IN RE DONALD CUTLER

EAJA Appeal No. 05-01

FINAL DECISION

Decided January 3, 2007

Syllabus

This case concerns a petition for an award of attorneys' fees and other expenses under sections 504(a)(1) and (a)(4) of the Equal Access to Justice Act ("EAJA" or "Act"), 5 U.S.C. §§ 504(a)(1), (a)(4), filed by Donald Cutler ("Cutler" or "Respondent"). The EAJA claims derive from an administrative complaint filed by Region 10 of the Environmental Protection Agency (the "Region") against Cutler alleging violations of sections 301(a) and 404 of the Clean Water Act, 33 U.S.C. §§ 1311(a), 1344, and proposing a $25,000 penalty for the alleged violations. Administrative Law Judge ("ALJ") Spencer T. Nissen found Cutler liable for the violations alleged in the complaint, but assessed a $1,250 penalty. The ALJ's penalty assessment turned in part on his determination that Cutler lacked the ability to pay the proposed penalty. The Region appealed the ALJ's decision to the Environmental Appeals Board ("Board") on several grounds, including the ALJ's ability-to-pay analysis. In its decision, the Board concluded that the ALJ had properly determined that Cutler lacked the ability to pay a penalty of $25,000, but found several errors in the ALJ's penalty calculation and assessed a $5,548 penalty.

Following the issuance of the Board's decision, the ALJ considered Cutler's EAJA petition. In his petition, Cutler claims to be entitled to EAJA recovery because he is a "prevailing party" within the meaning of EAJA section 504(a)(1). He also claims that, even if found not to be a prevailing party, he should be awarded costs and fees because the proposed penalty was "unreasonably excessive," within the meaning of EAJA section 504(a)(4). The ALJ denied Cutler's petition. The Board undertook review of the ALJ's decision pursuant to its *sua sponte* review authority under 40 C.F.R. § 22.30(b). While the Board agrees with the ALJ's determination that Cutler is not entitled to a reimbursement of expenditures, the Board disagrees with certain aspects of the ALJ's legal analysis, and undertook review out of concern that these analytical issues may serve both to discourage meritorious appeals in enforcement cases and to encourage non-meritorious fee petitions under EAJA.

Held: The Board upholds the ALJ's decision not to award fees but reverses that portion of his analysis concluding that Cutler was a prevailing party on the ability-to-pay issue, as well as his finding that the Region's penalty demand was substantially excessive and unreasonable. The Board's rationale follows:

(1) In order to be considered the "prevailing party" under EAJA section 504(a)(1), a defendant or respondent must be successful in defending against one or more claims, causes of action or counts of liability. Therefore, a respondent who succeeds in obtaining a penalty reduction by way of proving mitigating circumstances, such as

ability to pay problems, but fails in vindicating its conduct, has not "prevailed" for EAJA purposes.

(2) Section 504(a)(4) provides an avenue for non-prevailing parties to recover attorneys' fees and expenses in those instances where "the demand by the agency is substantially in excess of the decision of the adjudicative officer *and* is unreasonable when compared with such decision, *under the facts and circumstances of the case*." 5 U.S.C. § 504(a)(1) (emphasis added). Even if a demand is determined to have been excessive and unreasonable, an award may still be denied if the fee proponent "has committed a willful violation of law or otherwise acted in bad faith, or *special circumstances make an award unjust*." *Id*. (emphasis added). In the instant case, the ALJ found the Region's penalty demand excessive and unreasonable, but, in the second stage of his analysis, found special circumstances that militated against an award. The Board believes that a broader range of case-specific circumstances, including those that the ALJ considered in the second stage of his analysis, should have been considered in the first stage, as part of the excessiveness/ reasonableness determination. Viewing the Region's position as a whole, in light of all the facts and circumstances of this case, the Board concludes that the penalty demand was neither substantially excessive nor unreasonable, but rather represented a reasonable effort to match the penalty to the facts and circumstances of the case.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

I. *INTRODUCTION*

On October 26, 2005, Administrative Law Judge ("ALJ") Spencer T. Nissen issued a Recommended Decision on Application for Award of Fees and Expenses Pursuant to the Equal Access to Justice Act ("Recommended Decision") in the above captioned-matter, denying Donald Cutler's ("Cutler" or "Respondent") petition for an award of attorneys' fees and other expenses under section 504 of the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504. While the Environmental Appeals Board ("Board") agrees with the ALJ's determination that Respondent is not entitled to a reimbursement of expenditures, the Board, nonetheless, disagrees with certain aspects of the legal analysis in the ALJ's recommendation. Out of concern that these analytical issues – some of which are matters of first impression – may serve both to discourage meritorious appeals in enforcement cases and to encourage non-meritorious fee petitions under EAJA, the Board elected to exercise *sua sponte* review of the ALJ's Recommended Decision.[1] *See Order Electing to Review Sua Sponte*, EAJA Appeal No. 05-01 (EAB Dec. 9, 2005) *available*

[1] *See* 40 C.F.R. § 22.30 (authorizing the Board to review an initial decision on its own initiative); *id.* § 17.27 (authorizing Environmental Protection Agency to review a recommended decision from an ALJ in the same manner as an initial decision).

at http://www.epa.gov/eab. As discussed more fully below, our decision clarifies the standards for determining whether a party is a "prevailing party" under EAJA section 504(a)(1) and the circumstances under which a non-prevailing party may recover costs and other expenses under EAJA section 504(a)(4).

II. *FACTUAL AND PROCEDURAL BACKGROUND*

The current matter involves a request for attorneys' fees and other expenses under EAJA sections 504(a)(1) and (a)(4). The EAJA claims derive from an earlier sequence of events that began with the filing of an administrative complaint by Region 10 of the Environmental Protection Agency (the "Region" or "Complainant") against Cutler alleging violations of sections 301(a) and 404 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311(a), 1344, by virtue of discharges of dredged or fill material into a federally protected wetland without a CWA permit. In its complaint, the Region proposed a $25,000 penalty for these alleged violations. The ALJ found Cutler liable for the alleged violations, but assessed a penalty of $1,250 – considerably less than the penalty proposed by the Region. *In re Donald Cutler*, Docket No. CWA-10-2000-0188 (ALJ Dec. 31, 2002) ("Initial Decision"). The ALJ's penalty assessment turned in part on the ALJ's determination that Cutler lacked the ability to pay the penalty the Region proposed.[2]

The Region then appealed the ALJ's decision to the Board on several grounds,[3] including the ALJ's ability-to-pay analysis.[4] In relation to the ability-to-pay issue, the Region argued, principally, that the ALJ had erred in concluding that Cutler had successfully rebutted the Region's showing that Cutler could afford to pay the $25,000 proposed penalty. In view of this and other alleged errors, the Region requested the following relief on appeal: "[T]he Presiding Officer's Initial Decision should be set aside, and a more appropriate penalty assessed." Complainant's Appellate Brief at 33 (Feb. 28, 2003); *see also, id.* at 1 (requesting that the penalty be increased from the $1,250 the ALJ assessed).

The Board concluded that the ALJ had properly determined that Cutler lacked the ability to pay a penalty of $25,000, but nonetheless found several errors in the ALJ's penalty calculation. *See In re Donald Cutler*, 11 E.A.D. 622,

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[2] Ability to pay is one of the penalty assessment criteria set forth in the CWA. *See* CWA § 309(g)(3), 33 U.S. § 1319(g)(3).

[3] The facts of this case are set forth in detail in the Board's opinion in *In re Donald Cutler*, 11 E.A.D. 622 (EAB 2004) [hereinafter "*Cutler I*"]. Therefore, here we only discuss the facts sufficient for an understanding of the issues that give rise to this EAJA appeal.

[4] The CWA requires, inter alia, that a respondent's ability to pay a proposed penalty be considered in the course of assessing civil administrative penalties for CWA violations. *See Cutler I*, 11 E.A.D. at 631.

640-54 (EAB 2004) [hereinafter "*Cutler I*"]. In particular, the Board found error in the ALJ's determination regarding the gravity of violations, Respondent's culpability, the extent to which Cutler's history of violations was considered in assessing the penalty, and the ALJ's apparent conclusion that Cutler could afford to pay a penalty of no more than $1,250.[5] The Board ultimately assessed a $5,548 penalty. *Id.* at 655.

