

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

In the Matter of:

EDWARD WHITE, JR.,

Respondent.

HUDALJ 92-1848-DB(LDP)
Issued: August 3, 1993

DECISION AND ORDER ON MOTION FOR RECONSIDERATION

On October 9, 1992, I rescinded the Department's one-year Limited Denial of Participation ("LDP") against Edward White, Jr. ("Respondent"). The Secretary affirmed the rescission on March 22, 1993. Respondent subsequently filed an application for attorney fees pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, as amended ("EAJA").

On May 18, 1993, I denied Respondent's application on the basis that an LDP proceeding is not an "adversary adjudication" subject to an award of attorney fees under EAJA.¹ On June 18, 1993, Respondent filed a Motion for Reconsideration of his application for attorney fees. The Department has not responded to the Motion. I conclude that Respondent's Motion sets forth no basis for reversing my previous decision denying Respondent's application.

¹ An award is appropriate under EAJA provided that there has been an "adversary adjudication." 5 U.S.C. § 504(a)(1). EAJA defines an "adversary adjudication" as an adjudication under § 554 of the Administrative Procedure Act ("APA"). 5 U.S.C. § 504(b)(1)(C). That section defines such an adjudication as one that is "required by statute to be determined on the record." 5 U.S.C. § 554(a) (emphasis added). Because the LDP sanction is established by regulation, not by statute, I held that EAJA does not provide for an award of fees for an LDP proceeding.

Decision

Respondent contends that LDP hearings are mandated by the requirements of Constitutional due process and that these hearings, like statutorily required hearings, are subject to APA requirements. Accordingly, Respondent asserts that the term "adversary adjudication" includes Constitutionally mandated proceedings in addition to those required by statute. See Respondent's Motion for Reconsideration, pp. 2-3. I disagree.

EAJA constitutes a waiver of sovereign immunity by the United States. As such, it must be narrowly construed. See *Ardestani v. I.N.S.*, 116 L.Ed. 2d 496, 505-06 (1991). Attorney fee awards under EAJA are restricted to adjudications "required by statute." 5 U.S.C. § 554(a). The statutory language is unambiguous. If Congress had intended to waive sovereign immunity by awarding attorney fees in proceedings not mandated by statute, including those mandated by Constitutional due process requirements, it could have done so merely by defining "adversary adjudication" differently.² It did not do so.

Order

Upon consideration of Respondent's Motion for Reconsideration, his application is again *denied*.

²I also note that the Court in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50 (1950), a case cited by Respondent, found that 5 U.S.C. § 554(a) exempts from its application hearings which administrative agencies may hold only by *regulation*, rule, custom, or special dispensation, rather than by statute. 339 U.S. at 50. That finding is consistent with my prior ruling in this matter. See, n. 1.

WILLIAM C. CREGAR
Administrative Law Judge

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