

**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
UNITED STATES COAST GUARD**

**UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD,  
Complainant,**

**vs.**

**JOHN P. LOVE, JR.,  
Respondent**

**Docket Number: 99-0187  
Case Number: PA99001173**

**BEFORE: JOSEPH N. INGOLIA  
Chief Administrative Law Judge**

**ORDER DENYING RESPONDENT'S VERIFIED AND SUPPLEMENTAL  
APPLICATION FOR ATTORNEYS' FEES AND OTHER EXPENSES UNDER  
THE EQUAL ACCESS TO JUSTICE ACT**

On August 15, 2000 the Respondent filed a request<sup>1</sup> for attorneys' fees and other expenses (Verified Application) pursuant to the Equal Access to Justice Act (EAJA).

The Verified Application follows the award of the Respondent's original EAJA claim in which the Coast Guard and the Respondent filed a Stipulated Settlement Agreement to award the Respondent attorneys' fees and other expenses under the EAJA. The undersigned approved the Application and Stipulated Settlement Agreement following the clarification and correction of the original EAJA Application and Settlement Agreement through the use of a Show Cause Order. The approval was based on the

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<sup>1</sup> The Respondent's request is entitled, Respondent's Verified Application for Award of Attorneys' Fees and Other Expenses Pursuant to the Equal Access to Justice Act, 49 C.F.R. Part 6 and Other Law. In addition to this EAJA request, the Respondent filed a (1) Petition for Rulemaking or Exemption for Attorney Fee Rate In re United States v. John P. Love, Jr.; Docket No. 99-0187, (2) Affidavit in Support of Petition to the Department of Transportation for Attorney Fee Rate Pursuant to 49 C.F.R. Part 5, (3) FOIA Request In re United States v. John P. Love, Jr.; Docket No. 99-0187, and (4) Respondent's Memorandum in Support of Application for Attorney Fees and Expenses Pursuant to EAJA, 49 C.F.R. Part 6, and Other Law.

determination that the parties desired to settle the original EAJA claim in order to avoid trial hazards and costs associated with whether or not the Coast Guard was substantially justified in filing its Complaint against the Respondent. The Respondent now seeks additional attorneys' fees and expenses incurred during the time period required to approve the parties Stipulated Settlement Agreement. Specifically, the Respondent, after submitting a Stipulated Settlement Agreement with his original EAJA Application now seeks additional EAJA fees outside of his agreed upon Stipulated Settlement Agreement for costs incurred to respond to the Show Cause Order. He also requests that the record be held open to allow him to make further submissions for additional attorneys' fees.

#### I. FINDINGS OF FACT

1. On September 10, 1999, the United States Coast Guard (the "Agency") filed a Complaint against the Respondent, John P. Love, Jr., charging him with the Use of or Addiction to the Use of Dangerous Drugs in violation of 46 U.S.C. § 7704(c) (West Supp. 1999). The Complaint alleged that the Complainant took a drug test and tested positive for Marijuana Metabolite.
2. On September 24, 1999, the Respondent filed an Answer to the Complaint together with a Motion to Dismiss or in the alternative, a Motion for Summary Decision and a Motion for an Expedited Hearing, together with a Memorandum in Support of Respondent's Motion. The Motion to Dismiss asked for the payment of the Respondent's costs and attorneys' fees by the Agency.

