UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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IN RE	)	
	)	Application for Attorneys'
JOHN BOYLE & COMPANY, INC.	)	Fees and Expenses Under the
	)	Equal Access to Justice Act
Respondent	)	
	)	
Docket No. RCRA-85-69-R	)	

RECOMMENDED DECISION

This proceeding arises from an application by John Boyle and Company, Inc., for attorneys' fees and expenses under the Equal Access to Justice Act (5 U.S.C. § 504). The application results from a complaint issued by Region IV EPA on October 11, 1985 charging John Boyle and Company, Inc., hereinafter John Boyle or Applicant, with violations of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (hereinafter RCRA), 42 U.S.C. 6928 (Supp. IV 1980). Following a Hearing in Atlanta, Georgia on April 23-24, 1986, the ALJ issued an Initial Decision on July 23, 1986, dismissing the complaint for the reason that the complaint had not shown that John Boyle had violated the Act and the regulations promulgated pursuant thereto as charged in the complaint. Complainant did not appeal the initial decision and therefore such decision constitutes final Agency action. (See 40 C.F.R. § 22.27(c)). John Boyle filed an application for attorneys' fees and expenses on October 3, 1986. The Complainant filed its response in

opposition to said application on December 5, 1986. Pursuant to an order of the Court, the Applicant was directed to file a reply brief and such brief and attachments were filed on January 30, 1987.

Based on the record as presently constituted, I find that the following facts are established:

Findings of Fact

The pertinent facts surrounding this matter are set out in some detail in the Initial Decision heretofore issued by the Court and will not be repeated herein except as necessary to provide a foundation for the discussion which follows. The factual discussion contained in the above-mentioned Initial Decision are incorporated herein and adopted for purposes of this Decision.

The complaint alleged that John Boyle failed to develop hydro-geologic information sufficient for the purpose of determining its facility's full impact on the groundwater quality of the upper-most aquifer as required under 40 C.F.R. § 265.90(a) or that the groundwater monitoring system is adequate for groundwater quality assessment purposes under 40 C.F.R. § 265.93(d)(4). The Respondent's answer denied that it was engaged in the hazardous waste activities as alleged in the complaint and that it had in fact completely complied with the requirements of the above-cited regulations. The answer and the prehearing exchange as required by the Court also raised the issue of whether or not the Respondent, John Boyle, was entitled to an exclusion under the Act and its regulations on the basis that it only utilizes trivalent chromium in its process.

During the Hearing, the Agency's theory as to why it felt that the Respondent had not installed a proper groundwater monitoring system was discussed at some length and the record reveals that the Agency's philosophy

and basis for the bringing of the action was for the most part groundless and based on a completely indefensible position.

As to the issue as to whether or not the Respondent, John Boyle was entitled to any exclusion under the Act, the evidence was clear that they were entitled to such an exclusion. The Agency's rationale for deciding that they were entitled to this exclusion was refutted not only by several of the Respondent's expert witnesses but by the Agency's expert witness as well.

As indicated above, based on the record in its entirety the Court had no option but to dismiss the complaint for the failure of the Agency to prove the violations alleged therein.

Statutory Framework

The Act, 5 U.S.C. § 504, provides in pertinent part:

> "(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 as a party to the proceeding was substantially justified or that special circumstances make an award unjust."

The Act became effective on October 1, 1981, and applies to any adversary adjudication as defined in § 504(b)(1)(c) of Title 5, U.S.C., which is pending on or commenced after, such date. The proceeding giving rise to this application was commenced on October 11, 1985 and was clearly commenced subsequent to the passage of the Act. The proceedings initiated by the complaint are specifically identified in the Agency regulations and are clearly within the coverage of the Equal Access to Justice Act. The Act defines party to mean an individual whose net worth does not exceed a million dollars at the time the action was initiated and for corporations those whose net worth does not exceed 5 million dollars at the time the adjudication was initiated. The

definition also states that the qualified party must not employ more than 500 persons at the time the action was initiated. The affidavits associated with John Boyle's application demonstate that John Boyle has a net worth of less than $5 million and employs less than 500 employees. The response filed by the Agency does not dispute or put at issue any of these threshold factors and therefore no further discussion thereof shall be had herein.

