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FEDERAL COURT INTERPRETATION OF ATTORNEY'S FEES PROVISION OF EQUAL ACCESS TO JUSTICE ACT AS IT APPLIES TO THE HEARINGS OF THE UNITED STATES DEPARTMENT OF AGRICULTURE

United States Department of Agriculture v. Lane

Tamara Carnovsky*

I. INTRODUCTION

On June 25, 1996, in *Lane v. United States Department of Agriculture*¹ ("Lane"), the District Court of North Dakota reversed a United States Department of Agriculture ("USDA") regulation by holding that in certain circumstances the Equal Access to Justice Act ("EAJA")² may apply to the National Appeals Division ("NAD") hearings of the USDA.³ The court held that the EAJA was applicable to the NAD hearings because the agency conducted adversary adjudications⁴ pursuant to section 554 of the Administrative Procedure Act ("APA").⁵ However, the USDA regulation stated that ". . . provisions of the APA generally applicable to agency adjudications do not apply to NAD proceedings."⁶

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¹Lane v. United States Department of Agriculture, 929 F.Supp 1290 (1996).

²The EAJA provides that "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 the 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).

³Lane, 929 F. Supp. at 1290.

⁴An "adversary adjudication" is an adjudication "under section 554 of the Administrative Procedure Act ("APA") in which the position of the United States is represented by counsel or otherwise. . . ." 5 U.S.C. §504(b)(1)(C).

⁵Lane, 929 F. Supp. at 1293.

⁶The relevant section of the USDA regulation 60 Fed. Reg. 67298 §11.4 Inapplicability of other laws and regulations reads as follows:

Section 277 of the Act provides an elaborate appeals scheme for particular programs of USDA, including provisions for hearings, the issuance of subpoenas, and

Pursuant to 5 U.S.C. §504 for agency proceedings, the United States District Court ruled that the *Lanes* were entitled to fees.⁷ The court found that the NAD proceedings were under section 554; the position of the agency was represented by counsel or otherwise; and, the NAD hearing officer did not find the agency's position substantially justified.⁸

The USDA appealed, and in *USDA v. Lane*⁹ the United States Court of Appeals for the Eighth Circuit reviewed the district court's order granting summary judgment.¹⁰ The court affirmed in part, reversed in part, and remanded.¹¹

II. PROCEDURAL HISTORY

In 1992, Dwight and Darvin Lane ("Lanes") applied for delinquent farmer loan servicing.¹² The Farmers Home Administration ("FmHA") discovered possible violations of loan agreements.¹³ Subsequently, the FmHA requested the Office of the General Counsel ("OGC") to determine whether the Lanes had shown good faith.¹⁴ The OGC issued bad faith determinations;¹⁵ thus, the FmHA denied the Lanes' applications for servicing.¹⁶

even ex parte communications. Section 277(a)(2)(A) of the Act in fact explicitly incorporates the definition of an ex parte communication from the Administrative Procedure Act (APA) (5 U.S.C. 551(14)) as if the APA stands outside of, and is not applicable to, NAD proceedings. In view of this statutory language, and in the absence of Congressional intent otherwise, USDA has concluded that the provisions of the APA generally applicable to agency adjudications (5 U.S.C. 554, 555, 556, 557, & 3105) do not apply to NAD proceedings. Furthermore, because NAD proceedings are not required to be conducted under 5 U.S.C. 554, USDA also concludes the Equal Access to Justice Act, 5 U.S.C. 504, does not apply to NAD proceedings. *Ardestani v. I.N.S.*, 112S. U.S. Ct. 515, 519 (1991).

⁷Lane, 929 F. Supp. at 1298.

⁸*Id.*

⁹*United States Department of Agriculture v. Lane*, 120 F.3d 106 (8th Cir. 1997).

¹⁰Lane, 929 F. Supp. at 1298.

¹¹USDA, 120 F. 3d at 106.

¹²Lane, 929 F. Supp. at 1292.

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.*

The Lanes appealed to the National Appeals Staff ("NAS") of the FmHA.¹⁷ While their appeal was pending, Congress passed the Department of Agriculture Reorganization Act which transfers appeals to the NAD.¹⁸ After the NAD hearing officer reviewed opinions stating that the OGC determination was "seriously flawed," the hearing officer decided in the Lanes' favor.¹⁹

Pursuant to the EAJA, the Lanes petitioned for attorney fees.²⁰ The NAD hearing officer found that the NAD proceedings were not under section 554 of the APA, concluding that the EAJA was inapplicable.²¹ Consequently, the officer denied the Lanes' EAJA application and did not consider its merits.²²

