

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

GLEN EDWARD STEWART

Respondent

Docket No: 07-0387
CG Enforcement Activity No: 3000322

ORDER DENYING RESPONDENTS VERIFIED APPLICATION FOR ATTORNEY
FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT

Issued: November 18, 2008

Issued by: HON. BRUCE T. SMITH, Administrative Law Judge

This matter comes for decision on Glen Edward Stewart's (Applicant) Verified Application dated September 25, 2008 for attorney fees and expenses under the Equal Access to Justice Act (EAJA) filed with the ALJ Docketing Center on September 29, 2008. The Applicant, here, was referred to as the "Respondent" in the Coast Guard Suspension and Revocation hearing which gave rise to the instant EAJA claim. For the sake of continuity, the name "Applicant" has been substituted for "Respondent" throughout this Order.

The EAJA has two parts: one involves fees awarded through judicial proceedings pursuant to 28 U.S.C. § 2412, and the other, at issue here, involves an award of fees by an

administrative agency pursuant to 5 U.S.C.A. §504(a)(1) (1991). The standards for recovery under both statutes are the same and will be outlined below.

Pursuant to 5 U.S.C. 504 and 554, 49 CFR 6.13, 46 CFR 1.01-20, 33 CFR 20.201 and 20.202, the Chief Administrative Law Judge assigned this matter to the undersigned on August 12, 2008.¹

Background

This EAJA claim arises following an unsuccessful adverse action brought by the Coast Guard against Applicant's mariners' credential for his alleged use of illegal drugs.

At the due-process hearing, the Coast Guard was obliged to prove by a preponderance of the evidence that the Applicant used or was addicted to the use of dangerous drugs. Toward that end, the Coast Guard offered proof of three essential elements in an effort to establish a prima facie case of use or addiction to the use of dangerous drugs: 1) that the mariner submitted a urine sample for testing; 2) that the sample produced a positive result for illegal drugs and; 3) that the testing was conducted in accordance with 49 CFR Part 40. See Appeal Decision 2662 (VOORHEIS) (2007).

The Coast Guard successfully proved the first two elements: i.e., the Applicant submitted a urine sample and that the sample tested positive for marijuana. The Coast Guard, however, was unsuccessful in its attempt to prove the third element - that Applicant's urine sample was conducted in accordance with controlling regulatory

¹ Sec. 103 (c) of the Homeland Security Act, Pub. L. No. 107-296, 116, Stat. 2135, 2144, 6 U.S.C. § 113 (c) transferred the Coast Guard from the Department of Transportation to the Department of Homeland Security. The Act's Savings Provisions at § 1512, 116 Stat. 2135, 2310, 6 U.S.C. § 552, provide that completed administrative actions of an agency [e.g., regulations] shall not be affected by the enactment of this Act or the transfer of such agency to the Department but shall continue in effect according to their terms until amended, modified, superseded, terminated, set aside, or revoked in accordance with law by an officer of the United States or a court of competent jurisdiction, or by operation of law.

authority. The undersigned specifically notes that the Coast Guard's failure in regard to the third element was not based on a finding that there was not adequate evidence in existence—but, rather, it was based on the failure of the Coast Guard to properly present and adequately prove that information's existence in a legally admissible and relevant manner. The Coast Guard simply did not ask the right questions or present the right documents at the hearing. This was perhaps a result of the Coast Guard investigating officer not being an attorney, as is customary in suspension and revocations proceedings. The undersigned specifically found that the Coast Guard did not establish a prima facie case for use or addiction to the use of dangerous drugs based on a positive urinalysis because it did not establish that the drug test was conducted in accordance with 49 CFR Part 40.

While there was some questionable aspects of the underlying test in this case, the undersigned did not find that improper proper testing had occurred. Instead the undersigned found that the Coast Guard failed to affirmatively prove that proper testing had occurred.

Respondent's Application

The Applicant's abbreviated petition for attorneys' fees and costs correctly points out that Applicant was the prevailing party. In support of his claim, the Applicant cites no legal authority and only advances the undersigned's findings that the urine testing was not conducted in accordance with 49 CFR Part 40.

The Coast Guard's Response

By contrast, the Coast Guard brief is highly detailed in its recitation of facts related to the hearing and controlling legal authority. The Coast Guard brief describes, with particularity, that the Applicant's urine sample tested positive for THC by two distinct procedures at Kroll Laboratories. The Coast Guard response also correctly highlights the fact that the Applicant's "split specimen" likewise tested positive for THC at a separate testing facility, Elsoholy Labs.

