

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) [EAJA]
) Docket Number **14-0020**
Le Anne Smith)
)
Applicant) **Decision and Order Granting EAJA Fees**

Appearances:

Larry J. Thorson, Esq., Cedar Rapids, Iowa, for the Applicant, Le Anne Smith (Applicant Smith); and

Colleen A. Carroll, Esq. with the Office of the General Counsel, United States Department of Agriculture, Washington D.C., for the Respondent (APHIS).¹

Decision Summary

1. The Applicant, Le Anne Smith, timely filed her application for attorney’s fees and expenses under the Equal Access to Justice Act (EAJA) on December 6, 2013. Le Anne Smith is awarded EAJA attorney fees and expenses in accordance with 5 U.S.C. § 504 and 7 C.F.R. §§ 1.180 - 1.203. Beneath each heading that follows are my findings and conclusions that are required under the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. § 1.200), “§ 1.200 Decision.”

¹ The Respondent is the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (“APHIS” or “Respondent”).

Le Anne Smith Prevailed

2. Le Anne Smith became a prevailing party on September 11, 2013, when the Judicial Officer dismissed the Complaint as to her, as follows.

ORDER

The Complaint, as it relates to Le Anne Smith, filed by the Administrator on July 14, 2005, is dismissed.

In re Smith, 72 Agric. Dec. ____ (2013) (Decision and Order as to Le Anne Smith, slip opinion September 11, 2013, AWA Docket No. 05-0026); found online at http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/091113.Perry_DO_AWA05-0026.pdf

December 12, 2013 Was the Filing Deadline for the EAJA Application

3. For purposes of computing the time for Le Anne Smith to file her application for an EAJA award of attorney fees and other expenses, theoretically the parties would have had 60 days to seek review of the Judicial Officer's Order in the U.S. Court of Appeals (60 days from the date of the Judicial Officer's Order, 7 U.S.C. § 2149). Thus, from September 11, 2013, the parties would have had 60 days, until November 12 (Tuesday), 2013. The 60th day falls on a Sunday; the Monday was a federal holiday; consequently, on November 12, 2013, the Judicial Officer's Order became final and unappealable within the meaning of 7 C.F.R. § 1.193.

4. As a practical matter, the Judicial Officer spoke for the Secretary of Agriculture in his Order issued September 11, 2013, so APHIS would not appeal the Judicial Officer's

Order to the U.S. Court of Appeals. As a practical matter, Le Anne Smith won, so Le Anne Smith would not appeal the Judicial Officer's Order to the U.S. Court of Appeals.

Nevertheless, for purposes of computing the time for Le Anne Smith to file her EAJA application, November 12, 2013 is the date the Judicial Officer's Order became final and unappealable within the meaning of 7 C.F.R. § 1.193.

5. From November 12, 2013, Le Anne Smith had 30 days to file the EAJA application: December 12, 2013. 5 U.S.C. § 504. 7 C.F.R. § 1.193. Le Anne Smith filed the EAJA application on December 6, 2013, with time to spare.

6. APHIS argues that Le Anne Smith may not include the 60 days from September 11, 2013 as part of her calculation of time for filing her EAJA application, because she was not an exhibitor and thus did not have the right to appeal to the U.S. Court of Appeals. The principal issue as to Le Anne Smith in AWA Docket No. 05-0026 was whether, beginning approximately February 1, 2003, Le Anne Smith was an exhibitor under the Animal Welfare Act. Had Le Anne Smith lost before the Judicial Officer, she would have had the right to appeal to the U.S. Court of Appeals, within 60 days. 7 U.S.C. § 2149. For purposes of computing the time for Le Anne Smith to file her EAJA application, she still had the 60 days, before her 30 days began to run. True, Le Anne Smith proved she was not an exhibitor, but APHIS claimed she was, until the Judicial Officer found otherwise. Le Anne Smith will not now be deprived of that 60 days as part of the calculation of time for filing, based on APHIS's erroneous assertion that Le Anne Smith had no right to appeal to the U.S. Court of Appeals because she was not an exhibitor.

Parties and Pleadings

7. The Applicant is Le Anne Smith, who successfully defended allegations against her in AWA Docket No. 05-0026. In that case, APHIS failed to prove that Le Anne Smith played a critical role in the operation of the business of Craig A. Perry or Perry's Wilderness Ranch & Zoo, Inc., an Iowa corporation; APHIS failed to prove that Le Anne Smith was a de facto partner of Craig A. Perry or Perry's Wilderness Ranch & Zoo, Inc.; and APHIS failed to prove that Le Anne Smith was a de facto principal in Perry's Wilderness Ranch & Zoo, Inc. The Judicial Officer dismissed APHIS's claims against Le Anne Smith. As a prevailing party in AWA Docket No. 05-0026, Le Anne Smith applied for an award of attorney fees and other expenses under the Equal Access to Justice Act (EAJA). 5 U.S.C. § 504. Le Anne Smith is represented, both here and in AWA Docket No. 05-0026, by Larry J. Thorson, Esq., Cedar Rapids, Iowa. Le Anne Smith timely filed her EAJA application on December 6, 2013.

