

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0645

In re:

Application for Attorney's Fees and Costs
of LARRY THORSON, ESQ., counsel
for Respondents CRAIG PERRY, an individual doing
business as PERRY'S EXOTIC PETTING
ZOO; PERRY'S WILDERNESS RANCH
& ZOO, INC., an Iowa corporation,

Applicant.

**MISCELLANEOUS DECISION AND ORDER AMENDING THE CAPTION AND
GRANTING ATTORNEY FEES AND COSTS TO LARRY THORSON, ESQ.,
COUNSEL FOR PERRY RESPONDENTS**

The above captioned matter¹ involves an application for attorney's fees and costs filed by counsel for one group of Respondents in an administrative disciplinary proceeding initiated by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant"). APHIS filed a complaint against Craig Perry, an individual d/b/a Perry's Exotic Petting Zoo and Perry's Wilderness Ranch & Zoo, Inc. ("Respondents"). The complaint against Respondents was consolidated with other tenuously related matters under docket No. 09-0155. A hearing commenced on February 17, 2011 and continued

¹At the suggestion of the Judicial Officer for USDA ("Judicial Officer") in his Order of May 22, 2012, the caption has been amended to limit the instant matter to an application for attorney's fees and costs related to certain Respondents in docket No. 09-0155. In addition, pleadings related to the application were filed in a separate file and a new docket number was assigned by the Hearing Clerk for USDA's Office of Administrative Law Judges (Docket No. 12-0645)

through February 25, 2011, in person in Washington, D.C., and through audio-visual equipment located in Texas, Iowa and Missouri.

I. Procedural History

On December 20, 2011, I issued Findings of Facts and Conclusions of Law in docket No. 09-0155, in a Decision and Order (“D&O”) that segregated the Perry Respondents from other Respondents in the matter. I found that the majority of the Complainant’s allegations linking the Perry Respondents to actions of other Respondents were not substantiated. I further found that Complainant had established that Respondents’ failure to allow an inspection of Respondents’ premises violated the Act, but concluded that the circumstances underlying the violation did not merit the imposition of a sanction.

On January 17, 2012, counsel for the Perry Respondents, Larry Thorson, Esq., filed an application for an award of attorney fees. On January 23, 2012, APHIS filed a petition to appeal my D&O to the Judicial Officer. On February 3, 2012 Complainant filed objections to an award of fees, alleging that the application was not ripe. Counsel for Respondents did not file a response.

By Order issued February 6, 2012, I deferred ruling on the petition and referred the matter to the Judicial Officer. By Order issued May 22, 2012, the Judicial Officer concluded that he lacked jurisdiction over the application for fees and remanded the matter to me. On July 19, 2012, the Judicial Officer issued a Decision and Order on appeal, in which he upheld my findings, except that he concluded that the Perry Respondents’ failure to allow access to APHIS officials for inspection represented a

willful violation of 7 U.S.C. §2146(2) and 9 C.F.R. § 2.126 and warranted a sanction of \$500.00.

Neither party requested reconsideration of the Judicial Officer's Decision and Order and the Perry Respondents did not appeal his decision. Therefore, the matter of the pending application for attorney's fees and costs is ripe.²

DISCUSSION

An award of attorney fees for the successful prosecution of claims is governed by the Equal Access to Justice Act ("EAJA") section of the Administrative Procedures Act ("APA"). 5 U.S.C. §504. A prevailing party must file an application for fees within thirty (30) days after the final disposition of a proceeding. 5 U.S.C. § (a)(2); 7 C.F.R. § 1.193. The date of a final disposition is "the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding...becomes final and unappealable, both within the Department and to the courts." 7 C.F.R. § 1.193(b). In addition, "days" is defined by prevailing regulations as "calendar days", and therefore intervening weekends or holidays are not excluded from the computation of time. 7 C.F.R. § 1.180(a).

USDA objected to an award of fees because Mr. Thorson filed his application **before** my Decision and Order became final. Mr. Thorson's application was not untimely filed in the classic sense of failing to meet a deadline. Instead, having concluded all of his services with respect to the case before me, he protectively filed an application for fees.

²I would have welcomed a renewed application for attorneys' fees and costs, particularly considering USDA's objections on the ground that Mr. Thorson's application was pre-maturely filed. I note that in light of the assessment of a civil penalty, Mr. Thorson may have concluded that his application would be denied. However, as I discuss infra., the failure to prevail on one allegation does not totally preclude an award of fees and costs.