3. The Coast Guard filed a reply to the Motions filed by the Respondent on October 18, 1999, together with a Memorandum to Support Coast Guard's Reply Motion.
4. By Decision and Order dated October 27, 1999, the presiding Administrative Law Judge (ALJ) <sup>2</sup> dismissed the Coast Guard's Complaint. The Decision and Order contained no Findings of Fact and did not consider or even acknowledge the Respondent's request for costs and attorneys' fees. The holding made no determination under the Equal Access to Justice Act (EAJA).
5. By Application dated December 23, 1999, the Respondent moved for an award of attorneys' fees and other expenses pursuant to 49 C.F.R. Part 6 (1999). The Application was submitted with a Stipulated Settlement Agreement (Agreement) between the parties, pursuant to the provisions of 5 U.S.C. §504, the Equal Access to Justice Act and 49 C.F.R. Part 6. In the Agreement the parties agreed that the Agency would pay \$10,000 to the Respondent for attorneys' fees and expenses.
6. The Application for an EAJA award was assigned to the undersigned. The Agreement accompanying it contained a provision waiving documentation, which documentation is required by the EAJA statute and the regulations. On February 7, 2000, the undersigned issued an Order to Provide Documentation for Respondent's Motion Pursuant to the Equal Access to Justice Act, 49 C.F.R. Subpart B, noting that the law required proper documentation of fees and expenses and hourly rate charges to be filed with the Application and that such documentation could not be waived.
7. By submission received on February 23, 2000, the Respondent supplied the documentation required by the EAJA and the pertinent regulations.

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<sup>2</sup> The presiding ALJ retired in December of 1999.

8. In further reviewing the Application and the Agreement, the undersigned undertook to ascertain whether or not they complied fully with the requirement of the EAJA and the pertinent regulations. The regulations provide that:

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 . . . *unless the position of the Department over which the applicant prevailed was substantially justified . . . .*

(emphasis added)

and that,

no presumption arises that the Department's (Coast Guard) position was not substantially justified simply because the Department did not prevail.

(parenthesis supplied)

9. In reviewing the Agreement in the light of the EAJA statute, the pertinent regulations and the applicable case law, as well as the record made in this case,<sup>3</sup> it became clear that there was a material, unresolved question regarding whether or not the Agency was substantially justified in filing the Complaint in this case. Not only was the Coast Guard silent on this question in the Stipulated Agreement, but rather than indicate that the Coast Guard was not substantially justified, the record in the case indicated that the Respondent had tested positive in a properly administered drug test and that Coast Guard policy was to seek revocation of a mariner's license or document when that occurred.<sup>4</sup>

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<sup>3</sup> The Decision and Order dismissing the Complaint failed to find any facts or resolve obvious factual differences or answer pertinent questions that were relevant to the issues raised by the EAJA Application and Agreement

<sup>4</sup> G-MOA policy Ltr 3-99, dated August 4, 1999. It states in pertinent part: "[W] here evidence indicates that a mariner has used a dangerous drug, i.e. positive drug test or other evidence of use, IOs shall pursue revocation of the merchant mariner's credentials (MMC) under 46 USC § 7704 (c)."

10. Given the ambiguity of the Application and Agreement, and the questions raised by the record regarding substantial justification, the undersigned, on April 28, 2000, issued an Order to Show Cause Why the Application for Attorneys' Fees and Other Expenses Pursuant to the Equal Access to Justice Act Should Not be Denied (Show Cause Order). A Show Cause Order was used rather than the scheduling of additional hearings on the matter to avoid undue expense and delay. The undersigned contemplated that the Show Cause Order would cause the parties to respond in support and clarification of their Agreement.
11. The parties did respond and on May 9, 2000, the parties had a telephone conference with the undersigned. In it he explained the requirements of the EAJA and specifically noted that the parties needed to clarify whether or not they were agreeing that the Coast Guard was not substantially justified in filing the Complaint. The undersigned also noted that the record contained evidence involving a positive drug test and the Coast Guard's policy in such instances. After some discussion and after there was no oral agreement regarding the issue of substantial justification during the telephone conference the undersigned directed the parties to file a written response to the Show Cause Order.
12. In its reply to the Show Cause Order, received on May 23, 2000, the Coast Guard acknowledged that it had agreed to settle the Respondent's EAJA claim for attorneys' fees and expenses for \$10,000. As to the question of whether or not the Coast Guard was agreeing that it was not substantially justified in filing the Complaint, it stated:

The Agency's decision to stipulate the award for attorneys' fees expenses in this matter was done in the public's interest and exclusively for the purpose of settling the captioned matter without further litigation and attendant costs. *Nothing herein shall be construed*

as an admission of fault or liability on the part of the Agency,  
or *that the Agency was not substantially justified in filing a Complaint  
initiating subject case.*

(emphasis supplied).

