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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Whether the Nuclear Regulatory Commission May Pay Attorneys' Fees and Costs

File: B-208637.2

Date: August 1, 1988

DIGESTS

1. Section 502 of the fiscal year 1988 Energy and Water Development Appropriations Act, Pub. L. No. 100-202, 101 Stat. at 1329-129, does not preclude the Nuclear Regulatory Commission (NRC) from using fiscal year 1988 funds to pay a court award of attorneys' fees and expenses under the Equal Access to Justice Act resulting from a party's successful challenge to an NRC rule. The party involved was not an intervenor and section 502 only applies to intervenors.

2. Section 502 of the fiscal year 1988 Energy and Water Development Appropriations Act, Pub. L. No. 100-202, 101 Stat. at 1329-129, does not preclude the Nuclear Regulatory Commission from using prior year appropriations to pay an award for attorneys' fees and expenses under the Equal Access to Justice Act made in fiscal year 1988 to the extent that such appropriations are available. The restriction in section 502, as amended for fiscal year 1988, would only apply to fiscal year 1988 appropriations and not prior year appropriations.

3. For purposes of determining the availability of fiscal year 1987 funds to pay Equal Access to Justice Act awards for attorneys' fees and expenses that, by virtue of the restriction in section 502 of the fiscal year 1988 Energy and Water Development Appropriations Act, Pub. L. No. 100-202, 101 Stat. 1329-129, could not be paid from fiscal year 1988 funds, the Nuclear Regulatory Commission (NRC) should subtract its total obligations incurred since the effective date of its fiscal year 1987 appropriations act from the amount of the fiscal year 1987 appropriation. If the amount of funds obligated is less than the amount of the 1987 appropriation, the NRC should consider the difference as the

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amount of the fiscal 1987 appropriation still available for obligation to pay the award. Conversely, the NRC should consider itself as operating on fiscal year 1988 funds if the obligated amount is greater than the fiscal year 1987 appropriation.

4. The Nuclear Regulatory Commission can use available deobligated fiscal year 1987 funds to pay an award of attorneys' fees and expenses under the Equal Access to Justice Act that could not be paid from fiscal year 1988 funds by virtue of a restriction contained in its fiscal year 1988 appropriations act since deobligated no-year appropriations are available for obligation on the same basis as if they were unobligated balances of no-year appropriations.

DECISION

The Nuclear Regulatory Commission (NRC) asks several questions about its authority to pay court awarded attorneys' fees and costs under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504; 28 U.S.C. § 2412.

Specifically the NRC asks (1) whether the language of section 502 of the fiscal year 1988 Energy and Water Development Appropriations Act (Appropriations Act), Pub. L. No. 100-202, 100 Stat. 1329-129, precludes the NRC from using fiscal year 1988 funds to pay a court award of attorneys' fees and expenses under the EAJA to the Union of Concerned Scientists (UCS), a party which challenged an NRC rule in court; (2) whether the language of section 502 of the fiscal year 1988 Appropriations Act precludes the NRC from using appropriated funds from previous fiscal years to pay the award described in "(1)"; and (3) if section 502 does not preclude the NRC from using previous fiscal year funds to pay the described award, how the availability of these funds is to be determined. Since this matter is currently in court, the NRC asks for expedited consideration of these issues.1/

1/ The matter is before the United States Court of Appeals for the District of Columbia. Union of Concerned Scientists v. NRC, No. 85-1757 (D.C. Cir.). On April 18, 1988, the NRC filed a petition for rehearing and a suggestion for a rehearing en banc. Consistent with our policy to refrain from commenting on matters in litigation unless requested to do so by a court, 63 Comp. Gen. 98, 99 (1983), the Union of Concerned Scientists, in essence, asks that we not comment on the questions the NRC has presented to us. We have

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For the reasons given below, we conclude that (1) section 502 does not preclude payment of the award to the UCS since the UCS was not an intervenor in the proceeding in which the award was made; (2) as a general matter the restriction that was added to section 502 of the fiscal year 1988 Appropriations Act does not preclude the NRC from using appropriated funds from previous fiscal years to pay EAJA awards in court proceedings involving appeals of agency administrative decisions; and (3) the availability of prior year funds is to be determined consistent with our guidance in 62 Comp. Gen. 690, 696. This guidance also is applicable to deobligated prior year funds that become available for reprogramming and reobligation in fiscal year 1988.