Both the Lanes and the USDA moved for summary judgment, and in 1996, the United States District Court of North Dakota granted the Lanes' motion and denied the USDA's.²³ The court reversed the decision of the NAD by holding that the proceedings were under section 554, and that the EAJA did apply.²⁴ Furthermore, the court stated that NAD's refusal to consider the Lanes' fee application was not in accordance with the law, and therefore the Lanes were entitled to attorney's fees and other expenses.²⁵

The USDA appealed to the United States Court of Appeals of the Eighth Circuit.²⁶

III. THE COURT OF APPEALS OF DECISION

The Eighth Circuit in *USDA* considered two issues: (1) whether the EAJA was applicable...and whether the NAD officer had an opportunity to consider the applicability of the EAJA to NAD proceedings; and, (2) the opportunity of the NAD officer to review the

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.*

²¹*Id.*

²²*Id.* at 1293.

²³*Id.* at 1298.

²⁴*Id.*

²⁵*Id.* at 1297.

²⁶*USDA*, 120 F.3d at 106.

Lanes' application for attorney fees.²⁷

A. The EAJA's Applicability to NAD Proceedings

The USDA contended that the NAD statute was not pursuant to section 554 of the APA because it was a "separate, comprehensive statutory scheme that contains express procedures for conducting hearings."²⁸ However, the Lanes contended that procedural provisions appearing in the NAD statutes cover matters that the APA does not address.²⁹ Thus, the Lanes asserted the court should affirm the district court's decision that the NAD proceedings were an adjudication under section 554 of the APA and the proceedings do not supersede it.³⁰

The court of appeals affirmed in part the district court's decision, noting that the EAJA was applicable to the NAD proceedings because the proceedings met the "coverage requirements"³¹ of section 554 of the APA.³² Specifically, the court found that the NAD proceedings met the definition of an "adjudication"³³ and the requirement to provide an opportunity for a hearing.³⁴ Lastly, the court found that the NAD proceedings were on-the-record even though the NAD statute does not expressly state such a requirement.³⁵ The court's

²⁷*Id.* at 107.

²⁸*Id.* at 108.

²⁹Lane, 929 F. Supp. at 1294.

³⁰Lane, 929 F. Supp. at 1290.

³¹The APA applies to all adjudications required by statute to be determined on-the-record after the opportunity for an agency hearing. 5 U.S.C. §554(a).

³²Lane, 120 F. 3d at 108.

³³An adjudication is an agency process for the formulation of an order. 5 U.S.C. §551(7).

³⁴*Id.* at 108. Hearings are mandatory once requested by the participant. 7 U.S.C. §6997(b). *See also*, *Smedberg Mach. & Tool, Inc. v. Donovan*, 730 F.2d 1089, 1092 (7th Cir.1984).

³⁵In the NAD statute there are repeated references to the record and a provision for trial-type procedures. *Id.* For example, the NAD statute provides the following:

(1) "... a participant shall have the right to appeal an adversary hearing to the Division for an evidentiary hearing. . . ." 7 U.S.C. §6996(a).

(2) "The Director and hearing officer shall have the authority to require the

foundation for its reasoning was articulated by citing *City of West Chicago, Ill. v. U.S. Nuclear Regulatory Comm'n*³⁶ which stated that "Congress need only clearly indicate its intent to trigger the formal, on-the-record hearing provisions of the APA."³⁷

Furthermore, the court of appeals decided that the EAJA was applicable because the NAD proceedings do not supersede it.³⁸ Referring to the APA, the court stated that a "subsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly."³⁹ Moreover, the court was not persuaded by the agency's reliance on *Marcello v. Bonds*⁴⁰ in which the Supreme Court held that the APA was not applicable to the Immigration and Naturalization Service deportation hearings.⁴¹

attendance of witnesses, and the production of evidence, by subpoena and to administer oaths and affirmations. Except to the extent required for the disposition of ex parte matters as authorized by law . . . " 7 U.S.C. §6997(a)(2).

(3) "The hearing officer shall not be bound by previous findings of fact by the agency in making a determination. 7 U.S.C. §6997(c)(2).

(4) "The hearing officer shall leave the record open after the hearing for a reasonable period of time to allow the submission of information by the appellant or the agency after the hearing to the extent necessary to respond to new facts, information, arguments, or evidence presented or raised by the agency or appellant. 7 U.S.C. §6998(c)(3).

(5) "The appellant shall bear the burden of proving that the adverse decision of the agency was erroneous. 7 U.S.C. §6997(c)(4).

(6) "The Director shall conduct a review of the determination of the hearing officer using the case record, the record from the evidentiary hearing under section 6997 of this title, the request for review, and such other arguments or information as may be accepted by the Director." 7 U.S.C. §6998(b).