8. The Respondent here (Complainant in AWA Docket No. 05-0026) is the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS" or "Respondent"). APHIS objects, in accordance with 7 C.F.R. § 1.195, to the award requested in Le Anne Smith's EAJA application. APHIS is represented, both here and in AWA Docket No. 05-0026, by Colleen A. Carroll, Esq. with the Office of the General Counsel, United States Department of Agriculture. APHIS timely filed the Agency Answer on March 6, 2014.

9. Le Anne Smith timely filed Applicant's Response Brief on April 14, 2014.

APHIS's Position Was Not Substantially Justified

10. Repeatedly, from the beginning of my involvement in AWA Docket No. 05-0026, Mr. Thorson voiced opposition to the inclusion of Le Anne Smith as a party and asked that she be dismissed - - perhaps every time he had the opportunity to speak to me and counsel for APHIS during telephone conferences. Mr. Thorson continued to object to the inclusion of Le Anne Smith as a party during the 3 segments of the 13-day hearing: November 16-20, 2009; and December 7-11, 2009 in Chicago, Illinois; and January 11-13, 2010 in Cedar Rapids, Iowa.

11. The basis of APHIS's claims against Le Anne Smith was unclear from the Complaint and unclear from the evidence. Dr. Bellin's incorrect assumptions about Le Anne Smith's relationship to Craig A. Perry and Dr. Bellin's completion of APHIS paperwork may have contributed to APHIS's initial impression that Le Anne Smith was part of the exhibitor operation, but the evidence, including Dr. Bellin's testimony, proved that she was not. Le Anne Smith was not named on the Animal Welfare Act license applications or renewals as "authorized to conduct business" or in any other capacity. CX 1. Le Anne Smith had no authority and no responsibility regarding Craig Perry's or the corporation's Animal Welfare Act undertakings. Le Anne Smith was not a shareholder, officer, director, or employee of the corporation. Le Anne Smith was not an employee of Craig Perry. Le Anne Smith did not own the animals. Le Anne Smith was not an owner, lessor, or lessee of the real property or personal property required by the zoo or the animals. If there were any "titles" given to Le Anne Smith on inspection reports (on the signature line which merely acknowledged

receipt of an inspection report), such “titles” were chosen by Dr. Bellin to satisfy his requirements; they were not bestowed by Craig Perry or the corporation; they were not chosen by Le Anne Smith.

12. APHIS’s persistence in APHIS’s claims against Le Anne Smith was, to me, unreasonable. Mr. Thorson’s Affidavit, at p. 2, attached to Le Anne Smith’s EAJA application filed on December 6, 2013, includes in part the following.

This action against her was pursued even though through her attorney she asked the Government dismiss its action at the very start of this case (Tr. pp. 42-56) and to voluntarily dismiss her at the close of evidence in the case that was tried for approximately three weeks (Tr. pp. 4302-4303). This took her completely away from her children for two weeks when trial was held in Chicago and was a hardship she never should have had to bear. This was a cynical attempt to put pressure on her significant other, Craig Perry, by bringing these groundless allegations against her.

13. APHIS’s objective regarding the claims against Le Anne Smith is not clear; what is clear is that APHIS was not substantially justified in persisting in APHIS’s claims against Le Anne Smith.

Attributing 1/3 of the Attorney Fee to Le Anne Smith is Just

14. The corporate entity, Perry’s Wilderness Ranch & Zoo, Inc., required very little attention (work). Le Anne Smith required much more attention (work) than the corporate entity. Craig A. Perry required the most attention (work), better than half. Perhaps to put

too fine a point on it, I conclude that Perry's Wilderness Ranch & Zoo, Inc. required 1/9 of the attention (work); Le Anne Smith required 3/9 of the attention (work); and Craig A. Perry required 5/9 of the attention (work). Mr. Thorson's allocation of the work done on behalf of Le Anne Smith (1/3) computes to the same fraction as my own allocation (3/9).

Net Worth

15. Le Anne Smith's net worth did not exceed two million dollars at the time of the adjudication. Evidence during the hearing proved this; Le Anne Smith's EAJA application, including her Affidavit executed December 5, 2013, further confirms this.

Maximum Hourly Rate Under EAJA

16. The \$125.00 per hour maximum attorney fee under EAJA applies until March 3, 2011. The \$150.00 per hour maximum attorney fee under EAJA applies beginning March 3, 2011. 7 C.F.R. § 1.186. Mr. Thorson's work on behalf of Le Anne Smith merits the maximum rate authorized, given his experience, expertise, proficiency, efficiency, and effectiveness, and in accordance with the factors enumerated in 7 C.F.R. § 1.186. Based on my examination of the 27 pages of excerpts from the billing records attached to the Le Anne Smith EAJA application, Mr. Thorson charged little time for the amount of work he was required to do. This works to APHIS's advantage. The 27 pages of excerpts from the billing records, plus Mr. Thorson's Affidavit executed December 5, 2013, provide all the documentation for this case that is required by 7 C.F.R. § 1.192.