13. In his response to the Show Cause Order the Respondent states:

. . . any question raised by the Show Cause Order  
has been answered by the admission by counsel for  
the Agency that the position of the Agency was not  
“substantially justified.”

and further that:

. . . the record shows that by agreement the Agency  
has consented to the award. Therefore, the Agency  
has *de facto* agreed that its position in the underlying  
action was “not substantially justified.”

14. By Order dated June 16, 2000, the undersigned granted the Respondent’s EAJA

Application and the Agreement was approved. The Order states:

. . . it is evident that the parties agreed to settle the claim for  
an EAJA award on the basis of trial hazard and cost. These  
are certainly acceptable and appropriate reasons to settle  
disputed issues involving EAJA claims.<sup>5</sup>

15. The Order granting the EAJA Application and approving the Agreement specifically  
provides:

If neither the Applicant nor the Agency seek review within 30  
(thirty) days after issuance of the Order, this decision will become  
final. For purposes of this action the department of review is the  
United States Coast Guard. An appeal of this Order may be filed  
using the process as described in 33 C.F.R. Subpart J (1999). A  
copy of Subpart J is attached to this Order.

The Order also provided that:

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<sup>5</sup> The trial hazard involved relates to the question of whether or not the Coast Guard was substantially justified in filing the Complaint in this case. Since the Coast Guard took no position on the question and did not allege it was substantially justified, the EAJA award could be made without violating the EAJA requirement contained in the law itself.

[I]f the parties believe this matter should remain open for further hearings on the issues that they believe important and relevant and wish to hold the final approval of the EAJA award in abeyance until those issues are considered, they should so move.

16. Neither the Agency nor the Respondent appealed the Order approving the EAJA award and Settlement Agreement. By letter dated July 24, 2000, to the Coast Guard's legal officer the Respondent stated:

Further to our telephone conversation last week and pursuant to 49 CFR § 6.39, Respondent hereby requests immediate payment of the award of attorneys' fees and expenses . . .

17. On August 15, 2000, the Respondent filed Respondent's Verified Application for Award of Attorneys' Fees and Other Expenses Pursuant to the Equal Access to Justice Act, 49 C.F.R. Part 6, and Other Law (Verified Application). Contemporaneously he filed, Respondent's Memorandum in Support of Application for Attorneys' Fees Pursuant to EAJA, 49 C.F.R. Part 6 and Other Law. In the Verified Application the Respondent seeks an additional EAJA award of \$18,947.81 over and above the \$10,000 he originally agreed to accept. In addition the Respondent's Memorandum "reserves the right to supplement this Application following the receipt of information requested from the Agency."

18. By letter to the undersigned dated August 31, 2000, the Respondent stated that he had made a FOIA request of the Agency, that he reserved the right to supplement his submission, "following receipt of the information from the Agency," and he requested that, "you permit us to supplement our application within 30 days after receipt of the information requested from the Agency."

19. In a letter to the undersigned dated September 13, 2000, the Respondent increases the amount of the Verified Application to \$20,630.75. In it he also states that he "thought

it useful to highlight our concerns about the necessity for receipt of agency documents,” and that, “ we first outlined our concerns about the bad faith of Complainant in our letter to you dated July 6, 2000, wherein we asked your Honor to revise the text of your order granting Respondent’s initial application for fees and expenses.”

20. In Respondent’s Memorandum supporting his Verified EAJA claim he states:

Because Respondent prevailed in this matter and the position of the Agency in the underlying adjudication and also through CALJ’s issuance of the Show Cause Order was not substantially justified, Respondent should be awarded additional attorneys’ fees and expenses pursuant to EAJA.