The statute also goes on to say that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the Agency involved and that attorney fees shall not be awarded in excess of $75 per hour unless the Agency determines, by regulation, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved justifies a higher fee. It should be noted in this respect that the fees cited in John Boyle's Application exceed the $75 per hour rate by substantial margin.

Discussion

The language of the statute requires that several specific questions be answered in determining whether or not ultimately an award of fees and expenses shall be made. The first of these questions is whether or not the Applicant was the prevailing party. A review of the Court's Initial Decision makes it abundantly clear that the Applicant, John Boyle, was the prevailing party in the action in that not only was the initial aspect of the Agency's complaint found to be lacking in merit and was dismissed, also the ancillary matter raised by John Boyle in its prehearing exchange as to whether or not it was entitled to an exclusion under the regulations prevailed in that question as well. Given the facts in this case that the Court's decision that the

complaint be dismissed in its entirety, I do not think that reasonable men could differ as to whether or not John Boyle prevailed.

The next threshold issue to be determined is whether or not the Agency was substantially justified in bringing this action. Legislative history of the Act as well as the Agency's regulations suggest that while there is no presumption that the Agency's position was not substantially justified merely from the fact that the Agency lost, the test is essentially one of reasonableness and the burden of proof in this respect in on the Agency. The rule appears to be that in order to award to an otherwise elegible party, the Government must show that its actions had a reasonable basis in law and fact. Dept. of Commerce, Census Bureau, 735 F.2d. 558 (1984). Some courts, however, while not precisely articulating the scope of the appropriate standard, have indicated that the showing required of the Government (to defeat an award) should be slightly above or more strict than simply reasonableness.

Irrespective of the rule to be applied, however, it would be seem to be clear that complainant's action herein did not have a reasonable basis in fact and can not be regarded as substantially justified. The final Agency decision establishes that complainant's evidence showed that its primary concern with the respondent's groundwater quality monitoring system was that the data supporting the location of the wells involved in this system were susceptible of more than one interpretation. In other words, in the Agency witness' words the data was ambiguous. The Agency witness did state, however, that as far as he knows the location of the wells installed by the Respondent may in fact by perfectly placed. The efficacy of the Respondent's groundwater monitoring system was demonstrated by the record to have performed quite well the function for which it was constructed, i.e., the immediate detection of the migration

of the waste from the storage area. The record in this case reveals that the wells did in fact detect migration of some wastes and this fact was in the possession of the Agency at the time it elected to bring this action. The record also shows that the Agency's primary witness on the question of the adequacy of the respondent's groundwater monitoring system was absolutely wrong in his assumptions as to how the respondent chose the precise locations for the wells it had installed. The record reveals that, contrary to the Agency's witness supposition that the well sites were merely chosen by "eye-balling" the terrain surrounding the storage area, in fact the wells were installed upon recommendations by several highly qualified consultants and the State geologist one of who's duties is to advise facility operators such as respondent as to the proper location for their groundwater monitoring wells based upon its own investigation as well as the reading of consultants reports and other sub-surface information available to it. All of the above-cited evidence concerning the method by which the respondent located his groundwater monitoring wells as well as the fact that they did in fact immediately detect the migration of wastes was either in the possession of the Agency at the time it elected to bring this action or was available to it in the State agency files which it alleged it had perused and examined prior to the bringing of the action.

In view of these facts I am of the opinion that the Agency was not substantially justified in bringing the instant action.

