

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.

**DECISION AND ORDER ON REMAND GRANTING
ATTORNEY FEES AND COSTS TO LARRY THORSON, ESQ.,
COUNSEL FOR PERRY RESPONDENTS**

On February 22, 2013 the Judicial Officer for the Secretary of Agriculture issued a second remand Order vacating my Order awarding fees and my Order dismissing a second petition for fees. Accordingly, upon consideration of the second petition for attorney fees, which the Judicial Officer deemed to be timely filed, I hereby enter the following findings regarding Attorney Thorson's application for fees under the Equal Access to Justice Act.

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).

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. Dept. 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 is 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 this defense, and 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 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 28th day of February, 2013 at Washington, DC.

Janice K. Bullard
Administrative Law Judge