12/29/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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In the Matter of

JOHN DAVID GLADDEN

TANGLEWOOD SUBDIVISION
WATER SYSTEM

Great Falls, S. C.

Applicant

SDWA Docket No. PWS-A0-~~85~~88-02

Judge Greene

Equal Access to Justice Act, 5 U.S.C. §504, 40 CFR §17.1 et seq.: Where it can be shown that the U. S. Environmental Protection Agency was "substantially justified" in believing that applicant was a "supplier of water," who owned or operated a "public water system" which served at least 25 individuals daily for at least 60 days of the year, applicant may not recover attorney fees and expenses even though it later appeared that less than 25 individuals were served, and the complaint was dismissed.

Appearances:

John E. Peterson, Esquire, P. O. Drawer 560, Rock Hill, South Carolina, 20731-6560 for the applicant;

Craig A. Higgason, Esquire, Assistant Regional Counsel, United States Environmental Protection Agency Region IV, 345 Courtland Street, N. E., Atlanta, Georgia 30365, for respondent.

Before: J. F. Greene, Administrative Law Judge

December 29, 1989

DECISION AND ORDER

By application filed on September 14, 1989, Mr. John David Gladden, applicant, seeks recovery of attorney fees and expenses incurred in the above captioned proceeding pursuant to 40 CFR §17.1 et seq., as adopted by the U. S. Environmental Protection Agency (EPA) pursuant to 5 U.S.C. §504 (1988), as amended by the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, §203 (a)(1). An answer to the application was filed by EPA Region IV on October 18, 1989.

The complaint in the above captioned proceeding, dated April 27, 1989, charged applicant with violations of the Safe Drinking Water Act (SDWA), 42 U.S.C. §1401 et seq., and regulations promulgated thereunder. The complaint, based upon the alleged failure of applicant (respondent in that proceeding) to comply with certain requirements set forth in an Amended Administrative Order issued by EPA to applicant on August 12, 1988, alleged that applicant was a "supplier of water," and an owner of a "public water system," as those terms are defined at sections 1401(4) and 1401(5) of SDWA, 42 U.S.C. §§300f(4) and 300f(5), and 40 CFR §141.2. A "supplier of water" is defined therein as "any person who owns or operates a public water system." "Public water system" is defined as a system which has "at least fifteen service

connections or regularly serves an average of at least twenty-five individuals daily at least 60 days out of the year." In his answer to the complaint, applicant (then respondent) denied that he was the owner or operator of the Tanglewood Subdivision Water System (water system) and denied that it was a "public water system" because it had fewer than fifteen service connections and did not regularly serve at least twenty-five residents year-round. 1/ EPA moved to withdraw the complaint on the basis of new information supplied by applicant, which consisted of two affidavits that supported his position that the water system did in fact serve fewer than twenty-five individuals. On August 25, 1989, the complaint was dismissed without prejudice.

The standard for an award of fees and expenses incurred in connection with a EPA enforcement proceeding is set forth at 40 CFR §17.6, which provides as follows, in pertinent part:

> (a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding unless the position of the EPA as a party to the proceeding was substantially justified or unless special circumstances make the award sought unjust. No presumption arises that the agency's position was not substantially justified simply because the agency did not prevail.

EPA contends that applicant is not a "prevailing party" and

1/ Answer to the complaint, May 23, 1989, at pp. 3-5.

that EPA's position was "substantially justified," and that applicant is therefore not entitled to recover fees and expenses. The issue of "special circumstances" has not been raised by the parties, and nothing appears on this record to suggest that it may be applicable. The fact that EPA voluntarily moved to dismiss the complaint is not a "special circumstance". 2/ The burden is upon the government to show special circumstances. 3/ None have been shown.