The other issue decided by the Court in its Initial Decision had to do with whether or not the respondent was entitled to an exclusion under the regulations promulgated by the Agency and thus not subject to the provision of RCRA at all. As discussed above, this matter was raised by the answer and

and the prefiled testimony and exhibits of the respondent. As discussed at length in the Initial Decision, a person is entitled to an exclusion under the regulations if they use exclusively trivalent chromium in their process and if, at any stage of the process or treatment of the facilities' waste, they in any way alter the nature of the wastes thereby changing it from trivalent to hexavalent chromium. If the facility owner can demonstrate that it uses trivalent chromium exclusively in its process and does nothing to that material during the course of its manufacturing or treatment process then the exclusion should be granted. The evidence in this case was absolutely clear that the respondent was entitled to an exclusion under the regulations. However, the Agency in a rather unusual scientific leap of faith advised the State agency that the facility was not entitled to such an exclusion since some evidence of chromium was detected by its groundwater monitoring wells. The Agency's position in this matter was set forth in several memoranda, which were introduced into the record, which suggested that it was the Agency's position that if any chromium was found in the groundwater surrounding its facility that, by definition, such chromium must be hexavalent since hexavalent chromium is deemed to be substantially more soluable than trivalent chromium.

This rather interesting hypothesis was completed discredited not only by the Respondent's two expert witnesses but by the Agency's own expert witness who was presented to testify on this issue. Had the Agency consulted its own expert witness who, by the way is an Agency regional employee working in the Athens laboratory of Region IV, they could have determined that the scientific basis upon which they made their decision to deny or recommend denial of the respondent's exclusion request was not valid. The Agency's failure to do so

resulted in the bringing of this action and the expenditure by the respondent of substantial amounts of money to install and operate the groundwater monitoring system, which it had in place at the time of the bringing of this action, when a more serious inquiry as to the validity of the Agency's hypothesis would have rendered the installation of such system unneccessary.

In this regard, the Agency in its brief in opposition to the application for fees, took the position that the respondent did not really prevail on this issue since the decision did not ultimately decide this point in a manner favorable to the respondent. This is a completely inaccurate description as to what the court's finding was. The court held that, since the question of who, vis-a-vis, the State or the EPA had ultimate authority to rule on the exclusion question, if the Agency had such authority it was directed to issue the exclusion and if the State of North Carolina had that authority they were strenuously urged to grant the exclusion based on the discussion had in the Decision. Therefore, there can be no question that the respondent prevailed on this issue and as suggested above, had the Agency several years prior to the bringing of this action inquired in more depth as to the validity of its hypothesis vis-a-vis the entitlement of the respondent to the exclusion the proceeding would not have been brought at all.

Consequently, in view of the above I am of the opinion that the Agency was not substantially justified in bringing the action.

The other aspect of the statute and regulations concerning the availability of an award to Applicant states that the award should not be granted if special circumstances exist which makes the award sought unjust. The regulations do not elaborate as to what type of matters fall within the purview of this language but there is nothing in this record to suggest that special circumstances exist which would make the award of the fees unjust.

Additionally, there is nothing in this record to suggest that the applicant had unduly or unreasonably protracted the proceedings.

Having determined that the applicant is a party entitled to consideration of an award and that the other aspects of the Act and the regulations do not preclude such an award, the task now before the Court is to determine the amount of such an award.

The regulations state that the amount of fees awarded will be based upon the prevailing market rates for the kind and quality of services furnished except that compensation for an expert witness will not exceed $24.09 per hour and attorney or agent fees will not be in excess of $75.00 per hour. The regulation then goes on to describe what matters the Court must take into consideration in determining the reasonableness of the fee sought. These matters are set forth in 40 C.F.R. § 17.7C(1)(2)(3)(4)(5). As indicated above, the hourly rate claimed by the Applicant in this case in all cases substantially exceeds the $75.00 per hour limit set by the statute and the EPA regulations on the subject.

The Act itself states, as to the amount of the allowable fees and costs that:

> "§504(b)(1)(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study analysis engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that(i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency detemines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.)"

