFORE FORMAL DECISION ON ENTITLEMENT TO AN AWARD, FISCAL 1994

Presiding Agency	Applicant	Settling Agency
ASBCA	Pioneer Enterprises, Inc.	Navy
ASBCA	Hadson Corporation	Air Force
ASBCA	Pate Contractors, Inc.	Army
ASBCA	Meredith Construction Co.	Navy
ASBCA	Crawford Technical Services	Air Force
ASBCA	Batteast Construction Co.	Army
ASBCA	Technical Ordnance, Inc.	Navy
GSBCA	Computer Network Systems, Inc.	GSA

### APPENDIX IV

#### REASONS FOR DENIAL OF APPLICATIONS FOR FEES AND EXPENSES IN ADMINISTRATIVE ADJUDICATIONS, FISCAL 1994

Reason	Number of Cases
Agency position was substantially justified	8
Proceeding was not a covered adversary adjudication	4
Application was not timely filed	4
Applicant was not a prevailing party	2
Applicant was not eligible to receive an award	3
Unknown	3



APPENDIX V  
DISPOSITION OF APPLICATIONS FOR AWARDS OF FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT IN  
ADMINISTRATIVE PROCEEDINGS, FISCAL 1982 - FISCAL 1994

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
1994	64	12	24	\$281,516.55 <sup>1</sup>

<sup>1</sup> Includes one award agreed to by settlement.