## II. ULTIMATE FINDINGS OF FACT

1. The Respondent applied for and received an EAJA award of \$10,000 as a result of a Stipulated Settlement Agreement with the Coast Guard. The award applied specifically to the action brought by the Coast Guard in this proceeding, which action was ended when the agreement was finally approved. Under the EAJA statute, the pertinent regulations at 49 C.F.R. Part 6 §§ 6.1 *et seq.*, and the applicable case law he cannot now receive an additional award arising out of the same action.
2. There are no extenuating circumstances that would warrant the setting aside of the Agreement entered into by the parties. When the Application for the EAJA award, together with the Agreement was approved, both the Respondent and the Agency were aware of the exact nature of their agreement and were contractually bound by it. By accepting the Agreement, by not appealing the Order Granting Respondent’s Request for Attorneys’ Fees and by requesting immediate payment, the Respondent is

bound by its terms and cannot later receive an additional EAJA award arising out of the same cause of action. This is especially true when, at the time the Respondent accepted the Agreement, did not appeal and requested payment, he knew or should have known of any additional claim for an EAJA award.

3. The record does not support the allegation that the Coast Guard was not substantially justified in filing the Complaint in this proceeding where it contains evidence that the Respondent tested positive for drugs and where existing Coast Guard policy mandated revocation of a mariner's document. Further, the Show Cause Order of the Administrative Law Judge cannot be imputed to the Coast Guard and is in no way related to any conclusion that the Coast Guard was not substantially justified in filing the Complaint in this proceeding.
4. Even if the prior settlement did not preclude the granting of an additional EAJA award, the record in this proceeding does not support the approval of any such EAJA award by way of "Verified Application" or otherwise. Neither the Show Cause Order nor any other action by the ALJ could form the basis of a new or additional EAJA award and no action by the ALJ can properly be imputed to the Coast Guard as a basis for granting an EAJA award.
5. The record in this case does not support the granting of the Respondent's request that his application for a supplemental EAJA award be held in abeyance.

### III. DISCUSSION

The EAJA statute and pertinent regulations are clear and concise. They provide at 49 C.F.R. § 6.5 that:

The Act applies to adversary adjudications conducted by the Department of Transportation. These are adjudications under 5 U.S.C. § 554 (the Administrative Procedures Act (APA)).

(parenthesis supplied)<sup>6</sup>

The regulation specifically refers to and includes cases involving the Coast Guard's suspension or revocation of licenses. The crux of the regulations is set forth at section 6.9 (a), Standards for Awards, which states in 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 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 regulations also provide at § 6.11 (b) that no award of a fee shall exceed \$125 per hour rate and sections 6.17 and 6.19 have to do with certain net worth requirements.

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<sup>6</sup> (1) The ALJ presides over these adjudications under the APA. (2) The regulations at 49 C.F.R. § 6.13 provides that the Secretary of Transportation has delegated authority to take final action in these matters to the head of the operating administration. In this case it is the Commandant of the Coast Guard.

Section 6.21 states that:

- (a) The application shall be accompanied by full documentation of fees and expenses . . .

and that,

- (b) The documentation shall include an affidavit from any attorney, agent or expert witness representing or appearing in behalf of the party . . .

Section 6.29 of the 49 C.F.R. is particularly significant in this case which involves a proposed settlement. It states:

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded, in accordance with the agency's standard settlement procedure.<sup>7</sup> If a prevailing party and the agency counsel agree on a proposed settlement of an award before an application has been filed the application shall be filed with the proposed settlement.

