



In the Matter of:

JOHN C. REX,

COMPLAINANT,

v.

EBASCO SERVICES, INC.,

RESPONDENT,

and

**THE SOLICITOR OF LABOR
on behalf of
THE ADMINISTRATOR, WAGE AND
HOUR DIVISION, EMPLOYMENT
STANDARDS ADMINISTRATION,**

PARTY IN INTEREST.

ARB CASE NO. 96-150

**ALJ CASE NOS. 87-ERA-6
87-ERA-40**

DATE: January 7, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND ORDER

This is an application for attorney's fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1988), for the defense of an attorney disciplinary proceeding under 29 C.F.R. § 18.34(g)(3) (1996). That proceeding arose out of alleged improper conduct by the attorneys for the Complainant in the above captioned whistleblower case under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1988).

After recommending dismissal of the ERA complaint, the Administrative Law Judge (ALJ) in the whistleblower proceeding recommended taxing the Respondent's attorney's fees and costs to the Complainant and his attorneys under Rule 11 of the Federal Rules of Civil Procedure for pursuit of "this groundless action." ALJ Recommended Decision and Order, May 12, 1989, slip op. at 12. The Secretary rejected the ALJ's recommendation on fee shifting, finding that the Department of Labor only had the authority under the ERA to order a Respondent to pay the Complainant's attorney's fees where the Secretary found a violation of

that act. But taking into consideration the ALJ's detailed recitation of counsel's "baseless and willful conduct which amounted to an abuse of the administrative process," *id.* at 12, the Secretary ordered that a hearing be held to determine counsel's fitness to practice before the Department of Labor Office of Administrative Law Judges. *See* Secretary's Orders of March 4, 1994 and October 3, 1994. 29 C.F.R. § 18.34(g)(3). The disciplinary matter was assigned to another ALJ but was settled. The attorney respondents in the disciplinary proceeding (the applicants) now seek attorney's fees under the EAJA for the services of attorneys who represented them in that proceeding.

The ALJ in this fee application proceeding held that the EAJA does not apply to the attorney disciplinary proceeding because it was not an "adversary adjudication" as that term is defined in the EAJA. Recommended Decision and Order Denying Attorney Fees, Nov. 29, 1995 (Order Denying Fees) slip op. at 6. The EAJA requires payment of attorney's fees to the prevailing party, other than the United States, in an "adversary adjudication," 5 U.S.C. § 504(a), which is defined as "an adjudication under section 554 of [Title 5, Administrative Procedure Act, (APA)]." 5 U.S.C. § 504(b)(1). The adjudication provisions of the APA, 5 U.S.C. § 554, apply to an "adjudication required by statute to be determined on the record after an opportunity for an agency hearing . . ." 5 U.S.C. § 554(a). The ALJ held that the ERA requirement of a hearing applies only to the merits of Rex's whistleblower complaint and does not apply to the attorney disciplinary proceeding. Order Denying Fees at 6; 42 U.S.C. § 5851(b)(2)(A). We agree, and for the reasons discussed below, reject the applicants' exceptions to the ALJ's Order Denying Fees.

The applicants point out that orders of the Secretary under the ERA must be made "on the record after notice and opportunity for public hearing," 42 U.S.C. § 5851(b)(2)(A). They assert that the disciplinary proceeding was an "adversary adjudication" covered by the EAJA because it arose as part of the hearing on the whistleblower complaint filed by Rex under the ERA. We do not agree. The only hearings required by the ERA to be held on the record after notice are those upon which an "order" of the Secretary may be made under that act. "An order" of the Secretary under the ERA is one which "either provide[s] the relief prescribed by subparagraph (B) or den[ies] the complaint." The relief prescribed by subparagraph (B) is limited to an order requiring a person found to have violated the Act to take affirmative action to abate the violation, to reinstate the complainant with back pay, and to pay the complainant compensatory damages. The ERA is simply silent on any other agency proceedings which may arise out of or be related to a whistleblower complaint.

This construction of the statute is consistent with the Secretary's interpretation of other language utilizing the word "order" in the ERA. Both in this case and in others, the Secretary has held that his authority to require payment of attorney's fees is limited to cases in which "an order is issued" finding a violation of the ERA and fees may only be assessed "against the person against whom the order is issued." *Rex v. Ebasco*, Mar. 4, 1994 Final Decision and Order, slip op. at 5; *Rogers v. Multi-Amp Corp.*, Case No. 85-ERA-16, Sec'y. Dec. Dec. 18, 1992, slip op. at 2; *cf. Abrams v. Roadway Express, Inc.*, Case No. 84-STA-2, Sec'y. Dec. May 23, 1985, slip op. at 1-2; 42 U.S.C. § 5851(b)(2)(B). In addition, the Secretary has held that only orders

for relief under 42 U.S.C. § 5851(b)(2) are enforceable in federal District Courts under 42 U.S.C. § 5851(d), but an ALJ's orders relating to discovery are not. *Malpass and Lewis v. General Electric Co.*, Case Nos. 85-ERA-38 and 39, Sec'y. Dec. March 1, 1994, slip op at 21-22. These cases reinforce our conclusion that the only hearings required by the ERA to be made on the record are those upon which an order for relief to the complainant may be based. Any collateral orders are not required by statute to be made on the record after notice and opportunity for hearing.

The applicants also assert that the disciplinary proceeding was an adversary adjudication under the APA because the regulations under which it was conducted, the Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges, 29 C.F.R. § 18.26, require hearings to be held "in conformance with the Administrative Procedure Act, 5 U.S.C. § 554." Consistent interpretations of EAJA have held, to the contrary, that adoption of APA procedures by regulation does not meet the requirement for EAJA coverage that an adversary adjudication "under section 554 [of the APA]" must be "required by statute" to be held on the record. 5 U.S.C. § 504 (emphasis added). *Ardestani v. Immigration & Naturalization Service*, 502 U.S. 129, 133, 135 (1991) (regulations adopting APA-type procedures do not establish EAJA coverage of proceeding; only proceedings "subject to" or "governed by" APA meet EAJA requirements); *Friends of the Earth v. Reilly*, 966 F.2d 690, 695 (D.C. Cir. 1992) (agency decision to add protections matching APA and fact that proceeding is functional equivalent of APA hearing irrelevant for EAJA coverage); *Owens v. Brock*, 860 F.2d 1363, 1367 (6th Cir. 1988) (hearing must be governed by APA, not just substantially equivalent, for EAJA coverage); *Smedberg Machine & Tool Co. v. Donovan*, 730 F.2d 1089, 1092 (7th Cir. 1984) (agency regulations which permit hearings do not trigger EAJA coverage absent statutory provision for hearing).

The application for attorney's fees is DENIED.^{1/}

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member

^{1/} In view of our finding on the EAJA coverage issue, we need not address the questions of whether the government's position was substantially justified or whether special circumstances would have made an award of fees unjust. 5 U.S.C. § 504(a)(1).