

U.S. DEPARTMENT OF LABOR

**SECRETARY OF LABOR
WASHINGTON, D.C.**

DATE: May 1, 1991
CASE NO. 80-CET-212

IN THE MATTER OF

SAN DIEGO REGIONAL EMPLOYMENT
AND TRAINING CONSORTIUM (RETC)

v.

CHICANO FEDERATION.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§ 801-999 (Supp. V 1981), ^{1/} and regulations promulgated thereunder at 20 C.F.R. Parts 675-680 (1990). Administrative Law Judge (ALJ) Thomas Schneider, in a Decision and Order (D. and O.) dated April 2, 1987, dismissed with prejudice the claim of RETC, the prime sponsor, against Chicano Federation, the subgrantee, for disallowed CETA costs of approximately \$17,000 as determined by RETC. The ALJ also limited the claim of the Department of Labor Grant Officer against RETC in Case No. 82-CETA-231 by excluding the amount at

^{1/} CETA was repealed effective October 12, 1982. The replacement statute, the Job Training Partnership Act, 29 U.S.C. §§ 1501-1791 (1988), provides that pending proceedings under CETA are not affected. 29 U.S.C. § 1591(e).

issue in this case. ^{2/} D. and O. at 5. **Chicano's** counsel then submitted an application for attorney fees under the Equal Access to Justice Act (EAJA), Rub. L. No. 96-481, title II, 94 Stat. 2325 (1980), as amended by Rub. L. No. 99-80, 99 Stat. 183 (1985) (codified at 5 U.S.C. § 504 (1988) as applied to administrative agencies). In a Supplemental Recommended Decision Awarding Attorney's Fees (S.R.D.) dated March 22, 1988, the **ALJ** awarded Chicano fees and costs of **\$13,453.73**. S.R.D. at 4. Upon request of the Grant Officer the case was accepted for Secretarial review. My review proceeds in accordance with the provisions of 29 C.F.R. Part 16, esp. § 16.306 (1990).

BACKGROUND

This case began as a result of an audit by RETC of costs incurred by Chicano on two contracts. Total tentative disallowable expenditures of **\$44,233.37** were identified at the July 2, 1979, RETC Policy Board meeting. Administrative File Exhibit (A.F. Ex.) A-1. Chicano requested a hearing on the disallowed costs, and a hearing was held by RETC on August 28, 1979. The Hearing Officer ruled on September 6, 1979, that Chicano was responsible for **\$17,940.49 in disallowed costs**. A.F. Ex. A-8. The Grant Officer, by letter dated January 25, 1980, upheld the hearing officer's ruling.

^{2/} In Case No. 82-CTA-231 the Grant Officer asserts a claim against RETC for approximately \$135,000, which, under a joint and several liability theory, includes the \$17,000 RETC alleged was due from Chicano. D. and O. at 2. The **ALJ's** order limiting the Grant Officer's \$17,000 claim is interlocutory in Case No. 82-CTA-231 which is pending separately for final decision.

Chicano requested an **ALJ** hearing and then a trial de novo, the latter request being granted by **ALJ** Alexander Karst on February 12, 1982. ^{3/} As explained infra the trial never took place.

On September 20, 1985, the Grant Officer **moved to hold this** case in abeyance pending the United States Supreme Court's decision in Brock v. Pierce County, 476 U.S. 253 (1986). The **ALJ** granted the motion, and after the decision in Pierce County, a hearing was held on March 11, 1987, to consider **RETC's** motion to limit the issues and Chicano's motion to dismiss. On April 2, 1987, the **ALJ** issued his decision dismissing **RETC's** claim against Chicano, finding that essential witnesses were no longer available and pertinent documentary evidence had been inadvertently destroyed and, therefore, Chicano could not get a fair trial. D. and O. at 4. Chicano's attorney **fee** application was filed with the **ALJ** on June 16, 1987.