BACKGROUND

Section 161 of the Atomic Energy Act, 42 U.S.C. § 2201, authorizes the NRC to establish rules and regulations governing the possession and use of nuclear materials. In September 1983, the NRC published an advance notice of proposed rulemaking inviting public comment on draft backfitting rules.2/ The term, "backfitting," refers generally to NRC actions that require modification of the design, equipment, or operating procedures of nuclear power reactors previously licensed for construction or operation. Some 14 months later, the NRC published a proposed version of the rule. 49 Fed. Reg. 47,034 (Nov. 30, 1984).

NRC regulations require the NRC to afford interested persons an opportunity to participate in rulemaking proceedings through the submission of statements, information, opinions and arguments. 10 C.F.R. § 2.805. The UCS was one of the groups which chose to comment on the backfitting rule.

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decided to give the NRC the advice requested for three reasons. First, since we had previously issued a decision to the NRC on a similar matter, 62 Comp. Gen. 692 (1983), we feel a responsibility to provide additional assistance in determining its applicability in this case; second, the NRC informed the court that it had asked for our opinion on the appropriation issue; and third, the particular issues the NRC raises have not been addressed by the court, nor has the NRC directly raised these issues in its petition for rehearing.

2/ The NRC promulgated its first backfitting rule in 1970. Subsequent criticism led to its amending the rule. Union of Concerned Scientists v. NRC, 824 F.2d 108, 110 (D.C. Cir. 1987).

Although the same regulation also authorizes the NRC to hold informal hearings in rulemaking proceedings, NRC informs us that no such hearings were held on the amended backfitting rule.

After publication of the final backfitting rule, the UCS filed a petition for review of the rule in the United States Court of Appeals for the District of Columbia Circuit.3/ Union of Concerned Scientists v. NRC, 824 F.2d 108, 112-13 (D.C. Cir. 1987). The court eventually determined that the rule was invalid and under the EAJA awarded the UCS, as the prevailing party, $60,513.35 in attorneys fees and costs. Union of Concerned Scientists v. NRC, No. 85-1757 (D.C. Cir. filed Mar. 4, 1988).

The EAJA provides that parties to adversary adjudications before agencies or to court actions against the United States, who meet certain net worth and other requirements, are entitled to awards of fees and expenses if the party is a "prevailing party" and the position of the United States was not substantially justified. 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(B). The EAJA also provides that awards "shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise." Id. § 504(d); § 2412(d)(4).

The NRC receives a yearly lump-sum appropriation. These are the appropriations used to pay EAJA awards. Moreover, these appropriations have been no-year monies for many years; that is, they are available until expended. E.g., Pub. L. No. 96-367, 94 Stat. 1331, 1344-45.

The NRC maintains that the UCS was an intervenor and, as such, is barred from payment by section 502 of the 1988 Appropriations Act, Pub. L. No. 100-202, 101 Stat. at 1329-129, the appropriations act under which the NRC receives its appropriations. Section 502 was first added to the general provisions of the Energy and Water Development Appropriations Act for fiscal year 1981. Pub. L. No. 96-367, 94 Stat. 1331, 1345. The provision stated:

3/ In April 1986, the UCS filed a separate petition for review challenging a chapter of an NRC Manual which relates to the rule. By order of June 20, 1986, the court consolidated the two petitions. 824 F.2d at 113.

> "None of the funds of this Act shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in this Act."

This provision remained the same through fiscal year 1987.

