UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR<br>Complainant<br><br>v.<br><br>PENTECOST CONTRACTING CORP.,<br>Respondent | Docket No. 92-3788 |

DECISION
EAJA APPLICATION

The Secretary brought charges against Respondent in three dockets: 92-3788, 92-3789, and 92-3790. These three Dockets arose out of three inspections of a project which Respondent was carrying out for Westchester County, New York. Dockets 92-3789 and 92-3790 were consolidated for trial and a Decision and Order entered therein became final on August 17, 1995. Docket 92-3788 was tried separately and a Decision and Order issued. The Commission reviewed this Decision and Order and, on April 25, 1997, issued an opinion affirming it in part and reversing it in part.[1]

On September 15, 1995, Respondent filed one application for attorney's fees and expenses under the Equal Access to Justice Act (EAJA) pertaining to all three dockets. In the course of noting my Decision and Order in Docket 92-3788 for review, the Commission stayed

[1] 17 OSHC 1953.

the application for fees pertaining to it and required Pentecost to indicate whether it wished to pursue the application once a final decision took effect.

The application with respect to Dockets 92-3789 and 92-3790 was not stayed, and on February 5, 1996, I issued an order denying that portion of the application. The Commission affirmed this ruling on August 6, 1997. Respondent has indicated that it wishes to pursue the application with respect to Docket 92-3788, and this ruling addresses that portion of Respondent's application.

Respondent's argument in favor of its application is that I

> ... issued a decision reducing the proposed penalties ... from $63,000.00 to $10,000.00 primarily on the basis that the violations therein were duplicative and that [Respondent's] safety record entitled [it] to a classification of the violations therein as serious, rather than willful.[2]

Respondent's characterization of my decision is correct. The Secretary had charged Respondent with three willful violations, each carrying a proposed penalty of $21,000 for a total of $63,000. I held that two of these violations were duplicative, thus vacating one, and that the remaining two should be characterized as serious, but not willful. I imposed a total penalty of $10,000.

On review, the Commission reinstated the willful classification while affirming my determination that two of the violations were duplicative. The Commission imposed a fine of $10,000 for each violation, for a total of $20,000. Thus Respondent achieved a reduction of $43,000, or 68% in the amount of the penalty sought by the Secretary.

In its opinion affirming my ruling on the EAJ application in Dockets 92-3789 and 92-3790, the Commission held that it was appropriate to consider that Respondent was a

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[2] Application, ' 24, p. 6.

prevailing party as that term is defined by the EAJ Act by virtue of the fact that it had achieved a substantial reductions in the proposed penalty. There does not appear to be any reason to depart from that holding in this case. The Commission also held that the Secretary had substantial justification to seek a separate penalty for each standard violated. Similarly, there appears to be no reason to depart from that holding in this case. All three cases arose out of the same project and were closely related. The fact that the Commission did not concur in the Secretary's decision to seek separate penalties does not deprive that decision of substantial justification.

Given the Commission's determination that "... EAJA [is] available to parties that substantially [prevail] on penalty issues ...,"[3] the issue before me for decision is whether the 68% reduction in the penalty assessed entitles Respondent to relief. Although they are not, by their terms, applicable to this application, the recent amendments to the EAJ Act are of interest in this consideration.[4] Those amendments added an authorization for awards under EAJA to those parties who show that the government's demand "... is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision...."[5] However, they make such awards subject to an important qualification: that "... the party has [not] committed a willful violation of law...."[6]

Here the Commission specifically classified the violations as willful. The logic of denying EAJA benefits to parties who commit willful violations of the law is compelling. The

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[3] *Secretary v. Pentecost Contracting Corp.,* __ OSHC __ (Slip Op. p. 4, August 6, 1997).

[4] Section 233 of the Act of March 29. 1996, Pub. L. 104-121, limits the application of the amendments to adversary adjudications commenced on or after the date of their enactment.

[5] 5 U.S.C. ' 504(a)(4).

fact that the amendments are not applicable to this adjudication does not provide any reasonable basis to overlook Respondent's willfulness and consider an award. Accordingly, the application is denied.

It is so ORDERED.

JOHN H FRYE, III
Judge, OSHRC

Dated:
Washington, D.C.

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[6] *Id.*