In applying the applicable law and regulations in this case, it is clear that consideration of the Respondent's Verified Application for an EAJA award must begin with the obvious threshold question of whether or not the Respondent can receive an additional EAJA award in this particular case after he has entered into a good faith

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<sup>7</sup> The "agency's standard settlement procedure," refers to the Coast Guard's regulations at 33 C.F.R. § 20.502 (1999) which provides that:

- (a) The parties may submit a proposed settlement to the ALJ.
- (b) The proposed settlement must be in the form of a proposed decision, accompanied by a motion for its entry. The decision must recite the reasons that make it acceptable, and it must be signed by the parties or their representatives.
- (c) The proposed decision must contain – (1) An admission of all jurisdictional facts; (2) An express waiver of – (i) Any further procedural steps before the ALJ; and (ii) All rights to seek judicial review, or otherwise challenge or contest the validity, of the decision; (3) A statement that the decision will have the same force and effect as would a decision made after a hearing; and (4) A statement that the decision resolves all matters needing to be adjudicated.

agreement with the Coast Guard to settle the matter, after the settlement has been approved by the ALJ, after he has demanded payment in accordance with the agreement and after he has failed to appeal the ALJ's decision.

It is well settled that where parties in good faith reach a settlement in an adversarial proceeding it is "a contract and once entered into is binding and conclusive." Janneh v. GAF Corporation, 887 F.2d 432, 436 (2<sup>nd</sup> Cir. 1989). "An agreement to compromise and settle a claim may be enforced as a contract . . . ." Interspace Inc. v. Morris, 650 F. Supp. 107, 109 (S.D.N.Y. 1986). That legal tenet is particularly compelling in this case because the settlement agreement, as approved, was not susceptible of any misunderstanding. Not only was it necessary to invalidate any waiver and order submission of fiscal records, but there was specific clarification in the Order approving the Application and Agreement that the settlement was actually based on the trial hazards involved on the question of whether or not the Coast Guard was substantially justified in filing the Complaint in this case. See Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1079 (2<sup>nd</sup> Cir. 1995) (the court's focus is to "determine whether a proposed settlement is fair, reasonable, and adequate," by comparing "the terms of the compromise with the likely rewards of litigation"). Finally, throughout the entire settlement process the parties were completely aware of any additional fees and costs that may have altered the original amount agreed upon. Neither party sought to amend the agreement or to appeal the Order approving it, and the Respondent did not depart from his view that, "there are no disputed issues between the parties regarding the Stipulation for fees and expenses."

So here, it is held that the Original Application for an EAJA award and the Settlement Agreement submitted with it are valid and binding on the parties. In so holding it is well to note that the Respondent, neither in the Application itself nor in his supporting memorandum, ever addresses the effect of his agreeing to the settlement of the original EAJA claim arising from this proceeding. On the other hand, the Coast Guard takes the position that awarding the new claim (Verified Application):

. . . after a final settlement discourages the Agency from entering into settlements, is contrary to the Requirements of the EAJA, and penalizes the Agency. The fee decision should be accorded finality and the application should be dismissed.

The undersigned agrees. The claims for any additional EAJA award for any reason are invalid and any issues raised by such claims are moot. See Murphy v. Hunt, 455 U.S. 478, 481 (1982) (issues presented are no longer live and thus parties lack a legally cognizable issue); In re Lybarger, 793 F.2d 136 (6<sup>th</sup> Cir. 1986) (consent decree upheld to waive appellate rights for attorneys' fees).<sup>8</sup> Even if, for the sake of argument, the prior Application and Agreement did not moot issues raised by the Verified Application, the Verified Application would be denied. While the undersigned will not revisit many arguments made in the Respondent's supporting memorandum,<sup>9</sup> the basis of the new Verified Application requires comment. In his Supporting Memorandum the Respondent refers to the Show Cause Order and states:

Respondent showed cause and his stipulated application was granted on June 16, 2000. On July 6, 2000, Respondent requested the CALJ to revise his Order granting attorneys' fees to delete the portion of the

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<sup>8</sup> See also Arizonans for Official English v. Arizona, 520 U.S. 43, 45 (1997) (an actual controversy must be present at all stages of review); United States v. Munsingwear, Inc., 340 U.S. 36 (1950); Hickman v. Missouri, 144 F.3d 1141, 1141-43 (8<sup>th</sup> Cir. 1998); Miami Center Limited Partnership v. Bank of New York, 838 F.2d 1547 (11<sup>th</sup> Cir. 1988).