DISCUSSION

A. Timeliness of Fee Application

The Grant Officer alleges that the **ALJ** lacked jurisdiction to grant the **fee** award because the fee **application was not timely** filed. **Grant Officer's** Brief (G.O. Br.) at 7. Chicano contends that the Grant **officer is precluded from** ~~awarding the award~~ based on lack of timeliness since that issue was not raised before the **ALJ**. Chicano's Memorandum of Points and Authorities

^{3/} **ALJ** Karst failed to state any legal authority for granting a trial de novo.

(Chi. Mem.) at 4-5. As the Grant Officer argues, the statutory time limitation under EAJA is a jurisdictional prerequisite to an award of attorney fees. Russell v. National Mediation Board, 764 **F.2d** 341, 346 (5th Cir. 1985). See also Melkonvan v. Heckler, 895 **F.2d** 556, 557 (9th Cir. 1990). It therefore can be raised as an issue at any time.

EAJA requires that a party seeking an award of attorney fees submit an application "**within** thirty days of a final disposition in the adversary adjudication." 5 U.S.C. § 504(a)(2). Although there has been a split of opinion as to the meaning of "**final** disposition," see McQuiston v. Marsh, 707 **F.2d** 1082, 1085 (9th Cir. 1983) (request untimely if filed more than thirty days after court has entered judgment), the courts now uniformly hold that a fee application is timely if filed within 30 days of when the time to file an appeal has expired. See, e.g., Papazian v. Bowen, 856 **F.2d** 1455, 1456 (9th Cir. 1988); Feldpausch v. Heckler, 763 **F.2d** 229, 232 (6th Cir. 1985); Massachusetts Union of Public Housins Tenants v. Pierce, 755 **F.2d** 177, 180 (D.C. Cir. 1985).

In **CETA** cases, the time for appeal from an **ALJ** decision is governed by 20 C.F.R. § 676.91(f) which provides that a dissatisfied party may file exceptions within 30 days after receipt of the **ALJ** decision. In the instant case, the **ALJ**'s notice of transmittal of the April 2, 1987, D. and O., although citing 20 C.F.R. § 676.91(f), states that the decision becomes

final **"unless** the Secretary modifies or vacates the decision within 40 days after it is served."

The Grant Officer contends that the **ALJ** lacked authority to extend the period for seeking review and argues that the notice of transmittal does not operate as an estoppel because it is inconsistent with the plain wording of the regulation. G.O. Br. at 12-13. While I do not necessarily disagree with these contentions, it is always within the discretion of an agency to relax or modify its procedural rules when the ends of justice require. American Farm Lines v. Black Ball Freisht Service, 397 U.S. 532, 539 (1970); Onslow County, North Carolina v. United States Department of Labor, 774 F.2d 607, 611 (4th Cir. 1985); National Labor Relations Board v. Monsanto Chemical Co., 205 F.2d 763, 764 (8th Cir. 1953) (application for review of NLRB Regional Director's order accepted although filed six days after time fixed by NLRB rule). Inasmuch as the notice of transmittal was misleading, I decline to hold Chicano to the 30 day appeal period stated in 20 C.F.R. § 676.91(f).

Chicano was served with a copy of the D. and O. by mail on April 2, 1987. Adding together the 40 day period stated in the notice of transmittal, the additional five day period allowed when a document is served by mail, 29 C.F.R. § 18.4(c)(3) and the 30 day period provided in EAJA, Chicano's fee petition would be due on June 16, 1987. Chicano's fee petition, filed on June 16, 1987, was therefore timely.

