8/21/92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Biddle Sawyer Corporation,	)	Docket No. II-TSCA-TST-88-0244
	)	
Respondent	)	

RECOMMENDED DECISION

I. Background

Biddle Sawyer Corporation (Biddle Sawyer, Applicant, or Respondent) has filed an application for attorney's fees and expenses, pursuant to the applicable provision of the Equal Access to Justice Act (EAJA), 5 U.S.C. Section 504, as amended, and the implementing regulations, 40 C.F.R. Part 17, of the United States Environmental Protection Agency (EPA, Agency or Complainant).

The Applicant was the Respondent in an administrative proceeding under the Toxic Substances Control Act (TSCA), Section 16(a), 15 U.S.C. Section 2615(a), for the assessment of civil penalties for the alleged violations of TSCA. The complaint alleged that Biddle Sawyer failed to comply with the requirement contained in 40 C.F.R. Section 766.35(a)(1)(i) to file a letter of intent to test or to submit an exemption application for the importation of the chemical substance 2,3,5,6-Tetrachloro-2,5-cyclohexadiene-1,4-dione (chloranil or Tetra) to the EPA. The complaint sought a civil penalty of $5,000.00. Settlement negotiations ensued but the parties were unable to agree on a settlement.

On September 27, 1990, as Presiding Officer in the matter, I issued an Accelerated Decision dismissing the complaint for the reason that EPA had not shown that Biddle Sawyer was required to submit a letter of intent to test or an application for exemption, as charged. The decision became final on November 16, 1990.[1/]

Biddle Sawyer filed an application for attorney's fees and expenses under the EAJA on November 20, 1990.[2/] EPA filed an answer asserting that the application lacked requirements set out in 40 C.F.R. Part 17, Subparts A and B. Specifically, the application lacked, inter alia, signature of Applicant as required by 40 C.F.R. Section 17.11(f). Biddle Sawyer filed a motion for leave to file an amended application and an amended application on January 10, 1991. In addition, EPA filed a memorandum in opposition to the Applicant's motion for leave to file an amended application for attorney's fees and expenses.

EPA requests that the motion for leave to file an amended application be denied and the case be dismissed because Biddle Sawyer failed to include information required by 40 C.F.R. Part 17, in the original application.

1/ Under 40 C.F.R. Section 22.27, an initial decision becomes final 45 days after service on parties. The decision was issued on September 27, 1990. Because service was made by mail, five additional days were added pursuant to Section 22.07(c). Neither party elected to appeal, and the administrator did not decide to review the decision, so the decision became final on November 16, 1990.

2/ Under the EAJA, an application for attorney's fees must be filed no later than 30 days after final disposition of adjudication, making this a timely application. 5 U.S.C. Section 504(a)(2); 40 C.F.R. Section 17.14.

EPA asserts that failure to include this information in the original application bars eligibility of the application because including such information in an amended application would not be filing in a timely fashion.[3/]

Thus, Biddle Sawyer's application presents two issues. First, I must determine whether I may consider supplementary documentation and allow Biddle Sawyer to amend its application for attorney's fees. Second, if I conclude that I may consider such supplementary documentation, then I must determine the amount, if any, which Biddle Sawyer may recover for attorney's fees and expenses.

II. Whether to Allow Supplementary Documentation

In order to be eligible for attorney's fees under the EAJA, an applicant must (1) submit an application within 30 days of the final decision; (2) show that the applicant is a prevailing party and eligible to receive the award;[4/] (3) itemize the amount sought; and (4) allege that the position of the opposing party was not substantially justified.[5/] The court will award fees and other expenses unless the position of the Agency was substantially justified, or special circumstances made an award unjust.[6/]

3/ Answer, pp. 4-5 (December 21, 1990).

4/ To be eligible, the applicant must be a "party" who is (1) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed; (2) own a business whose net worth did not exceed $7,000,000 at the time action was filed and employ less than 500 employees at the time the action was filed. 5 U.S.C. Section 504(b)(1)(B).

5/ 5 U.S.C. Section 504(a)(2).

6/ 5 U.S.C. Section 504(a)(1).

