

DWIGHT L. LANE AND DARVIN R. LANE v. U.S. DEPARTMENT OF AGRICULTURE; ANN C. VENEMAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; KEITH KELLY, ADMINISTRATOR OF THE FARM SERVICE AGENCY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; AND WILLIAM G. JENSON, THE JUDICIAL OFFICER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE.

Civil No. A2-00-84.

Filed July 18, 2001.

EAJA – NAD – Attorney fees – Statutory authority to review – Plain meaning of statute – Arbitrary and capricious – Award period.

The Judicial Officer's (JO) decision to reduce the Equal Access to Justice Act award (EAJA) from \$213,997 to \$55,396 was not arbitrary and capricious. The JO has the statutory authority to review awards by a National Appeals Division (NAD) officer. The District Court determined: (1) The JO had authority to review the NAD award because EAJA awards are made through the Administrative Procedure Act (APA), not NAD. The court cited *Adam Sommerrock Holzbau, GmbH v. U.S.*, 866 F.2d 427, 429 (Fed. Cir. 1989), as precedent for having the JO review issues of attorney fees and expenses; (2) The JO did not abuse his discretion and carefully considered the Appellant's claims and supported his decision; (3) The JO followed the principal of the plain meaning of the statute by determining ". . . attorney or agent fees" to be disjunctive and not additive; (4) The JO properly determined the time period for which fees may be considered, began when the controversy began; and (5) The JO properly considered the hourly rate cap and analyzed the reasonable hours of work for the legal issues.

**United States District Court
District of North Dakota
Northeastern Division**

MEMORANDUM AND ORDER

Before the Court is defendants' (hereinafter collectively referred to as the United States) Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim (doc. #3) and the Lanes' Federal Rule of Civil Procedure 56 motion for summary judgment (doc. #17). Oral argument was heard on Friday, June 29, 2001, in Grand Forks, North Dakota. At the close of the hearing, the Court took the matter under advisement. Upon consideration of the submissions of the parties and in light of the entire file, the Court rules as follows.

A. BACKGROUND

This case involves awarding attorney fees for adverse agency adjudications pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. This is the

third time these parties have been before the Court. The background and history of this case is set forth in *Lane v. United States Department of Agriculture*, 929 F. Supp. 1290 (D.N.D. 1996), *aff'd in part, rev'd in part, and remanded by* 120 F.3d 106 (8th Cir. 1997) (*Lane I*); and *Lane v. United States Department of Agriculture*, 187 F.3d 793 (8th Cir. 1999) (*Lane II*), and need not be repeated here in depth.

In short, it is sufficient to note that the Eighth Circuit remanded the case in order for the National Appeals Division (NAD) of the United States Department of Agriculture (USDA) to consider whether the Lanes were entitled to an EAJA fee award. *See Lane I*, 120 F.3d at 110-11. The Lanes had been successful before the NAD in challenging the denial of their delinquent loan servicing applications by the Farmers Home Administration, now known as the Farm Service Agency (FSA). Upon remand, the original NAD hearing officer, Harry Iszler, considered the petitions for fees and expenses. Iszler determined that the Lanes were prevailing parties and found both that the agency's position in the underlying action was not substantially justified and that special circumstances making an award unjust did not exist. *See* 5 U.S.C. § 504(a)(1). Consequently, he awarded Dwight Lane \$95,933.45 and Darvin Lane \$118,064.26 for attorneys fees, agent fees, and costs.

The FSA sought review of Iszler's determination from the Judicial Officer of the USDA. *See* 5 U.S.C. § 504(a)(3). Upon review, the Judicial Officer reduced Darvin's award to \$27,353.30 and Dwight's award to \$28,043.30, resulting in a net reduction of \$158,601.17.

The Lanes, obviously dissatisfied with the Judicial Officer's drastic reduction, brought this suit. They challenge both the ability of the Judicial Officer to review an NAD EAJA award and his substantive determination.¹ Their amended complaint and motion for summary judgment clarify that they have three main arguments: first, that the USDA Judicial Officer lacks authority to review an NAD hearing officer's EAJA award; second, that this Court should award EAJA fees after a *de novo* application of the law to the facts²; and last, assuming that the USDA Judicial Officer had the authority to review the EAJA

¹The Lanes apparently have abandoned their previous argument that any further review of the hearing officer's determination is invalid by failing to address it in their motion for summary judgment. Thus, the Court deems the argument waived.

