

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	EAJA Docket No. 13-0186
	)	
Jennifer Caudill, an individual,	)	
a/k/a Jennifer Walker and	)	
Jennifer Herriott Walker,	)	
	)	
Applicant	)	<b>Decision and Order</b>

**PROCEDURAL HISTORY**

On February 28, 2013, Jennifer Caudill instituted this proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [EAJA Rules of Practice] by filing “Respondent, Jennifer Caudill a/k/a Jennifer Walker a/k/a Jennifer Herriott Walker’s Verified Application for Attorney’s Fees and Other Expenses” [EAJA Application]. Ms. Caudill requests an award of \$18,090 for attorney fees and \$2,648.55 for other expenses which she incurred in connection with *Caudill*, No. 10-0416, an adjudication which the Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], instituted against Ms. Caudill under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [Animal Welfare Act] and the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133).<sup>1</sup> On March 29, 2013, APHIS filed Agency Motion to Strike

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<sup>1</sup>EAJA Application ¶ 3 at 1.

Application or Request to Stay Proceedings stating no final unappealable disposition of *Caudill*, No. 10-0416, has been issued.<sup>2</sup> Subsequent to APHIS filing its Agency Motion to Strike Application or Request to Stay Proceedings, I issued a final agency decision dismissing *Caudill*, No. 10-0416, as moot.<sup>3</sup>

On September 12, 2014, former Chief Administrative Law Judge Peter M. Davenport<sup>4</sup> [Chief ALJ] issued a Decision and Order [Initial EAJA Decision] awarding Ms. Caudill \$18,090 for attorney fees and \$2,648.55 for other expenses which Ms. Caudill incurred in connection with *Caudill*, No. 10-0416.<sup>5</sup> On November 3, 2014, APHIS appealed the Chief ALJ's Initial EAJA Decision to the Judicial Officer.<sup>6</sup> On December 8, 2014, Ms. Caudill filed a response to APHIS's Appeal Petition.<sup>7</sup> On December 10, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I issue this final decision denying Ms. Caudill's request for attorney fees and other expenses which she incurred in connection with *Caudill*, No. 10-0416.

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<sup>2</sup>Agency Mot. to Strike Application or Request to Stay Proceedings at 2.

<sup>3</sup>*Caudill*, No. 10-0416, \_\_ Agric. Dec. \_\_ (U.S.D.A. 2014), 2014 WL 4311060 (U.S.D.A. May 16, 2014) (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding).

<sup>4</sup>Former Chief Administrative Law Judge Peter M. Davenport retired on January 3, 2015.

<sup>5</sup>Chief ALJ's Initial EAJA Decision at 9.

<sup>6</sup>Agency Petition for Appeal of Initial Decision Awarding Fees and Costs and Supporting Brief [Appeal Petition].

<sup>7</sup>Jennifer Caudill a/k/a Jennifer Walker a/k/a Jennifer Herriott Walker's Response Brief [Response to Appeal Petition].

## DISCUSSION

The Equal Access to Justice Act requires an agency that conducts an adversary adjudication to award fees and other expenses to a prevailing party, other than the United States, as follows:

### § 504. Costs and fees of parties

(a)(1) 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. 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.

5 U.S.C. § 504(a)(1).

The Chief ALJ found Ms. Caudill was a prevailing party in *Caudill*, No. 10-0416; APHIS's position in *Caudill*, No. 10-0416, was not substantially justified; and no special circumstances make an award to Ms. Caudill unjust.<sup>8</sup> APHIS raises nine issues on appeal and requests that I reverse the Chief ALJ's Initial EAJA Decision.

First, APHIS asserts *Caudill*, No. 10-0416, was not an "adversary adjudication" under the Equal Access to Justice Act or a "covered" proceeding under the EAJA Rules of Practice (Appeal Pet. ¶ IA at 9-15).

The Equal Access to Justice Act defines the term "adversary adjudication," as follows:

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<sup>8</sup>Chief ALJ's Initial EAJA Decision at 6-9.

