

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

IN THE MATTER OF)	
JOHN R. GIVENS)	
EQUAL ACCESS TO JUSTICE APPLICANT)	AA-EC-93-91
U.S. NATIONAL BANK OF CLAYTON)	
ST. LOUIS, MISSOURI)	

DECISION OF THE COMPTROLLER

I. SUMMARY

The Comptroller of the Currency ("Comptroller") denies the Application of the Estate of John R. Givens ("Givens" or "Applicant"), former President and Director, U.S. National Bank of Clayton, St. Louis, Missouri (the "Bank"), for attorney's fees pursuant to the Equal Access to Justice Act ("EAJA"), because Givens was not a "prevailing party" in the underlying action.

II. ISSUES

Is a Respondent a "prevailing party" for purposes of EAJA when an administrative action is dismissed because the Respondent has died before a decision is rendered?

III. PROCEDURAL HISTORY

The procedural history of this action is summarized in the Comptroller's decision in the underlying action and need not be repeated in detail here. Briefly, a Notice of Assessment of a Civil Money Penalty ("Notice") was issued by the Office of the Comptroller of the Currency ("OCC") against the Applicant. A hearing was held on all alleged violations.

The final pleading prior to the Recommended Decision of the Administrative Law Judge ("ALJ") was submitted by each party on January 8, 1993. On January 9, 1993, Applicant died suddenly in an automobile accident.

On February 8, 1993, the ALJ filed his Recommended Decision. The ALJ found that the action abated as a result of the Applicant's death. Therefore, he recommended a final order abating any penalty and dismissing the action. Both Applicant's widow, in her capacity as the personal representative of Respondent's estate, and the Enforcement and Compliance Division ("E&C") filed Exceptions to the Recommended Decision. In the Exceptions, both parties argued that a final decision on the merits was necessary.

On June 9, 1993, the Comptroller dismissed the civil money penalty ("CMP") action against Applicant. In the Matter of John R. Givens, AA-MW-91-136 ("Givens I"). Because a dispute has arisen concerning the reasons for the dismissal, the reasons for the Comptroller's decision are discussed in detail in the Discussion, infra, Section IV.B.3.

On July 2, 1993, Applicant filed an Application for attorney's fees ("Application") pursuant to EAJA, 5 U.S.C. § 504, and 31 C.F.R. Part 6. E&C filed an Answer ("Answer"), and Applicant filed a Reply to the Answer ("Reply").

On October 6, 1993, the ALJ issued his Initial Decision on the Application. The ALJ found that Applicant was a "prevailing party" within the meaning of EAJA, and that E&C was not "substantially justified." He found no special circumstances that would make an award unjust. He found that Applicant was eligible to receive an award pursuant to EAJA. However, he limited the award to \$75 per hour.

Both parties asked the Comptroller to review the Initial Decision. In its Request for Review, E&C argued that Applicant was not a prevailing party and that E&C was substantially justified. In his Request for Review, Applicant asked that the award be increased to the actual amount of attorney's fees, instead of a limit of \$75 per hour. In a Response to E&C's Request for Review ("Response"), Applicant made numerous comments concerning E&C's Request.

IV. DISCUSSION

A. Equal Access to Justice Act

EAJA provides that

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.

5 U.S.C. § 504(a)(1). EAJA also contains a time limitation for an application for an award and a net worth limitation. 5 U.S.C.

§ 504(a)(2), (b)(1)(B). E&C has not alleged that Applicant failed to satisfy the time and net worth limitations, and the Comptroller finds that these limitations have been satisfied.

The dispute in this case revolves around two of the substantive requirements that must be met before an award is made pursuant to EAJA. First, the applicant must be a "prevailing party." Second, the government must not be "substantially justified."

B. Prevailing Party

1. Burden of Proof

The applicant in an EAJA action bears the burden of proving that he or she is a prevailing party. Shepard v. Sullivan, 898 F.2d 1267, 1273 (7th Cir. 1990). Therefore, Applicant must prove that he was a prevailing party in the underlying action; E&C need not prove that he was not prevailing.