As to the question of whether applicant is "prevailing," or a "prevailing party," 4/ EPA asserts that the circumstances surrounding the voluntary dismissal of the complaint do not mean that applicant "prevailed" in the underlying proceeding. EPA cites two cases containing interpretations of "prevailing party" in instances where a complaint was dismissed upon a (voluntary) motion by a plaintiff: Corcoran v. Columbia Broadcasting System, Inc., 121 F. 2d 575 (9th Cir. 1941), as referenced in the legislative history of the EAJA, finds a party to be "prevailing" if

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2/ Donovan v. Pentrancosta, 102 Lab. Cas. (CCH), ¶34,611, Civil Action No. 81-1978 (W. D. Pa., July 26, 1984): a voluntary dismissal with prejudice is not a "special circumstance" under EAJA.

3/ Dougherty v. Lehman, 711 F. 2d 555, 560-561 (3d Cir. 1983).

4/ 40 CFR §17.5(a) provides in pertinent part:

> To be eligible for an award of attorney's fees and other expenses under the [EAJA], the applicant must be a prevailing party in the adversary adjudication for which it seeks an award.

if the plaintiff "has sought voluntary dismissal of a groundless complaint." 5/ EPA also cites Fernandez v. Southside Hospital, 593 F. Supp. 850, 843 (1984) for the interpretation, "where the complaint is clearly frivolous . . . defendants have a stronger argument that they prevail when plaintiff voluntarily discontinues suit." The court continued, "[o]n the other hand, where it has not been shown that the complaint is frivolous and there have been no proceedings on the merits or substantial pretrial proeedings, the argument must necessarily be less persuasive." 6/

While EPA may be correct in asserting that the complaint here was not "groundless" or "clearly frivolous," the issue of whether applicant is a prevailing party cannot clearly be determined on the basis of the authority and arguments submitted. Further guidance on the issue of "prevailing party" is provided by the holding of Corcoran, supra:

> Where . . . a defendant has been put to the expense of making an appearance and of obtaining an order for the clarification of the complaint, and the plaintiff then voluntarily dismisses without amending his

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5/ H. R. Rep. No. 1418, 96th Cong., 2d Sess. 11, reprinted in 1980 U.S. Code Cong. & Ad. News, pp. 4984, 4990

6/ See Answer of U. S. Environmental Protection Agency to Application for Award of Fees and Expenses (answer to application), October 18, 1989, at p. 7.

> pleading, the party sued is the prevailing party within the spirit and intent of the statute even though he may, at the whim of the plaintiff, again be sued on the same cause of action. 8/

In the instant case, by contrast, EPA cannot bring the same cause of action against applicant because EPA does not have jurisdiction over applicant's water system under the facts acquiesced in by EPA concerning the size of the water system. 9/ A fortiori, applicant may be deemed a "prevailing party" under the hold- of Corcoran.

Indeed, in cases involving a dismissal of the plaintiff's action for lack of jurisdiction, defendant has been held to be the "prevailing party" for purposes of award of costs. 10/ It must also be noted that "[t]he legislative history of the Equal Access to Justice Act makes clear . . . that the prevailing party requirement should be liberally construed, consistent with

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8/ Corcoran v. Columbia Broadcasting System, Inc., 121 F. 2d at 575, 576 (9th Cir. 1941).

9/ For EPA to have jurisdiction, a water system must have 15 or more service connections or 25 or more individuals regularly served by the system, as noted, supra, pp. 2-3. Applicant submitted evidence to EPA that fewer than twenty-five individual were served by the system at all relevant times, which prompted EPA to withdraw its complaint (Motion to Withdraw Complaint, dated August 9, 1989).

10/ U. S. Use of West v. Peter Kiewit & Sons' Co., 235 F. Supp 500 (D. C. Alaska, 1964), cited inter alia in Annot., 66 ALR 3d 1087, 1091 (1975).

the law that has developed under other fee-shifting statutes."11/ Accordingly, there is substantial support for finding that applicant was the prevailing party in the underlying proceeding here. However, such a determination is unavailing in light of the following resolution of the issue of "substantial justification," which is dispositive of the question of whether applicant is entitled to recover attorney fees and costs.

EPA asserts that it had substantial justification for its position, thereby precluding applicant's recovery of attorney fees and expenses. Applicant contends that EPA lacked substantial justification due to its failure to verify ownership and size of the water system before issuing the Amended Administrative Order and Complaint (Application at pp. 4-5).

