

CFR part 581 to arrange for a hearing official. Agencies must then cooperate as required by 4 CFR 102.1 and provide a hearing official.

PART 1262—EQUAL ACCESS TO JUSTICE ACT IN AGENCY PROCEEDINGS

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AUTHORITY: 5 U.S.C. 504; 51 U.S.C. 20113(a).

SOURCE: 51 FR 15311, Apr. 23, 1986, unless otherwise noted.

Subpart 1262.1—General Provisions

§ 1262.101 Purpose of these rules.

(a) The pertinent provisions of the Equal Access to Justice Act at 5 U.S.C. 504 (hereinafter “the Act”) provide for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called “adversary adjudications”). An eligible party may receive an award when it prevails,

unless it has unreasonably protracted the proceedings, or the Agency’s position in the proceeding was substantially justified, or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the National Aeronautics and Space Administration (NASA) will use in determining awards.

(b) As used in this part:

(1) *Adversary adjudication* means:

(i) An adjudication under 5 U.S.C. 554 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 6 of the Contract Disputes Act (CDA) of 1978, as amended (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of the CDA (41 U.S.C. 607);

(iii) Any hearing conducted under Chapter 38 of Title 31 (added by section 6104 of the Program Fraud Civil Remedies Act of 1986 (Pub. L. 99-509, 100 Stat. 1948, Oct. 21, 1986), 31 U.S.C. 3801, *et seq.*, as amended); and

(iv) The Religious Freedom Restoration Act (RFRA) of 1993 (added by section 4(b), of RFRA (Pub. L. 103-141, 107 Stat. 1489, Nov. 16, 1993), 42 U.S.C. 2000bb).

(2) *Adjudicative officer* means the deciding official, without regard to whether the official is designated an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication;

(3) *Position of the agency* means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based;

(4) *Party*, as defined in 5 U.S.C. 551(3), includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes, and who meets the eligibility requirements of § 1262.104; and

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(5) *Agency* with a capital A denotes the NASA.

(c) Determination of *Substantially justified*. 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.

[51 FR 15311, Apr. 23, 1986, as amended at 60 FR 12668, Mar. 8, 1995]

§ 1262.102 When the Act applies.

The Act applies to any adversary adjudication pending or commenced before NASA on or after August 5, 1985. It also applies to any adversary adjudication commenced on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that an application for fees and expenses, as described in subpart 1262.2, had been filed with the Agency within 30 days after August 5, 1985, and to any adversary adjudication pending on or commenced on or after October 1, 1981, in which an application for fees and other expenses was timely filed and was dismissed for lack of jurisdiction.

§ 1262.103 Proceedings covered.

(a) The Act applies to the following adversary adjudications conducted by the Agency:

(1) Adjudications under 5 U.S.C. 554 in which the position of NASA or any other agency of the United States, or any component of an agency, is represented by an attorney or other representative who enters an appearance and participates in the proceedings;

(2) Appeals of decisions made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before the Board of Contract Appeals (BCA) as provided in Section 8 of that Act (41 U.S.C. 607);

(3) Any hearing conducted under Chapter 38 of Title 31 (31 U.S.C. 3801, *et seq.*, as amended); and

(4) Adjudications under the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb).

(b) The Act does not apply to:

(1) Any proceeding in which this Agency may prescribe a lawful present or future rate;

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(2) Proceedings to grant or renew licenses (note, however, that proceedings to modify, suspend, or revoke licenses are covered if they are otherwise adversary adjudications); and

(3) Proceedings which are covered by a compromise or settlement agreement, unless specifically consented to in such agreement.

(c) NASA may also designate a proceeding as an adversary adjudication for purposes of the Act by so stating in an order initiating the proceeding or designating the matter for hearing. The Agency's failure to designate a proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(d) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

[60 FR 12668, Mar. 8, 1995]

§ 1262.104 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses, the applicant must be a "party" to the adversary adjudication for which an award is sought. The applicant must show that it meets all conditions of eligibility set out in this subpart and in subpart 1262.2.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than \$2 million;

(2) Any owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, unit of local government, or organization with a net worth

of not more than \$7 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered as an "individual" rather than as a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

[51 FR 15311, Apr. 23, 1986, as amended at 60 FR 12668, Mar. 8, 1995]

§ 1262.105 Standards for awards.