2. "Prevailing Party" When Case Not Decided on Merits

It is not necessary to win after a trial on the merits to be a prevailing party for purposes of EAJA. For example, a party may prevail by negotiating a successful settlement. Environmental Defense Fund, Inc. v. Watt, 722 F.2d 1081, 1084 n.2 (2d Cir. 1983). The determining factor is the substance of the litigation, not the technical disposition of a case or motion.

Consolidated International Automotive, Inc. v. United States, 797 F. Supp. 1007, 1010 (Ct. Int'l Trade 1992).

However, not every party that obtains a victory against the government may also receive payment of attorney's fees. A party does not prevail simply because it receives a favorable disposition on an interlocutory issue or even on the case as a whole. For example, attorney's fees are awarded for success on an interlocutory motion only to "a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." Hanrahan v. Hampton, 446 U.S. 754, 757 (1980) (per curiam) (emphasis added). The substance of the disposition, and not the form, must be examined. Devine v. Sutermeister, 733 F.2d 892, 898 (Fed. Cir. 1984).

Even where a party is clearly victorious, a party does not prevail for purposes of EAJA if the reasons for the victory are unrelated to the merits of the case. For example, an applicant for Social Security benefits does not prevail if, while litigation is pending, legislation is enacted under which the applicant is clearly eligible for benefits. Huett v. Bowen, 873 F.2d 1153, 1155 (8th Cir. 1989); Shepard at 1272. Similarly, an applicant for benefits does not become a prevailing party by reaching an age, while litigation is pending, at which the threshold of eligibility is lowered. Swedberg v. Bowen, 804 F.2d 432, 434 (8th Cir. 1986). Even where the government's case is

dismissed because the government refuses to reveal information that may jeopardize a criminal investigation, the government's opponent in litigation is not a prevailing party. United States v. Kemper Money Market Fund, Inc., 594 F. Supp. 185, 186-87 (N.D. Ill. 1984), aff'd 781 F.2d 1268 (7th Cir. 1986). Clearly, the reason for the disposition of the original case is significant.

3. Reasons for Dismissal of Underlying Action

There can be no doubt that the underlying civil money penalty action against Applicant was dismissed. However, as the cases cited above demonstrate, the reasons for the dismissal are significant. Because there is a dispute concerning this very question, it is necessary to examine the reasons that the Comptroller dismissed the underlying action.

E&C argued that the action was dismissed because of Applicant's death. Answer at 4; E&C Request for Review at 5-6. In the Request for Review, E&C amplified this argument to state that "the true crux of the decision [was] that a CMP would obviously not have any deterrent effect on the deceased Respondent." E&C Request for Review at 5.

In the Reply, Applicant argued that the OCC failed to carry the burden of proving the merits of the case. Reply at 2. Rather than decide the merits of the case, the OCC "simply quit." Id.

In essence, Applicant argues that by dismissing the action, the OCC's failure to reach a decision on the merits translates to prevailing party status for Applicant. Id. at 3.

In his Initial Decision, the ALJ found that "a primary reason that the proceeding was dismissed was one of convenience to the government." Initial Decision at 8. He found that this reason was an argument in favor of finding that the Applicant had prevailed, and that the government should not be allowed to bring a CMP action and then refuse to decide the merits simply for its own convenience. Id.

In its Request for Review, E&C renewed its argument. In his Response, Applicant noted without additional comment that "the ALJ nevertheless, reviewed the variety of bases enunciated in the order of June 6, 1993, which clearly go beyond the fact of death." Response at 2.

A reading of the entire Decision of the Comptroller in Givens I clearly demonstrates that Applicant's death was the sine qua non of that Decision. In a ten-page decision, Givens I states at least three times in so many words that the action was dismissed because of Applicant's death. Givens I at 1, 5, 10. Givens I found only four facts: Applicant was the President and a Director of the Bank, a Notice was issued against Applicant, a hearing was held, and Applicant died. Id. at 9. Clearly, the

key factor in Givens I was the death of the Applicant.