APPLICABLE LAW

These proceeding are covered by 5 U.S.C. §504 and 554 *et seq.* and the current implementing regulations at 49 CFR Part 6.

The pertinent part of The Equal Access to Justice Act, ("Act") Pub. L. 96-481, 94 Stat. 2325, codified at 5 U.S.C. §504, provides,

(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. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(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. When the United States appeals the underlying merits of an adversary adjudication, no decision on an

application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

* * *

5 U.S.C. 504.

Title 49 CFR 6.5 provides that the “Act” applies to “Coast Guard suspension or revocation of licenses, certificates or documents under 46 U.S.C. 7701 *et seq*” among other things. Section 6.7 provides, in pertinent part, that the applicant must be a party (emphasis added) to an adversary adjudication for which it seeks an award and that the applicant meets all conditions of eligibility set out in the regulations.

Title 49 CFR 6.9 provides, in pertinent part,

(a) An eligible applicant may receive an award for fees and expenses incurred by that party in connection with a decision in favor of the applicant (emphasis added) in a proceeding covered by this Part, unless the position of the Department over which the applicant has prevailed was substantially justified or special circumstances make the award sought unjust. The burden of proof that an award should not be made to an eligible applicant is on the Department where it has initiated the proceeding. No presumption arises that the Department’s position was not substantially justified simply because the Department did not prevail. Whether or not the position of the Department was substantially justified shall be determined on the basis of the administrative record, as a whole, in the adversary adjudication for which fees and other expenses are sought. The ‘position of the Department’ means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the Department upon which the adversary adjudication may be based.

Subpart B of Title 49 CFR Part 6 – Information Required from Applicants, lists the requirements for filing an application: a showing that the applicant has prevailed (emphasis added) and identifying the position of an agency that the applicant alleges was not substantially justified; a statement of the applicant’s net worth; the amount of fees and expenses for which the award is sought; a written verification under oath that the information provided is true and correct; a net worth exhibit; and documentation of fees and expenses.

Subpart C of Title 49 CFR Part 6 – Procedures for Considering Applications, lists the requirements for filing and service which the Applicant has followed. It also provides that within 30 calendar days after service of an application, the agency counsel may file an answer to the application or a request for an extension of time to file answer. Failure to file an answer within the 30 day period may be treated as consent to the award request. The Coast Guard Investigating Officer filed a timely Answer. The remainder of the subpart provides that the parties may settle, and, if appropriate, additional proceedings may be held.

Finally, the regulations at 49 CFR 6.33 provide that the Administrative Law Judge shall issue an initial decision containing findings, if at issue, on whether the Department’s position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. (Emphasis added). Either party may seek review of the decision or the Department may decide to review the decision on its own initiative. Otherwise, the initial decision becomes final 30 days after it is issued.

Findings of Fact

1. As a respondent in a Coast Guard suspension and revocation proceeding conducted under 46 U.S.C 7701 *et seq.*, Applicant Glen Stuart was a “prevailing party” within the meaning of 5 U.S.C. 504(b)(1)(B) and 49 CFR 6.7.
2. On March 20, 2008, the hearing commenced as scheduled in New Orleans, LA. Both parties appeared and presented their respective cases. Three (3) witnesses testified as part of the Coast Guard’s case-in-chief. The Coast Guard offered seven (7) Exhibits into evidence, all of which were admitted.
3. Likewise, Applicant testified on his own behalf and called one (1) other witness to testify. Applicant offered eight (8) exhibits, all of which were admitted into evidence.
4. At the conclusion of the hearing, the parties each filed post-hearing briefs.
5. On July 3, 2008, the undersigned published a Decision and Order finding that the Coast Guard had failed to prove the allegations of drug use against the Applicant. Hence, the Applicant was the prevailing party in that proceeding.
6. On Aug 1, 2008, Applicant timely filed an incomplete, handwritten EAJA claim which, *inter alia*, did not contain all of the requisite elements of a proper EAJA claim. The Coast Guard did not respond.
7. On September 10, 2008 the undersigned conducted a telephone conference between the pro se Applicant and Coast Guard, wherein the undersigned gave Applicant 30 days to submit a complete and proper EAJA application.
8. On September 29, 2008 Applicant, through counsel Danatus King, submitted a full, complete and verified EAJA application.
9. On October 27, 2008 the Coast Guard filed its response to Applicant’s EAJA claim.
10. Applicant’s filing was timely.
11. The Coast Guard was substantially justified in bringing the adverse action against Applicant’s mariner’s credentials per 49 CFR §6.9(a); specifically in light of Applicant’s positive urinalysis which revealed the presence of a dangerous drug in his urine specimen.
12. The Coast Guard’s adverse action against Applicant’s mariner’s credentials failed because the Coast Guard could not prove by a preponderance of the evidence that the urine testing was performed in accordance with the technical requirements of 46 CFR Part 16 and, thus 49 CFR Part 40.
13. There were no facts adduced to suggest that the Applicant unduly protracted the proceedings nor were there any facts adduced suggesting that any special circumstances were present.