Following the issuance of the Board's final decision, the ALJ considered a petition for attorneys' fees and other expenses submitted by Cutler pursuant to EAJA section 504.[6] In essence, Cutler claimed that he is entitled to recovery under EAJA because he is a "prevailing party" within the meaning of EAJA. In his view, he "prevailed" because the penalty ultimately assessed against Cutler was considerably lower than the one the Region proposed.[7] *See* Amended Verified Petition for Attorney Fees and Other Expenses (Sept. 9, 2004). Even if found not to be a prevailing party, Cutler argued that he should be awarded costs and fees because the Region's proposed penalty was "unreasonably excessive," within the meaning of EAJA. The Region, for its part, claimed that "Respondent cannot show he was the prevailing party in this case [because] Complainant won on liability and a penalty was assessed against Respondent for his willful violations of the law." Answer to Petition for Attorneys Fees at 5 (Oct. 12, 2004). For essentially the same reasons, the Region resists the idea that its penalty demand was unreasonably excessive. *Id.* at 7-10.

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[5] With regard to the ability-to-pay question, in reviewing the ALJ's assessment the Board explained:

> While the ALJ did find an inability to pay a $25,000 penalty, we do not read his decision as stating clearly that Appellee is unable to pay a penalty of more than $1,250. Rather, the $1,250 penalty appears to have been predicated on his assessment of the totality of the circumstances, turning not just on ability to pay but also on his determination regarding the gravity of the violation and his conclusions regarding the extent to which Appellee acted in good faith and whether Appellee's pre-1995 compliance history could be considered in assessing a penalty. As stated below, we find the ALJ committed legal errors with respect to several factors in his totality-of-the-circumstances analysis. Therefore, we assess our own penalty, based on a proper consideration of the factors involved.

Cutler I, 11 E.A.D. at 641-42.

[6] Donald Cutler originally submitted an EAJA request for attorneys' fees and expenses incurred during the proceedings before the ALJ. *See* Verified Petition for Attorney Fees and Other Expenses (Jan. 17, 2003). He later amended the request to include attorneys' fees and expenses incurred in the appeal stage. *See* Amended Verified Petition for Attorney Fees and Other Expenses (Sept. 9, 2004).

[7] The penalty the ALJ assessed amounted to 5% of the proposed penalty, and the one the Board ultimately assessed was 22% of the proposed penalty.

In his recommended decision, the ALJ denied Cutler's petition. The ALJ analyzed Cutler's request under two statutory provisions – EAJA sections 504(a)(1) and 504(a)(4).[8] He first concluded that Cutler is a prevailing party on the issue of ability-to-pay under section 504(a)(1), but, because in the ALJ's view the Region was, at least until the close of the evidentiary hearing, "substantially justified" in claiming that Cutler did have the ability to pay the penalty, no award of attorneys' fees and other expenses should be awarded for the pre-appeal phase of the case. Recommended Decision at 1. With respect to the appeal phase of the case, the ALJ found that the Region was not substantially justified in continuing to press its demand for a $25,000 penalty, but concluded that no award was appropriate for the appeal phase because the Board's finding that Cutler was "culpable" in placing fill into wetlands on his property without a permit is a "special circumstance making an award unjust" within the meaning of EAJA section 504(a)(1). *Id*.

The ALJ also analyzed Cutler's request under EAJA section 504(a)(4), *id*. at 22-26, which, as discussed below, allows an award of fees to non-prevailing parties in some circumstances. The ALJ determined that, while the penalty proposed by Complainant may be regarded as both "substantially in excess" of the Board's decision and "unreasonable when compared with such decision," the request should also fail based on Cutler's culpability, which, in the ALJ's view, is once again "a special circumstance making an award unjust." *Id*. at 26.

III. *STATUTORY BACKGROUND*

EAJA is a fee-shifting statute that enables private parties to recover attorneys' fees and expenses from the government under certain limited circumstances.[9] Its principal purposes are to ensure that private litigants are not deterred from challenging questionable government decisions because of the burden and costs of litigating against the government, *In re Hoosier Spline Broach Co.*, 7 E.A.D. 665, 679-80 (EAB 1998), *aff'd*, 112 F. Supp. 2d 763 (S.D. Ind. 1999), and to promote the correction of government error, *In re Edward Pivirotto*,

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[8] Cutler claimed to be entitled to attorneys' fees and other expenses under these two EAJA provisions. These provisions are set forth and discussed in Sections III and IV, below.

[9] EAJA is codified under two statutes covering two distinct types of proceedings: 5 U.S.C. § 504, which governs adversarial administrative adjudications, like the one at hand; and 28 U.S.C. § 2412, which governs civil, non-tort, court actions. These two sets of provisions are similarly worded, but are not identical. Case law interpreting EAJA has developed under both statutes. While at issue in this decision is the language governing administrative adjudications under section 504, cases decided under the 28 U.S.C. § 2412 may provide useful guidance for interpreting the analogous provisions in 5 U.S.C. § 504, as these statutes may be deemed *in pari materia*. *See* Black's Law Dictionary (8th ed. 2004)("It is a canon of construction that statutes that are *in pari materia* [statutes that have a common purpose] may be construed together * * * .").

3 E.A.D. 96, 100 n.8 (CJO 1990). In Congress' words, EAJA seeks to protect the interests of "those individuals for whom cost may be a deterrent to vindicating their rights." H.R. Rep. No. 96-1418, at 10 (1980), *reprinted* in 1980 U.S.C.C.A.N. 4984, 4991.

Originally enacted in 1980, EAJA's initial focus was to enable certain "prevailing parties" to recover fees. *See* 1980 Equal Access to Justice Act Amendments, Pub. L. No. 96-481, 94 Stat. 2325. In 1996, EAJA was amended and expanded to allow certain defendants in enforcement actions who may not prevail *per se* against the government to nonetheless recover fees and expenses in cases where the penalty originally sought by the government was unreasonably excessive. Equal Access to Justice Act Amendments, Pub. L. 104-121, § 231(a), 110 Stat. 863 (1996) (codified at 5 U.S.C. § 504(a)(4)).

Both the prevailing party and non-prevailing party provisions of EAJA are implicated in the case before us. The prevailing party provision, section 504(a)(1), provides that:

> 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 was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

EAJA § 504(a)(1), 5 U.S.C. § 504(a)(1). This provision thus allows the award of fees and other expenses to a "prevailing party" other than the federal government, unless the adjudicative officer finds that: (1) the position of the federal agency was "substantially justified;" or (2) "special circumstances make an award unjust."

The so-called non-prevailing party provision – EAJA section 504(a)(4) – was part of the 1996 EAJA amendments. It provides that:

> If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and

> other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

Id. § 504(a)(4). The function of this provision then is "to permit *non*-prevailing parties to recover fees and expenses where the United States obtained a judgment that was substantially – and unreasonably – exceeded by its initial demand." *Am. Wrecking Corp. v. Sec'y of Labor*, 364 F.3d 321, 328 (D.C. Cir. 2004).[10]

IV. *DISCUSSION*

In his Recommended Decision, the ALJ discussed several key issues arising under sections 504(a)(1) and 504(a)(4) that informed his decision. The relevant issues under section 504(a)(1) included whether Cutler was a "prevailing party," whether the Region's position was "substantially justified," and whether Cutler's "culpability" was a special circumstance that precluded him from recovery under EAJA. Notably, the first of these is a threshold issue, in that if Cutler is not considered a "prevailing party," then section 504(a)(1) would not apply to this matter.[11]

Under section 504(a)(4), the primary issues addressed by the ALJ included whether the Region's demand was "substantially in excess" of the final penalty assessed, whether the demand was unreasonable when compared with the Board's penalty assessment, and whether Cutler's "culpability" was a special circumstance that precluded him from recovery under this provision of EAJA.

Our discussion below focuses on whether the ALJ erred in concluding that Cutler was a "prevailing party" under section 504(a)(1) (Section IV.A below), and also on whether the ALJ erred in his approach to section 504(a)(4) (Section IV.B).