**§ 504. Costs and fees of parties**

....  
 (b)(1) For purposes of this section—

....  
 (C) “adversary adjudication” means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 7103 of title 41 before an agency board of contract appeals as provided in section 7105 of title 41, (iii) any hearing conducted under chapter 38 of title 31, and (iv) the Religious Freedom Restoration Act of 1993[.]

5 U.S.C. § 504(b)(1)(C). APHIS contends *Caudill*, No. 10-0416, was not an “adversary adjudication” conducted under 5 U.S.C. § 554;<sup>9</sup> Ms. Caudill contends *Caudill*, No. 10-0416, was an “adversary adjudication” conducted under 5 U.S.C. § 554.<sup>10</sup> Neither APHIS nor Ms. Caudill contends that *Caudill*, No. 10-0416, was an “adversary adjudication” as that term is defined in 5 U.S.C. § 504(b)(1)(C)(ii), (iii), or (iv).

The Administrative Procedure Act provides that 5 U.S.C. § 554 applies, as follows:

**§ 554. Adjudications**

(a) This section applies, according to the provisions thereof in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . .

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<sup>9</sup>Appeal Pet. ¶ IA at 12.

<sup>10</sup>Response to Appeal Pet. at 2-3.

5 U.S.C. § 554(a). APHIS instituted *Caudill*, No. 10-0416, pursuant to 7 U.S.C. § 2133, seeking termination of Ms. Caudill's Animal Welfare Act license.<sup>11</sup> While Animal Welfare Act license termination proceedings have been determined on the record after an agency hearing,<sup>12</sup> 7 U.S.C. § 2133 does not require that Animal Welfare Act license termination proceedings be determined on the record after opportunity for an agency hearing. Therefore, I conclude *Caudill*, No. 10-0416, was not an "adversary adjudication," as that term is defined in the Equal Access to Justice Act. Consequently, Ms. Caudill is not entitled to an award of fees and expenses which she incurred in connection with *Caudill*, No. 10-0416.

Moreover, the only proceedings that are "covered" proceedings under the EAJA Rules of Practice are "adversary adjudications," as that term is defined in the Equal Access to Justice Act.<sup>13</sup> As *Caudill*, No. 10-0416, was not an "adversary adjudication," as that term is defined in the Equal Access to Justice Act, it was not a "covered" proceeding under the EAJA Rules of Practice.

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<sup>11</sup>The Animal Welfare Act provides that the Secretary of Agriculture shall issue licenses to dealers and exhibitors upon application therefore in such form and manner as the Secretary may prescribe (7 U.S.C. § 2133). The power to require and to issue licenses under 7 U.S.C. § 2133 includes the power to terminate licenses and to disqualify persons from becoming licensed. *Greenly*, No. 11-0073, \_\_ Agric. Dec. \_\_, slip op. at 5 (U.S.D.A. 2013), 2013 WL 8213613, at \*2 (U.S.D.A. July 2, 2013); *Vanishing Species Wildlife, Inc.*, 69 Agric. Dec. 1068, 1070 (2010); *Animals of Montana, Inc.*, 68 Agric. Dec. 92, 94 (2009); *Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 77, 81 (2009); *Loreon Vigne*, 67 Agric. Dec. 1060, 1062 (2008); *Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991).

<sup>12</sup>See 9 C.F.R. § 2.12 providing that an Animal Welfare Act license may be terminated after a hearing in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

<sup>13</sup>7 C.F.R. § 1.183(a).

Second, APHIS contends the Chief ALJ erroneously concluded Ms. Caudill was a “prevailing party” in *Caudill*, No. 10-0416 (Appeal Pet. ¶ IB at 15-20).