²The Lanes cite no authority for the proposition that the Court has the authority to perform a *de novo* review and award the fees it determines appropriate. Therefore, this suggestion is summarily denied.

awards, that his decision was arbitrary and capricious.

B. ANALYSIS

The United States has filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The Court converts this motion to one for summary judgment pursuant to Fed. R. Civ. P. 56. *See* Fed. R. Civ. P. 12(c). Consequently, the Court has cross motions for summary judgment before it. Summary judgment is appropriate when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Both parties agree that the relevant facts are not in dispute. The dispute involves only the legal conclusions to be drawn from those facts.

1. Did the USDA Judicial Officer Have Authority to Review an NAD Hearing Officer’s Determination on EAJA fees?

The Lanes challenge the authority of the USDA Judicial Officer to review an NAD decision. The United States admits that Judicial Officer review of an NAD decision is awkward but insists that the appropriate regulations were followed correctly.

The NAD is an independent appeals division of the USDA, separate from all other agencies and offices of the Department, which was created by Congress on October 13, 1994, in the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994. *See* Title II, Subtitle H, Pub. L. No. 103-354, §§ 271-283, 108 Stat. 3228-3235 (codified at 7 U.S.C. § 6991 et seq.). Congress gave NAD the responsibility for all administrative appeals formerly handled by various agencies and divisions of the USDA,³ including appeals from the former Farmers Home Administration, now the Farm Service Agency. *See* 60 Fed. Reg. 67298, 67299, Dec. 29, 1995; 7 C.F.R. § 11-1. The NAD is headed by a Director who is subject only to the direction and control of the Secretary of Agriculture. 7 U.S.C. § 6992(b), (c). The Secretary is prohibited from delegating NAD authority to anyone other than the Director. *Id.* § 6992(c).

Agency decisions which are subject to the NAD’s jurisdiction may be appealed to the NAD for an evidentiary hearing before a hearing officer. *See id.*

³Specifically, the NAD is authorized to hear appeals from the Commodity Credit Corporation, Farm Service Agency, Federal Crop Insurance Corporation, National Resources Conservation Service, Risk Management Agency, Rural-Business Cooperative Service, Rural Development, Rural Housing Service, Rural Utilities Service, and any predecessor or successor agency of those listed. *See* 7 U.S.C. §§ 6991(2), 6993; *see also* 7 C.F.R. § 11.1.

§ 6996(a). The NAD hearing officer's determination is subject to the Director's review. *Id.* § 6998. The Director's decision is considered the final NAD determination. *Id.* § 6998(b) ("the Director shall issue a final determination").

The Judicial officer is a separate official within the USDA who is appointed by the Secretary of Agriculture. The Judicial Officer is not part of the NAD and, therefore, is not under the NAD Director's control and supervision.

Because the NAD is a separate and independent division of the USDA, the Lanes conclude that the Judicial Officer had no authority to review their EAJA awards. The Lanes, therefore, request the Court to set aside the Judicial Officer's decision as invalid and reinstate the hearing officer's decision as final. The United States counters that it was following its extant EAJA regulations in allowing the Judicial Officer to review the EAJA award. *See* 7 C.F.R. §§ 1.201, 1.145. The United States points out that the NAD did not have regulations in place allowing the Director to review an EAJA award⁴ since it had taken the position that EAJA did not apply to NAD proceedings. *See Lane I*, 120 F.3d at 109-110 (rejecting NAD position and finding that proceedings before the NAD are under § 554 of the APA). When both this Court and the Eighth Circuit rejected that position, the USDA argues it was faced with a dilemma regarding agency review. It could either allow the NAD Director to review the hearing officer's EAJA award, which would have been logical; or, follow its EAJA regulations which required review by the Judicial Officer. The United States asserts that in keeping with the legal principle that "agencies must follow their own rules," *see Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the USDA determined that the EAJA award should be appealed to the Judicial Officer for review.