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[10] *See also United States v. One 1997 Toyota Land Cruiser*, 248 F.3d 899, 904 (9th Cir. 2001)(holding that 28 U.S.C. § 2412(d)(1)(D) applies to civil actions involving individuals – not only to small businesses).

[11] *See Comm'n, I.N.S. v. Jean*, 496 U.S. 154, 160 (1990) ("the determination that a claimant is a 'prevailing party,' * * * operates as a one-time threshold for fee eligibility."); *In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 205 n.44 (EAB 1997) (noting that the requirement to be a "prevailing party" is a precondition for recovery under EAJA section 504(a)(1)).

A. *Was Cutler a "Prevailing Party" Within the Meaning of Section 504(a)(1)?*

1. *The Recommended Decision*

According to the ALJ, the question here is whether the reduction of the penalty from the $25,000 figure proposed in the complaint to the $5,548 penalty established in the Board's final decision, due to Cutler having established his inability to pay the proposed penalty, rendered Cutler a "prevailing party." Recommended Decision at 20. The ALJ concluded that it does.

The ALJ appears to have found two points particularly persuasive. First, the ALJ relied on language from a Supreme Court case involving a claim for attorneys' fees and other costs under the Civil Rights Act, 42 U.S.C. § 1998, also a fee-shifting statute, where the Court held that "if the plaintiff has succeeded on *any significant issue* in litigation, which achieved some of the benefit the parties sought in bringing the suit, the plaintiff has crossed the threshold for an award of some kind." *Id*. at 18 (citing *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist*., 489 U.S. 782 (1989)) (emphasis added).

The ALJ also found persuasive another ALJ decision – *In re Agronics, Inc*., Docket No. CWA 06-99-1631 (ALJ June 3, 2004). *See id*. at 19-20. In *Agronics*, Region 6 of the Environmental Protection Agency issued an administrative complaint against respondent, Agronics, Inc., alleging that the respondent had violated the CWA by discharging pollutants into waters of the United States without a permit. Region 6 eventually moved to withdraw the complaint on the basis that the respondent lacked the ability to pay a penalty beyond a de minimis amount. Agronics, Inc. then filed an EAJA petition. The ALJ in *Agronics* found respondent to be the "prevailing party," because respondent prevailed on an issue – ability-to-pay. The ALJ there stated as follows: "The simple fact is that Petitioner prevailed on an issue, 'ability to pay.' * * * In securing dismissal of the complaint upon the ground that it lacked the resources to pay a penalty beyond a de minimis amount, Agronics secured resolution of a dispute which changed the legal relationship of the parties because it was no longer [r]espondent in an administrative proceeding in which [c]omplainant sought a substantial penalty." *In re Agronics, Inc.*, Docket No. CWA 06-99-1631, 2004 WL 1328661, at 19 (ALJ June 3, 2004).

In finding that Cutler is a prevailing party, the ALJ distinguished the instant case from *Pivirotto*, a pre-Board decision in which the Chief Judicial Officer[12]

[12] Prior to the creation of the EAB in 1992, the authority to decide appeals from initial decisions resided with a Chief Judicial Officer ("CJO"). The Board is not bound by the CJO's decisions, but consults them as persuasive authority, as appropriate.

declined to grant an EAJA request on the basis of his conclusion that the respondents were not the prevailing party. *See In re Edward Pivirotto*, 3 E.A.D. 96 (CJO 1990) [hereinafter "*Pivirotto*"]. In *Pivirotto*, Region 7 filed a complaint against Edward Pivirotto and other respondents for alleged violations of the Toxic Substances Control Act, 15 U.S.C. § 2605(e). The parties settled the case by way of respondents' admitting that the violations occurred and complainant's agreeing to a lower penalty. Thereafter, respondents petitioned for attorneys' fees and expenses under EAJA arguing that they were the "prevailing party" because they succeeded in persuading EPA to lower the amount it would accept in settlement. On appeal, the Chief Judicial Officer found respondents' arguments unpersuasive. The ALJ in the instant case found the *Pivirotto* holding inapposite for two reasons: first, because, unlike in *Pivirotto*, Cutler prevailed through litigation by successfully rebutting the Region's evidence on his ability to pay the penalty, and second, because *Pivirotto* was based on the subsequently superceded notion that the respondent has the burden of raising and establishing its inability to pay a proposed penalty.[13] Recommended Decision at 20, n.7.

As explained in more detail below, we disagree with the ALJ's analysis. We begin our review of the ALJ's decision by first examining the meaning of "prevailing party" as this term has been judicially construed, and then proceed to analyze the issue before us in light of this jurisprudence.

2. *Definition of* "*Prevailing Party*"

As previously explained, under section 504(a)(1), in order to recover attorneys' fees and other expenses from a government agency, a litigant must be a "prevailing party." Neither the statute nor the implementing regulations (codified at 40 C.F.R. pt. 17) define this term. Consequently, the meaning of this term has evolved through case law.[14]

The Supreme Court has, on several occasions, addressed the meaning of "prevailing party" within the context of cases brought under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 [hereinafter "§ 1988"], and other fee-shifting statutes. *E.g., Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001) (under the Fair Housing Amendments Act of 1988); *Farrar v. Hobby*, 506 U.S. 103 (1992) (under § 1988); *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989) (same); *Hewitt v. Helms*, 482 U.S. 755 (1987) (same). Notably, in the Court's recent *Buckhannon* decision, the Court noted that the term "prevailing

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[13] *See infra* note 22.

[14] Acknowledging that this term had been subject of much litigation under other fee-shifting statutes, Congress expressed its intent that the interpretation of this term be consistent with the law developed under such other statutes. H.R. Rep. No. 96-1418, at 11 (1980).

party" is a legal term of art and that Black's Law Dictionary defines it as: "A party in whose favor a judgment is rendered, *regardless of the amount of damages awarded*." *Buckhannon*, 532 U.S. at 603 (quoting Black's Law Dictionary 1145 (7th ed. 1999)) (emphasis added). The Court also explained that the award of counsel fees is intended "only when a party has prevailed on the merits of at least some of his claims." *Id*. (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980)). The Court further stated that "a plaintiff [must] receive at least some relief on the merits of his claim before he can be said to prevail," *id*. (quoting *Hewitt*, 482 U.S. at 760),[15] and that "even an award of nominal damages suffices under this test," *id*. at 604 (citing *Farrar*, 506 U.S. 103). Consequently, "the prevailing party inquiry does not turn on the magnitude of the relief obtained." *Farrar*, 506 U.S. at 114; *see also id.* at 113 ("A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay.").

With this as background we now turn to the issue at hand.

3. *Whether Obtaining a Penalty Reduction By Showing Inability to Pay Renders a Respondent a Prevailing Party?*

In the ALJ's view, the reduction of the penalty from $25,000 to $5,548 based on inability to pay rendered Cutler a prevailing party on the issue of ability-to-pay. As noted above, the ALJ relies on language from the Supreme Court decision, *Texas Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989) [hereinafter "*Texas*"], a § 1988 case, where the court held that a plaintiff who succeeds *on any significant issue in litigation* has crossed the threshold (e.g., the prevailing party threshold) for an award of some kind.

In the ALJ's view, the issue of ability-to-pay – a statutory factor required to be considered in penalty determinations under the CWA[16] – constitutes a "significant issue" on which Cutler succeeded, and such success was sufficient to confer

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[15] In this regard, the Supreme Court has further stated that to qualify as a prevailing party a *plaintiff* must either obtain an enforceable judgment against a defendant from whom fees are sought, or a comparable relief through consent decree or settlement. *Farrar*, 506 U.S. at 111; *see also Buckhannon*, 532 U.S. at 604 (stating that enforceable judgments on the merits and court-ordered consent decrees materially alter the legal relationship of the parties in a manner that permits an award of attorneys' fees).