On September 7, 2010, APHIS instituted *Caudill*, No. 10-0416, seeking an order terminating Ms. Caudill’s Animal Welfare Act license based upon Ms. Caudill’s alleged unfitness to hold an Animal Welfare Act license. Ms. Caudill denied APHIS’s allegations and opposed termination of her Animal Welfare Act license. On February 1, 2013, the Chief ALJ issued an initial decision in *Caudill*, No. 10-0416, in which he reversed APHIS’s determination that Ms. Caudill was unfit to hold an Animal Welfare Act license and dismissed *Caudill*, No. 10-0416. The Chief ALJ’s initial decision in *Caudill*, No. 10-0416, did not become final and effective as both APHIS and Ms. Caudill timely appealed the Chief ALJ’s initial decision to the Judicial Officer. Prior to the Judicial Officer’s issuance of a final agency decision in *Caudill*, No. 10-0416, Ms. Caudill failed to pay an annual Animal Welfare Act license renewal fee, as required by 9 C.F.R. § 2.6, and, on October 16, 2013, Ms. Caudill’s Animal Welfare Act license automatically terminated, pursuant to 9 C.F.R. § 2.5(a)(4).

On April 29, 2014, APHIS moved to dismiss *Caudill*, No. 10-0416, as moot, based upon the automatic termination of Ms. Caudill’s Animal Welfare Act license. Ms. Caudill failed to file a response to APHIS’s motion, and on May 16, 2014, I dismissed *Caudill*, No. 10-0416, as moot stating, as follows:

Based upon the record before me, I find the automatic termination of Animal Welfare Act license number 58-C-0947, pursuant to 9 C.F.R. § 2.5, renders moot the instant proceeding in which the Administrator seeks termination of Animal Welfare Act license number 58-C-0947, pursuant to 9 C.F.R. § 2.12.

*Caudill*, No. 10-0416, \_\_ Agric. Dec. \_\_\_, slip op. at 5 (U.S.D.A. 2014), 2014 WL 4311060, at

\*2 (U.S.D.A. May 16, 2014) (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding).

The Chief ALJ concluded that Ms. Caudill was the prevailing party in *Caudill*, No. 10-0416, because, although Ms. Caudill's Animal Welfare Act license was terminated, the termination was not related to her fitness to hold an Animal Welfare Act license.<sup>14</sup>

A "prevailing party" is one in whose favor a judgment is rendered.<sup>15</sup> While *Caudill*, No. 10-0416, \_\_\_ Agric. Dec. \_\_\_ (U.S.D.A. 2014), 2014 WL 4311060 (U.S.D.A. May 16, 2014) (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding), contains no finding that Ms. Caudill was unfit to hold an Animal Welfare Act license, it contains no judgment rendered in favor of Ms. Caudill. Instead, the specific outcome sought by APHIS in *Caudill*, No. 10-0416, and opposed by Ms. Caudill, was obtained due to Ms. Caudill's failure to pay an annual Animal Welfare Act license renewal fee, rendering the Animal Welfare Act license termination proceeding moot. Therefore, I conclude the Chief ALJ's conclusion that Ms. Caudill was a prevailing party in *Caudill*, No. 10-0416, is error.

Third, APHIS asserts the Chief ALJ's February 1, 2013, initial decision in *Caudill*, No. 10-0416, was not a final disposition of *Caudill*, No. 10-0416, and the Chief ALJ erroneously awarded fees and expenses under the Equal Access to Justice Act to Ms. Caudill based upon the Chief ALJ's initial decision in *Caudill*, No. 10-0416 (Appeal Pet. ¶¶ IC-ID at 21-23).

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<sup>14</sup>Chief ALJ's Initial EAJA Decision at 6-7.

<sup>15</sup>*Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 602-05 (2001); *Jeroski v. Federal Mine Safety and Health Review Comm'n*, 697 F.3d 651 (7th Cir. 2012); *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 567 F.3d 1128, 1131 (9th Cir. 2009).

*Caudill*, No. 10-0416, was conducted in accordance with the Rules of Practice, which provide that an administrative law judge's decision shall become final and effective unless a party appeals the administrative law judge's decision to the Judicial Officer, as follows:



**§ 1.142 Post-hearing procedure.**

....

(c) *Judge's decision.*

....