The ALJ found that a primary reason for the dismissal in Givens I was the convenience of the OCC. Initial Decision at 8. His reasoning was largely based on the statement in Givens I that the "general deterrent effect of a CMP would not outweigh the burden of analyzing the hearing record, making a final decision on the merits, and collecting the CMP." Id., quoting Givens I at 7.

The Comptroller agrees with the ALJ's assertion that the government should not commence an administrative action against a person, require the person to undergo the burden of a hearing, and then arbitrarily drop the matter. However, Givens I was not arbitrary. The Decision clearly sets out that the action was dismissed because of Applicant's death, and no other factor, such as the possible deterrent effect of any merits decision on the banking community generally, outweighed the death of the Applicant. If there is any implication that the Comptroller decided that the small amount of the CMP was not worth the effort of a final decision, it is noted that, in at least one prior case, the Comptroller issued a final decision in a CMP action in which the original notice assessed a \$5,000 penalty, and the respondent did not die before the issuance of the final decision. In the Matter of Raymond Howard, AA-MW-88-95 (February 21, 1990).

While research has disclosed no fee shifting cases in which litigation was terminated due to the death of a party, the cases

cited supra, pages 5-6, illustrate two significant principles:

(1) Even if a party obtained everything sought in the underlying action, the party is not prevailing if success resulted from factors unrelated to the merits of the litigation. Under Huett, Shepard, and Swedberg, supra pages 5-6, an applicant for Social Security benefits does not prevail for purposes of EAJA if the granting of benefits results from the enactment of legislation or the passing of time rather than the merits of the underlying action. Similarly, in this case, the dismissal was caused by a factor outside the control of any person -- Applicant's death.

(2) Applicant has argued that nothing prevented a decision on the merits, and that the dismissal was chosen by the Comptroller and not forced upon him. E.g., Response at 2. In Kemper Money Market Fund, supra page 6, the government could have avoided dismissal simply by disclosing the information demanded by the judge. However, it chose to suffer dismissal rather than jeopardize a related investigation. Clearly, where the government chooses dismissal, the opponent is not prevailing if the government has a sound reason for dismissal apart from the merits.

C. Substantial Justification

Because this Decision finds that Applicant was not a prevailing party, it is not necessary to determine whether E&C was

substantially justified in the underlying action. Accordingly, the Comptroller makes no findings on this issue.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

In addition to the Findings of Fact in Givens I, which are incorporated by reference, the Comptroller makes the following Findings of Fact:

5. On July 2, 1993, Applicant filed an Application under EAJA.

6. Givens I was dismissed because of the Applicant's death.

B. Conclusions of Law

In addition to the Conclusion of Law in Givens I, which is incorporated by reference, the Comptroller makes the following Conclusion of Law:

2. Applicant was not a prevailing party pursuant to EAJA, 5 U.S.C. § 504.

VI. CONCLUSION

After a careful review of the record in the EAJA Application, the Initial Decision of the ALJ, the applicable law, and the relevant portions of the record in the underlying CMP action, the Comptroller concludes that Applicant was not a prevailing party

in the underlying CMP action. Accordingly, the Comptroller issues the attached final Order denying the Applicant's application for attorney's fees.

2/22/94
Date

Eugene A. Ludwig
Comptroller of the Currency

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ORDER

On July 2, 1993, the Applicant Estate of John R. Givens filed an application for attorney's fees pursuant to 5 U.S.C. § 504, alleging that it had prevailed in civil money penalty action AA-MW-91-136, and that the Office of the Comptroller of the Currency was not substantially justified in that action. An Initial Decision was issued without hearing on October 6, 1993, by the Honorable Arthur L. Shipe, Administrative Law Judge.

The Comptroller has determined that the Applicant was not a prevailing party. Accordingly, it is ORDERED that the application be denied.

So ORDERED, this 22nd day of February, 1994.

Eugene A. Ludwig
Comptroller of the Currency