In 1983, this Office determined that the NRC was precluded from using appropriated funds to pay EAJA awards of fees or expenses for those intervening in adjudicatory or regulatory proceedings conducted by the NRC. 62 Comp. Gen. 692 (1983). The United States Court of Appeals for the District of Columbia Circuit reached the same result in a similar case. Business and Professional People for the Public Interest v. NRC, 793 F.2d 1366 (D.C. Cir. 1986). Both decisions were based on the language in section 502.

Subsequent to the Business and Professional People decision, the Federal Energy Regulatory Commission (FERC), which receives funding under the same appropriations act as the NRC, argued before the same court that the quoted language in section 502 precluded it from paying an award of attorneys' fees stemming from court litigation, in contrast to agency proceedings. In Electrical District No. 1 v. FERC, 813 F.2d 1246 (D.C. Cir. 1987), the court rejected this argument, in essence holding that the section 502 prohibition applied only to agency proceedings funded under the appropriations act of which section 502 was a part. Since the judicial proceeding brought by the plaintiff was not funded from the FERC appropriations act, the prohibition in section 502 did not apply. Id. at 1247-48.

Soon after the Electrical District decision, the Congress amended section 502. The fiscal year 1988 Energy and Water Development Appropriations Act added a sentence making it clear that the section 502 bar also applied to judicial proceedings stemming from appeals of administrative decisions to the federal courts. H.R. Rep. No. 162, 100th Cong., 1st Sess. 133 (1987). The new sentence states:

> "This prohibition bars payment to a party intervening in an administrative proceeding for expenses incurred in appealing an administrative decision to the courts." Pub. L. No. 100-202, 101 Stat. at 1329-129.

The NRC is concerned that the United States Court of Appeals has erred in making an EAJA award to the UCS, which NRC considers to be an intervenor. It relies primarily on section 502 as amended in 1988. The NRC raises questions both about the specific award to the UCS and about the general applicability of the 1988 amendment to section 502.

We will answer these questions seriatim below and include the NRC's position as part of the discussion of each question.

Legal Discussion

1. Whether the language of section 502 of the fiscal year 1988 Energy and Water Development Appropriations Act precludes the NRC from using fiscal year 1988 funds to pay a court award of attorneys' fees and expenses resulting from the UCS's challenge to an NRC rule.

The NRC suggests that the answer to this question depends upon whether the UCS is considered a party appealing an administrative decision to the courts resulting from its intervention in an NRC administrative proceeding. The NRC suggests that rulemaking commenters such as the UCS are intervenors for purposes of section 502's prohibitions. The NRC contends that the Webster's dictionary definition of "intervene" as "to become a party to an action or other legal proceeding begun by others for the protection of an alleged interest" encompasses commenters on rulemaking such as the UCS. The NRC also reasons by analogy to section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2339(a), which affords party intervenor status to persons requesting a hearing in any proceeding under the Atomic Energy Act "for the granting, suspending, revoking, or amending of any license or construction permit . . . and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees. . . ."

We disagree that the UCS was a party intervening in an administrative proceeding it appealed to the courts. The word intervenor is a term of art in law to describe "a person who voluntarily interposes in an action or other proceeding." Black's Law Dictionary (5th Ed. 1979). Intervention has been judicially defined as the admission of a person not an original party into the proceeding by which the person becomes a party for the protection of some right or interest alleged to be affected by the proceeding. In re Willacy County Water Control Improvement Dist. No. 1, 36 F. Supp. 36, 40 (S.D. Tex. 1940).

In this instance, the UCS was not a party intervening in an agency proceeding but merely was a party commenting on the backfitting rule, consistent with NRC procedures on "Rulemaking." 10 C.F.R. § 2.805. We do not view rule commenters as being involved in an agency proceeding in which they can be characterized as intervening parties. The rulemaking procedures do not characterize rule commenters as

intervenors nor do they provide for formal hearings.4/ These procedures contrast with NRC regulations on "Rules of General Applicability" for adjudications and hearings, 10 C.F.R. § 2.700 et seq., which specifically allow for participation through intervention in the adjudications and hearings covered by the rule. As the original party that initiated the lawsuit, it also is evident that the UCS is not an intervenor in the action in the United States Court of Appeals for the District of Columbia Circuit.