(4) The Judge's decision shall become final and effective without further proceedings 35 days after issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145; *Provided, however*, that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.142(c)(4). On February 1, 2013, the Chief ALJ issued an initial decision in *Caudill*, No. 10-0416. APHIS and Ms. Caudill timely appealed the Chief ALJ's initial decision to the Judicial Officer pursuant to 7 C.F.R. § 1.145(a); therefore, the Chief ALJ's February 1, 2013, initial decision in *Caudill*, No. 10-0416, did not become final and effective.

The EAJA Rules of Practice define the term "final disposition," as follows:

**§ 1.193 Time for filing application.**

....

(b) For the purposes of this subpart, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become final and unappealable, both within the Department and to the courts.

7 C.F.R. § 1.193(b). As the Chief ALJ's February 1, 2013, initial decision in *Caudill*, No. 10-0416, did not dispose of the merits of the proceeding, did not constitute a complete resolution of *Caudill*, No. 10-0416, and was appealable within the United States Department of Agriculture, I conclude the Chief ALJ's February 1, 2013, initial decision in *Caudill*, No. 10-0416, was not a final disposition of *Caudill*, No. 10-0416, and the Chief ALJ's award of fees and expenses under the Equal Access to Justice Act to Ms. Caudill based upon the Chief ALJ's February 1, 2013, initial decision in *Caudill*, No. 10-0416, was error.

Fourth, APHIS contends the Chief ALJ failed to issue a timely ruling on the Agency Motion to Strike Application or Request to Stay Proceedings (Appeal Pet. ¶ IE.1. at 23-24).

On March 29, 2013, APHIS filed Agency Motion to Strike Application or Request to Stay Proceedings requesting that the Chief ALJ either strike Ms. Caudill's EAJA Application as premature or stay this Equal Access to Justice Act proceeding pending final disposition of *Caudill*, No. 10-0416. On September 12, 2014, the Chief ALJ denied APHIS's motion to strike Ms. Caudill's EAJA Application<sup>16</sup> and stated he had stayed consideration of Ms. Caudill's EAJA Application pending final disposition of *Caudill*, No. 10-0416, as follows:

As an appeal was taken in the license termination case, the stay of the application for attorney's fees and costs required by section 1.193(c) took effect. 7 C.F.R. § 1.193(c). As a final determination has now been made, this matter is again before me for consideration of the application for attorney fees in the amount of \$18,090.00, which has been submitted in this action by [sic] for services provided by William J. Cook, Esquire, as Caudill's attorney, and for the further sum of \$2,648.55 for costs and expenses incurred.

Chief ALJ's Initial EAJA Decision at 4. While I find the 1 year 5 month 14 day period between APHIS's March 29, 2013, filing and the Chief ALJ's September 12, 2014, ruling, inordinate, I do not find the Chief ALJ was required by the EAJA Rules of Practice to rule on APHIS's March 29, 2013, filing within a specified time. Therefore, I reject APHIS's contention that the Chief ALJ's September 12, 2014, ruling on the Agency Motion to Strike Application or Request to Stay Proceedings was not timely.

Fifth, APHIS asserts the Chief ALJ's Initial EAJA Decision contains unwarranted criticism of APHIS's filing the Agency Motion to Strike Application or Request to Stay Proceedings (Appeal Pet. ¶ IE.2. at 25-29).

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<sup>16</sup>Chief ALJ's Initial EAJA Decision at 5.

The Chief ALJ observed that certain attorneys employed by the United States Department of Agriculture, Office of the General Counsel, routinely respond to Equal Access to Justice Act applications, as follows:

[A]s apparently is routine practice by certain attorneys in the Department's Office of General Counsel, rather than filing an answer, on March 29, 2013, [APHIS] moved to strike [Ms. Caudill's EAJA Application] as being premature, or in the alternative, requested stay of the proceedings.

Chief ALJ's Initial EAJA Decision at 4. While I find the Chief ALJ's observation regarding the routine practice by certain attorneys irrelevant to the disposition of this proceeding, I do not find the Chief ALJ's observation constitutes criticism of APHIS's filing the Agency Motion to Strike Application or Request to Stay Proceedings, as APHIS contends.

Sixth, APHIS contends the Chief ALJ erroneously failed to afford APHIS an opportunity to file an answer to Ms. Caudill's EAJA Application (Appeal Pet. ¶ IE.3. at 29).