The standard for determining whether the government's position is substantially justified is basically one of reasonableness. 12/ "Where the government can show that its case had a reasonable basis in law and fact, no award will be made," H. R. Rep. No. 1418 at p. 10, 1980 U. S. Code Cong. & Ad. News at

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11/ Vitale v. Secretary of Health & Human Services, 673 F. Supp 1171, 1175 (N.D. N.Y. 1987), citing H. R. Rep. No. 1418 at p. 11, reprinted in 1980 U. S. Code Cong. & Ad. News at p. 4990.

12/ Environmental Defense Fund, Inc. v. Watt, 722 F. 2d 1081, 1085 (2d Cir. 1983), citing H. R. Rep. No. 1418 at p. 10, reprinted in 1980 U.S. Code Cong. & Ad. News, p. 4989.

p. 4989. 13/ The burden is upon the government, which must make a "strong showing" to meet that burden. 14/ Such a standard and burden of proof are "intended to caution agencies to carefully evaluate their case and not to pursue those which are weak or tenuous." Id. at 4993.

"Substantial justification" is defined by the Supreme Court as "not 'justified to a high degree,' but rather 'justified in substance or in the main' -- that is, justified to a degree that would satisfy a reasonable person." 15/ The question presented is whether EPA's investigation of the owner of the water system and of the number of individuals served by the system meets the reasonableness standard described above. Applicant denies that he is the owner of the system; he says he sold the property on which the water system is located (affidavit of applicant dated

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13/ See also Thompson v. U. S. Department of Labor, 85 F. 2d 551, 558-559 (9th Cir. 1989); and Pierce v. Underwood, ___ U. S. ___ (1988); 108 S. Ct. 2541, 2550-2551, 101 L. Ed. 2d, 490, 503-504 where the Supreme Court held that the reasonableness standard is not changed by 1985 legislative history indicating that more than mere reasonableness is required to satisfy the "substantially justified" test.

14/ Environmental Defense Fund, Inc. v. Watt, 722 F. 2d at 1085; H. R. Rep. No. 1418, at p. 18, reprinted in 1980 U.S. Code Cong. & Ad. News, at p. 4997; Natural Resources Defense Council v. EPA, 703 F. 2d 700, 712 (3d Cir. 1983).

15/ Pierce v. Underwood, supra, 108 S. Ct. at 2550, cited in National Wildlife Federation v. Federal Energy Regulatory Com'n., 870 F. 2d 542,546 (9th Cir. 1989).

May 19, 1989 attached to applicant's answer) for full value to one Robert Patterson in 1973. Applicant asserts that "EPA refused to dismiss the action on the ownership issue despite substantial evidence demonstrating that [the applicant] was no longer the owner of the system." Such evidence included an Order of the Court of Common Pleas in the County of Chester, South Carolina, dated December 14, 1981, in which it was found that Robert Patterson owns and operates the water system. (Exhibit C attached to application, at p. 2; application at p. 3). Applicant also submitted evidence attached to its answer to the complaint consisting of a letter dated May 12, 1988, from Fairfield Electric Cooperative stating that applicant's account for electric service was put into Mr. Robert Patterson's name on September 20, 1973, and an Environmental Contact Report, dated August 29, 1974, which noted that applicant stated that he had nothing to do with the water system and that Robert Patterson was operating the system. (Exhibits C and D, respectively, attached to applicant's answer to the complaint). Moreover, applicant asserts that he had paid no real estate taxes on the property since 1973, and had had nothing to do with the water system since that date (Id. at p. 3).