These requirements must be strictly construed because the Act is a waiver of the government's sovereign immunity.[7] The jurisdictional prerequisites or threshold conditions which must be met in order to establish my jurisdiction over this case are the 30 days filing deadline and the showing of eligibility.[8] The applicant has met these conditions. Biddle Sawyer filed the application in a timely manner.[9] Biddle Sawyer stated in its original application that it is a prevailing party, and that it meets the eligibility requirements.[10] Biddle Sawyer stated that its net worth was less than $7,000,000 at the time of filing, as evidenced by the attached audited financial statement, and that it employed fewer than 100 employees.[11] Lastly, Biddle Sawyer asserted that EPA was not substantially justified in its position.[12]

EPA claims the initial application does not meet jurisdictional requirements because it lacked the Applicant's signature. This is not a jurisdictional requirement established by the EAJA. This requirement is set forth in 40 C.F.R. Section 17.11(f) in EPA's implementing regulations. Contrary to EPA's contention, I find that such a regulatory requirement is a procedural requirement and not a jurisdictional one.

7/ Action on Smoking and Health v. Civil Aeronautics Board, 724 F.2d 211, 225 (D.C. Cir. 1984) ("As a waiver of sovereign immunity, the Act must be strictly construed.").

8/ United States v. Hopkins Dodge Sales, Inc., 707 F. Supp. 1078, 1080 (D. Minn. 1989).

9/ See supra, p. 2, n. 2.

10/ Application, p. 3.

11/ Id.

12/ Id., p.4.

Even if the signature requirement were jurisdictional, some courts have allowed supplementation of an application to meet eligibility requirements.[13] In Dunn the court stated:

> Congress did not intend that defects in the pleading requirements of . . . [the EAJA] be treated as jurisdictional. So long as fee petition is filed within thirty-day time period which puts the court, and eventually the government, on notice that the petitioner seeks fees under the Equal Access to Justice Act, the court may consider the petition, and may, . . . permit supplementation. [14]

Other courts have allowed an amendment of the application to allow applicants to supply the court with more detailed information regarding attorney's fees.[15] Because the Applicant filed the original application in a timely manner and has met all of the jurisdictional requirements, I accordingly will consider Applicant's supplement to its original submission.

III. The Amount of Recoverable Attorney's Fees and Expenses

Having determined that I will consider Applicant's additional documentation, I now turn to the question of how much, if any, of the fees and expenses are recoverable.

13/ See Dunn v. United States, 775 F.2d 99 (3d Cir. 1985). Dunn allows supplementation of an application lacking an itemized statement of attorney's fees.

14/ Dunn v. United States, 775 F. 2d at 104.

15/ In Public Citizen Health Research Group v. Young, 700 F. Supp. 581, 587 (D.D.C. 1988), rev'd in part on other grounds, 909 F.2d 546 (D.C. Cir. 1990), the court allowed an applicant to submit a more detailed affidavit of attorney's fees after filing a timely application. In Lavernier Construction v. United States, 22 Cl. Ct. 247 (Jan. 8, 1991) the court allowed supplementation of a timely filed application for fees and expenses in order to cure itemization defects.

The standard for an award of fees and expenses incurred in connection with an EPA enforcement proceeding is set forth at 40 C.F.R. Section 17.6, which provides in pertinent part, as follows:

> (a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding unless the position of the EPA . . . 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 admits that Applicant is a prevailing party,[16] but contends that Applicant is not entitled to recover fees and expenses because EPA's position was "substantially justified".

The Supreme Court defined the test for "substantially justified" in Pierce v. Underwood, 487 U.S. 552 (1988). The Court stated that a position is justified if it is "justified in substance or in the main - that is, justified to the degree that could satisfy a reasonable person".[17] The Court then noted[18] that this was in practical effect no different from the "reasonable basis both in law and fact" formulation which several Courts of Appeals have adopted.[19]

16/ Answer, p. 2.

17/ Pierce v. Underwood at 565.

18/ Id.

19/ See, e.g., Anderson v. Heckler, 756 F.2d 1011, 1013 (4th Cir. 1985); Citizens Council of Delaware County v. Brinegar, 741 F.2d 584, 593 (3d Cir. 1984); Foster v. Tourtellotte, 704 F.2d 1109, 1112 (9th Cir. 1983) (per curiam).

In the initial proceeding, EPA charged Biddle Sawyer with violations of Section 4 of TSCA, 15 U.S.C. Section 2603 and of rules promulgated pursuant to Section 4, specifically, 40 C.F.R. Section 766.35(a)(1). More particularly, the complaint had alleged that Biddle Sawyer had imported chloranil (or Tetra) for commercial purposes between January 1, 1984 and July 6, 1987, and had failed to submit a letter of intent to test or an exemption application to EPA no later than September 3, 1987. In my decision I held that Biddle Sawyer could not be held liable for a violation of Section 766.35(a)(1)(i) in view of the fact that, as of the effective date of Part 766, Biddle Sawyer was no longer engaged in the importation of chloranil.