<sup>9</sup> Most of the arguments have been made at least twice before and are either not related to or dispositive of the EAJA claim, or have been rejected.

discussion that injured Respondent's reputation as unnecessary to the decision approving the fees.<sup>10</sup> On July 18, 2000, the CALJ denied Respondent's request. Respondent now submits an Application for Attorneys' fees and Expenses incurred as a result of the CALJ's Order to Show Cause Why the Application for Attorneys' Fees and Other Expenses Pursuant to the Equal Access to Justice Act Should Not be Denied ("Show Cause Order"). *This memorandum is submitted in support of the new application.*

(emphasis supplied)

While the Respondent's allegations justifying the new Verified Application are far from clear, apparently it is his position that the undersigned's Show Cause Order gave rise to a new EAJA award. The Respondent's position in that regard is patently frivolous. It is predicated on the assertion that:

Thus, Respondent has prevailed on both the underlying adjudication . . . and also the Show Cause Order . . . the action of the Agency in the underlying matter and through the CALJ ordering Respondent to show cause which required Respondent to incur additional fees and expenses was not substantially justified.

In essence, the Respondent recognizes that the "underlying adjudication" (the Coast Guard's Complaint) as one action, and would have one impute the actions of the undersigned (issuing the Show Cause Order) to the Coast Guard, thereby establishing

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<sup>10</sup> There is nothing in the Show Cause Order that would cause one to logically conclude that it was unnecessarily damaging to the Respondent's reputation. As the Show Cause Order succinctly states:

In reviewing the record for countervailing arguments in support of the proposition that the Coast Guard's position was not substantially justified, it became immediately apparent that it raises more questions than it answers. While the Respondent's arguments were very ably and forcefully presented, they are based on factual allegations, many of which are in dispute. They raise a multitude of unanswered questions, which may well have been answered had the case gone to trial on the merits. The decision dismissing the Complaint forestalled any in depth analysis and in doing so, it prevented any consideration of facts that may have been helpful in making the EAJA determination.

The Show Cause Order then gave samples of disputed facts related to the question of substantial justification.

another action that gives rise to a second EAJA award. The Respondent has provided no authority, and indeed there is none, for the position that the actions of an ALJ or any other adjudicative officer in resolving an Application for an EAJA award ought to be ascribed to an Agency in determining the issue of substantial justification. Further, it is well settled that the position of the Agency in a particular adjudication is what is subject to substantial justification. The EAJA does not provide an Applicant the opportunity to make successive claims for an EAJA award in piecemeal fashion after each phase of litigation. See Commissioner v. Jean, 496 U.S. 154 (1990). So here, the Respondent's attempts to use EAJA as some kind of continuing pool for the payment of attorneys' fees and costs is misguided and invalid. That is especially true where the fees and costs relate to repetitious submissions that are more related to the disposition of the original case on the merits than any EAJA claim. Consequently, the Verified Application for an additional EAJA award is DENIED.

Once again, assuming that the approval of the original EAJA Application and Agreement did not foreclose any additional EAJA claims, or that no new EAJA claims are allowable that are based on the actions of the ALJ, there is a compelling reason why the additional claims for further attorneys' fees and costs ought to be denied. It is clear from the Respondent's submissions that he continues to misunderstand and misconstrue the law and regulations governing the award of attorneys' fees and other expenses under the EAJA. Throughout the approval process of the original Application and Agreement and now, in the Verified Application, he continues to create and protract EAJA litigation by raising issues not germane to the claim. He continues to manipulate and misstate

information, which the undersigned has repeatedly noted is inaccurate, or is inconsistent with the written record, or is of no weight. He complains of delay in the original application when in fact much of the delay was caused by his filing of an incomplete Application and Agreement. He misstates the facts relating to the May 9, 2000 telephone conference and pointedly omits reference to the fact that the parties were told that the issue at hand was whether or not the Coast Guard was agreeing it was not substantially justified. He still argues that the Agency was not substantially justified and that it is estopped from arguing otherwise without citing a single case or authority. This in the face of a positive drug test and Coast Guard policy requiring revocation. He argues inexplicably that the Show Cause Order, served on both parties, shifted the burden of proof from the Complainant to the Respondent - - despite the fact that the Application and Agreement were non-adversarial and did not involve any burden of proof issue. Again, the Respondent cites no authority supporting his allegation.