(7) "A final determination of the Division shall be reviewable and enforceable by any United States district court of competent jurisdiction in accordance with chapter 7 of Title 5." 7 U.S.C. §6999.

³⁶701City of West Chicago, Illinois v. U.S. Nuclear Regulatory Commn., F.2d 632, 641 (7th Cir.1983). See also, Moore v. Madigan, 990 F.2d 375, 378 (8th Cir.1993), cert. denied, 510 U.S. 823, 114 S.Ct. 83 (1983).

³⁷Lane, 120 F. 3d at 108.

³⁸Id. at 109.

³⁹5 U.S.C. §559.

⁴⁰Marcello v. Bonds, 349 U.S. 302, 310 (1955).

⁴¹Unlike Marcello, the NAD statutes contain minor variations. 5 U.S.C. §§554-557, 7 U.S.C. §§6996-6998. In addition, the NAD statutes and the APA do not directly conflict. Id. Moreover, there was no provision in the NAD statutes, as

Therefore, the court decided that the EAJA was applicable to the NAD proceedings.⁴²

B. Application for Attorney Fees

Next, the court of appeals addressed whether the Lanes were entitled to attorney fees.⁴³ The district court held that the Lanes were entitled to attorney fees because the NAD hearing officer did not find that the agency's position was substantially justified.⁴⁴ However, the court of appeals noted that the agency did not have the opportunity to review the merits of the Lanes' application for fees prior to judicial review because its sole finding was that the EAJA was not applicable.⁴⁵

Therefore, the court held that the hearing officer must have the opportunity to consider the application's merits because "to hold otherwise would put the NAD in an untenable position."⁴⁶

The court of appeals supported its reasoning by citing *Fidelity Construction Co. v. United States*.⁴⁷ In *Fidelity*, the Federal circuit court clearly states that "an adjudicative officer cannot decide issues which are not properly before the officer."⁴⁸ Thus, the court of appeals reversed in part the district court's decision on the issues of and remanded this issue for further proceedings.⁴⁹

Marcello 349 U.S. at 761; 5 U.S.C. §§554-557.

⁴²Lane, 120 F. 3d at 108.

⁴³*Id.* at 110.

⁴⁴*Id.*

⁴⁵*Id.* The district court relied on 5 U.S.C. §706(2)(A) found that the agency's refusal "to consider the Lanes' application was not justified by law, and therefore, the court need not give deference to the agency's findings.." *Id.*

⁴⁶*Id.*

⁴⁷*Fidelity Constr. Co. v. United States*, 700 F.2d 1379, 1386 (Fed.Cir.1983), *cert. denied*, 464 U.S. 826 (1983). ("the board of contract appeals had no authority to award attorney fees under the EAJA where its proceedings were not subject to 5 U.S.C. §554").

⁴⁸*Id.*

⁴⁹Lane, 120 F. 3d at 110. After a phone conversation with the plaintiffs' attorney, the current status regarding the merits and subsidiary issues of this case is as follows: (1) the government may decide to appeal the applicability of the EAJA to the NAD proceedings; and, (2) the issue to award attorney fees remains tied up in the court system.

IV. CONCLUSION

The decision of the North Dakota Court of Appeals, holding that the EAJA applied to the NAD hearings of the USDA, is a significant precedent establishing EAJA's applicability to adjudications conducted by other federal agencies. Whenever adjudications by federal agencies are subject to judicial review, the appropriate court can apply the following two-step analysis conducted in *USDA* to determine whether the EAJA applies: (1) whether the adjudication meets the coverage requirements of section 554 of the APA; and, (2) whether the adjudication supersedes the EAJA.⁵⁰ A statute may not be held to supersede the APA unless it does so expressly;⁵¹ however, the court identified a potential exception based on the legislative history and plain language of a statute.⁵² The court's ruling in *USDA* was proper since the NAD proceedings did not fall within the exception; the proceedings met the APA's section 554 coverage requirements; and, the proceedings did not supersede the EAJA.⁵³

Secondarily, the court of appeals emphasized that an agency must have an opportunity to consider an application's merits prior to judicial review.⁵⁴ Since the USDA initially found that the EAJA was inapplicable, the hearing officer did not have the opportunity to review the Lanes' application on its merits.⁵⁵ Therefore, the court of appeals properly reversed in part the district court's decision and remanded for further proceedings.⁵⁶

in the court system.

⁵⁰Lane, 120 F. 3d at 108, 109.

⁵¹5 U.S.C. §559.

⁵²Marcello, 349 U.S. at 310 (1955).

⁵³USDA, 120 F. 3d at 108.

⁵⁴*Id.* at 110.

⁵⁵*Id.*

⁵⁶*Id.*

