UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Rayne Hymn, Charging Party, and Rayne Hymn, Intervenor, v. Courthouse Square Company, Urban, Inc., Preston DeJongh and Joan DeJongh, Respondents.

HUDALJ 08-95-0321-8
Decided May 3, 2002

Kenneth S. Hope, Esq.
For the DeJongh Respondents

Alfred F. Blum, Esq.
For Courthouse Square Company and Urban, Inc.

Michal F. Stover, Esq.
For the Secretary

Before: Constance T. O'Bryant
Administrative Law Judge

INITIAL DECISION AND ORDER ON
APPLICATIONS FOR ATTORNEY'S FEES AND COSTS

On October 31, 2000, the United States Department of Housing and Urban Development ("the Government") charged Respondents Courthouse Square Company,

Urban, Inc., Preston DeJongh and Joan DeJongh with engaging in unlawful housing discrimination and interference with rights protected by the Fair Housing Act, as amended in 1988, 42 U. S. C. §§ 3601-3619 ("Act"), specifically, 42 U. S. C. §§ 3604 (f) (1) (A), 3604 (f) (2) (A), 3604 (f) (3) (b) and 3617. Both Preston and Joan DeJongh were employees of Courthouse Square Company. Trial was conducted in the case from February 6, 2001 through February 8, 2001. The DeJongh Respondents were represented at trial by Kenneth R. Hope of the Bendelow Law Firm, P. C. Respondents Courthouse Square Company and Urban, Inc. were represented by Alfred S. Blum.

On February 7, 2001, upon motion at the close of the Charging Party's case, the undersigned dismissed the charges against Respondent Preston DeJongh; however, finding that the Charging Party had presented sufficient evidence of discrimination to withstand a motion at that point, the undersigned denied the same motions by Joan DeJongh and the other Respondents. On March 8, 2001, Respondent Preston DeJongh filed a motion for award of attorney's fees. By Order dated March 16, 2001, ruling on that motion was held in abeyance pending issuance of the Initial Decision. On August 13, 2001, I issued my Initial Decision[1] finding for the remaining Respondents on all counts of the Charge of Discrimination ("Charge"). On October 12, 2001, Respondent Joan DeJongh filed her motion for award of attorney's fees and Respondent Preston DeJongh renewed his previously filed motion.[2] Both applications were timely filed. Thereafter, the Charging Party was granted extensions of time in which to conduct discovery and to respond to the fee applications, Respondents were granted an extension of time to reply to the response, and the Charging Party was permitted to file a rebuttal to Respondents' reply. The matter is now ripe for adjudication.

Preston DeJongh seeks attorney's fees in the amount of $22,141.56 and Joan DeJongh seeks attorney's fees in the amount of $11,251.80. The Applications will be *Denied*.

Although Mr. Blum claims that Respondents Urban, Inc., and Courthouse Square Company filed applications for attorney's fees, that claim is without merit.

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[1]That decision was amended on August 16, 2001.

[2]Respondents sought fees under 28 USCA § 2412; however, the Code provisions that apply to administrative proceedings are found at 42 U. S. C. § 3612 and 5 U. S. C § 504. *See also* 24 C.F.R. Part 14.

Statutory Framework

The Fair Housing Act, as amended, provides for the payment by the United States of attorney's fees and costs in administrative proceedings brought pursuant to the Act to the extent provided by the Equal Access to Justice Act ("EAJA"), as amended. 42 U. S. C. § 3612, citing 5 U. S. C. § 504. Section 504 of 5 U. S. C. provides in part:

> Sec. 504. Costs and fees of parties:
>
> (a) (1): 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.
>
> (a) (2): A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. . .
>
> (b) (1) For the purposes of this section -
>
> (B) "party" means a party, as defined in section 551(3) of this title, who is (I) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated . . .

The EAJA exposes the federal government to liability for attorney's fees and expenses to which it would not otherwise be subjected; hence, it is a waiver of sovereign immunity and must be strictly construed in the government's favor. *Ardestani v. INS*, 502 U. S. 129 at 137 (1990). *See also Ed A. Wilson, Inc. v. GSA*, 126 F. 3d 1406 (Fed. Cir. 1997).