We recognize that the amendment to section 502 was intended to cover appeals of agency regulatory as well as adjudicatory decisions to the courts, and agree that parties intervening in regulatory proceedings that appeal those decisions to the courts would be covered by the amendment to section 502. Although we agree that rulemaking is one kind of regulatory proceeding, as is enforcement of regulations and licensing, it does not follow that this makes rule commenters parties intervening in agency regulatory proceedings such that the section 502 prohibition would apply. To do so would require a construction of the term "intervene" far beyond its usual meaning in law. It also would further limit payment of EAJA awards without any clear intention from the Congress that this was intended.

We do not think that the Atomic Energy Act provision relied on by the NRC is a persuasive analogy. That provision, like the NRC regulations on adjudicatory proceedings and hearings, contemplates a formal hearing process rather than a procedure for merely commenting on agency rules.

Since we do not think the UCS was a party appealing the decision in an agency administrative proceeding in which it was an intervenor, section 502 of the fiscal year 1988 Appropriations Act is not applicable, and does not bar the NRC from paying the award of attorneys' fees and costs to the UCS.

2. Whether the language of section 502 of the fiscal year 1988 Energy and Water Development Appropriations Act precludes the NRC from using appropriated funds from previous fiscal years to pay the UCS award.

The NRC suggests that the wording of the amendment to section 502 seems to say that the Congress intended that sentence to be a definitive description of what the prohibition in the first sentence means in the context of

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4/ Although the NRC may convene informal hearings for rule commenters, 10 C.F.R. § 2.805(b), none were held in this instance.

awards of expenses for litigation relating to agency administrative actions. Thus, for any fiscal year in which section 502 was applicable, its prohibition, as stated in fiscal year 1988, would cover not only parties intervening in agency regulatory or adjudicatory proceedings but also parties intervening in administrative proceedings at the agency level in which administrative decisions were appealed to the courts.

Furthermore, the NRC suggests that because the amending sentence of section 502 does not contain the qualifier "[n]one of the funds of this Act" found in the first sentence, it should be read as a total bar to use of any appropriated funds to pay intervenor litigation expenses, whether from fiscal year 1988 funds or prior year funds rather than only a bar to the appropriations provided by the fiscal year 1988 Appropriations Act.

As we have said, since we do not view the UCS as an intervenor, the prohibition in section 502 included in the NRC appropriations acts from 1981-88 would not apply. As the appropriations used to pay EAJA awards are no-year monies, it is clear that previous years' funds if available may be used to pay the award.

Notwithstanding this conclusion, we understand the NRC question to be more general. That is, assuming an EAJA award may not be paid with fiscal year 1988 funds because of the 1988 amendment to section 502, may previous years' funds be used to pay the award? Consistent with 62 Comp. Gen. 692 (1983), we conclude that the language of section 502, as stated in the 1988 Appropriations Act, does not preclude the NRC from using appropriated funds from previous fiscal years to pay awards to intervenors in fiscal 1988.

In 62 Comp. Gen. 692, we concluded that funds restricted by section 502 could not be used to satisfy an EAJA award in an agency adversary adjudication regardless of whether part of the proceeding was conducted in a fiscal year in which section 502 was not applicable. We also found, however, that appropriations not limited by section 502, that is, no-year NRC monies appropriated before section 502 first was enacted, could be used to pay intervenor awards to the extent those funds were still available. Specifically we said:

> "The fact that the Commission issues an award during a restricted fiscal year does not prevent its being paid out of a previous fiscal year's appropriation so long as part of the proceeding giving rise to the award was funded by an unrestricted appropriation." Id. at 696.

We think the same principle would apply to the additional restriction added to section 502 in the 1988 Energy and Water Development Appropriations Act, Pub. L. No. 100-202, 101 Stat. 1329-129. The new restriction regarding appeals to the courts of administrative decisions would not apply to monies previously appropriated. Awards made in 1988 could be paid from previous years' monies to the extent they still are available.