[16] *See* CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3). Inability to pay a penalty can, if successfully proved, act as a downward adjustment or mitigating factor on a penalty that is otherwise calculated to redress a violation. *See Cutler I*, 11 E.A.D. at 631.

prevailing party status on Cutler.[17] We disagree. While we do not doubt that the Supreme Court intended the principles set forth in *Texas* to apply in the context of other federal fee-shifting statutes,[18] such as the statute at hand, the context of *Texas* – which involved a *plaintiff* seeking fees – cannot be ignored. As discussed below, viewed in its proper contextual light, *Texas* augers in favor of a result directly contrary to the one recommended by the ALJ in a case like this one involving the filing of a fee petition by a respondent in an enforcement case.

We note at the outset that a number of courts have expressed deep reservations about applying *Texas* and its sister cases to fee petitions filed by defendants and respondents in the manner contemplated by the ALJ below. For example, in *Dean v. Riser*, 240 F.3d 505, 508-09 (5th Cir. 2001), the Fifth Circuit observed that "the most recent Supreme Court jurisprudence on the issue of prevailing party status * * * specifically addressed the circumstances under which a plaintiff can be deemed a prevailing party. * * * The Court, however, neither articulated a separate standard for prevailing defendants nor suggested or intimated that the standard, which it pronounced in the exclusive context of prevailing plaintiffs, is applicable to prevailing defendants." *See also Montview Park P'ship v. U.S. Dep't of Hous. and Urban Dev.*, 100 F.3d 967 (10th Cir. 1996)(declining to decide what the proper standard is for determining whether a defendant in an adversary administrative adjudication has achieved prevailing party status); *Mr. L v. Sloan*, 449 F.3d 405 (2nd Cir. 2006)(declining to reach the open question in the Second Circuit of what standard applies for determining whether a prevailing party defendant should be awarded attorneys' fees). *See also, Pivirotto*, 3 E.A.D. at 100 ("All the decisions that the Respondents cite in which private litigants were awarded fees on the basis of partial success in settlements involve prevailing plaintiffs who achieved at least part of their objective in bringing suit.").

To our way of thinking, viewed in its proper contextual light, *Texas*, if anything, supports the conclusion that Cutler is not a prevailing party for purposes of section 504(a)(1). As noted, in *Texas*, the party seeking fees was the party who brought the suit in the first place.[19] This nuance is significant because the term

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[17] *See* Recommended Decision at 21 (stating as follows: "In the present case, there is no question that Complainant was the prevailing party as to Petitioner's liability, and as to some penalty determination factors. Therefore there is no need to evaluate whether Complainant was substantially justified as to those issues. As to the penalty determination factor of ability to pay, as concluded above, Petitioner was the prevailing party.").

[18] *See Texas*, 489 U.S. at 784 (granting certiorari to clarify the term "prevailing party" under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ("§ 1998"), and other fee-shifting statues).

[19] This is also the context of most Supreme Court cases involving recovery of fees under fee-shifting statutes. *See, e.g., Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001);*Farrar v. Hobby*, 506 U.S. 103 (1992); *Hewitt v. Helms*, 482 U.S. 755 (1987); *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980).

"issue" in *Texas*, upon which the ALJ's analysis turns, appears to be contextually connected to the fact that the party seeking fees was a plaintiff. Indeed, the Court appears to use the term "issue" interchangeably with "claim." Thus, *Texas* stands for the proposition that where a *plaintiff* wins on one of several claims in his complaint, he can be said to be a prevailing party on that issue. Applying this rationale to a defendant seeking fees, it would appear that in order to be considered the "prevailing party," the defendant must be successful in defending against one or more claims, causes of action or counts of liability.[20] *See, e.g., Am. Wrecking Corp. v. Sec'y of Labor*, 364 F.3d 321 (D.C. Cir. 2004)(noting that defendant was prevailing party insofar as defendant succeeded in having two of three citations vacated); *Allen v. Nat'l Transp. Safety Bd.*, 160 F.3d 431 (8th Cir. 1998)(awarding fees to defendant who was partially successful at defending against claims brought against him). Indeed, the Supreme Court has made clear that "[l]iability on the merits and responsibility for fees go hand in hand." *Farrar*, 506 U.S. at 109 (applying *Texas* standard); *see also*, *Buckhannon*, 532 U.S. at 603 (stating that a "prevailing party" must prevail "on the merits of at least some of his claims"). We therefore do not believe that succeeding on a penalty factor like ability to pay, which does not pertain to liability, is the type of "issue" the Supreme Court envisioned when ruling in *Texas*.[21]

The following excerpt from Justice Scalia's concurring opinion in *Buckhannon* (joined by Justice Thomas) conveys the notion that success on an issue that benefits a liable defendant does not transform such defendant into a prevailing party. We find this excerpt relevant to our discussion.

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[20] This does not mean that a defendant found liable has no recourse to collect fees. As previously noted, a non prevailing party may be successful in a claim under section 504(a)(4). *See, e.g., United States v. One 1997 Toyota Land Cruiser*, 248 F. 3d 899 (9th Cir. 2001) (holding that while the government was the "prevailing party" in the case, and claimant could not obtain attorneys' fees under EAJA section 2412(d)(1)(A) [analogous to § 504(a)(1)], the claimant could proceed under the "substantially in excess" provision in section 2412(d)(1)(D) in order to obtain fees).

[21] The ALJ also cites to other cases for the proposition that a party who prevails on some but not all issues may recover a pro rata portion of the fees and expenses. *See* Recommended Decision at 19. However, none of the cases the ALJ cites involve liable defendants whose penalties were reduced only through proof of penalty mitigation factors. The decisions that the ALJ cites involve prevailing plaintiffs who obtained judgment in their favor, or defendants who were successful in defending against some of the charges brought against them. *See Cmty. Heating and Plumbing Co. v. Garrett*, 2 F.3d 1143, 1146 (Fed. Cir. 1993)(plaintiff who prevailed on one of his claims awarded attorneys' fees and expenses under EAJA in proportion to degree of success); *Allen v. Nat'l Transp. Safety Bd.*, 160 F.3d 431 (8th Cir. 1998)(defendant who succeeded in defending against claims brought against him found prevailing party as to issues on which he succeeded); *Alphin v. Nat'l Transp. Safety Bd.*, 839 F.2d 817 (D.C. Cir. 1988)(defendant who prevailed against claims). Instead of supporting the ALJ's position, we rather find that these cases support the conclusion that to be conferred prevailing party status, a defendant must succeed in defeating some of the counts advanced against him or her.

> That a judicial finding of liability was an understood requirement of "prevailing" is confirmed by many statutes that use the phrase in a context that *presumes* the existence of a judicial ruling.
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> * * *
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> * * * [W]hen "prevailing party" is used by courts or legislatures in the context of a lawsuit, it is a term of art. It has traditionally – and to my knowledge, prior to enactment of the first of the statutes at issue here, *invariably* – meant the party that wins the suit or obtains a finding (or an admission) of liability. Not the party that ultimately gets his way because his adversary dies before the suit comes to judgment; not the party that gets his way because circumstances so change that a victory on the legal point for the other side turns out to be a practical victory for him; and not the party that gets his way because the other side ceases (for whatever reason) its offensive conduct.

Buckhannon, 532 U.S. at 614-15. We also find relevant the CJO's articulation in *Pivirotto* of why a liable respondent in a settlement context should not be attributed prevailing party status:

> We have found no instance in which a fee award was made to the *losing defendant* in a settlement. Much less to one who, as in this case, paid a penalty to the government in settlement of its violations of the law. Indeed, it would be incongruous with the purpose of the EAJA to attribute prevailing status to litigants, like the Respondents, whose success is not in vindicating their conduct but only in persuading an agency to accept a reduced penalty for admitted violations.