The EAJA Rules of Practice provide that agency counsel may file an answer to an Equal Access to Justice Act application within 30 days after service of the application.<sup>17</sup> The EAJA Rules of Practice are binding on administrative law judges;<sup>18</sup> therefore, the Chief ALJ was required to allow APHIS's counsel to file an answer to Ms. Caudill's EAJA Application during the 30 day period after the Hearing Clerk served APHIS with Ms. Caudill's EAJA Application. I find nothing in the record supporting APHIS's contention that the Chief ALJ denied APHIS the opportunity to file an answer to Ms. Caudill's EAJA Application in violation of 7 C.F.R.

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<sup>17</sup>7 C.F.R. § 1.195(a).

<sup>18</sup>*Cf.*, Reinhart, 59 Agric. Dec. 721, 740-41 (2000) (stating the Rules of Practice are binding on administrative law judges), *aff'd per curiam*, 39 F. App'x 954, 2002 WL 1492097 (6th Cir. July 10, 2002), *cert. denied*, 538 U.S. 979 (2003).

§ 1.195(a). To the contrary, the record reveals that on March 29, 2013, APHIS filed a timely answer denying the allegations in Ms. Caudill's EAJA Application.<sup>19</sup> Therefore, I reject APHIS's contention that the Chief ALJ erroneously failed to afford APHIS an opportunity to file an answer to Ms. Caudill's EAJA Application.

Seventh, APHIS contends the Chief ALJ erroneously failed to rule on APHIS's request to conduct further proceedings before issuing the Chief ALJ's Initial EAJA Decision (Appeal Pet. ¶ IE.3. at 29).

The EAJA Rules of Practice provide that an administrative law judge may order "further proceedings," as follows:

**§ 1.199 Further proceedings.**

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether the position of the Department 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.

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<sup>19</sup>Agency Mot. to Strike Application or Request to Stay Proceedings at 2 n.3. In light of APHIS's answer denying the allegations in Ms. Caudill's EAJA Application, I find the Chief ALJ's statement that APHIS filed a motion to strike or, in the alternative, a request for a stay of proceedings "rather than filing an answer" (Chief ALJ's Initial EAJA Decision at 4), perplexing. Based upon the current status of this proceeding, I decline to remand the proceeding to the Office of the Administrative Law Judges to provide an administrative law judge the opportunity to consider APHIS's answer which the Chief ALJ may have overlooked.

(b) A request that the adjudicative officer order further proceedings under this section shall identify specifically the information sought or the disputed issues, and shall explain specifically why the additional proceedings are necessary to resolve the issues.

7 C.F.R. § 1.199(a)-(b).

On March 29, 2013, APHIS requested that the Chief ALJ order further proceedings pursuant to 7 C.F.R. § 1.199(a).<sup>20</sup> I find nothing in the record indicating that the Chief ALJ ruled on APHIS's March 29, 2013, request for further proceedings. Nonetheless, I decline to remand this proceeding to the Office of the Administrative Law Judges for a ruling on APHIS's March 29, 2013, request. Instead, I find the Chief ALJ's failure to rule on APHIS's March 29, 2013, request for further proceedings and the Chief ALJ's issuance of the Initial EAJA Decision without further proceedings, pursuant to 7 C.F.R. § 1.199(a), operate as an implicit denial of APHIS's request that the Chief ALJ order further proceedings.<sup>21</sup> Moreover, I agree with the

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<sup>20</sup>Agency Mot. to Strike Application or Request to Stay Proceedings at 2 n.3.

