UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 13-0186[1]

In re: Jennifer Caudill, an individual
also known as Jennifer Walker and
Jennifer Herriott Walker,

Applicant

Decision and Order

Appearances: William J. Cook, Esquire, Tampa, Florida for Applicant;

Colleen A. Carroll, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC for the Respondent

Preliminary Statement

On September 7, 2010, Kevin Shea, the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS), initiated a license termination proceeding pursuant to the Animal Welfare Act (the Act or AWA), 7 U.S.C. § 2131, *et seq.*, by filing an "Order to Show Cause Why Animal Welfare Act Licenses 58-C-0947, 55-C-0146 and 58-C-0505 Should Not Be Terminated." The action named as Respondents Jennifer Caudill (also known as Jennifer Walker and Jennifer Herriott Walker) (Caudill), Brent Taylor (Taylor) and William Bedford (Bedford), individuals doing business as Allen Brothers Circus, and Mitchel Kalmanson (Kalmanson).[2]

[1] Although counsel filed the application using the docket number of the original license termination proceeding, as the application is governed by different statutory and regulatory provisions, the Hearing Clerk assigned the application a new docket number as reflected above.

[2] *In re*: Jennifer Caudill, an individual also known as Jennifer Walker and Jennifer Herriott Walker, Brent Taylor and William Bedford, indiv. d/b/a Allen Bros. Circus, and Mitchel Kalmanson, Docket No. 10-416

AWA license 55-C-0146, held by Taylor and Bedford, was voluntarily terminated on May 12, 2012 whereupon APHIS moved to withdraw the Order to Show Cause as to Bedford and Taylor. An Order of Dismissal as to them was entered on June 15, 2012.[3]

Three days of trial for the remaining two Respondents were conducted in Tampa, Florida from June 11 to June 13, 2012. At the hearing, thirteen witnesses testified, thirty-five exhibits were introduced by the government, and eighteen exhibits were introduced by the Respondents. Post-hearing briefs were filed by all parties, and on September 24, 2012, I entered a Decision reversing the Administrator's determination that Kalmanson was unfit to be licensed and dismissing the license termination proceedings brought against him.[4] On October 12, 2013, the Judicial Officer granted an initial Request for Extension of Time for the filing an appeal in which the Administrator had requested that the time for filing of the Administrator's appeal of the Kalmanson decision be extended to thirty days following the entry of the Administrative Law Judge Decision as to Jennifer Caudill.

On February 1, 2013, I entered a Decision and Order as to Jennifer Caudill.[5] In that Decision, as previously done in the Kalmanson case, I reversed the determination made by the Administrator that Caudill was unfit to be licensed and dismissed the license termination proceedings that were brought against her.

On February 27, 2013, the Administrator filed a Request for a Second Extension of Time for the filing of the Administrator's appeal of the Kalmanson decision. In his

---

[3] *In re:* Brent Taylor, 71 Agric. Dec. _____, (U.S.D.A 2012), 2012 WL 3877338.
[4] *In re:* Mitchel Kalmanson, 71 Agric. Dec. ____, (U.S.D.A. 2012); *appeal dism'd by Judicial Officer,* (Order Denying Second Request for Extension of Time to Appeal the Decision as to Mitchel Kalmanson and Rulings Denying Mr. Kalmanson's Motions for Fees, Costs, Expenses, Sanctions and a Monetary Advance, March 4, 2013), 2012 WL 5378830.
[5] *In re:* Jennifer Caudill, 72 Agric. Dec. _____, (U.S.D. A. 2013); *On appeal, license term. on other grounds*, Decision and Order, 2013 WL 604009.

Order of March 4, 2013 denying the extension, the Judicial Officer noted that the Administrator had already had more than five months in which to prepare and file an appeal of my September 24, 2012 Decision as to Mr. Kalmanson and further noted that good reason for an additional extension of time had not been provided.[6] Following that denial, my September 24, 2012 Kalmanson Decision became final.

The Administrator appealed my February 1, 2013 Caudill Decision to the Department's Judicial Officer. On April 29, 2014, during the pendency of that appeal and prior to a decision on the merits of the case by the Judicial Officer, the Administrator filed a Petition to Reopen the hearing in order to receive in evidence a letter dated November 13, 2013 sent from Elizabeth Goldentyer, D.V.M. , Regional Director, Animal Care, APHIS to Ms. Caudill advising her that her AWA license number 58-C-0947 had been automatically terminated on its expiration date of October 16, 2013 because of non-payment of the annual license fee prior to the expiration date. The Administrator also requested that the Judicial Officer issue an order dismissing the proceeding. On May 2, 2014, the Hearing Clerk served Ms. Caudill with the Petition to Reopen and in the accompanying letter informed Ms. Caudill that she had ten days from the date of service within which to file a response to the petition. No response was received from Ms. Caudill, and on May 16, 2014, the Judicial Officer: (1) reopened the hearing; (2) received the November 13, 2013 letter into evidence; (3) found the license in question automatically was terminated pursuant to section 2.5 of the Regulations, 9 C.F.R. §§

[6] Judicial Officer Order Denying Second Request for Extension of Time to Appeal the Decision as to Mitchel Kalmanson and Rulings Denying Mr. Kalmanson's Motions for Fees, Costs, Expenses, Sanctions and a Monetary Advance, March 4, 2013, 2012 WL 5378830.