The Court admits that this is a difficult decision. The Lanes' argument is appealing and it appears logical that an NAD hearing officer's decision should only be reviewed by the Director given the independent nature of the NAD. In contrast, it also appears logical for the USDA to follow its generally applicable EAJA regulations when appealing an EAJA award. On balance, the Court determines that the weight of the arguments favors the United States.

⁴The Court has been informed that this omission has been corrected. On June 14, 1999, the Secretary of Agriculture delegated authority to the NAD Director to review NAD hearing officer determinations, in lieu of the Judicial Officer, in circumstances where EAJA has been held to apply to NAD proceedings. Prior to this delegation, the Judicial Officer reviewed a handful of other similar NAD EAJA awards. The parties have indicated that those awards have not been challenged. Consequently, this case may be the only one of its kind where the issue of the Judicial Officer's authority is questioned.

EAJA requires agencies to formulate uniform procedures for submitting and considering applications for fees and other expenses. *See* 5 U.S.C. § 504(c)(1). In complying with the statutory mandate, the USDA has promulgated final rules providing the procedures applicable to EAJA applications before the Department. *See* 7 C.F.R. § 1.180 et seq. These regulations are applicable to all adversary adjudications. *See id.* § 1.183(a)(1). Adversary adjudications are adjudications required by statute to be conducted by the Department under 5 U.S.C. § 554 in which the position of the agency is represented by counsel. *See id.* In *Lane I*, it was specifically determined that NAD proceedings fit the definition of adversary adjudications. *See Lane I*, 120 F.3d at 108. Thus, the sine qua non of plaintiffs' victory in *Lane I* is that NAD proceedings are subject to EAJA.

As such, the Lanes' applications necessarily were subject to the Department's generally applicable EAJA regulations. EAJA awards are made only through the APA, not the NAD statute. Thus, in a sense, when this case was remanded to the agency the issue was not uniquely an NAD issue – it was an EAJA issue. And, as noted above, EAJA requires agencies to formulate uniform procedures and rules for handling EAJA applications. The Department's uniform procedures, and the EAJA statute itself, require, where possible, the adjudicative officer “who presided at the adversary adjudication” to consider the applications. *See* 7 C.F.R. § 1.200; 5 U.S.C. § 504(b)(1)(D). In the Lanes' case, this was Harry Iszler, an NAD hearing officer. The fact that the presiding hearing officer was within the NAD does not make the decision on an EAJA application a substantive NAD determination; rather it is simply a by-product of applying the applicable EAJA regulations. Thus, the Court concludes that the Lanes' EAJA applications were subject to the USDA's EAJA regulations.

The Court is emboldened in its decision by the case of *Adam Sommerrock Holzbau, GmbH v. United States*, 866 F.2d 427 (Fed. Cir. 1989). In *Adam Sommerrock*, the court considered whether a time limit for appealing decisions within a provision of the Contract Disputes Act (CDA), 41 U.S.C. § 607, trumped a competing time limit within EAJA § 504(c)(2) as applied to EAJA applications. *Id.* at 430. The court rejected the argument that the CDA appeal period applied to EAJA fee decisions. *See id.* In explaining its determination, the court noted that “5 U.S.C. § 504(c)(2) alone applies to fee rulings by contract appeal boards.” *Id.* (emphasis in original). In so holding, the court further explained that “the CDA governs appeals to this court of decisions by boards on contract disputes themselves; the EAJA provision at issue governs appeals of disputes of attorney fees and expenses.” *Id.* at 429. The principle of *Adam Sommerrock* is equally applicable in this case: the NAD statute governs substantive agency appeals to the Division; however, EAJA governs attorney fees and expense decisions. *See id.*

Consequently, the Court concludes that it was not inappropriate for the

USDA to follow its EAJA regulations. Under those regulations, the Judicial Officer was the appropriate reviewing official. *See* 7 C.F.R. §§ 1.201(a), 1.145(a).

2. Was the Judicial Officer’s EAJA Decision Supported by Substantial Evidence?

Since it has been determined that the Judicial Officer had the authority to review an NAD EAJA award, the Court faces the question of whether the Judicial Officer’s decision was supported by substantial evidence.