Most importantly, Respondent still holds the mistaken belief that the undersigned should have *pro forma* approved his initial Application and Agreement. He reasons that because the parties were not in dispute and that because “the Agency’s settlement was approved by Coast Guard Headquarters,” that somehow the requirements of the law need not be met. The Respondent asserts there is “no requirement<sup>11</sup> that the CALJ must reach a conclusion about the position of the Agency in a settlement for EAJA fees.” This interpretation of the law suggests that parties can settle their EAJA claims and “stipulate”

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<sup>11</sup> The “requirement” is contained in the EAJA law itself that clearly provides an EAJA award cannot be made if the action of the Agency is substantially justified. Where, as here, the record in the case indicates the Agency action may have been justified and the Stipulated Agreement is ambiguous, the ALJ not only has the authority but the duty to ensure that the requirements of the law have been satisfied.

to award attorneys' fees and other expenses without any regard to the legal standards required to award such a claim. Congress and the regulations did not so intend. Further, again the Respondent has not provided any citations or authority to support such a conclusion. The Respondent's misguided interpretation of the rules and regulations governing the EAJA has been consistent from the outset and it was manifested initially when the Respondent sought to "waive" any of the required documentation in support of his EAJA claim and simply "stipulate" that his application was correct.<sup>12</sup> The Respondent's characterization that his "straightforward Stipulation Application" was something that "should have been quickly approved" is patently wrong. This is also true of the unwarranted and unconscionable remarks that the Respondent makes in a legally inexplicable attempt to tie the issuance of the Show Cause Order by the undersigned to an Agency action that he considers to be "vexatious" and "manifest bad faith" that "amounts to fraud and cannot be condoned." While certainly, Respondent has the prerogative to make such arguments, the statements supporting them are clearly reckless and improvident.

All of the above is noted, not to revisit Respondent's old arguments, but to note that in making the new Verified Application it is clear that the Respondent is attempting to further his EAJA claims by raising new issues. They involve a FOIA request to the Coast Guard in an apparent effort to discover other facts that might support a claim for

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<sup>12</sup> The regulations clearly provide that documentation of fees and expenses in an EAJA application *shall* be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, test or similar matter for which an award is sought and the application *shall* include an affidavit 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 and the application *shall* state the services performed. See 49 C.F.R. § 6.21 (1999) (emphasis added).

additional fees in an EAJA claim when the Respondent has already settled for attorneys' fees and other expenses. Moreover, as to his request to file supplemental claims, it should be noted that the undersigned provided in his Order Denying Respondent's Request to Revise Order Granting Attorneys' Fees and Expenses Pursuant to the Equal Access to Justice Act, "if the parties believe this matter should remain open for further hearings on the issues that they believe important and relevant and wish to hold the final approval of the EAJA award in abeyance until those issues are considered, they should so move." Neither party so moved. The Respondent in his effort to extend litigation for attorneys' fees and other expenses now appears to have shifted strategy and now argues that the Agency "through the device of the Show Cause Order that the CALJ 'knew to be baseless in an effort to coerce the waiver of EAJA fees, [created] a prime example of bad faith.'" Because the Respondent now considers "the Agency's conduct [] at issue," he even seeks a waiver of costs in his FOIA application and charges that if his request is not met, he has "no choice" but to "supplement his application for fees and expenses." The continued efforts by the Respondent to protract this matter and create litigation is an unnecessary exercise that brings to light the "grim reality feared by the Supreme Court" that petitions for attorneys' fees "'should not result in a second major litigation.'" United States v. Eleven Vehicles, 200 F.3d 203, 205 (3<sup>rd</sup> Cir. 2000) (quoting Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)).