We disagree with the NRC's suggestion that the amendment was intended to extend to prior year funds. Neither the language of the amendment nor its legislative history shows that the amendment was intended to apply to fiscal years other than that in which the amendment was contained, that is fiscal year 1988. Furthermore, it is a general principle of statutory construction that a law generally will not be construed to operate retroactively unless it clearly indicates that it is to be so applied. 2 Sutherland, Statutory Construction § 41.04 (4th ed. 1986).

We also disagree that because the phrase "None of the funds of this Act" is used in the first sentence of section 502, but not the amendment, the amendment should not be so limited and should extend to prior year funds. Again, neither the language of the amendment nor its legislative history indicates this intention. In any event, as a matter of syntax, we think the better construction is that the first two words of the amendment--"This prohibition"--refers back to the first sentence and, thus, by reference, incorporates the limitation "None of the funds of this Act."

3. If the language of section 502 as provided in the fiscal year 1988 Energy and Water Development Appropriations Act does not preclude the NRC from using previous fiscal year funds to pay awards to intervenors in judicial proceedings, how is the availability of these funds to be determined?

The NRC quotes from our guidance in 62 Comp. Gen. at 696 about how prior years' funds, appropriated without the section 502 prohibition, were to be used to pay awards in a fiscal year for which section 502 applied. We said:

> "For the purposes of determining the availability of funds to make awards of the type in question, the Commission should consider that it obligates its funds in the order in which they are appropriated. Under this approach, the Commission should subtract its total obligations since the effective date of the earlier appropriation from the amount of that appropriation. If the amount of funds obligated is less than the amount of the unrestricted appro-

priation, then the Commission should consider the difference as the amount of the unrestricted appropriation still available for obligation to pay the award. The award may be satisfied up to the amount of the difference. Conversely, the Commission should consider itself as operating on restricted funds if the obligated amount is greater than the unrestricted appropriation and the award should not be made."

The NRC understands the quoted language to mean that, for example, in determining the availability of fiscal year 1987 funds to satisfy an EAJA award, it should look at all obligations made from the effective date of the fiscal year 1987 Appropriations Act up to the date of the court award and if these obligations exceed the amount of fiscal year 1987 appropriated funds, then there are no appropriated funds available to pay the award. The NRC also understands our guidance to mean that if funds obligated during fiscal year 1987 or any earlier fiscal year are later deobligated and otherwise become available for reprogramming and reobligation in fiscal year 1988, they nonetheless may not be considered pre-fiscal year 1988 funds available to pay a fee award. In this regard, the NRC points out that the House Appropriations Committee has established procedures specifying that utilization of unobligated carry-over funds to fund other than prior year commitments is considered a reprogramming action that must be submitted for Committee approval.

In part, the NRC correctly interprets 62 Comp. Gen. at 696 regarding use of fiscal year 1987 appropriations to pay awards made in fiscal year 1988. If the amount of total obligations since the effective date of the fiscal year 1987 appropriations exceeds the amount of funds provided in fiscal year 1987, then no fiscal year 1987 monies would be available to pay awards made in fiscal year 1988. If, however, the amount of monies appropriated in fiscal year 1987 exceeds total obligations, then, to the extent of the excess, those monies can be used to pay EAJA awards. These monies would not be subject to the fiscal 1988 amendment to section 502.

We disagree, however, that deobligated prior year monies would not be available to pay such awards. We have held that deobligated no-year funds are available for obligation on the same basis as if they were unobligated balances of no-year appropriations. B-200519, Nov. 28, 1980; 40 Comp. Gen. 694, 697 (1961). Accordingly, the guidance we provided in 62 Comp. Gen. at 696 also would apply to any such balances.

We see no inconsistency with the House Appropriations Committee's reprogramming procedures. The required notification and approval process describes the relationship between the NRC and the Committee concerning reprogramming. It does not directly speak to the availability of the funds.

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