The sole basis for an EAJA fee award in administrative proceedings is 5 U.S.C. § 504. *See Melkonvan v. Sullivan*, 501 U.S. 89, 94 (1991) (stating explicitly that § 504 was enacted at the same time as 28 U.S.C. § 2412, and is the only part of the EAJA that allows fees and expenses for administrative proceedings). Section 504(a)(1) provides in part:

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).

In this case, the United States no longer contests that all of the prerequisites for an EAJA fee award have been met: the underlying NAD action was an “adversary adjudication;” the Lanes were prevailing parties; the agency position was not substantially justified; and no other special conditions make an award unjust. Consequently, the only issue is the Lanes’ dissatisfaction with the amount of “fees and other expenses” they were awarded.

Under EAJA, dissatisfied parties, such as the Lanes, may appeal the agency determination to the appropriate court for judicial review. *See* 5 U.S.C. § 504(c)(2). The reviewing court’s authority is strictly limited. It must base its decision solely on the factual record made before the agency. *Id.* Further, it must give deference to the agency decision such that it “may modify the determination of fees and other expenses only if the court finds that . . . the calculation of the amount of the award, was unsupported by substantial evidence.” *Id.*; *Allen v. National Transp. Safety Bd.*, 160 F.3d 431, 432 (8th Cir.

1998) (noting that an agency decision will be affirmed unless it is arbitrary, capricious, an abuse of discretion, or otherwise unsupported by the law).

The substantial evidence test is met if the government's position is "justified to a degree that could satisfy a reasonable person." *Smith v. National Transp. Safety Bd.*, 992 F.2d 849, 852 (8th Cir. 1993) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). Put differently, "the government must show that there is a reasonable basis in truth for the facts alleged in the pleadings; that there exists a reasonable basis in law for the theory it propounds, and that the facts alleged will reasonably support the legal theory advanced." *Id.* (quotations omitted).

The Lanes propound that the Judicial Officer committed four errors which viewed separately or taken together demonstrate that his decision was unsupported by substantial evidence. First, they assert that the Judicial Officer legally erred in determining that agent fees may not be awarded in addition to attorneys fees. Second, they argue that the Judicial Officer erred in shortening the time period over which he awarded fees. Third, they assert that the Judicial Officer should not have limited attorneys fees to \$75.00 per hour. Last, the Lanes argue that the Judicial Officer erred in reducing the attorneys' hours of work. All of their arguments, however, are unconvincing and fall short of showing that the Judicial Officer abused his discretion.

It must be noted that the Judicial Officer's May 17, 2000, Decision and Order was 70 pages long. It contained a thorough analysis of the Lanes' attorneys' billing records. In fact, the Judicial Officer considered individually the attorneys' monthly statements dating from November 1993 until January 1995. Although he drastically reduced their EAJA award, he did make several favorable concessions to the Lanes. For example, the billing statements contained a notation of "no charge" for certain attorney activities – mostly traveling and telephone time. The Judicial Officer, however, found that there was substantial evidence in the record to conclude that the "no charge" time was actually billed to the clients at a half-time rate. Additionally, he rejected the government's position that the Lanes' billing records were not sufficiently detailed. These examples demonstrate, contrary to the Lanes' suggestion, that the Judicial Officer approached his determination in a fair and unbiased manner.

a. Elimination of Agent Fees

The NAD hearing officer awarded the Lanes \$52,705.00 for the agent services of Mr. Kreklau. The Lanes hired Mr. Kreklau, an agricultural credit counselor, to help them prepare their FSA delinquent loan servicing applications in the underlying agency proceedings. The Judicial Officer determined, as a matter of law, that the Lanes were not entitled to recover both attorneys fees and agents fees under EAJA. Additionally, he also concluded that such services

were not reasonable or necessary. He did award, however, the Lanes some expenses for Kreklau by treating him as an expert witness. *See* 28 U.S.C. § 1621. Under that analysis, the Lanes were awarded \$120 for his services.

The Lanes argue that both agent fees and attorney fees are recoverable under EAJA. EAJA defines the “fees and expenses” that may be awarded to include the “reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which found by the agency to be necessary for the preparation of the party’s case, *and reasonable attorney or agent fees.*” 5 U.S.C. § 504(b)(1)(A) (emphasis added). The Lanes read this language to allow for reasonable attorney fees and agent fees. The Judicial Officer specifically rejected the argument that the statute allows for both types of fees.