<sup>21</sup>See *Esso Standard Oil Co. v. Lopez-Freytes*, 522 F.3d 136, 144 (1st Cir. 2008) (stating general principles of administrative law provide that an agency's failure to act on a pending matter is treated as a denial of the relief sought); *Hernandez v. Reno*, 238 F.3d 50, 55 (1st Cir. 2001) (treating the Board of Immigration Appeal's failure to act on the petitioner's motion to reopen for more than 3 years as a denial of that motion); *United States v. Stefan*, 784 F.2d 1093, 1100 (11th Cir. 1986) (concluding the United States District Court for the Southern District of Florida's failure to rule on appellant's motion for mistrial constitutes an implicit denial of the motion), *cert. denied*, 479 U.S. 1009 (1986); *Dabone v. Karn*, 763 F.2d 593, 597 n.2 (3d Cir. 1985) (stating the Board of Immigration Appeal's failure to act within a reasonable time period on a motion to reopen constitutes effective denial of that motion); *Toronto-Dominion Bank v. Central Nat'l Bank & Trust Co.*, 753 F.2d 66, 68 (8th Cir. 1985) (stating the failure to rule on a motion to intervene can be interpreted as an implicit denial of that motion); *Greenly*, No. 11-0073, \_\_\_ Agric. Dec. \_\_\_, slip op. at 14 (U.S.D.A. 2013), 2013 WL 8213613, at \*6 (U.S.D.A. July 2, 2013) (stating the administrative law judge's issuance of an initial decision and failure to rule on the complainant's motion for summary judgment operate as an implicit denial of the complainant's motion for summary judgment), *aff'd per curiam*, No. 13-2882 (8th Cir. Aug. 22, 2014).

Chief ALJ's implicit denial of APHIS's request for further proceedings as APHIS failed to identify specifically the information sought or the disputed issues and failed to explain specifically why the additional proceedings were necessary to resolve the issues, as required by 7 C.F.R. § 1.199(b).

Eighth, APHIS contends the Chief ALJ awarded Ms. Caudill attorney fees at the rate of \$150 an hour, which exceeds the maximum hourly rate that can be awarded in this Equal Access to Justice Act proceeding (Appeal Pet. ¶ IF at 29-33).

The Chief ALJ awarded Ms. Caudill attorney fees at the rate \$150 per hour.<sup>22</sup> The EAJA Rules of Practice currently provide that no award for the fee of an attorney may exceed \$150 per hour, as follows:

**§ 1.186 Allowable fees and expenses.**

....  
(b) In proceedings commenced on or after the effective date of this paragraph, no award for the fee of an attorney or agent under the rules in this subpart may exceed \$150 per hour. No award to compensate an expert witness may exceed the highest rate at which the Department pays expert witnesses, which is set out at § 1.150 of this part. However, an award also may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

7 C.F.R. § 1.186(b) (2014). The final rule amending 7 C.F.R. § 1.186(b) to provide a maximum hourly attorney fees rate of \$150 became effective March 3, 2011.<sup>23</sup> The final rule explicitly states the maximum hourly attorney fees rate of \$150 only applies to proceedings initiated on and after the effective date of the final rule, as follows:

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<sup>22</sup>Chief ALJ's Initial EAJA Decision at 9.

<sup>23</sup>76 Fed. Reg. 11,667 (Mar. 3, 2011).

**SUMMARY:** The U.S. Department of Agriculture (USDA) is amending its regulations implementing the Equal Access to Justice Act (EAJA) by raising the maximum hourly attorney fees rate from \$125.00 to \$150.00 for covered proceedings initiated on and after the effective date of this final rule.

**DATES:** This final rule is effective March 3, 2011.

....

**SUPPLEMENTARY INFORMATION:** On July 30, 2010, USDA published a proposed rule (75 FR 44928, July 30, 2010) to amend its regulations implementing the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, to raise the maximum hourly attorney fees rate set forth in 7 CFR 1.186 from \$125.00 to \$150.00 for proceedings initiated on and after the effective date of the publication of this final rule.

76 Fed. Reg. 11,667 (Mar. 3, 2011).

APHIS initiated the adjudication for which Ms.Caudill seeks attorney fees and other expenses, on September 7, 2010.<sup>24</sup> Therefore, the maximum hourly attorney fees rate of \$150 set forth in 7 C.F.R. § 1.186(b) (2014) is not applicable to this proceeding, and I find the Chief ALJ erroneously awarded attorney fees at the rate of \$150 an hour. Instead, I find the maximum hourly attorney fees rate of \$125 is applicable to this proceeding.<sup>25</sup>

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<sup>24</sup>Caudill, No. 10-0416, \_\_ Agric. Dec. \_\_\_, slip op. at 3 (U.S.D.A. 2014), 2014 WL 4311060, at \*2 (U.S.D.A. May 16, 2014) (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding).