Pivirotto, 3 E.A.D. at 100.[22] [23]

In short, in our view, where, as here, a respondent succeeds in obtaining a penalty reduction by way of proving mitigating circumstances, but fails in vindicating its conduct, the respondent has not "prevailed" for EAJA purposes. This conclusion is consistent with a number of other federal cases in which defendants seeking fees under EAJA have not been found to be the prevailing party despite being successful at obtaining reductions in the penalty sought by the government. In *United States v. Sheyenne Tooling & Manufacturing Company, Inc.*, 1998 WL 544413, at *1 (8th Cir. 1998), a case brought in federal court under EAJA section 2412(b) but the facts of which are otherwise similar to this one, the district court found that a company, Sheyenne Tooling & Manufacturing, had violated the CWA in several ways, including by discharging pollutants in violation of effluent limitations. *United States v. Sheyenne Tooling & Mfg. Co.*, 952 F. Supp. 1414 (D.N.D. 1996) (liability ruling). The court, however, decreased the penalty amount sought by the government from $336,000 to $60,150 (approximately 18% of the penalty originally sought). In considering the statutory criteria in setting penalties for CWA violations in cases brought in federal district court,[24] the court

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[22] As previously explained, *Pivirotto* is a pre-Board decision in which the CJO denied an EAJA petition from respondents who claimed prevailing party status on the basis that they obtained a much lower penalty than the one complainant proposed. In the ALJ's view, *Pivirotto* is inapposite here because *Pivirotto* was a settled case and here Cutler prevailed through litigation. The ALJ also pointed out that *Pivirotto* was based "on the discredited notion * * * that the respondent has the burden of raising and establishing its inability to pay a proposed penalty." Recommended Decision at 20 n.7. It is now well established that the complainant has the burdens of presentation and persuasion that, inter alia, the relief sought in the complaint is appropriate. *See* 40 C.F.R. § 22.24; *Cutler I*, 11 E.A.D. at 631. Contrary to the view of the ALJ, however, we believe that, regardless of the fact that a respondent does not bear the burden of establishing its inability to pay, the principle that guided the CJO in *Pivirotto* (i.e., keeping with the spirit of the EAJA) applies with same force in the context of this case. As to *Pivirotto* being a settled case, we find the ALJ's rationale a bit surprising considering that the ALJ relies on *Agronics*, another ALJ case where complainant withdrew the complaint and no adjudication on the merits was made. In any event, other courts have found administrative settlements, like the one here, to meet the "material alteration" standard the Supreme Court articulated in *Farrar*. *See supra* note 15 (explaining "material alteration" standard); *see also A.R. ex rel. R.V. v. New York City Dept. of Educ.*, 407 F.3d 65, 77 (2nd Cir. 2005)(holding that administrative consent decrees create a material alteration of the legal relationship of the parties necessary to permit an award of attorneys' fees); *Mr. L v. Sloan*, 449 F.3d 405, 407 (2nd Cir. 2006)(same). We thus find that the fact that *Pivirotto* was a settled case is not a reason for ignoring its precedential value.

[23] The CJO decision in *Pivirotto* precedes the 1996 EAJA amendments and only addresses recovery under section 504(a)(1).

[24] The statutory criteria considered in determining civil penalties, which can be found in section 309(d) of the CWA, 33 U.S.C. § 1319(d), are sightly different than the criteria for the assessment of administrative penalties, found in CWA section 309(g)(3), 33 U.S.C. § 1319(g)(3). While section 309(d) does not include an ability-to-pay component like section 309(g)(3), it requires the court to consider the economic impact of the penalty on the violator, which is roughly analogous to the violator's ability-to-pay.

essentially determined that defendant was a small actor in a sparsely-settled community and the government's estimates were more applicable to larger actors. *United States v. Sheyenne Tooling & Mfg. Co.*, 952 F. Supp. 1420, 1426 (D.N.D. 1996) (penalty ruling). On appeal of the district court's denial of EAJA fees, the Eighth Circuit held as follows: "Sheyenne is not a prevailing party. The United States successfully sought the imposition of a penalty against Sheyenne. The fact that Sheyenne's penalty was substantially less than that sought did not transform Sheyenne into a prevailing party." 1998 WL 544413 at *1.[25] *See also, Beall Constr. Co., v. Occupational Safety and Health Review Comm'n*, 507 F.2d 1041 (8th Cir. 1984) (holding that petitioner could not be said to be a prevailing party by "succeed[ing] in obtaining reductions" in the penalty in light of the Commission's and Court's findings that petitioner violated the statute and regulations; *see Secretary v. Beall Constr. Co.*, OSHA Docket No.557, 1974 WL 3975 (O.S.H.R.C. Feb. 21, 1974));[26] *United States v. Modes, Inc*., 18 C.I.T. 153, 1994 WL 88927 (Ct. Int'l Trade March 4, 1994) (holding that the government was the prevailing party because it obtained judgment under the Tariff Act, notwithstanding that the sum it recovered in damages was far below the amount sought in the complaint; *see United States v. Modes, Inc*., 826 F. Supp. 504 (Ct. Int'l Trade Jun. 24, 1993)).[27] *Cf. Sec. and Exch. Comm'n v. Litler*, 874 F. Supp. 345 (D. Utah 1994) (finding that defendant who had violated securities laws could not be considered prevailing party under EAJA even though court concluded that relief

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[25] The Court did not consider the recently-amended EAJA provision at 28 U.S.C. § 2412(d)(1)(D) because the provision, by its terms, did not apply to the case, which had been filed before the effective date of the amendments.

[26] We cite *Beall* only for the proposition that a party who obtains a penalty reduction cannot, without more, be considered a prevailing party. We note that *Beall*'*s* finding that a party could not be found to be a prevailing party on the dismissal of some of the citations may no longer be appropriate under the *Texas* standard (i.e., "any significant issue"). *See Texas*, 489 U.S. at 784-93 (1989) (rejecting "central issue" standard, whereby a party could only be deemed prevailing party, and thus eligible for a fee award, if party prevailed on the central issue in litigation).

[27] In *Modes*, the court found defendants liable for fraudulent violations of section 592 of the Tariff Act of 1930. The court, however, reduced the proposed penalty from $3 million to $50,000 (approximately 99%) and rejected the defendants' claim that they were the prevailing party as to 99% of the amount. *Modes*, 1994 WL 88927, at *3 (Ct. Int'l Trade March 4, 1994).

The ALJ cites to this case in his Recommended Decision, for the proposition that "[t]he reduction of a penalty to an amount much less than that proposed in the complaint does not alone render the respondent or defendant a 'prevailing party' under Section 504(a)(1)." Recommended Decision at 18. The ALJ, however, did not attribute precedential value to this case. According to the ALJ, "this decision ignores the settled rule that it is unnecessary to be successful on all issues in order to be a prevailing party and is explainable only by the magnitude of the fraud involved." *Id*. We disagree with the ALJ. The *Modes* court did not ignore the *Texas* standard. Indeed, in Part I of its decision, the *Modes* court noted that "a prevailing party is defined as one that 'succeed[s] on *any significant issue* in litigation which achieves some of the benefit the parties sought in bringing suit." *Modes*, 1994 WL 88927, at *3 (Ct. Int'l Trade March 4, 1994) (emphasis added). Moreover, the *Modes* decision is consistent with other EAJA decisions where similar propositions have been rejected.

sought by plaintiff was unwarranted); *United States v. One 1997 Toyota Land Cruiser*, 248 F.3d 899 (9th Cir. 2001) (noting, in the context of a forfeiture proceeding, that the government was the prevailing party despite the difference between the amount initially sought by the government and the amount ultimately forfeited).[28]

In light of all the above, we conclude that Cutler is not a prevailing party under section 504(a)(1) of the EAJA and that the ALJ erred in finding otherwise.[29] Because the prevailing party question is a threshold issue, in that, as noted above, section 504(a)(1) does not provide a recourse to non-prevailing parties, we find unnecessary to continue our analysis under this section.[30]

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[28] In *One 1997 Toyota Land Cruiser*, the government initially sought to seize a vehicle valued at $40,000. Ultimately, however, the claimant only forfeited $1,000 and up to $4,000 in investigation costs. *United States v. One 1997 Toyota Land Cruiser*, 248 F.3d 899, 904 (9th Cir. 2001).