There Are No Special Circumstances That Make An Award Unjust

17. APHIS argues that prevailing against Craig A. Perry and Perry's Wilderness Ranch

& Zoo, Inc. constitutes special circumstances that make the award sought by Ms. Smith unjust. “It would be unreasonable to award EAJA fees for work performed in connection with the violations that were found to have been committed.” APHIS Agency Answer, at p. 18. I agree that APHIS prevailed against all the respondents except Le Anne Smith.

(a) APHIS successfully obtained revocation of the Animal Welfare Act license of Jeff Burton and Shirley Stanley, individuals doing business as Backyard Safari, when they failed to appear on the first day of the hearing in November 2009. That decision is online. http://www.dm.usda.gov/oaljdecisions/091116_AWA_05-0026_do.pdf

(b) APHIS successfully obtained a cease and desist order and a civil penalty against American Furniture Warehouse, Inc. in April 2006. That consent decision is online. http://www.dm.usda.gov/oaljdecisions/AWA_05-0026_042106.pdf

(c) APHIS successfully obtained a cease and desist order and a civil penalty against Craig A. Perry and Perry’s Wilderness Ranch & Zoo, Inc. in September 2013. That Judicial Officer decision is online. http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/090613.Perry_DO_AWA05-0026.pdf

18. I am confident that the attorney fee and expenses awarded to Applicant Le Anne Smith herein are attributable to the work done only on her behalf and not the other respondents in AWA Docket No. 05-0026. Consider, the case against Le Anne Smith was filed on July 14, 2005, and not until November 12, 2013 did the Judicial Officer’s Order as

to Le Anne Smith become final and unappealable within the meaning of 7 C.F.R. § 1.193. Consider, Mr. Thorson vigorously and vehemently argued throughout that roughly 8-year period that the case against Le Anne Smith should be dismissed. Consider, there were 13 days of hearing, in 3 separate segments, and the pursuit of the claims against Le Anne Smith, and the defense of those claims against Le Anne Smith, occupied a prominent portion of that hearing. Consider, the attorney fee and expenses have been cut to 1/3, to separate the work attributable to defense of Le Anne Smith, from the work performed in connection with the violations that were found to have been committed by Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc. There are no special circumstances that make an award unjust.

Calculation of Award

19. Le Anne Smith asks for an award of \$17,450.00 for her share (1/3) of attorney fee; plus an award of \$815.00 for her share (1/3) of expenses. The Attachment, at p. 27, of the Le Anne Smith EAJA application filed on December 6, 2013, mistakenly shows 349 hours. When I added the time, I got 369 hours. My number, 369 hours, is confirmed by the \$59,040.00 bill, which, at Mr. Thorson's \$160.00 per hour which he billed for the case, required 369 hours. I divided the 369 hours into the two rates that maximum under the EAJA, as follows.

Beginning March 3, 2011 (\$150.00 per hour maximum attorney fee):

See Le Anne Smith EAJA application filed on December 6, 2013, beginning on **p. 25** of Attachment.

03/21/2011 - 09/14/2013

$$7.5 \text{ hours} \times \$150.00 = \$1,125.00 / 3 = \$375.00$$

Beginning July 21, 2005 until March 3, 2011 (\$125.00 per hour maximum attorney fee):

See Le Anne Smith EAJA application filed on December 6, 2013, beginning on **p. 1** of Attachment (through much of p. 25).

07/21/2005 - 02/09/2011

$$361.5 \text{ hours} \times \$125.00 = \$45,187.50 / 3 = \$15,062.50$$

So, adding \$375.00 to \$15,062.50, I find that the maximum attorney fee for Le Anne Smith's 1/3 share is \$15,437.50. Next I look to the Agency Answer filed March 6, 2014, pp. 22-24, to evaluate the entries. Since the Complaint in AWA Docket No. 05-0026 was filed on July 14, 2005, I equate "situation" with the allegations contained in the Complaint. Every entry questioned by APHIS I find to have been performed in connection with the litigation and to be recoverable under the Equal Access to Justice Act except those on p. 24 questioned because they appear to be communications with legislators. I will subtract those.

$$1.9 \text{ hours} \times \$125.00 = \$237.50 / 3 = \$79.17 \text{ to be subtracted}$$

\$15,437.50

- 79.17

\$15,358.33

=====

Next, the \$2,445.00 in expenses (p. 27 of Attachment), divided by 3 is **\$815.00**, which should be awarded to Le Anne Smith.

Order

20. APHIS shall pay Le Anne Smith, through her attorney, Larry J. Thorson, Esq., a total of \$16,173.33 for Le Anne Smith's share of the attorney fee (\$15,358.33); plus Le Anne Smith's share of the expenses (\$815.00), in accordance with 5 U.S.C. § 504 and 7 C.F.R. §§ 1.180 - 1.203. [Applicant has to comply with § 1.203.]

Finality

21. This Decision and Order shall be final and effective 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to "§ 1.201 Department review." of the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. § 1.201).

Copies of this Decision and Order Granting EAJA Fees shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

this 5th day of May 2014

s/ Jill S. Clifton

Jill S. Clifton

Administrative Law Judge

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