(a) A prevailing applicant may receive an award subject to paragraph (b) of this section, for fees and expenses incurred in connection with a proceeding, or in a significant and discrete sub-

stantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. No presumption arises that the agency's position was not substantially justified simply because the agency did not prevail. The burden of proof that an award should not be made to an eligible prevailing applicant is on the agency.

(b) An award, for any portion of the adversary adjudication, will be denied if the applicant has unreasonably protracted the proceedings, or denied or reduced if special circumstances make the award sought unjust.

§ 1262.106 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under these rules may exceed \$75 per hour. No award to compensate an expert witness may exceed the highest rate at which this Agency pays expert witnesses, which is \$20 an hour (5 hours maximum) or maximum daily rate of \$100 (3 days maximum). However, an award may also 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.

(c) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the adjudicative officer shall consider the following:

(1) If the attorney, agent, or witness is in private practice, his or her customary fee for similar service, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily performs services;

(3) The time actually spent in the representation of the application;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

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(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

§ 1262.107 Rulemaking on maximum rates for attorney fees.

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Agency may adopt regulations providing that attorney fees may be awarded at a rate higher than \$75 per hour in some or all of the types of proceedings covered by this part. This Agency will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act (5 U.S.C. 553).

(b) Any person may file with the Agency a petition for rulemaking to increase the maximum rate for attorney fees. The petition should be addressed to the General Counsel, NASA Headquarters, Washington, DC 20546; should identify the rate the petitioner believes the Agency should establish and the types of proceedings in which the rate should be used; and should also explain fully the reasons why the higher rate is warranted. The Agency will respond to the petition within 60 days after it is filed, by initiating a rulemaking proceeding or denying the petition, or taking other appropriate action.

§ 1262.108 Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States that participates in a proceeding before NASA, the award or an appropriate portion of the award shall be made against that agency, subject to § 1262.105(b), if it had taken a position that is not substantially justified.

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§ 1262.109 Delegations of authority.

(a) The NASA Administrator hereby delegates authority to the General Counsel or designee to take final action on matters pertaining to the Act, other than the authority for final fee determination after Agency review pursuant to § 1262.308.

(b) The NASA Administrator may, in particularly specified matters under the Act, delegate authority to officials other than those designated in paragraph (a) of this section.

Subpart 1262.2—Information Required From Applicants

§ 1262.201 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of an agency or agencies in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed \$2 million (if an individual) or \$7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if the applicant:

(1) Attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)), or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) States that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expense for which an award is sought.

(d) The application may also include any other matters that the applicant wishes this Agency to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

[51 FR 15311, Apr. 23, 1986, as amended at 80 FR 42029, July 16, 2015]

§ 1262.202 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in §1262.104(f) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public records of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the adjudicative officer in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)-(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The materials in question shall be served on counsel representing the agency

against which the applicant seeks an award, but need not be served on any other party to the proceeding. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Agency's regulations under the Freedom of Information Act, at 14 CFR part 1206.

[51 FR 15311, Apr. 23, 1986, as amended at 80 FR 42029, July 16, 2015]

§ 1262.203 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project, or similar matter for which an award is sought. A separate itemized statement, accompanied by an oath of affirmation under penalty of perjury (28 U.S.C. 1746), shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount paid or payable by the applicant or by any other person or entity for the services provided. The adjudicative officer may, in addition, require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 1262.204 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after the Agency's final disposition of the proceeding.

(b) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

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(c) For purposes of this rule, final disposition means the latter of:

(1) The date on which the last “initial decision”, in a bifurcated proceeding, or other recommended disposition of the merits (both as to liability and amount, if applicable) of the proceeding, by an adjudicative officer or intermediate reviewer, becomes administratively final;

(2) The date on which an order is issued disposing of any petitions for reconsideration;

(3) If no petition for reconsideration is filed, the last date on which such a petition could have been filed; or

(4) The date of a final order or any other final resolution of the proceeding, such as a settlement or a voluntary dismissal, which is not subject to a petition for reconsideration.