The question of whether both attorney and agent fees may be awarded under EAJA is one of statutory interpretation. In such a case, the court must “adhere to the general principle that ‘when the plain language of a statute is clear in its context, it is controlling.’” *United States v. Smith*, 35 F.3d 344, 346 (8th Cir. 1994) (citations omitted). The statute, quoted above, uses the term “or” to separate attorney from agent. In its most common usage the word “or” implies a mutually exclusive choice, in other words, an alternative. *See* Webster’s II New Riverside University Dictionary 926 (1984); Black’s Law Dictionary 756 (6th ed. 1991). Accordingly, courts generally ascribe a disjunctive rather than conjunctive meaning to the word “or”. *See Smith*, 35 F.3d at 346 (“ordinary usage of the word ‘or’ is disjunctive, indicating an alternative”); *Christl v. Swanson*, 609 N.W.2d 70, 73 (N.D. 2000) (same); *State v. Loge*, 606 N.W.2d 152, 155 (Minn. 2000) (same).

Nevertheless, courts sometimes interpret “or” to mean “and” when a disjunctive meaning would either frustrate a clear statement of legislative intent or render the statute inoperable. *See United States v. Smeathers*, 684 F.2d 363, 364 (8th Cir. 1989) (noting that the rule of construction must yield if it frustrates legislative intent); *Christl*, 609 N.W.2d at 72 (“literal meaning of the terms “and” and “or” should be followed unless it renders that statute inoperable or the meaning becomes questionable”); *Stanton v. Iowa Dist. Ct. for Polk County*, 2001 WL 98951, *2 (Iowa Ct. App. 2001) (noting that such an interpretation might be needed to comport with the “spirit of the law”); *see also DeSylva v. Ballentine*, 351 U.S. 570, 573 (1956) (explaining that the word “or” is often carelessly used as a substitute for the word “and”).

This, however, is not such a case. The primary intent of Congress in creating EAJA was “to diminish the deterrent effect of the expense involved in seeking review of, or defending against, unreasonable government action.” *S.E.C. v.*

Comserv Corp., 908 F.2d 1407, 1415 (8th Cir. 1990) (quotations omitted). In other words, Congress intended to relieve average persons of the economic disincentive to challenge unjustified government actions. See *Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir. 1995). In the context of an agency proceeding, private parties may challenge government actions or defend against them through the use of counsel or, if allowed by the agency, by other qualified representatives. See 5 U.S.C. § 555(b). Thus, if the specific agency so provides, a private party is not required to retain an attorney for representation; instead, they may hire a qualified non-attorney representative. These non-attorney representatives generally are referred to as agents. See *Cook v. Brown*, 68 F.3d 447, 450-51 (Fed. Cir. 1995) (“Congress understood agents’ to be persons who are not trained and authorized to practice law, and who may not represent clients without special permission from a given tribunal.”) Courts generally have recognized that agents and attorneys are two mutually exclusive types of representation. See *id.* Thus, it is not surprising that Congress defined “fees and other expenses” to include “attorney or agent fees” within the EAJA provision applicable to *agency proceedings* since an agent could be used as a representative in such proceedings. See 5 U.S.C. § 504(b)(1)(A).

In contrast, the EAJA fee-shifting provision applicable to court proceedings allows only for the recovery of “reasonable attorney fees” within its definition of “fees and other expenses.” See 26 U.S.C. § 2412(d). It does not mention agent fees. *Id.* See also *Cook*, 68 F.3d at 451 (noting that EAJA authorizes recovery of agent fees only in agency, not court, proceedings). This is perfectly logical since only attorneys, i.e., those admitted to the practice of law, may represent clients in court. From this comparison of otherwise identical definitions of “fees and other expenses,” the Court concludes that Congress was aware of the alternative type of representation available in agency proceedings, i.e., agent representation, and Congress intended to reimburse private parties for such *alternative* representation, not both. Interpreting the word “or” in its usual alternative sense does not frustrate that intent or make the provision inoperable. See *Smith*, 35 F.3d at 347 (declining to read “or” to mean “and” when such a construction would defeat the plain language of the statute and would not foster any clearly articulated legislative intent to the contrary). Therefore, the Court gives “or” its plain meaning and concludes that both attorney fees and agent fees may not be recovered under § 504(b)(10)(A).