Reference to the Agency rules (40 C.F.R. §§ 17, et. seq.) reveals that, although the language therein tracks the above-quoted language of the Act, no provision is included that would seem to allow the awarding of a fee for attorneys or agents in excess of $75 per hour. See 40 C.F.R. § 17.7(b)(2). The rules also provide that the compensation for expert witnesses shall not exceed $24.09 per hour. Although these rules were written in 1983 and have not been revised since, no provision or guidance is provided which would allow the Court to make an upward adjustment of such fees to account for inflation or other relevant factors. Although justice and fairness would suggest that some increase in witness fees would be proper, I feel that I have no authority to do so.

The affidavits and exhibits accompanying the application show that as to attorney fees, the Respondent was billed for 343 hours. In addition, there was 60 hours at $75 per hour of time for a second year law student who was clerking for the law firm during the summer of 1986. The Agency objects to the law student's billing as being excessive. The Agency argues that the Respondent should prove that $75 per hour for a non-lawyer is the prevailing rate in Greenville, South Carolina. Although the rules say I must consider local prevailing rates in setting legal fees, they are silent as to who has the burden of persuasion on the question and under what circumstances I am required to make the inquiry. The affidavit of Joseph Rhodes, Jr., the lead attorney for the firm representing the Respondent, states that the hourly rates quoted are the same rates which the named lawyers charge all other clients and that they are less than or equal to the rates charged by other environmental lawyers in Greenville, South Carolina. The rates cited range from $85 to $120 per hour for the lawyers. The rate for the second year law student is $75 per hour. This means that the law student's time was billed

at a rate of from 62 per cent to 88 per cent of that of the lawyers. I am presented with no evidence to suggest that this is excessive and it will be accepted.

The Agency also argues that the schedule of attorney fees is defective since it does not show the number of hours of work performed per day as required by the regulations. The regulations only require that the applicant show the number of hours and services performed "per date". The exhibits are monthly billings with a breakdown of the number of hours performed by each lawyer working on the case along with his hourly rate. I find that this documentation substantially complies with the rule, although it may not be precisely in accord with the letter thereof.

Some of the hours claimed were expended by Respondent's counsel in seeking an injunction against EPA to prevent its chief witness in the instant case from inspecting its premises prior to the hearing. The Federal District Court issued a temporary restraining order and subsequently EPA agreed not to conduct the inspection in return for the Respondent's agreements to have the action dismissed. The Agency argues that these hours should be denied because: (1) they are time-barred; and (2) it is not a proceeding for which the regulations allow reimbursement. I do not find these arguments persuasive. Clearly the suit in question would never have been brought had EPA not filed the administrative complaint and prosecuted the instant case. The Federal suit was therefore brought in connection with this matter and the costs incident thereto are recoverable. See <u>In Re, Robert Ross & Sons, Inc.</u>, Docket No. TSCA-V-C-008, wherein Judge Nissen of EPA allowed 5.5 hours of attorney time spent in meeting with the press and television media to explain his client's position in the case, following a flurry of adverse news stories. The time-

barred argument is unavailing since the time does not begin to run until the issuance of the decision in this case and not the date of the bringing of the Federal suit.

The Agency also objects to the hours billed to the Respondent for services rendered prior to the filing of the complaint. This issue was also addressed in the Ross case, supra, wherein the Court held that:

> "Ross was clearly entitled to legal representation in its efforts to head-off or avoid the filing of the complaint and to be prepared and informed when, and if, a complaint was filed."

Other than the fact that the amounts for attorneys' fees claimed are in excess of the hourly rate allowed by the regulation, the Agency's other objections are considered to be without merit. These include arguments to the effect that in some cases, someone other than an attorney could have performed the work identified--for example, a secretary or paralagal.

Therefore, as to the attorney and agent costs, I am of the opinion that a sum in the amount of $30,225 is allowable. The applicant sought an award for legal fees in the amount of $43,931.17. As discussed above, this amount must be reduced to comply with the maximum hourly rate set out in the Act.*

The application also requests reimbursement for $1624.42 in miscellaneous expenses such as postage, taxi fares, filing fees and photocopying costs. The Agency argues that such costs are not reimbursable, citing Hirschey v. Federal Energy Regulatory Commission, 777 F.2d 6. That case supports the Agency's position except as to photocopying costs, which it holds are compensable. In this case, the application documents $316 for reproduction costs. I find this amount to be allowable.