Discussion

The Charging Party argues against an award of attorney's fees to both DeJongh applicants because: (1) both are ineligible for attorney's fees under 5 U. S. C. § 504 and HUD's implementing regulations at 24 C.F.R. Part 14; (2) in the case of Respondent Joan DeJongh, the Charging Party's position in the underlying litigation was substantially justified; and (3) special circumstances make an award of attorney's fees to the DeJongh

Respondents unjust. Assuming this court disagrees and decides that attorney's fees

should be awarded, the Charging Party argues that the Respondents should be awarded less than the requested amount because Respondents have not established that they are entitled to the full amount requested.

Because I find merit to the Charging Party's first argument and deny the fee petitions on that basis, the Charging Party's other arguments need not be addressed.

I. The DeJonghs' applications for attorney's fees must be denied because they do not establish that they are eligible to receive an award of fees.

The burden is on the party who seeks an award of attorney's fees to establish eligibility for attorney's fees. *Hensley v. Eckerhart*, 461 U. S. 424 (1983). With regard to eligibility, the EAJA provides in pertinent part that:

> A party seeking an award of fees and other expenses *shall*, within thirty days of a final disposition in the adversary adjudication, *submit to the agency an application which shows that the party* is a prevailing party and *is eligible to receive an award under this section . . . .*

5 U. S. C. § 504(a)(2) (emphasis added). *See also* 24 C.F.R. 14.120 (a).

Eligibility for an EAJA award is established upon meeting the conditions set out by the statute. *Commissioner, INS v. Jean*, 496 U. S. 154 (1990). Section 504 (a) (1) of 5 U. S. C. authorizes an award of "fees and other expenses *incurred by that party* in connection with that proceeding. . . . " Thus, to be eligible for an award of attorney's fees, the party seeking the fees must have *incurred* the fees. *See Neal v. Honeywell Inc*. 191 F. 3d 827 (7th Cir. 1999) (" EAJA allows recovery of attorneys fees 'incurred' by the prevailing party," *citing* 28 U. S. C. § 2412(d)(1)(A) and *U. S. v. Paisley*, 957 F. 2d 1161l, 1164 (4th Cir. 1992)).

To establish that they *incurred* the fees requested, Respondents must show that they have either paid the fees or that they remain liable for the payment of the fees. *See SEC v. Comserv Corp*, 908 F. 2d 1407 (8th Cir. 1990) (attorney's fees denied where cost of representation was paid by party's former employer pursuant to a severance agreement); *U. S. v. Paisley*, 957 F. 2d 1161 (4th Cir. 1992); *In the Matter of Kirk Montgomery*, SEC Rel. No. 34-45161, Admin. Proc. File No. 3-9786-EAJ, 2001 SEC LEXIS 2608 (Dec. 18, 2001) (fees denied where prevailing party had a legally enforceable right to full indemnification of attorney's fees from a third party and

therefore could not be deemed to have incurred any expenses); and *Unification Church v. INS*, 762 F. 2d 2077 (D. C. Cir. 1985) (individual church members denied award of

fees because fees paid by the Unification Church and church members would not be liable for fees if court-awarded fees are denied).

Preston and Joan DeJongh were represented in this case by Kenneth S. Hope of the Bendelow Law Firm ("Bendelow"). They are seeking a combined amount of $33,393.37 in attorney's fees charged by Bendelow for their representation. However, the evidence is uncontradicted that neither Respondent Preston DeJongh nor Joan DeJongh paid any part of the $33,393.37 paid to Bendelow for representing them in this litigation..

It is undisputed that the fees charged by the Bendelow firm were paid not by the DeJonghs, but by Courthouse Square Company, the DeJonghs' employer. This fact was not disclosed in the DeJonghs' applications for fees but rather uncovered by the Charging Party during discovery in preparation for its response to the DeJonghs' motions for attorney's fees. In their Reply, Respondents agree that Courthouse Square Company paid the Bendelow firm a total of $35,000 for the firm's representation of Preston and Joan DeJongh. (*See* Charging Party's Opposition, Attachments G, H, I and Respondents' Reply Brief).