There is no prejudice to USDA in having notice of an application for fees and costs before the time expires within which one must file such application. USDA cites to no precedent for striking an early-filed application. There is nothing of record to suggest that the substance of Mr. Thorson's application would have changed had he waited to file his fee petition until after the final disposition of the case.

Although USDA characterizes Mr. Thorson's application as "premature", I have declined to rule upon it until it had "matured" following the expiration of the time to appeal the Judicial Officer's Decision and Order of July 19, 2012. Accordingly, USDA's objection to Mr. Thorson's application on the grounds that it was premature is over-ruled, and the Motion to Strike the application is DENIED.

An award of attorney's fees against the Government is appropriate if (1) the applicant is a prevailing party; (2) the Government's position was not "substantially justified; and (3) an award would not be rendered unjust due to special circumstances. See, Charles Davidson v. USDA, 62 Agric. Dec. 49 (2003), citing Sims v. Apfel, 238 F.3d 597, 699-600 (5th Cir. 2000). An applicant for attorney fees may be said to be a prevailing party if the applicant succeeded on any significant issue. Id.

In order to be deemed a "prevailing party", a party must "receive at least some relief on the merits of his claim . . ." Buckhannon B. and Care Home, Inc. v. W. Va. Depart. of Health and Human Res. 532 U.S. 598, 604 (2001) (quoting Hewitt v. Helms, 482 U.S. 755, 760 (1987)). No award of fees may be granted if the position of the United States was substantially justified. See, 28 U.S.C. § 2412(d)(1)(A).

The Judicial Officer substantially upheld my findings that dismissed the majority of the government's allegations against the Perry Respondents. USDA charged the Perry

Respondents with liability for violations involving the care and exhibition of animals owned by other licensed exhibitors. I rejected that argument, and so did the Judicial Officer. Accordingly, I find that the position of the government was not substantially justified, and that the Perry Respondents were prevailing parties.

I find no circumstances that would make an award of fees “unjust”. I credit the affidavits accompanying the application that attest that Respondent Craig Perry’s net worth did not exceed two million dollars at the time of the adjudication and that the business Respondents did not have a net worth in excess of seven million dollars.

Considering all of the evidence, an award of attorneys’ fees and costs is warranted. I find that the number of hours charged by Mr. Thorson are reasonable. I note that Mr. Thorson’s total charges would likely have been more modest but for the government’s unsuccessful attempt to impute the actions of other Respondents to his client. Mr. Thorson’s documented expenses of \$603.83 appear to be reasonable.

It is generally appropriate to exclude from an award for fees and costs those that can be attributed to services rendered on issues that were unsuccessful. Since my finding that the Perry Respondents had violated the Act by not having a responsible individual on site to allow inspection by APHIS officials was upheld by the Judicial Officer, it is appropriate to calculate and exclude the costs of Mr. Thorson’s services for that defense. At the hearing, a witness testified about the circumstances that led to Mr. Perry’s absence from his establishment. Mr. Thorson consulted the witness before the hearing, as evidenced by his itemized time records. Mr. Thorson made argument on that issue in his written closing argument. I estimate a total of four hours of Mr. Thorson’s services were

devoted exclusively to the defense of this charge, and I therefore adjust his claimed total of 110.30 hours to 106.30 hours.

In addition, I must reduce Mr. Thorson's hourly rate for services. Although Mr. Thorson's rate of \$160.00 per hour is objectively reasonable, an award of fees under EAJA is limited to an hourly rate of \$150.00, pursuant to 7 C.F.R. § 1.186 (March 3, 2011). Accordingly, a total of \$16,548.83 (\$150.00 X 106.30 hours + 603.83 costs) is hereby awarded to Larry Thorson, Esq.

ORDER

For the reasons set forth herein, supra., the application for attorney fees by Larry Thorson, Esq., counsel for the Perry Respondents is GRANTED.

Attorney fees and costs in the amount of \$16,548.83 are hereby awarded to Larry Thorson, Esq.

This Decision and Order shall become effective and final 35 days from its service upon Respondents' counsel unless an appeal is filed with the Judicial Office pursuant to 7 C.F.R. § 1.145.

The Hearing Clerk shall serve copies of this Miscellaneous Order upon the parties.

So Ordered this 27th day of September, 2012 at Washington, DC.

Janice K. Bullard
Administrative Law Judge