[29] As to the ALJ's reliance on *Agronics*, we disagree with the proposition that succeeding on an issue like ability-to-pay, without more, confers prevailing status on the respondent. Notably, in *Agronics*, complainant moved to dismiss its complaint on the basis that respondent lacked the ability to pay the proposed penalty. Whether the voluntary dismissal played a part in the *Agronics* determination (where respondent was found to be a prevailing party because it prevailed on ability-to-pay) we do not know, as the decision does not elaborate on this point. The question whether a voluntary dismissal confers prevailing party status on a defendant has elicited different responses in various courts. *See Zenith Ins. Co. v. Breslaw*, 108 F.3d 205, 207 (9th Cir. 1997)(agreeing with Fifth Circuit that a plaintiff's voluntarily dismissal with prejudice before trial confers prevailing party status on defendant), *but see Inland Steel Co. v. LTV Steel Co.*, 364 F.3d 1318, 1321 (Fed. Cir. 2004) (stating that "when the plaintiff voluntarily dismisses the lawsuit prior to final judgment, it has been held that the defendant is not necessarily a prevailing party"); *Dean v. Riser*, 240 F.3d 505, 509-10 (5th Cir. 2001) (holding that defendant is not a prevailing party within meaning of § 1988 when plaintiff voluntarily dismissed his claim, unless defendant can demonstrate that plaintiff withdrew to avoid disfavorable judgment on the merits); *Marquart v. Lodge 837, Intern. Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842, 851-52 (8th Cir. 1994) (holding that defendant was not the prevailing party where the plaintiff took voluntary dismissal with prejudice before any summary judgment motion was made). Because the *Agronics* decision is not before us on appeal and we are without the benefit of briefing on the particular circumstances of that case, we decline to express a view on whether complainant's voluntary dismissal there conferred prevailing status on the respondent. In view of our decision here, however, *Agronics* cannot be viewed as supporting the proposition that success in penalty mitigation can alone qualify a respondent for prevailing party status under section 504(a)(1) of EAJA.

[30] While we do not need to discuss in this section the ALJ's determination that the Region was substantially justified in its approach to the litigation, it bears noting that we agree with that part of the ALJ's decision that concludes that the Region's approach was substantially justified in the pre-appeal stage of the litigation, but disagree with his conclusion that the Region was not substantially justified in appealing the ALJ's Initial Decision. Our discussion below touches upon this area, albeit in the context of section 504(a)(4). For a discussion of the substantial justification standard, *see In re Bricks, Inc.*, 11 E.A.D. 796, 803 (EAB 2004), *aff'd* 426 F.3d 918 (7th Cir. 2005); *In re L&C Servs., Inc.*, 8 E.A.D. (EAB 1999); *In re Hoosier Spline Broach Corp.*, 7 E.A.D. 665, 686 (EAB 1998), *aff'd*, 112 F. Supp. 2d 763 (S.D. Ind. 1999).

Significantly, the fact that Cutler does not qualify as a prevailing party for purposes of section 504(a)(1) does not mean that Cutler has no avenue for seeking fees. Indeed, this is precisely the setting that section 504(a)(4) was designed to address. We now turn our attention to this provision to determine whether the ALJ's analysis of Respondent's request under this section was appropriate.

B. *Did the ALJ Err in His Analysis of Section 504(a)(4)?*

As noted, section 504(a)(4) provides an avenue for non-prevailing parties, like Cutler, to recover attorneys' fees and expenses in those instances where "the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case."[31] EAJA § 504(a)(4), 5 U.S.C. § 504(a)(4). According to legislative history for the provision, the test for recovering attorneys' fees "is whether the agency or government demand that led to the administrative or civil action is substantially in excess of the final outcome of the case so as to be unreasonable when compared to the final outcome (whether a fine, injunctive relief or damages) under the facts and circumstances of the case." 142 Cong. Rec. S3242, S3244 (1996).[32] Further, the test for awarding attorneys' fees "should not be a simple mathematical comparison," but should "be applied in such a way that it identifies and corrects situations where the agency's demand *is so far in excess of the true value of the case*, as demonstrated by the final outcome, *that it appears that the agency's assessment or enforcement action did not represent a reasonable effort to match the penalty to the actual facts and circumstances of the case*." 142 Cong. Rec. S3242, S3244 (1996) (emphasis added). This Congressional guidance suggests that while amount is inevitably a salient part in determining whether the demand by the agency is substantially in excess of the penalty ulti-

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[31] Section 504(b)(1)(F) defines the term demand as: "the express demand of the agency which led to the adversary adjudication, but does not include a recitation by the agency of the maximum statutory penalty (i) in the administrative complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount." EAJA § 504(b)(1)(F), 5 U.S.C. § 504(b)(1)(F). The legislative history for section 504(a)(4) notes that "the comparison called for in the Act is always between a 'demand' by the government in terms of injunctive and monetary relief taken as a whole and the final outcome of the case in terms of injunctive and monetary relief taken as a whole." 142 Cong. Rec. S3242, S3244 (1996). This text is discussed further below.

[32] The legislative history for section 504(a)(4) is set forth in part in 142 Cong. Rec. S3242 (1996), which consists of statements by Senators Bond and Bumpers, sponsors of the Small Business Regulatory Enforcement Fairness Act (S.942). The Small Business Regulatory Enforcement Fairness Act was incorporated, as amended by the House, in the Contract with America Advancement Act of 1996 (H.R. 3136). Because there was no formal legislative history available, Senator Bond offered a statement to provide additional guidance for agencies to comply with the requirements of the Small Business Regulatory Enforcement Fairness Act. 142 Cong. Rec. S3242 (1996) ("Since there will not be a conference report on the Act, this statement and a companion statement in the House should serve as the best legislative history of the legislation as finally enacted."). For additional history, *see also* H.R. Rep. N. 104-500 (1996); 142 Cong. Rec. H2987-01 (1996).

mately assessed and unreasonable, the facts and circumstances of each case should also play a part in this determination.[33]

Even when a penalty demand is deemed unreasonably excessive, an award is still to be denied in cases of willful violations, bad faith actions and cases involving special circumstances.[34] EAJA § 504(a)(4), 5 U.S.C. § 504(a)(4) ("* * * [T]he adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.").

In the instant case, Cutler claimed that had the Region asked for a lower penalty (i.e., $10,000) this matter could have been resolved without the need for the initial hearing, the reopened hearing, or the appeal. *See* Amended Verified Petition for Attorney Fees and Other Expenses at 2 (Sept. 9, 2004).[35] The Region opposed the request, arguing that Cutler is not entitled to an EAJA award under this section because the proposed penalty was reasonable under the facts and cir-

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[33] While section 504(a)(4) provides a means for non-prevailing parties to recover attorneys' fees, it is not intended to award attorneys' fees "as a matter of course." 142 Cong. Rec. S3242, S3244 (1996).

[34] The legislative history discusses this feature of the statute as follows:

> In addition, the bill excludes attorneys fee awards in connection with willful violations, bad faith actions and in special circumstances that would make such an award unjust. These additional factors are intended to provide a "safety valve" to ensure that the government is not unduly deterred from advancing its case in good faith. Special circumstances are intended to include both legal and factual considerations which may make it unjust to require the public to pay attorneys fees, even in situations where the ultimate award is significantly less than the amount demanded. Special circumstances could include instances where the party seeking fees engaged in a flagrant violation of the law, endangered the lives of others, or engaged in some other type of conduct that would make the award of the fees unjust. The actions covered by "bad faith" include the conduct of the party seeking fees both at the time of the underlying violation, and during the enforcement action. For example, if the party seeking fees attempted to elude government officials, cover up its conduct, or otherwise impede the Government's law enforcement activities, then attorney's fees should not be awarded.

142 Cong. Rec. S3242, S3244 (1996).

[35] We note that there is nothing in the record that supports Cutler's contention that had the Region asked for a lower penalty he would have settled. The record is rather devoid of any indication that he had expressed this interest to the Region or that he was open to this possibility. To the contrary, the record instead suggests that he steadfastly held to the view that no penalty was warranted in this case.

cumstances of the case. Answer to Petition for Attorneys Fees at 7-13 (Oct. 12, 2004).