2.5(a)(3)-(4), (b); and (4) dismissed the pending proceedings as moot.[7] The time for appeal of his ruling has elapsed and it is now the final determination in that case.

Discussion

As an appeal was taken in the license termination case, the stay of the application for attorney's fees and costs required by section 1.193(c) took effect. 7 C.F.R. § 1.193(c). As a final determination has now been made, this matter is again before me for consideration of the application for attorney fees in the amount of $18,090.00, which has been submitted in this action by for services provided by William J. Cook, Esquire, as Caudill's attorney, and for the further sum of $2,648.55 for costs and expenses incurred. The record reflects that the application was served upon counsel for the Respondent; however, it is apparent that no agreement was reached between the Respondent and Mr. Cook concerning the attorney or costs and expenses. To the contrary, as apparently is routine practice by certain attorneys in the Department's Office of General Counsel, rather than filing an answer, on March 29, 2013, the Administrator moved to strike the application as being premature, or in the alternative, requested stay of the proceedings. In the Agency Motion to Strike the Petitioner's Application, counsel suggests that the application was filed prematurely as a party may request attorney's fees and costs "**within 30 days after final disposition** of the proceeding by the Department." 7 C.F.R. § 1.193(a) (emphasis supplied). A careful reading of the regulation, however, reflects that counsel's argument ignores and fails to take into account the clear and unambiguous language of section 1.193(a), which without ambage reads in pertinent part:

[7] *In re:* Jennifer Caudill, 73 Agric. Dec. _____ (U.S.D.A. 2014), 2014 WL 4311060, at *2.

> (a) An application may be filed **whenever the applicant has prevailed in the proceeding or in a significant or discrete substantive portion of the proceeding**, but in no case **later** than 30 days after final disposition….

7 C.F.R. § 1.193(a) (emphasis supplied).

I find that, while obviously not a final disposition of the case, prevailing before an administrative law judge following an oral hearing satisfies the requirement of prevailing in a significant or discrete substantive portion of the proceeding,[8] and I will decline to find the application to have been filed prematurely[9] or to strike the application.[10]

When costs of the action and attorney fees are awarded, the traditional and usual starting point for determining the amount of a reasonable attorney fee is an examination of the number of hours reasonably expended multiplied by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Reasonableness is required in both the number of hours billed and the rate sought and parties seeking an award "should submit

---

[8] *See* 7 C.F.R. § 1.193(b) ("For the purposes of this subpart, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as settlement or voluntary dismissal, become final and unappealable, both within the Department and to the courts."

[9] *Cf. In re:* Bodie Knapp, 72 Agric. Dec. _____ (U.S.D.A. 2013), 2013 WL 8213607 at *12. (Currently pending on appeal before the Court of Appeals for the Fifth Circuit). In that case, the Judicial Officer faulted the Chief Administrative Law Judge for opining that EAJA fees were warranted *prior* to the adverse party's applying for the fees and expenses under EAJA and a final determination had been made.

[10] In its "Agency Motion to Strike Application or Request to Stay Proceedings," the Department cites two cases to support its contention that Ms. Caudill's application for attorney's fees is "premature": *Aranov v. Napolitano,* 562 F.3d 84, 87 n.3 (1st Cir. 2009) and *In re: Asakawa Farms*, 50 Agric. Dec. 1144, 1164 (U.S.D.A. 1991). It should be noted that both cases cited predate the Supreme Court opinion in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001) in which the Court surveyed its precedent on the issue of prevailing parties. Even were the cases cited applicable to this case, the position by the agency taken conflicts with the Department's regulation which permits the filing of an application upon prevailing in the proceeding or in a significant or discrete substantive portion of the proceeding. 7 C.F.R. § 1.193(a). Further, the language attributed to *Aranov* inaccurately cites 5 U.S.C. § 504(a)(2) as that provision contains no mention of "may only," but rather indicates that the application shall be filed within 30 days of a final determination having been made.

evidence supporting the hours worked and the rates claimed." *Id.* at 433, 437. In the instant case, the application contains a detailed chronological listing of services performed by date together with a brief description of the service and the amount of time expended on each occasion.

Where, as in this case, the fees and costs are being paid pursuant to the Equal Access to Justice Act (EAJA) (*See,* 7 C.F.R. § 1.182), three separate issues must be decided: (1) whether the Applicant is a prevailing party; (2) whether the Secretary's position was substantially justified; and if both prior conditions are met, (3) exactly what fees, costs and expenses submitted by the Applicant are allowable.