<sup>25</sup>7 C.F.R. § 1.186(b) (2010).



Ms. Caudill concedes that the \$125 per hour rate for attorney services is applicable to this Equal Access to Justice Act proceeding and, based upon this rate, Ms. Caudill now seeks an award of \$15,075 for attorney fees instead of the \$18,090 which she sought in her EAJA Application.<sup>26</sup> However, based on my findings that *Caudill*, No. 10-0416, was not an “adversary adjudication,” as that term is defined in the Equal Access to Justice Act, and that Ms. Caudill was not a prevailing party in *Caudill*, No. 10-0416, \_\_ Agric. Dec. \_\_\_\_ (U.S.D.A. 2014), 2014 WL 4311060 (U.S.D.A. May 16, 2014) (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding), I conclude Ms. Caudill is not entitled to an award of any attorney fees or other expenses under the Equal Access to Justice Act.

Ninth, APHIS contends the Chief ALJ erroneously awarded attorney fees for 1.7 hours of work that, on the face of Ms. Caudill’s EAJA Application, appears not to have been performed for Ms. Caudill, but rather for Mr. Kalmanson, and the Chief ALJ erroneously awarded attorney fees for 2.7 hours of work related to a Freedom of Information Act request that appears to be unrelated to *Caudill*, No. 10-0416 (Appeal Pet. ¶ IF at 32-33).

Ms. Caudill attached to her EAJA Application full documentation of the fees and expenses for which Ms. Caudill seeks an Equal Access to Justice Act award. The documentation states the actual time expended and the hourly rate at which William J. Cook, Ms. Caudill’s attorney in *Caudill*, No. 10-0416, computed attorney fees and describes the specific services performed by Mr. Cook and the other expenses. In support of this documentation, Ms. Caudill submitted Mr. Cook’s declaration in which Mr. Cook, under penalty of perjury, swears to the accuracy of the documentation of the fees and expenses and the hourly

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<sup>26</sup>Response to Appeal Pet. ¶ III at 4.

rate at which he computed attorney fees in *Caudill*, No. 10-0416.<sup>27</sup> Mr. Cook explains the entries that APHIS contends appear to relate to Mr. Kalmanson, rather than to Ms. Caudill, as follows:

3. My firm has served as counsel for Ms. Caudill in this case since its inception. During this time, I have expended 120.6 hours for legal services for Ms. Caudill. Attached as Exhibit "B" is a listing of the time I spent on this matter. I also represented Respondent, Mitchel Kalmanson, and I have deleted any time entries devoted exclusively to Mr. Kalmanson's portion of the case. Thus, the hours claimed represent time spent only on Ms. Caudill's defense or time spent jointly on both respondents' defense. Most of the time, however, was spent on Ms. Caudill's case, as the allegations against her were more detailed and extensive than the allegations against Mr. Kalmanson.

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<sup>27</sup>Decl. of William J. Cook, dated February 27, 2013 (EAJA Application Ex. 2).

EAJA Application Ex. 2 ¶ 3 at 1-2. Moreover, I find Mr. Cook's April 27, 2011, entry in the Statement of Attorney's Time establishes that the 2.7 hours of work related to a Freedom of Information Act request is related to *Caudill*, No. 10-0416.<sup>28</sup>

Therefore, I reject APHIS's contention that the Chief ALJ erroneously awarded attorney fees for 1.7 hours of work that was not performed for Ms. Caudill, but rather for Mr. Kalmanson, and APHIS's contention that the Chief ALJ erroneously awarded attorney fees for 2.7 hours of work related to a Freedom of Information Act request that was unrelated to *Caudill*, No. 10-0416. However, based on my findings that *Caudill*, No. 10-0416, was not an "adversary adjudication," as that term is defined in the Equal Access to Justice Act, and that Ms. Caudill was not a prevailing party in *Caudill*, No. 10-0416, \_\_ Agric. Dec. \_\_ (U.S.D.A. 2014), 2014 WL 4311060 (U.S.D.A. May 16, 2014) (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding), I conclude Ms. Caudill is not entitled to an award of any attorney fees or other expenses under the Equal Access to Justice Act.