While there is no Tenth Circuit court decision squarely addressing the issue of eligibility for an award of fees based on whether the party incurred the expense, the D. C. Circuit Court's analysis in the case of the *Unification Church v. INS*, 762 F. 2d 2077 (D. C. Cir. 1985), provides guidance in making the determination. In *Unification*, the Church and three of its members prevailed in the litigation brought by them against the Immigration and Nationalization Service("INS"). In that case attorney fee applications were filed by all parties - the Church and each of the three church members - the court found that the Unification Church was responsible for payment for representation of the three named church members and that the church members had nothing at stake in the award of fees. As a result, the court limited its examination of the eligibility for attorney fees solely to the Unification Church. The court stated:

> We hold therefore that, where the fee arrangement among the plaintiffs is such that only some of them will be liable for attorney's fees, the court shall consider only the qualifications *vel non* under the Equal Access to Justice Act of those parties that will be themselves liable for fees if court-awarded fees are denied. *Id*. at 1082.

Applying that rationale to this case where the fee arrangement was between Respondents Urban, Inc. and Bendelow, and the fees were paid by Courthouse Square Company, the DeJonghs must be found ineligible for an award of fees.

The DeJonghs assert that even if they did not pay the attorney's fees charged in the case, that they should be found to have incurred the fees because Courthouse Square Company's payment of the fees was an "advance" of the fees to Bendelow on their behalf. This assertion is not persuasive since the DeJonghs have produced no evidence that they assumed any liability for the payment of attorneys' fees. The record contains no evidence that the DeJonghs agreed to reimburse Courthouse Square Company for monies paid to Bendelow. They have failed to show that they have anything at stake in the current claim for attorney's fees. Accordingy, I find that Respondent Preston DeJongh and Respondent Joan DeJongh have not established with regard to this case that they have "incurred" any attorney's fees or expenses within the meaning of EAJA.

The DeJonghs argue that an award of attorney's fees is necessary to counteract any deterrence to their exercise of right to contest the Government's case against them because they did not have the resources to pay an attorney on their own and would have been unable to defend themselves had not Courthouse Square "advanced" the fees on their behalf. This argument, too, is without merit.

"The specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions" and it focuses primarily on those individuals for whom cost may be a deterrent to vindicating their rights. *Commissioner, INS v. Jeans*, 496 U. S. 154 at 167 (1990) (citations omitted). The burden is on the Respondents to establish that they would have been unable to defend themselves against the charges in this case had not Courthouse Square "advanced" the fees for their representation. Nothing in the record suggests, for example, that the DeJonghs made any attempt to obtain representation apart from the Bendelow firm or that the DeJonghs, in deciding to challenge the Government's allegations, weighed the potential availability of reimbursement through EAJA. *See In the Matter of Kirk Montgomery*. These applicants are like those in *Comserv*. As the court observed there, because the applicants did not have to pay the cost of their representation, they were from the beginning, able to pursue their defense secure in the knowledge that they would incur no legal liability for attorney's fees or costs. Under these circumstances, fee shifting would not serve the primary intent of Congress in creating the EAJA legislation. 908 F. 2d 1407 at 1414. *See also Unification Church v. INS*, 762 F. 2d 2077 at 2082 (D. C. Cir. 1985)

II. Courthouse Square Company is not eligible in this case for an award of attorney's fees under EAJA

Although Respondents Preston and Joan DeJonghs' application for an award of attorney's fees had been signed solely by their attorney, Kenneth S. Hope of Bendelow,

their reply brief to the Charging Party's Opposition was signed by both Kenneth Hope as counsel to the DeJonghs and by Alfred Blum, on behalf of Courthouse Square Company and Urban, Inc. In that reply brief, counsel jointly urge that assuming *arguendo* that I conclude that the DeJonghs are not entitled to an award of fees, then I should award Courthouse Square Company the $33,393.37 in fees requested in the case. They contend that both Respondents Courthouse Square Company and Urban, Inc. submitted applications for attorney's fees on October 12, 2001, at the same time Respondent Joan DeJongh submitted her application. In support of this contention, they point to paragraph 27 of Joan DeJongh's October 12, 2001, application for attorney's fees, which states:

> 27. These Respondents [Preston and Joan DeJongh] would represent that Respondents Urban, Inc. and Courthouse Square Company join in the filing of the within motion and motions previously filed on behalf of Preston DeJongh.

Respondents' counsel attempt to obtain attorney's fees for Courthouse Square Company under color of applications by Preston and Joan DeJongh and in the absence of the filing of an application by Courthouse Square Company which meets the EAJA and HUD filing requirements must be rejected. Their claim that Courthouse Square Company filed an application is disingenuous at best and dishonest at worst.

The EAJA and HUD's regulations require that an application be made for attorney's fees under EAJA and that the application contain certain very specific information. 24. C. F. R. Part 14, Subpart B as pertinent here, require, *inter alia*, that the application identify the applicant in the case. Where the applicant is other than an individual, the application must state the number of employees of the applicant, the type and purpose of its business, and that the net worth of the applicant, including its affiliates, does not exceed $7 million. 24 C. F. R. § 14.200 (a) & (b). With its application, a partnership or corporation must also submit a detailed exhibit showing the new worth of the applicant and any affiliates it had when the proceedings against it were initiated. 24 C. F. R. § 14.205(a). Further, if the applicant is a partnership or corporation, it is required to state that it did not have more than 500 employees at the time the proceeding was initiated. 24 C. F. R. § 14.200 (c). Finally, the application must be signed by an authorized officer of the applicant regarding eligibility and by the attorney of the applicant with respect to fees and expenses sought. 24 C. F. R. § 14.200 (f).

Only two applications for attorney's fees were submitted in this case. Both were submitted by individuals. Preston DeJongh seeks attorney's fees in the amount of $22,141.56 and Joan DeJongh seeks attorney's fees in the amount of $11,251.80. Both applications were filed by and through the DeJonghs' attorney of record, Kenneth S.

Hope of Bendelow Law Firm, P. C., and each ended with the prayer that this tribunal award attorney's fees to the respective Respondent. There was no application filed or signed by any attorney that identified the applicant as other than an individual. The mere inclusion of the statement in paragraph 27 of Joan DeJongh's application that Courthouse Square Company and Urban, Inc. "join[ed] in the filing of the within motion and motions previously filed on behalf of Preston DeJongh" in no way gives Courthouse Square Company applicant status. Even assuming *arguendo* that Courthouse Square Company filed a timely application, it has failed to meet its burden under 24 C. F. R. § 14.120 (a) of showing that it meets all conditions of eligibility in that it has failed to submit, *inter alia*, a statement signed by an authorized officer regarding its net worth, including that of its affiliates, and has not submitted the required net worth exhibits.

Conclusion

Respondent Preston DeJongh has failed to establish his eligibility to receive an award of attorney's fees under the EAJA. Accordingly, his application for attorney's fees and cost must be, and hereby is, *DENIED*.

Respondent Joan DeJongh has failed to establish her eligibility to receive an award of attorney's fees under the EAJA. Accordingly, her application for attorney's fees and costs must be, and hereby is, *DENIED*.

Respondent Courthouse Square Company has not filed an application for attorney's fees which meets the requirements of the EAJA. Respondents request that an award of attorney's fees and costs be made to Courthouse Square Company must therefore be, and hereby *is, DENIED.*

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CONSTANCE T. O'BRYANT
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION AND ORDER ON APPLICATIONS FOR ATTORNEY'S FEES AND COSTS issued by CONSTANCE T. O'BRYANT, Administrative Law Judge, in HUDALJ 08-95-0321-8, were sent to the following parties on this 3rd day of May, 2002, in the manner indicated:

_____
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