B. Justification for Grant Officer's Position

EAJA provides that attorney fees and expenses shall be awarded to a prevailing party unless the position of the agency is substantially justified. 5 U.S.C. § 504(a)(1). In finding that the Grant Officer's position was not substantially justified, the ALJ stated that the delay following the February 12, 1982, grant of a trial de novo resulted in the loss of evidence and the disappearance of witnesses which made a fair trial impossible. He also found that Chicano made numerous settlement proposals in 1982 and 1983 which could have ended the case had the Grant Officer simply approved one of them. Instead, the ALJ noted, the Grant Officer "**chose to delay.**" ^{4/} S.R.D. at 3. The **ALJ** therefore concluded that the Grant Officer had not met his burden of showing that the long delay was not attributable to him. **Id.**

Although "**substantially** justified" usually refers to the agency's litigation position on the merits, both **EAJA** ^{5/} and the courts have recognized that an award of attorney fees may be proper where the agency, as litigator, is responsible for **delaying** the proceedings. **Ashburn v. United States, 740 F.2d**

^{4/} The **ALJ** further noted that the case was stayed from October 1, 1985, to May 19, 1986, pending the Supreme Court's decision in **Pierce County**. S.R.D. at 3. It is not clear if the **ALJ** considered the Grant Officer's requested stay a delaying tactic.

^{5/} **EAJA** provides that position of the agency means "in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based:.. ." 5 U.S.C. § 504(b)(1)(E) (emphasis added).

843, 850 (11th Cir. 1984); Seravalli v. United States, 16 Cl. Ct. 424, 430 (1989). In Seravalli, the court articulated a three pronged approach to deciding EAJA delay cases: 1) whether the government bears the greater responsibility for the delay; 2) if the government is responsible, whether the delay is reasonably explained; and 3) whether the EAJA applicant was harmed by the delay. 16 Cl. Ct. at 430.

The Grant Officer essentially argues that, except for the requested stay concerning Pierce County, he was not responsible for any delays. ^{6/} G.O. Br. at 4, 14, 17; Grant Officer's Reply Brief (G.O. Rep. Br.) at 7-9. The delays in this case fall into three categories.

The first category is delay relating to scheduling the hearing on the merits. The **ALJ** did not attribute any of this delay to the Grant Officer. See S.R.D. at 3. It is nevertheless important to address this particular delay as it sheds some light on which party bears the greater responsibility for the overall delay. The Grant Officer alleges that the case was set for a hearing and on two occasions Chicano requested continuances.

^{6/} Chicano contends that the Grant Officer should **not be permitted** to challenge in this proceeding the **ALJ's** Binding **that he was responsible for the delay because those issues should** have been **raised at** the March 11, 1987, hearing **on fees or by** appealing the April 2, 1987, D. and O. Chicano's Reply Brief at 1-2. This contention amounts to a request that I apply administrative collateral estoppel to the issue of delay. The effect of applying collateral estoppel in this case would be to preclude the Grant Officer from making any defense to the **EAJA** claim. Although applying administrative collateral estoppel may be appropriate in some cases, absent compelling legal justification for doing so, and Chicano has offered none, I decline to apply that extreme remedy in this case.

G.O. Br. at 4, 17; G.O. Rep. Br. at 9. In fact, Chicano requested extensions or continuances, all of which were granted, on five separate occasions: April 11, 1980; August 20, 1981; **May** 24, 1982; August 24, 1982; and November 9, 1982. Had the proceedings not been delayed at Chicano's instance on these occasions, ^{1/} a hearing on the merits would have taken place. ^{2/}

The second category is delay caused by failure to respond to or accept settlement offers. Inquiry into the negotiation aspect of a case may be appropriate because the test relating to substantial justification is one of reasonableness. United States v. 0.51 Acres of Land, More or Less, 592 F. Supp. 42, 43 (E.D. Wash. 1984). As the Grant Officer argues, G.O. Rep. Br. at 6 n.3, the **ALJ's** conclusion that the Grant Officer failed to negotiate in good faith is not supported by testimony or any evidence as to the nature of the offers made. ^{3/} See S.R.D.

^{1/} Moreover, it was during this time frame, and before the requested stay for Pierce County, that pertinent evidence was inadvertently destroyed by RETC and material witnesses for Chicano and RETC became unavailable without their testimony having been perpetuated. Hearing Transcript (T.) at 28, 30, 45, 47, 56, 69.