Discussion

Timeliness of Applicant's EAJA Claim. I allowed the Applicant to file an amended EAJA claim clearly outside of the 30-day time period prescribed for EAJA applications. Although his initial application was filed timely, it was incomplete in that it lacked information required by the applicable regulations. In allowing Applicant to supplement and amend his EAJA claim, I took guidance from *Becker v. Montgomery, Attorney General of Ohio, et al*, 532 US 757 (2001), where the Court said that a pro se litigant's failure to follow the exacting standards of a filing statute was not fatal to his application or appeal. This is especially true in the case of an EAJA claim wherein the EAJA statute was clearly written for, and directed toward, attorneys. *Scarborough v. Principi, Secretary of Veterans Affairs*, 541 US 401 (2004).

Substantial justification. The application for an award of attorney fees and costs under EAJA is also subject to denial because the government's position was "substantially justified." Title 49 CFR 6.9(a) provides that "[a]n eligible applicant may receive an award for fees and expenses incurred by that party in connection with a decision in favor of the applicant in a proceeding covered by this Part, unless the position of the Department over which the applicant has prevailed was substantially justified."

The standard for "substantial justification," within the meaning of EAJA, is simply one of reasonableness. To avoid award of fees, the proceeding must have a reasonable basis in law and fact. It is necessary to examine both the state of the law and the facts in the record to determine whether there was substantial justification for the agency's position. Frey v. Commodity Futures Trading Commission, 931 F.2d 1171,

1174 (7th Cir. 1991), *rehearing and rehearing en banc denied*. (Commodity Futures Trading Commission's enforcement proceeding against commodities broker for price manipulation had reasonable basis in law and fact and, thus, broker was not entitled to attorney fees under EAJA for fees incurred in successfully defending himself).

At the administrative level, the burden is on administrative agency to prove that an attorney fee award should not be made under EAJA. Charger Management, Inc. v. N.L.R.B., 768 F.2d 1299, 1301 (11th Cir. 1985). For instance, in Bruch v. United States Coast Guard, an application for an award of attorney fees and costs under EAJA was denied even though the docking masters in the underlying action successfully defended against misconduct citations for allegedly docking boats without the requisite license. 749 F.Supp. 688 (E.D.Pa.1990). On appeal, the critical question for the district court judge was whether the Coast Guard's position - the stance it took in the administrative hearing, its basic rationale for the issuance of the citations - was "substantially justified." Id. at 693. The district court held that the test is not whether the Coast Guard's position was ultimately correct but only whether a reasonable person could countenance the Coast Guard's position in the particular context of the dispute. Id.

In holding that the Coast Guard's position was substantially justified, the district judge relied on Pierce v. Underwood, 487 U.S. 552 (1988). In Pierce, Justice Scalia, writing for the majority, stated that the phrase "substantially justified" does not mean "justified to a high degree," but rather "justified in substance or in the main-that is, justified to a degree that could satisfy a reasonable person." Bruch, 749 F.Supp. at 694 (citing Pierce, 487 U.S. at 556). Justice Scalia noted that "a position can be justified even though it is not correct, and we believe it can be substantially (*i.e.*, for the most part)

justified if a reasonable person could think it correct; that is, if it has a reasonable basis in law and fact.” Id. (citing Pierce, 487 U.S. at 566 n. 2; see also Russell v. Heckler, 866 F.2d 638 (3d Cir.1989)).

Finally, in INS v. Jean, 496 US 154 (1990), the Court provided guidance that a determination of “substantial justification” rests on whether the government made a good faith effort to analyze the issues as they were known at the time or whether the government unreasonably forced litigation without justification. Id at 159, fn. 7.