The ALJ agreed with the Region that an EAJA award was not warranted,[36] but found that the Region's proposed penalty was "substantially in excess" of the Board's penalty assessment and was "unreasonable when compared with such decision." *See* Recommended Decision at 22-25. More specifically, the ALJ concluded that the "substantially in excess" question "may be readily answered" in Cutler's favor. *Id*. at 22. Although observing that there is no bright-line rule or numeric standard upon which to evaluate whether a penalty is "substantially in excess" of the amount ultimately assessed, the ALJ found that a "rule of reason" indicates that $25,000 is substantially in excess of $5,548. *Id.* at 24-25. Apparently, in the ALJ's view, a recovery of only 22% of the amount sought suggests that the original claim was substantially excessive. After concluding that the Agency demand (i.e., the proposed penalty) was excessive, the ALJ proceeded to analyze the reasonableness of the demand.[37]

Based on the following, he concluded that the proposed penalty was unreasonable:

> [N]o specific reductions were made from the proposed penalty (or from the statutory maximum penalty), nor were any dollar values assigned, to account for each of the various penalty factors by either the Administrative Law Judge or the EAB. *The EAB determined a penalty based entirely on petitioner's ability to pay*, calculating four percent of Mr. Cutler's gross receipts averaged over four years. As indicated previously, the four-percent rule was derived from penalty policies applicable to statutes

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[36] Even though the ALJ found Cutler to be the prevailing party under section 504(a)(1), he went on to analyze, for the sake of argument, Cutler's request under section 504(a)(4). *See* Recommended Decision at 22-26.

[37] The ALJ reasoned as follows:

> The next question is whether the demand by the Agency was reasonable when compared with the Final Decision under the facts and circumstances of the case. * * * Pertinent here is the fact that the EAB found it necessary to derive the four percent of gross income averaged over four year rule by which it determined Mr. Cutler's ability to pay from penalty policies applicable to the Toxic Substance Control Act and FIFRA rather than the CWA. The penalty demanded is substantially in excess of the penalty awarded and it may be concluded further that the demand is not a reasonable evaluation of the case compared with the Final Decision.

Recommended Decision at 25.

> other than the CWA. The EAB did not express any opinion as to whether the $25,000 proposed penalty was an appropriate assessment aside from the ability to pay issue.

Id. at 25 (internal citations omitted) (emphasis added).[38]

Notwithstanding his conclusion that the Region's demand was substantially excessive and unreasonable, the ALJ determined that Cutler's request should be denied based on the Board's culpability finding, which, in his view, is a "special circumstance making an award unjust." *Id*. at 26.

While we agree with the ALJ's conclusion that Cutler is not entitled to attorneys' fees and other expenses under section 504(a)(4), we take issue with the analytical path he followed to get there. In particular, we question whether the ALJ considered the full range of circumstances pertinent to this case and where in his analysis this contextual information was factored in. Our analysis follows.

Section 504(a)(4) includes two references to case-specific circumstances. The first reference is in relation to the substantially-in-excess/reasonableness test, which invites consideration of whether "the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case." EAJA § 504(a)(4), 5 U.S.C. § 504(a)(4). Under a plain reading of this provision, because of the conjunctive usage, to give rise to a fee request, a demand must be both substantially in excess of the final assessment *and* unreasonable in relation to that decision. The substantially-in-excess/reasonableness test is then qualified by the following language "under the facts and circumstances of the case." Thus, case-specific considerations are an essential ingredient in evaluating the excessiveness and reasonableness of the demand in the first instance.

The second reference to case-specific circumstances comes later in the provision. Pursuant to this language, even if a demand is determined to have been excessive and unreasonable, an award may still be denied if the fee proponent "has committed a willful violation of law or otherwise acted in bad faith, or *special circumstances make an award unjust*." EAJA § 504(a)(4), 5 U.S.C. § 504(a)(4) (emphasis added).

As noted, the ALJ found the Region's penalty demand unreasonable, but, in the second stage of the analysis, found special circumstances that militated against

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[38] In essence, the ALJ seems to be saying that because the final penalty was based on Cutler's ability to pay the proposed penalty, and the Board agreed with the ALJ's determination that Cutler lacked the ability to pay the $25,000 penalty, the demand by the Agency was inherently unreasonable. As explain below, we disagree.

an award. We believe that a broader range of case-specific circumstances, including those that the ALJ considered in the second stage of his analysis, should have been considered in the first stage, as part of the excessiveness/reasonableness determination. In particular, we do not share the ALJ's apparent view that the case-specific circumstances considered in the first stage should be limited to the ability-to-pay issue. Rather, the Region's demand should be considered as a whole, in light of all the facts and circumstances of the case. As we noted previously, the "comparison called for in the Act is always between a 'demand' by the government * * * *taken as a whole* and the final outcome of the case * * * *taken as a whole*."[39] This comparison is analogous to the standard for determining whether the government's position was substantially justified under section 504(a)(1), which requires that the trier of fact evaluate the government's position in its entirety, on the basis of the record as a whole.[40] *In re Bricks, Inc.*, 11 E.A.D. 796, 803 (EAB 2004), *aff'd* 426 F.3d 918 (7th Cir. 2005).

When we evaluate the Region's position as a whole in light of the facts and circumstances of this case, we do not find the Region's penalty demand excessive and unreasonable.[41] Below, we briefly review some of the case-specific circum-

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[39] *See Wolkow Braker*, 2000 WL 1466087, *4; *see also supra* note 31.

[40] *See American Wrecking*, 364 F.3d at 327 (holding that government's initial demand only appears "unreasonable" to the extent that its position in litigation and before the agency was not "substantially justified") *but see Toyota Land Cruiser*, 248 F.3d at 906 (explaining that section 2412(d)(1)(D) contains different language than other provisions in section 2412 allowing denial of fees where the government action was "substantially justified," and stating that "[e]ven though the government may have been substantially justified in bringing its action against [defendant], that alone should not disqualify [defendant's] motion for attorney's fees."). We do not find the statements in *Toyota Land Cruiser* to be inconsistent with our conclusion that in determining the reasonableness of the demand by the agency one needs to look at the demand as a whole, in light of all the facts and circumstances of the case.

[41] As we have stated in previous cases: "It is possible that in the course of examining the government's position in its entirety, a reviewing body might conclude that an action was initially substantially justified but not thereafter." *See In re Hoosier Spline Broach Corp.*, 7 E.A.D. 665, 686 (EAB 1998), *aff'd*, 112 F. Supp. 2d 763 (S.D. Ind. 1999). This, in the ALJ's view, is the case here. *See* Recommended Decision at 22 (concluding that Complainant's position that Respondent had the ability to pay the proposed penalty lost any justification no later than the conclusion of the hearing and that Complainant was not substantially justified in pursuing that issue on appeal).

We disagree with the ALJ's conclusion that the Region was not substantially justified in appealing his decision. This case is clearly distinguishable from the line of cases where reviewing tribunals have found that the agency lost its justification to continue pursuing the case, especially because in this case Complainant's appeal resulted in the assessment of a higher penalty than the one the ALJ assessed. *See, e.g., Quality C.A.T.V., Inc. v. NLRB*, 969 F.2d 541, 545 (7th Cir. 1992) (substantial justification for bringing worker safety claim lost when NLRB pursued claim after hearing testimony that workers were not contesting unsafe working conditions; EAJA fees awarded from conclusion of hearing onward); *In re L&C Servs., Inc.*, 8 E.A.D. 110, 119 (EAB 1999) (concluding that the Region's underlying action lacked substantial justification where the Region put on its case "without a shred of

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stances that lead us to this conclusion.

First, significantly, this is not a case where the complainant sought a penalty at the high end of the statutory penalty scale.[42] Indeed, as the Region has explained, the proposed penalty of $25,000 was only 18% of the maximum penalty available under CWA section 309(g) for the alleged violations. Answer to Petition for Attorneys Fees at 7-13 (Oct. 12, 2004). Second, when the circumstances in this case are considered in their entirety, the Region's demand looks measured, rather than excessive and unreasonable. This is a case where the respondent was found liable for the violations alleged in the Complaint, and where his prior history of violations reflected both a pattern of disregard for the regulatory requirements and a willful disregard of the law at issue in the case. *Cutler I*, 11 E.A.D. at 647-48. To add to this picture, the environment affected by Cutler's unlawful activities was sensitive and the gravity of his violations significant. *See id.* at 648-53 (explaining that the wetlands unlawfully filled by Cutler are designated critical habit for federally protected species). Moreover, the Region's proposed penalty does not strike us as arbitrary, as it was based on a combination of factors, including Cutler's culpability, his history of prior violations, and the harm to the environment caused by his illegal fill activities. *See id.* at 629. In short, the penalty proposed in the Complaint was only a small percentage of the maximum available penalty and was not at all out of alignment with the statutory penalty criteria; we therefore do not find the Region's proposed penalty excessive[43] and unreasonable.