Finally, as has been noted the Respondent has sent the undersigned copies of letters relating to a FOIA request made to the Coast Guard and a Petition for Rulemaking or Exemption for Attorney Fee Rate In re United States v. John P. Love, Jr., Docket No

99-0187, that was sent to the Office of the General Counsel at D.O.T. While the undersigned is not involved in processing the FOIA request he would note that in the letter of October 5, 2000, to Admiral Naccara, the Respondent's discussion of the tests done by the Maine State Police, alludes to facts which are not contained in the record of the case. Further, the statement by the Respondent's counsel that "the bad faith is material because the CALJ erroneously relied upon this false information to impugn Respondent's reputation" is wrong. The undersigned did not rely on any "false information," erroneously or otherwise. What he did rely on is the agreement of the parties to settle an EAJA claim for \$10,000 in which agreement the Coast Guard took no position as to whether or not it was substantially justified.

As to the letter seeking Rulemaking or Exemption for Attorney Fee Rate, such rulemaking is within the purview of D.O.T. and not the undersigned. However, any exemption for fees would not apply in this case in view of the decision denying any further EAJA award, other than that agreed to by the parties for \$10,000 in the first instance.

As has been noted the Respondent, by letter dated August 31, 2000, requested that his Application for a supplemental EAJA award be held in abeyance until after he received a response to his Coast Guard FOIA request. The letter is being treated as a Motion and the Motion is DENIED.<sup>13</sup>

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<sup>13</sup> Throughout the pendency of the original EAJA Application and subsequently in making the Supplemental EAJA claim the Respondent has sent correspondence to the undersigned by letter, which letters often contain assertions of argumentative facts and conclusions that more properly belong in a formal motion, provided for in the pertinent regulations. Also, they often contain facts and conclusions in

So here, in summarizing it is held that:

1. The Respondent's original Application and Stipulated Agreement for EAJA fees of \$10,000 was approved with respect to the case brought by the Agency and is not entitled to an additional EAJA award. Any subsequent issue and claims relating to the award are moot.
  
2. At the time the EAJA Application and Stipulated Settlement was approved the Respondent knew or should have known of any additional claim for fees that he may have had and was given an opportunity to keep the record open. He chose not to do so, did not appeal, and in fact demanded payment of the \$10,000. Consequently, he is bound by the original Application and Stipulated Settlement Agreement.
  
3. The issuance of the ALJ Show Cause Order or any other action of the ALJ cannot be imputed to the Coast Guard for the purposes of showing it was not substantially justified in bringing the original action or in making a claim for any additional EAJA award from the Agency.
  
4. Even if the approval of the original Application and Stipulated Agreement did

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addition to those submitted in support of a formal motion. Correspondence should not be used for that purpose because while it furnishes facts and argument to the adjudicator it often does not allow the other party to respond in accordance with the pertinent regulations.

not finally dispose of the EAJA claim, the Verified Application and Supporting Memorandum do not justify a new or additional award.

5. The letter of August 31, 2000, wherein the Respondent requested that his Application for a supplemental EAJA award be held in abeyance is being treated as a formal Motion and is DENIED.<sup>14</sup>

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JOSEPH N. INGOLIA  
Chief Administrative Law Judge  
United States Coast Guard

Done and dated this 15<sup>th</sup> of November, 2000 at  
Baltimore, Maryland

PLEASE TAKE NOTE that if neither party seeks review within 30 (thirty) days after issuance of this Order, this decision will become final. For the purposes of this action, the department of review is the United States Coast Guard. An appeal of this Order may be filed using the process as described in 33 C.F.R. Subpart J. (2000). A copy of Subpart J is attached to this order.

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<sup>14</sup> The Respondent's letter is unclear as to whether or not he is seeking to supplement the original \$10,000 award or supplement the new Verified Application. In any event the denial of the Motion applies to either supplement.

*[REDACTED]*