

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Irving L. Becker,)	DATE: May 2, 1990
)	
Petitioner,)	
)	
- v. -)	Docket No. C-214
)	
Department of Health and)	DECISION CR 77
Human Services.)	

DECISION

The Department of Health and Human Services (the Department) charged Petitioner, a retired federal employee, with engaging in conduct which violated the provisions of 18 U.S.C. 207(a). I held a hearing in the case (Docket No. C-76), and, on August 18, 1989, I issued a decision in which I concluded that Petitioner had not violated the law as was alleged. My decision was affirmed by a decision of the Deputy Assistant Secretary for Personnel Administration dated February 9, 1990.

Petitioner now seeks attorney fees pursuant to the Equal Access to Justice Act, 5 U.S.C. 504 (EAJA). The Department opposes this demand. I conclude that no attorney fees should be awarded in this case, because the Department's position in its case against Petitioner (Docket No. C-76) was substantially justified.

ISSUE

The issue in this case is whether Petitioner is entitled to attorney fees pursuant to 5 U.S.C. 504.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On November 23, 1988, the Department charged Petitioner with engaging in conduct which violated 18 U.S.C. 207(a). Decision at 1.¹
2. I held a hearing in the case on April 26, 1989. Decision at 3.
3. On August 18, 1989, I issued a decision which concluded that Petitioner's allegedly unlawful conduct did not violate 18 U.S.C. 207(a). Decision at 9.
4. On February 9, 1990, the Deputy Assistant Secretary for Personnel Administration issued a decision which affirmed my decision in the case. Decision of Deputy Assistant Secretary.
5. There existed a reasonable basis in fact and law for the Department to have concluded that Petitioner had engaged in unlawful acts in violation of 18 U.S.C. 207(a). 18 U.S.C. 207(a); 5 C.F.R. Part 737; Decision.
6. The Department's position in its case against Petitioner was substantially justified. 5 U.S.C. 504.
7. Petitioner is not entitled to attorney fees pursuant to 5 U.S.C. 504.

ANALYSIS

This case constitutes a request for attorney fees pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. 504. In pertinent part, that statute 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

¹ I refer to the Decision of Administrative Law Judge as Decision at . I refer to the Decision of the Deputy Assistant Secretary to Affirm the Decision of the Administrative Law Judge as Decision of the Deputy Assistant Secretary at

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.

Petitioner's claim for attorney fees has its genesis in a case originally brought against Petitioner by the Department. In August, 1988, the Department charged that Petitioner had unlawfully engaged in representation activities subsequent to his retirement as a federal employee and sought to bar him from participation in representation activities. This charge was based on the allegation that while employed by the Social Security Administration, an administrative component of the Department, Petitioner made favorable recommendations to his superiors concerning a candidate for an employment position announced pursuant to a competitive selection process. The Department alleged that, as a direct result of Petitioner's recommendation, the candidate recommended by Petitioner was selected to fill the position.

The Department further alleged that, subsequent to his retirement from federal service, Petitioner acted as an attorney for an individual on a discrimination complaint. The Department asserted that the individual represented by Petitioner had been a candidate for a position filled under the vacancy announcement with respect to which Petitioner had made recommendations. The Department asserted that the individual represented by Petitioner claimed in his discrimination complaint that his nonselection was as a result of discrimination. Therefore, according to the Department, Petitioner had engaged in unlawful representation activities subsequent to his retirement, because he represented a party to a particular matter in which the Department had an interest and in which Petitioner had personally and substantially participated while a federal employee. Petitioner was specifically charged with violating 18 U.S.C. 207(a).

I conducted a hearing in the case and issued a decision favorable to Petitioner. I found that, while Petitioner was a federal employee, he had recommended to his superiors that an employee on his staff be promoted. I concluded further that subsequently his superiors had announced vacancies for a position, and that one of the employees selected to fill the vacancy was the employee concerning whom Petitioner had made recommendations. I

also found that Petitioner's superiors had been influenced in their selection decision by Petitioner's recommendations. I concluded that, after his retirement from federal employment, Petitioner represented one of the unsuccessful candidates for the vacancies announced and filled by Petitioner's former superiors, in a discrimination action against the Department.

However, I found that that Petitioner had not participated personally and substantially in a particular matter, while a federal employee, which was the subject of his post-retirement representation activity. This finding was based on two conclusions. First, I concluded that the "particular matter at issue" was the selection process by which vacancies had been filled. Second, I concluded that Complainant had neither offered recommendations nor been consulted with respect to filling the specific vacancies. Therefore, I decided that the Department failed to prove that Petitioner had engaged in unlawful activities which violated 18 U.S.C. 207(a).

There is no question that the hearing before me involving Petitioner and the Department was an adversary action. Furthermore, Petitioner is a "prevailing party other than the United States." Therefore, Petitioner is entitled to attorney fees unless I conclude that the Department's position in the hearing before me was not substantially justified, or that special circumstances exist which make an award unjust. I conclude that Petitioner is not entitled to attorney fees because the Department's position in the hearing before me was substantially justified -- that is, that it "had a reasonable basis in law and fact." Pierce v. Underwood, 487 U.S. 552, 108 S.Ct. 2541 (1988).

The Department's case against Petitioner turned on the issue of whether Petitioner had, while a federal employee, personally and substantially participated in a particular matter which subsequently became the subject of his post-employment representation activities. Critical to resolving this issue were the questions of what constituted a "particular matter" and "personal and substantial" involvement within the meaning of 18 U.S.C. 207(a)(2) and (3). These were mixed questions of fact and law, depending on both the meaning of statutory language and the evidence of the case.

As is noted above, I concluded that the "particular matter" in the case before me constituted the process by

which selections were made to fill the vacancy announcement concerning which Petitioner engaged in post-employment representation activities. This was a matter of first impression, and I resolved it in part by analyzing the evidence in light of regulations which described situations which were distinguishable from the facts of the case. It was within the realm of reasonable possibility, based on the law and the facts, that I could have defined the "particular matter" more narrowly than I did, as was urged by Petitioner, or more broadly. For example, I could have more broadly defined the "particular matter" at issue to include not only the selection process, but the determinations by Petitioner's superiors as to whether to announce vacancies, or what vacancies to announce.

My conclusion as to what was meant by the term "particular matter" and my application of that meaning to the facts of the case directed the outcome of the case. Even a slightly broader definition and application by me of the term "particular matter" -- which, in my judgment, could have been supported by the law and the facts -- would have resulted in a decision adverse to Petitioner. I could have concluded that Petitioner's promotion recommendations to his superiors were "substantial and personal" involvement in a "particular matter" which included determinations as to whether to announce vacancies. In my opinion, this finding would have been supported by the evidentiary record of the hearing. This finding in turn would have mandated a decision by me that Petitioner's post-retirement representation activities violated 18 U.S.C. 207(a).

My decision was grounded on what I concluded was the most reasonable application of the law to the facts. There were other possibilities which I did not find, but which were nonetheless reasonable. The Supreme Court held in Pierce that an agency should not be liable for attorney fees under EAJA where it can demonstrate that its position in a case was justified to the degree that could

satisfy a reasonable person. 108 S.Ct. at 2550. It stated:

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.

108 S. Ct. at 2550, n. 2. I conclude that a reasonable person could have thought that the Department's position in its case against Petitioner was correct, because that position had a reasonable basis in law and fact. Therefore, Petitioner is not entitled to attorney fees pursuant to EAJA.

CONCLUSION

I conclude that Petitioner is not entitled to attorney fees pursuant to 5 U.S.C. 504.

/s/

Steven T. Kessel
Administrative Law Judge