Consequently, the Judicial Officer did not err in refusing to award the Lanes agent fees for Kreklau’s services.

3. Shortening the Period for Awarding Fees

The NAD hearing officer awarded the Lanes attorneys fees beginning from June 1993. The Judicial Officer, however, held that the adversarial proceeding

did not begin until November 1993 and limited attorneys fees from that date forward. The Lanes argue that the Judicial Officer should not have shortened the period for which they recovered fees.

EAJA allows for an award of fees and expenses “in connection with” an adversarial proceeding. 5 U.S.C. § 504(a)(1). This prompts the question: when does an adversarial proceeding begin? EAJA provides that such a proceeding begins when there is an “action or failure to act by the agency” which becomes the basis for the adversary adjudication. *Id.* § 504(b)(1)(E). The Judicial Officer determined that the “action by the agency” which became the basis for the adversary adjudication was the denial of the Lanes’ delinquent loan servicing applications. The denials occurred in November 1993.

The Judicial Officer’s conclusion is reasonable and logical. Prior to the denial of the applications there was not an adversarial relationship between the parties. The Lanes were merely applying for agency benefits in the form of delinquent loan servicing. It was not until after the applications were denied that the parties’ interests were at odds. The adversarial proceedings began when the Lanes appealed FSA’s denial of their applications to the NAD. This happened in November 1993. Consequently, the Judicial Officer did not err in limiting the period for awarding fees from that time forward.

4. Applying the Statutory Cap of \$75.00 per hour

The Lanes assert that the Judicial Officer erred in applying the statutory cap of \$75.00 per hour in awarding attorneys fees. At the time these adversarial proceedings were ongoing, § 504(b)(1)(A)(ii) provided: “Attorney or agent 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 . . . justifies a higher fee.”⁵ 5 U.S.C. § 504 (b)(1)(A)(ii).

This provision clearly and unambiguously applies a \$75 rate cap unless the agency regulations provide otherwise. In this case, the agency did not have a regulation increasing the statutory cap above \$75 per hour. *See* 7 C.F.R. § 1.187. Therefore, the \$75.00 cap applied. The Judicial Officer had no authority to increase or disregard the statutory \$75 per hour rate cap. *See Mendenhall v. National Transp. Safety Bd.*, 213 F.3d 464, 468 (9th Cir. 2000) (concluding that

⁵The March 29, 1996 amendments to EAJA raised the cap to \$125.00 per hour. The new cap, however, only applies to adversarial adjudications that began on or after March 29, 1996. Therefore, the \$125 cap is not applicable in this case.

allowing an agency to award attorneys' fees at a reasonable market rate contravened the plain statutory text and Supreme Court case law). To do so would have been in contravention of the law.

5. Reducing Reasonable Hours of Work

Finally, the Lanes challenge several categories of time eliminated by the Judicial Officer as unreasonable and unnecessary. The Judicial Officer denied fees for time that both attorneys met with the Lanes, met with Kreklau, and researched certain legal issues. EAJA vests the agency with the authority to determine, in the first instance, what attorney fees are reasonable and necessary. *See* 5 U.S.C. § 504(a)(1) (providing that the *agency* shall award fees and other expenses). This Court must defer to the agency's determination unless it was "unsupported by substantial evidence." *Id.* § 504(c)(2). Thus, it is not the place of this Court to substitute its judgment for that of the agency. The Court finds that the Judicial Officer's decision eliminating duplicative and irrelevant work was supported by substantial evidence. Therefore, the Court does not modify those determinations.

C. CONCLUSION

For the reasons given above, **IT IS ORDERED** that the defendants' motion to dismiss (doc. #3), construed as a motion for summary judgment, is **GRANTED**; contrarily, **IT IS ORDERED** that plaintiffs' motion for summary judgment (doc. #17) is **DENIED**. Plaintiffs' complaint and cause of action is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.