(continued)
direct evidence establishing key elements of the offenses" alleged); *American Wrecking*, 364 F.3d at 324 (alleged violation vacated as agency conceded that it was not substantially justified in proceeding since defendant had indeed satisfied the requirements he was being charged with).

[42] The pegging of the initial penalty demand at the top of the penalty scale as a means of leveraging quick settlements from small entities was one of the considerations that propelled Congress to enact section 504(a)(4). *See* 142 Cong. Rec. S3242, S3244 (1996) ("[I]n the new regulatory climate for small business under this legislation, government attorneys with the advantages and resources of the federal government behind them in dealing with small entities must adjust their actions accordingly and not routinely issue original penalties or other demands at the high end of the scale merely as a way of pressuring small entities to agree to quick settlements.").

[43] While, as noted, we reject the idea that the section 504(a)(4) inquiry can be reduced to a mathematical exercise, we note that the few cases to date in which the first stage of the analysis has been resolved in favor of the EAJA petitioner have involved far greater disparities between the demand and the penalty assessed that the one at issue here. *See Am. Wrecking Corp. v. Sec'y of Labor*, 364 F.3d 321 (C.A.D.C. 2004) (penalty ultimately assessed ($7,000) represented 5.5% of initial demand ($126,000)); *United States v. One 1997 Toyota Land Cruiser*, 248 F.3d 899 (9th Cir. 2001) (parties settled for $1,000, which represents 2.5% of initial demand ($40,000), and investigation costs). *See also Sec'y of Labor v. Wolkow Braker Roofing, Corp.*, OSHRC Docket Nos. 97-1773 & 98-0245, 2000 WL 1466087, (O.S.H.R.C.A.L.J.) (penalty assessed ($4,000) represented 6.5% of initial demand ($61,100)). These are also cases, unlike the case at hand, where most of the charges the government brought against the defendant were vacated or dismissed, and where the government had no support for its demand at the time the action was filed; thus accounting for the dramatic difference
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That in *Cutler I* we agreed with the ALJ that Cutler lacked the ability to pay the proposed penalty does not indicate that the Region did not make an effort to match the penalty to the actual facts and circumstances of the case. Indeed, in this particular case, the ALJ concluded that the Region was justified in his position that Respondent had the ability to pay the proposed penalty at the time the complaint was filed and throughout the trial proceedings in *Cutler I*. *See, e.g.*, Recommended Decision at 22 ("Complainant's position that Petitioner had the ability to pay a $25,000 penalty may have been justified at the time the complaint was issued, and at the beginning of the hearing based on the opinions and analysis of its expert, Ms. Beatrice Carpenter"). The ALJ even concluded, and we agreed,[44] that the Region had made a prima facie showing of Cutler's ability to pay the proposed penalty of $25,000.

It also bears noting that the Region's appeal brief in *Cutler I*, fairly read, indicates that the Region had moderated its request for relief on appeal, presumably influenced by what had transpired at trial.[45] While it is true that the Region did request the Board to set aside the ALJ's ruling that Cutler had demonstrated an inability to pay the proposed penalty, the Region stopped short of requesting that the Board impose the amount originally demanded in the Complaint. Instead, the Region stated its request for relief on appeal as follows: "[T]he Presiding Officer's

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between the proposed and final penalties. *E.g.*, *American Wrecking*, 364 F.3d at 323 (explaining that two of the three citations for willful violations were vacated and the finding of a willful violation in relation to the remaining claim was reversed); *Wolkow Braker*, 2000 WL 1466087, *1 (explaining that seven of nine allegations of violations were dismissed); *Toyota Land Cruiser*, 248 F.3d at 902 (noting that government had no cause to conclude at the time the action was filed that the vehicle had been purchased with illegal drugs proceeds and therefore its initial valuation of the case ($40,000) was not reasonable). Under the circumstances of these cases, one can readily conclude that the initial demand was far in excess of the true value of the case. This, however, is not the case here.

[44] *See Cutler I*, 11 E.A.D. at 640.

[45] Under these circumstances, continuing to use the $25,000 amount as the sole reference point seems questionable, and the Region's advocacy before the Board appears quite reasonable, particularly when viewed in juxtaposition to the outcome – an over 400% increase in the penalty awarded by the ALJ. It should be noted that we do not regard the statutory definition of "demand" as precluding consideration of how the Region framed its request for relief on appeal. As noted, section 504(b)(1)(F) of EAJA defines "demand" as "the express demand of the agency which led to the adversary adjudication, but does not include a recitation by the agency of the maximum statutory penalty (i) in the administrative complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount." EAJA § 504(b)(1)(F), 5 U.S.C. § 504(b)(1)(F). While this definition may ordinarily focus attention on the demand stated in the complaint, it strikes us that an appeal can effectively adjust the demand to the extent that it includes "an express demand for a lesser amount." Also, at least with respect to fees associated with an appeal – the part of the litigation of greatest apparent concern to the ALJ – the appeal could be viewed as a discrete *adversary adjudication* for which the issue of demand is freshly assessed, rather than merely as an extension of the underlying adjudication with an inherited demand. We have found no case law or authority that counsels against interpreting the term "demand" in this manner in the context of an appeal.

Initial Decision should be set aside, and a more appropriate penalty assessed." Complainant's Appellate Brief at 33 (Feb. 28, 2003). Elsewhere in its brief, the Region stated it this way: "Region 10 respectfully requests * * * that the penalty be increased from the $1,250 [the ALJ] assessed." *Id.* at 1.

Under these circumstances, viewed in their entirety, we conclude that the Region's penalty demand was not in excess of the true value of the case and represented a reasonable effort to match the penalty to the actual facts and circumstances of the case. The fact that Cutler proved during the course of litigation its inability to pay the proposed penalty and as a result was assessed a smaller penalty simply does not, without more, transform a reasonable demand into an unreasonable one. *See Sec'y of Labor Mine Safety and Health Admin. v. L&T Fabrication & Constr., Inc.*, No. EAJ 99-1, 2000 WL 687693, at *6 (F.M.S.H.R.C. April 28, 2000) (stating that as matter of law the reduction of a penalty after a hearing does not establish that the agency's assessment was unreasonable, "but rather 'only that the judge viewed it differently based on the hearing evidence.'"). *Cf. In re Bricks, Inc.*, 11 E.A.D. 796, 804 (EAB 2004) (stating that "the fact that the government's position did not prevail on appeal does not create a presumption that its position was not substantially justified"); *In re Hoosier Spline Broach Corp.*, 7 E.A.D. 665, 691 (EAB 1998), *aff'd*, 112 F. Supp. 2d 763 (S.D. Ind. 1999) (where the government's position is reasonably supported by evidence in the record, "the mere fact that the record contains some contradictory evidence, which may, in the ultimate judgment of the trier of fact, outweigh the evidence upon which the government's position is based, provides no basis for an award of EAJA fees"); 40 C.F.R. § 17.6(a) ("[n]o presumption arises that the agency's position was not substantially justified simply because the agency did not prevail").

V. *CONCLUSION*

Cutler is not a prevailing party under the meaning of EAJA section 504(a)(1) and, therefore, he is not entitled to an award of fees under this section. Likewise, Cutler is not entitled to fees under EAJA section 504(a)(4), because, when we review the record as a whole, we are persuaded that the Region's demand was neither excessive nor unreasonable under the facts and circumstances of this case. Accordingly, while we uphold the ALJ's decision not to award fees in this case, we REVERSE that portion of his analysis concluding that Cutler was a prevailing party on the ability-to-pay issue, as well as his finding that the Region's demand was substantially excessive and unreasonable when compared to the penalty assessed.

So ordered.