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*Although several courts have held that some adjustment to the hourly rate may be made under specific circumstances, the burden of proving these special factors rests with the applicant and no such showing was made here. Action on Smoking & Health v. C.A.B., 724 F.2d 211.

The applicant seeks reimbursement for expert witness fees, engineering studies and laboratory analysis, totalling $11,636. Of this figure, $1,839.63 is allocated to Dr. F. Michael Saunders, an expert witness, who testified at the hearing. Dr. Saunders testified on the subject of whether or not the Respondent was entitled to an exclusion under the regulations and thus not subject to RCRA at all. The Agency objects to this expense on the theory that the Respondent did not really prevail on this issue and thus not entitled to compensation. This argument was discussed earlier and will not be repeated here except to say that I reject it.

The documentation supporting this claim reveals that Dr. Saunders billed the Respondent at $50 per hour. The rules promulgated by the Agency limit the hourly rate to $24.09 per hour. See 40 C.F.R. § 17.7(b)(1). The application documents 34 allowable hours. This time multiplied by the allowable hourly rate results in a compensable fee of $819. The invoice also shows $164.63 for airfare, rental car and parking fees. In accordance with the holding in Hirschey, supra. These costs are not compensable and will not be allowed.

The consulting engineers firm of Davis & Floyd, Inc. billed the Respondent for its services in the amount of $9,796.61. Of this amount, expert witness fees total $5,978. Assuming that the expert billed at the rate of a "project principal", which according to Exhibit C of Respondent's May 8, 1987 submittal, is $125 per hour, one arrives at 47.8 hours expended. When one multiplies that figure by the allowable hourly rate of $24.09, we arrive at a

figure of $1,151 for the Davis & Floyd witness. Although some of the billing suggests dates beyond the hearing, the Respondent advises that the work was actually performed prior to or at the hearing. Consequently, I will allow that amount.

The balance of the Davis & Floyd fees are related to sampling, analysis and other studies made in connection with the litigation and are, in my judge ment, allowable. This figure is $3,818 and will be accepted.

CONCLUSION

Based upon the record before me, I am of the opinion that the following fees and expenses are allowable under the Act:

Attorney fees	- $30,225.00
Dr. Saunders, expert witness	- $ 819.00
Davis & Floyd, expert witness	- $ 1,151.00
Davis & Floyd, studies & analysis	- $ 3,818.00
Reproduction costs	- $ 316.00
TOTAL ALLOWABLE	$36,326.00

DATED: October 8, 1987

Thomas B. Yost
Administrative Law Judge

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

IN RE	)	
	)	RCRA-85-69-R
JOHN BOYLE & COMPANY, INC.	)	
	)	EQUAL ACCESS TO JUSTICE ACT
Respondent	)	5 USC §504

CERTIFICATION OF SERVICE

I hereby certify that the original of the Recommended Decision by Hon. Thomas B. Yost was served on the Hearing Clerk (A-110), U.S. Environmental Protection Agency, 401 "M" Street, S.W., Washington, D.C. 20460, along with the official Agency record and file of this proceeding (service by certified mail return receipt requested); and that true and correct copies of the foregoing Recommended Decision were served on the parties as follows: Reuben T. Bussey Jr., Esquire, U.S. Environmental Protection Agency, Region IV, 345 Courtland Street, Atlanta, Georgia 30365 (service by hand-delivery); and Joseph A. Rhodes Jr., Esquire, Haynsworth, Baldwin, Miles, Johnson, Greaves and Edwards, P.A., Post Office Box 10888, Greenville, South Carolina 29603 (service by certified mail return receipt requested).

Dated in Atlanta, Georgia this 8th day of October 1987.

Sandra A. Beck
Regional Hearing Clerk