#### **Findings of Fact and Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction over this matter.
2. Ms. Caudill is an individual whose address is in Florida.

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<sup>28</sup>EAJA Application Ex. B at 2.

3. On September 7, 2010, pursuant to 7 U.S.C. § 2133, APHIS instituted an adjudication, *Caudill*, No. 10-0416, against Ms. Caudill seeking termination of Ms. Caudill's Animal Welfare Act license.<sup>29</sup>

4. Ms. Caudill failed to pay timely an annual Animal Welfare Act license renewal fee, and on October 16, 2013, pursuant to 9 C.F.R. § 2.5, Ms. Caudill's Animal Welfare Act license automatically terminated.<sup>30</sup>

5. On May 16, 2014, the Judicial Officer dismissed *Caudill*, No. 10-0416, as moot.<sup>31</sup>

6. *Caudill*, No. 10-0416, was not an "adversary adjudication," as that term is defined in the Equal Access to Justice Act (5 U.S.C. § 504(b)(1)(C)).

7. *Caudill*, No. 10-0416, was not a "covered" proceeding under the EAJA Rules of Practice (7 C.F.R. § 1.183).

8. Ms. Caudill was not a prevailing party in *Caudill* No. 10-0416.

9. Ms. Caudill does not meet the conditions of eligibility for an award of fees and other expenses which she incurred in connection with *Caudill*, No. 10-0416.

For the foregoing reasons, the following Order is issued.

### **ORDER**

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<sup>29</sup>*Caudill*, No. 10-0416, \_\_ Agric. Dec. \_\_, slip op. at 3 (U.S.D.A. 2014), 2014 WL 4311060, at \*2 (U.S.D.A. May 16, 2014) (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding).

<sup>30</sup>*Caudill*, No. 10-0416, \_\_ Agric. Dec. \_\_, slip op. at 4 (U.S.D.A. 2014), 2014 WL 4311060, at \*2 (U.S.D.A. May 16, 2014) (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding).

<sup>31</sup>*Caudill*, No. 10-0416, \_\_ Agric. Dec. \_\_ (U.S.D.A. 2014), 2014 WL 4311060 (U.S.D.A. May 16, 2014) (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding).

Ms. Caudill's February 28, 2013, request for an award of attorney fees and other expenses which she incurred in connection with *Caudill*, No. 10-0416, is denied.

### **RIGHT TO SEEK JUDICIAL REVIEW**

Ms. Caudill has the right to seek judicial review of this Decision and Order in the courts of the United States having jurisdiction to review the merits of *Caudill*, No. 10-0416, \_\_ Agric. Dec. \_\_ (U.S.D.A. 2014), 2014 WL 4311060 (U.S.D.A. May 16, 2014) (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding).<sup>32</sup>

Ms. Caudill must seek judicial review within 30 days after the determination of the award of attorney fees and other expenses in this Decision and Order.<sup>33</sup> The date of the determination of the award of attorney fees and other expenses in this Decision and Order is February 23, 2015.

Done at Washington, DC

February 23, 2015

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William G. Jenson  
Judicial Officer

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<sup>32</sup>5 U.S.C. § 504(c)(2); 7 C.F.R. § 1.202.

<sup>33</sup>5 U.S.C. § 504(c)(2). See also *Holzbau v. United States*, 866 F.2d 427, 429-30 (Fed. Cir. 1989) (stating the 30-day time for appeal runs from issuance of the determination, not from the date the party receives a copy of the determination); *Sonicraft, Inc. v. NLRB*, 814 F.2d 385, 386-87 (7th Cir. 1987) (stating the deadline runs from the determination itself).