EPA had sought to impose retroactively the regulatory requirement on Biddle Sawyer, who did not import or manufacture chloranil subsequent to July 6, 1987, the effective date of Part 766. Under those circumstances, I concluded that to attempt to hold Biddle Sawyer liable would be not only unreasonable and unjust, but also an impermissible retroactive application of the regulation.[20/] There was no reasonable basis in law and fact for EPA's position that Biddle Sawyer had violated TSCA and the implementing regulations thereunder. Accordingly, I hold that the Agency's position was not substantially justified and the awarding of fees and expenses cannot be denied on those grounds.

EPA also raised the issue of "special circumstances" as a justification for denying Applicant's request for fees and expenses. What constitutes a "special circumstance" is not clearly defined in the statute or the

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20/ See Accelerated Decision, p. 29.

regulations. The burden of proving the special circumstances or the substantial justification exception to the mandatory award of fees under the EAJA rests with the Agency.[21/]

EPA claims the special circumstances in this case are that Applicant maintained control over the chemical substance for eight months following the effective date of the rule.[22/] EPA requests that I extend the definition of "importation" under TSCA to include possession of the product until an importer no longer has control of the chemical substance.[23/] EPA claims that "importation" does not cease with the act of entering the United States, but continues until the importer sells or otherwise no longer has control/possession of the substance.[24/] The Agency offers no supporting case law or legislative history for this argument, making it weak at best; and, therefore, I conclude the Agency has failed to meet the burden of proving that special circumstances exist which make the award sought unjust.

21/ See Haitian Refugee Center v. Meese, 791 F.2d 1489, 1496 (11th Cir.), aff'd in part and rev'd in part, 804 F.2d 1573 (1986); Keasler v. United States, 585 F. Supp. 825, 830 (E.D. Ark. 1984).

22/ Answer, p. 13.

23/ Id.

24/ Id.

IV. Types of Fees and Expenses

Biddle Sawyer has filed a claim for an award of attorney's fees of $26,823.75[25] and paralegal and other expenses of $3,828.96, making a total of $30,652.71.

Although case law is divided on the scope of expenses recoverable under the EAJA,[26] generally all "reasonable and necessary expenses" incurred by an attorney in preparation for trial which are customarily charged to the client are recoverable.[27] It is the responsibility of the Presiding Officer to determine what is "reasonable".[28]

EPA objects to expenses charged during the attempted settlement of the case prior to adjudication.[29] Although the Supreme Court has ruled that fees can be recovered for all phases of litigation, it has not specifically addressed the issue of settlement.[30] Other courts have held

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25/ Application, p. 7 (357.65 hours times a rate of $75.00 per hour).

26/ Kelly v. Bowen, 862 F.2d 1333, 1335 (8th Cir. 1988).

27/ International Woodworkers of America v. Donovan, 769 F.2d 1388, 1392 (9th Cir. 1985); Oliveira v. United States, 827 F.2d 735, 744 (Fed. Cir. 1987).

28/ Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

29/ Answer, pp. 14-16.

30/ See Commissioner, I.N.S. v. Jean, 495 U.S. ____, 110 SCt____, 110 L.Ed. 2d 134, 146-147. (1990) ("Congress intended the EAJA to cover the costs of all phases of successful civil litigation addressed by the statute").

that settlement of a case does not preclude application of the EAJA.[31] Furthermore, legislative history indicates that the EAJA applies to parties who prevail by consent or settlement.[32] Therefore, I hold that fees incurred during the settlement process are recoverable in this case.

I likewise reject the Agency's contention that counsels' hours be subject to reduction as a result of "excessive or duplicative" work.[33] While duplication of effort is a proper ground for reducing hours, "a reduction is warranted only if the attorneys are unreasonably doing the same work".[34] Use of multiple counsel in complex cases is understandable and not grounds for reducing hours because it is common in litigation to use a team of attorneys who divide up work.[35] The Agency has pointed to no specific instances where the work of Respondent's counsels was unreasonably duplicative. I find, therefore, that the number of hours of work by the attorneys shall not be reduced on these grounds.

31/ Dubose v. Pierce, 857 F.2d 889 (2d Cir. 1985) (holding that even where stipulation of settlement that no fees be paid from settlement fund did not preclude application of EAJA); Alspach v. District Director of Internal Revenue, 527 F. Supp. 225 (D.C. Md 1981) (applying EAJA where applicant was a "prevailing party as result of settlement").