The framework for the analysis of a party's status as a "prevailing party" is set forth in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources,* 532 U.S. 598 (2001). In *Buckhannon*, the Supreme Court surveyed its precedent on the issue of prevailing parties and made several observations. Initially, the Court noted that the term "prevailing party" is a legal term of art and that in accordance with both its precedent and Black's Law Dictionary a prevailing party is "one who has been awarded some relief by the court." *Buckhannon*, 532 U.S. at 603. The Court found that a party must "receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 604 (*quoting Hewitt v. Helms,* 482 U.S. 755, 760 (1987)). Even an award of nominal damages will suffice. *Id.* (*citing Farrar v. Hobby,* 506 U.S. 103 (1992)). Similarly, the Court looked at whether there was a court ordered change in the legal relationship of the parties. *Id. (citing Texas State Teacher's Ass'n. v. Garland Independent School District*, 489 U.S. 782 (1989). In the instant case, although the license was terminated for other unrelated reasons, as the determination of unfitness

which was reversed is no longer being questioned, the requirement to be a prevailing party has been met.

By statute, no award can be given if "the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A). The burden of proof is upon the Secretary. *Lundin v. Mecham,* 980 F.2d 1450, 1459 (D.C. Cir. 1992). The findings set forth in my decision in the termination action regarding the egregiously improper conduct of the Regional Director, Animal Care, APHIS need not be recounted in concluding that, although Ms. Caudill's license was in fact ultimately terminated, the Petitioner prevailed on the most serious issues raised in the Order to Show Cause. By requesting and securing dismissal based upon mootness and upon a regulatory provision unrelated to the allegations raised in the Order to Show Cause, Applicant possibly very wisely abandoned and hence has now waived any review of my reversal of the Administrator's determination that Caudill was unfit to be licensed. As I find that APHIS was not substantially justified in including allegations which have since been abandoned, the award of attorney's fees and expenses is warranted. *See, Fox v. Vice,* 563 U.S. _____(2011). In *Fox,* the Supreme Court articulated a "but for" test, allowing that portion of the fees that the party would have incurred because of, but only because of, what in that action was termed a frivolous [non-prevailing] claim. *Slip Op at* 8.

Where a party prevails on some but not all issues, the award of attorney fees must be calculated so as to reflect only that portion of the billing which was successful. In this action, the termination of the license by reason of failing to remit the necessary annual license renewal fee is completely separate, independent from, and unrelated to the

allegations contained in the Complaint which were resolved favorably to Ms. Caudill in my decision.

Counsel for the prevailing party is ethically obligated to make a good faith effort to exclude from any fee request such hours that are excessive, redundant, or otherwise unnecessary, using appropriate "billing judgment." *Hensley*, 461 U.S. at 434. It will be noted that Mr. Cook represented both Mr. Kalmanson and Ms. Caudill, and while the combined billing of both Petitioner and Mr. Kalmanson is not before me for examination or evaluation, there was no objection interposed by Applicant as to the number of hours billed or the expenses claimed which were itemized.[11] Further, it appears from Mr. Cook's affidavit that the Caudill expenses were segregated and that the required mandate has been adhered to.

In his application, Mr. Cook indicates that his "customary billing rate" is $350.00 per hour based upon the prevailing rate in the Tampa Bay area for the type of representation performed.[12] Under EAJA, the fees available to a prevailing party are "those reasonable and necessary expenses of an attorney incurred or paid in preparation for trial of the specific case before the court, which expenses are those customarily charged to the client where the case is tried." *Oliveira v. United States*, 827 F.2d 735,744 (Fed. Cir. 1987). In setting an appropriate hourly rate, substantial discretion rests with courts and factors normally not considered include the difficulty of the issues, the ability of counsel, or the results received. *Pierce v. Underwood*, 487 U.S. 552, 572 (1988).[13]

[11] It similarly is noted that the application was not supplemented to reflect any additional time expended or expenses incurred after the filing of the application.
[12] *Cf.* Laffey matrix adopted by the Civil Division of the United States Attorney's Office for the District of Columbia which provides an enhanced fee for professional services performed before that court.
[13] The Court in *Hensley* however considered the results achieved to be significant. *Hensley* 461 U.S. at 436.

While it is clear that enhanced hourly rates are frequently awarded by Article III Courts using local, the Laffey, or other matrices, in the absence of a stipulation as to fees at a higher rate, the Department's well-established position on the maximum rate allowable which I am compelled to follow is currently limited to $150.00 per hour. Accordingly, a fee of $18,090.00 will be allowed for attorney fees and the amount of $2,648.55 will be allowed for costs and expenses.

Being sufficiently advised, it is **ORDERED** as follows:

1. Attorney fees in the amount of $18,090.00 are awarded to William J. Cook, Esquire for his representation as attorney for Jennifer Caudill in the above-styled case.

2. The sum of $2,648.55 will be awarded for costs and expenses incurred.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

September 14, 2014

_____

Peter M. Davenport
Chief Administrative Law Judge

Copies to: William J. Cook, Esquire
Colleen A. Carroll, Esquire

Hearing Clerk's Office
U.S. Department of Agriculture
1400 Independence Avenue SW
Room 1031, South Building
Washington, D.C. 20250-9203
202-720-4443
Fax: 202-720-9776