^{2/} Chicano **argues**, without citation to any authority, that **the Grant Officer**, as the aggrieved party in this case: was **responsible** for assuring that the hearing was scheduled. Chi. Mem. at 7-8. I reject this contention. The regulations at 20 C.F.R. § 676.90 (a) place responsibility for scheduling hearings with the **ALJ**, and nothing in the regulations prevents **any** party from requesting that a hearing be expedited.

^{3/} RETC argues that the Grant Officer rejected substituting stand-in costs for disallowed costs when such costs routinely were accepted by Grant Officers in other cases as an alternative to cash. RETC Response to Grant Officer's Statement of Exceptions at 7. Had the **ALJ** offered this reason to support his

(continued...)

at 3. I therefore decline to adopt this finding.

The final category is the delay occasioned by the stay pending the decision in Pierce County. Although the ALJ may have considered this an unreasonable delay, see note 4 supra, it is not the type of a delay that would support an award of attorney fees under EAJA. While the Grant Officer requested this delay, it is reasonably explained because the Grant Officer wanted to await clarification in an unsettled area of the law. The ALJ's granting of the requested stay also may be indicative that the delay was reasonable. In any event, as the Grant Officer points out, G.O. Br. at 18, Chicano could not have been harmed by this delay because it occurred after the missing evidence had been destroyed and after the key witnesses had become unavailable. See Seravalli, 16 Cl. Ct. at 430.

CONCLUSIONS AND ORDER

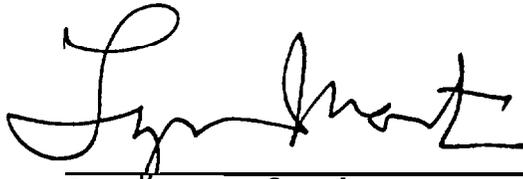
Based on the particular facts in this case, i.e., the ALJ's erroneous notice statement, I conclude that Chicano's counsel submitted a timely application for attorney fees under EAJA.

9 (...continued)

failure to negotiate finding, I would nevertheless reject it in this case. Essentially, stand-in costs are previously unreported costs which a grantee proposes to report in place of unallowable costs. At the time of the negotiations in this case, the Department of Labor's position was that stand-in costs were acceptable at the Grant Officer's discretion. Employment and Training Administration Field Memorandum No. 78-82, April 28, 1982. Although statements were made that stand-in costs were allowed under other grants, see T. at 77, 81, the specific circumstances pertaining to those grants and to the grants in this case were not presented in sufficient detail to allow me to conclude that there may have been an abuse of discretion in this case.

While there were delays in the adjudication of the case on the merits, which eventually resulted in its dismissal with prejudice, the only delay properly attributable to the Grant Officer was the stay pending the Supreme Court's decision in Pierce County. That delay was reasonable and not harmful to the **EAJA** applicant. Accordingly, I conclude that the Grant Officer's position in the case dismissed with prejudice was substantially justified and, therefore, that the EAJA applicant is not entitled to attorney fees.

SO ORDERED.

A handwritten signature in black ink, appearing to read "Lynn Hunt", written over a horizontal line.

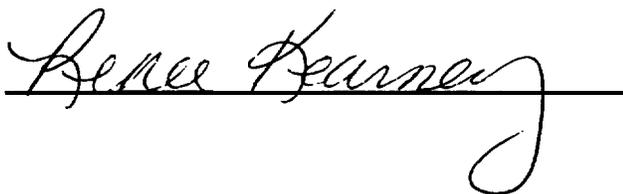
Secretary of Labor

Washington, DC

CERTIFICATE OF SERVICE

Case Name: In the Matter of San Dieao Resional **Employment and**
Trainina Consortium (RETC) v. Chicano Federation
Case No. : 80-CET-212
Document : Final Decision and Order

A copy of the above-referenced document was sent to the following
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