Applying the facts to the law

A review of the entire administrative record, here, shows that the Coast Guard had a reasonable basis in both law and fact to initiate these proceedings.

Basis in law. To promote safety at sea, 46 U.S.C. §§7701 *et seq.* provides the legal authority for the Coast Guard to initiate suspension and revocation proceedings. Section 7703 provides that licenses, certificates of registry, or merchant mariner’s documents may be suspended or revoked for “misconduct” and “negligence,” among other things. Title 46 CFR sections 5.29 and 5.33 define negligence and misconduct respectively. Suspension and Revocation proceedings are remedial and not penal in nature and are “intended to help maintain the standards of competence and conduct essential to the promotion of safety at sea.” 46 CFR §5.5. The Commandant delegated to Administrative Law Judges the authority to suspend or revoke a license, certificate, or merchant mariner’s document for violations arising under 46 U.S.C. §§7703 and 7704. *See* 46 CFR §5.19. Here, the Coast Guard charged Respondent under 46 U.S.C. § 7704(a) and 46 CFR §5.35 alleging his use of dangerous drugs. Thus, the Coast Guard sought revocation of Applicant’s merchant mariner’s credentials.

The allegations of illegal drug use described above in the Complaint and the Amended Complaint conformed to the requirements of 46 U.S.C § 7703 and 46 CFR §§5.29 and 5.33. Therefore, I find that the Coast Guard had a reasonable basis in law to initiate the underlying proceedings.

Basis in Fact. In the instant case, the Coast Guard sought revocation of Applicant's mariner's credentials because he failed a Department of Transportation-mandated urine test for the presence of dangerous drugs. The facts revealed that he tested "positive" for the presence of THC-the psycho-active ingredient in marijuana.

After the hearing, the undersigned made the following salient findings of fact:

1. Applicant holds a Coast Guard-issued merchant mariner's license number 1095579 and a Coast Guard-issued merchant mariner's document.
2. The Applicant provided a urine sample to Pelican State on or about June 29 2007.
3. The Applicant's urine sample tested positive for a dangerous drug, i.e., marijuana.
4. The Coast Guard did not establish that Applicant was tested in accordance with Part 40.
5. The Coast Guard did not establish a prima facie case for use or addiction to the use of dangerous drugs based on a positive urinalysis because it did not establish that the drug test was conducted in accordance with 49 CFR Part 40.

It is noteworthy that in a Suspension and Revocation action based upon an allegation of illegal drug use, the Coast Guard must prove three essential elements in order to establish a prima facie case of illegal drug use: 1) that the mariner submitted a urine sample for testing; 2) that the sample produced a positive result for illegal drugs and; 3) that the testing was conducted in accordance with 49 CFR Part 40. See Appeal Decision 2662 (VOORHEIS) (2007).

Of the three elements, the most salient for the present purpose was the finding that the Applicant tested positive for the presence if illegal drugs in his urine. The Coast

Guard was not only substantially justified, but was actually duty-bound to proceed against his credentials in light of the test results which eventually led to this finding.

The Coast Guard subsequently failing to prove the third element, i.e., that the testing was conducted in accord with 49 CFR Part 40, speaks more to the exigencies of courtroom proof than it does to the propriety of proceeding, *ab initio*. It is important to note that determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the Administrative Law Judge. See Appeal Decision 2640 (PASSARO) (2003). Also, the Administrative Law Judge is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. Appeal Decision 2639 (HAUCK) (2003).

These are the functions of the Administrative Law Judge and whether the undersigned believed or disbelieved a given witness in a hearing—or whether the Coast Guard failed to adequately present evidence to establish facts necessary to prove one element of a drug case by a preponderance of the evidence—is not dispositive on the issue of whether the Coast Guard had a good-faith justification for proceeding against the Applicant's credentials.

As previously discussed, the Coast Guard had not just a good-faith justification, but an actual duty to bring this proceeding because of the positive drug test results at issue in this case. The Coast Guard was therefore substantially justified in bringing the adverse action against Applicant's mariner's credentials per 49 CFR §6.9(a); specifically in light of Applicant's two positive urinalysis tests which revealed the presence of an illegal drug in his urine specimen.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that having found the Coast Guard's position was "substantially justified" in law and fact, the Applicant's fee application is **DENIED**.

Done and dated this ____ day of November 2008 at
New Orleans, LA

HON. BRUCE T. SMITH
Administrative Law Judge
United States Coast Guard