32/ H. Conf. Rep. 96-1434 at 21, 96th Cong., 2d Sess. reprinted in 1980 U.S. Code Cong. & Admn. News, at 5010.

33/ See Answer, p. 18. EPA objects to the fact that two Senior Attorneys were assigned to the case and asks that their hours be reduced by half.

34/ Johnson v. University College of Univ. of Alabama, 706 F.2d 1205, 1208 (11th Cir.), cert. denied, 464 U.S. 994 (1983).

35/ Jean v. Nelson, 863 F.2d 759, 772 (11th Cir. 1988), aff'd sub nom Commissioner, I.N.S. v. Jean, 495 U.S. ____, 110 L. Ed. 2d 134 (1990).

EPA also objects to the alleged lesser experience of Mr. Bickerman, an associate on the case.[36] EPA requests that this attorney's hourly rate be reduced to $55.00 from $75.00, citing Action on Smoking and Health v. C.A.B., 724 F.2d 211, 220-21 (D.C. Cir 1984) and N.A.A.C.P. v. Donovan, 554 F. Supp. 715, 719 (D.C. Dist. 1982) as authority. Both of these cases address the issue of whether an attorney's skill is a sufficient factor to increase the lodestar amount allowed by statute,[37] not to decrease it. The Supreme Court has ruled that "adjustments up or down are appropriate where the fee charged is out of line with the nature of the services rendered".[38] Absent any evidence of this kind, and taking into consideration that the amount charged is substantially less than usually charged by these individuals, I find the $75.00 amount to be reasonable.

Lastly, EPA objects to other expenses listed, including: toll calls; duplicating; local transportation; managing attorney's fees; Lexis charges; postage; telecopying; messenger; and meals.[39] Some courts have viewed the specific items set forth in the statute as an exclusive list of the expenses recoverable under the EAJA.[40] Other courts have interpreted the

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36/ Answer, p. 18.

37/ At 5 U.S.C., Section 504(b)(1)(A), the statute, in pertinent part, states: "attorneys . . . fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys . . . for the proceedings involved, justifies a higher fee".

38/ Pierce v. Underwood, 487 U.S. 552, 581 (1988).

39/ Answer, pp. 19-20.

40/ See, e.g., Action on Smoking & Health v. C.A.B., 724 F.2d 211, 223-24 (D.C. Cir. 1984) (allowing only photocopying costs); Weakley v. Bowen, 803 F. 2d 575, 580 (10th Cir. 1986) (disallowing postage fees).

items listed as examples of expenses for which compensation may be granted.[41] The Second Circuit has rules that telephone, postage, travel and photocopying costs are reimbursable under EAJA as reasonable "fees and other expenses".[42] The latter interpretation is consistent with the statutory objectives of the EAJA.[43] The limitation on the amount and nature of expenses is that they must be "necessary for the preparation of the [prevailing] party's case".[44] I therefore hold that with the exception of meals which are a cost of daily living, the challenged expenses may be reimbursed under EAJA.

[40/ continued]
"Fees and expenses" is defined at 5 U.S.C. Section 504(b)(1)(A) as including "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. . . ." By including these items not usually charged to clients, Congress intended to enlarge, not contract, the category of expenditures. Jean v. Nelson, 863 F. 2d at 778.

41/ See, e.g., International Woodworkers Local 3-98 v. Donovan, 769 F.2d 1388, 1392 (9th Cir. 1985) (telephone, travel postage and air courier); Oliveira v. United States, 827 F.2d 735, 744 (Fed. Cir. 1987) (photocopying, telephone, postal, printing and binding of briefs); Jean v. Nelson, 863 F.2d at 778 (telephone, reasonable travel, postage, and computerized research).

42/ Aston v. Secretary of Health and Human Services, 808 F.2d 9, 12 (2d Cir. 1986).

43/ Kelly v. Bowen, 862 F.2d 1333, 1335 (8th Cir. 1988).

44/ 5 U.S.C. Section 504(b)(1)(A).

In conclusion, I am of the opinion that Biddle Sawyer is entitled to the following fees and expenses under the EAJA:

Attorney Time: 375.65 hours @ $75.00	=	$26,823.75
Expenses (less meals): $3,828.96 -$25.00	=	$ 3,823.96
		$30,627.71

Accordingly, it is recommended that Biddle Sawyer be awarded fees and expenses in the amount of $30,627.71.

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: August 21, 1991
Washington, D.C.