EPA, on the other hand, contends that it was justified in pursuing action against applicant as the owner of the system as a result of an investigation carried out by Mr. William Cloward, an environmental engineer at EPA. Upon issuance of a draft Ad-

ministrative Order to Robert Patterson as "owner" of the water system, Mr. Patterson told Mr. Cloward that the system was owned by applicant by virtue of his ownership of the property on which it was located, and that Patterson had entered into a verbal agreement in 1973 with applicant merely to operate and keep the proceeds from the water system, not to purchase the property or the water system. 16/ Mr. Cloward then spoke with applicant and with applicant's attorney, Harry H. Abernathy, Esquire, who handled the 1973 transaction, who were unable to find any records to document the transaction, or a deed. 17/ Mr. Cloward reviewed deed records in the county court house, but found only a deed transfer document which showed transfer of the title to applicant in 1971. 18/ Upon review of tax records in the county tax collector's office, Mr. Cloward found that those records showed applicant as owner of the property on which the water system is located, and that uncompleted tax sale proceedings concerning the property were initiated in 1987 for unpaid property taxes. 19/ Mr. Cloward asserts in his affidavit that South Carolina offi-

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16/ Exhibit A, attached to EPA answer to application, at p. 1.

17/ Id. at p. 2; affidavit of Harry H. Abernathy, attached to applicant's answer to the complaint, at pp. 2-3.

18/ Exhibit A, attached to answer to application, at p. 2.

19/ Id.; Exhibit G, attached to answer to application.

cials did not conduct any research of deed or tax records for the the water system or the property upon which it is located. 20/ On the basis of Mr. Cloward's investigation, including conversations with all persons involved, EPA's position that applicant is the owner of the water system was substantially justified, as it had a reasonable basis in law and fact.

As to the issue of whether the water system is a "public water system," that is, whether it regularly serves at least twenty-five persons or has at least fifteen service connections, EPA also relies upon Mr. Cloward's investigation of this matter. As it pertains to this issue, the investigation consists of a 1985 South Carolina Department of Health and Environmental Control water supply survey, quarterly updates on state surveys provided by the Federal Reporting Data System (FRDS), and upon discussions with Mr. Patterson concerning the size of the system. On the state survey, dated November 13, 1985, the "retail population served" by the water system is listed as "30". 21/ The number of taps is listed as "10" on the survey. 22/ On the last quarter-

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20/ Exhibit A attached to answer to the application, at p. 2.

21/ Exhibit I attached to answer to application, at pp. 1, 2. However, figures which appear to have been written in first, and then written over, and then crossed out in favor of the "30" (on both pages of the application) may show that the actual figure was in doubt. On the second page the crossed out number may be "28" or "29". On the first page, the first number may be "2". The second is illegible.

22/ Id. at p. 2.

ly update prior to the issuance of the Administrative Order in this case, and for fiscal years 1988 and 1989, the FRDS indicates that the "population served" by the water system is "30". 23/ Mr. Cloward discussed the size of the water system with Mr. Patterson in May, 1988, and asserts that Mr. Patterson, the operator of the system, in discussing each individual household on the system, said that approximately 30 persons were being served by the system. 24/

Applicant contends that EPA was not substantially justified in alleging that the water system is a "public water system," because EPA did not verify the number of individuals served by the system by means of an actual survey; rather, EPA, through the Department of Health and Environmental Control (DHEC) of the State of South Carolina, had not since before 1982 performed an actual survey, and the annual and quarterly updates relied upon by EPA were merely estimates of individuals being served. 25/

However, Mr. Cloward's discussion with Mr. Patterson would seem to be a current and reliable source of information relating to the size of the system, since he operates that system. But, on the other hand, especially because 30 individuals is so close

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23/ Id. at p. 4; Exhibit A attached to answer to application, at p. 3.

24/ Exhibit A attached to answer to application, at p. 3.

25/ Application, at p. 4.

to the jurisdictional minimum of twenty-five individuals needed for a "public water system," did EPA have a duty to survey each of the households to determine the actual number, to add to the information it already had? EPA did have another actual survey performed by DHEC on July 12, 1989, after the complaint and the answer to the complaint were filed. This survey indicates that a total of 37 individuals occupy the six dwellings serviced by the water system. 26/ In one such dwelling, the Simpson residence, the survey shows that some of the 20 occupants reported for that dwelling are children kept by the Simpsons while their parents are at work. 27/ This fact could have alerted EPA to the possibility that less than twenty-five individuals may have been served on a regular basis by the water system.

Because EPA did not conduct such a survey prior to issuing the complaint, it is a close question as to whether EPA had a reasonable basis in law and fact for alleging that the water system was a "public water system". An analysis of other cases addressing the issue of "substantial justification" provides some

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26/ Exhibit I, attached to answer to application.

27/ Id. However, it is noted that the definition of "public water system" does not require that the "average of at least twenty-five persons [served] daily" had to be served 24 hours a day (see p. 3, supra). Further, if the children are present in the Simpson household during the work week, they may well be served for some 200 days per year -- i. e. more than the 60 days required by the definition.

guidance. In Britton v. United States, 587 F. Supp. 834 (W. D. Mo. 1984), the Internal Revenue Service (IRS) did not successfully establish that it was substantially justified in demanding a penalty assessment from a corporate bookkeeper. IRS based the requisite allegation that the bookkeeper was a "responsible person," as defined at 26 U.S.C. section 6672, on the fact, inter alia, that the bookkeeper was an authorized signatory on two checking accounts. Id. at 838. IRS never had any indication that the bookkeeper was a corporate officer or director, which would have provided the requisite inference of control for the allegation that the bookkeeper was a "responsible person"; it was held that the government had a duty to look for other evidence of control, which it failed to do. Id. at 838-839. Upon notice of the assessment, the bookkeeper promptly presented a notarized latter from the president of the corporation declaring that the bookkeeper was not a responsible person. The "conscious and repeated disregard of this evidence . . . demonstrates the unfairness and unreasonableness of the government's position." Id. at 839.

In contrast, the government in this case had a strong inference that the water system was a "public water system" from the operator of that system, Mr. Patterson, from the 1985 annual survey, and from the FRDS quarterly updates. Applicant did not present documentary evidence to EPA that fewer than 25 in-

dividuals were served by the system until July, 1989, after the complaint was issued; then affidavits of residents in the Simpson household were presented. 28/ At this point, a duty to go beyond information already in hand would arise had EPA wished to pursue this matter. However, EPA promptly moved to withdraw the complaint on August 9, 1989.

In Tesch v. General Motors Corporation, 724 F. Supp. 1251 (E.D. Wis. 1989), attorney fees were denied a prevailing defendant in an action under the Employment Retirement Income Security Act (ERISA). At least two contradictory inferences concerning a change of a beneficiary on a life insurance policy were drawn from the evidence; therefore the requisite "unequivocal act" was not successfully demonstrated by the plaintiff. However, the inference promoted by plaintiff was "not frivolous and provided the plaintiff with a solid basis to argue that it constituted an unequivocal act." 29/ In the case at hand,

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28/ See status report dated July 31, 1989, from counsel for applicant; answer to application at p. 17.

Applicant appears not to have raised the matter of the size of the system until after the complaint had issued (Answer to application at p. 16; answer to the complaint at pp. 4-5; status report dated July 6, 1989 from EPA; application at pp. 3-4).

29/ Tesch v. General Motors Corporation, supra. The standard used to determine whether to award attorney fees to a prevailing defendant in ERISA actions is analagous to that utilized by EAJA, 28 U.S.C. §2412(d)(1)(A).

EPA's understanding that the water system was, albeit just barely, a "public water system" was not contradicted by applicant or by any evidence that had come to light during the investigation until after the complaint was filed. 30/

Information that the water system here served twenty-five or more persons, and that applicant is the owner of the system, gave EPA a reasonable basis for issuing the complaint in this matter. EPA has made a showing that its position was "justified to a degree that would satisfy a reasonable person." 31/ It is concluded that EPA's position was substantially justified. Applicant is, therefore, not entitled to recover attorney fees and expenses.

ORDER

It is hereby ordered that the application for award of fees as a result of the EPA complaint in this matter be, and it is hereby, denied.

J. F. Greene
Administrative Law Judge

December 29. 1989
Washington, D. C.

30/ The Order from the South Carolina court was presented not to establish whether or not the system was a "public water system," but to establish ownership of the system.

31/ See supra, p. 8.