Subpart 1262.3—Procedures for Considering Applications

§ 1262.301 Filing and service of documents.

Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 1262.202(b) for confidential financial information.

§ 1262.302 Answer to application.

(a) Within 30 calendar days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 calendar days, and further extensions may be granted by the adjudicative officer upon request by agency counsel and the applicant.

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(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of agency counsel’s position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 1262.306.

§ 1262.303 Reply.

Within 15 calendar days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 1262.306.

§ 1262.304 Comments by other parties.

Any party to a proceeding other than the applicant and agency counsel may file comments about an application within 30 calendar days after it is served, or about an answer within 15 calendar days after it is served. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 1262.305 Settlement.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 1262.306 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.

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

§ 1262.307 Decision.

(a) The adjudicative officer shall issue an initial decision on the application with 90 calendar days after completion of proceedings on the application. The decision shall include written findings and conclusions on such of the following as are relevant to the decision:

(1) The applicant's eligibility and status as a prevailing party;

(2) Whether the Agency's position was substantially justified;

(3) Whether the applicant unreasonably protracted the proceedings, or whether special circumstances make an award unjust; and

(4) The amounts, if any, awarded for fees and expenses with an explanation of the reasons for any difference between the amount requested and the amount awarded. Further, if the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment of any award made among the agencies, and shall explain the reasons for the allocation made.

(b) When the Agency appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

[51 FR 15311, Apr. 23, 1986, as amended at 60 FR 12669, Mar. 8, 1995]

§ 1262.308 Agency review.

(a) Within 30 calendar days of the receipt of the adjudicative officer's initial decision on the fee application, either the applicant or agency counsel may seek Agency review of the decision; or, the NASA Administrator, upon the recommendation of the General Counsel or other designee, may decide to review the decision based on the record. Whether to review a decision is solely a matter within the discretion of the NASA Administrator. A 15-day notice of such review will be given the applicant and agency counsel, and a determination made not later than 45 days from the date of notice. The Administrator may make a final determination concerning the application or remand the application to the adjudicative officer for further proceedings.

(b) If neither the applicant nor agency counsel seek review, and the NASA Administrator does not on own initiative take a review, the adjudicative officer's initial decision on the fee application shall be the final administrative decision of the Agency 45 days after it is issued.

§ 1262.309 Judicial review.

Judicial review of final Agency decisions on awards may be sought under 5 U.S.C. 504(c)(2), which provides: If a party other than the United States is dissatisfied with a determination of fees and other expenses made under [this part], that party may, within 30 days after the [final administrative] determination is made, appeal the determination to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. The court's determination of any appeal heard under this [authority] shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by the substantial evidence.

[51 FR 15311, Apr. 23, 1986, as amended at 60 FR 12669, Mar. 8, 1995]

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§ 1262.310 Payment of award.

(a) An applicant seeking payment of an award shall submit to the paying agency a copy of the Agency's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. The submission to NASA should be addressed as follows:

Director, Financial Management Division,
NASA Headquarters, Washington, DC 20546.

(b) The Agency will pay the amount awarded to the applicant within 60 days, if feasible, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

PART 1263—DEMAND FOR INFORMATION OR TESTIMONY SERVED ON AGENCY EMPLOYEES; PROCEDURES

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AUTHORITY: 44 U.S.C. 3102, 51 U.S.C. 20113(a).

SOURCE: 55 FR 28370, July 11, 1990, unless otherwise noted.

§ 1263.100 Purpose and scope.

(a) This part sets forth procedures to be followed with respect to the produc-

tion or disclosure of official information or records and/or the testimony of present or former employees of the National Aeronautics and Space Administration relating to any official information acquired by any employee of NASA as part of the performance of that employee's official duties or by virtue of that employee's official status, where a demand for such production, disclosure, or testimony is issued in a federal, state, or other legal proceeding.

(b) This part does not apply to any legal proceeding in which an employee is to testify, while in leave status, as to facts or events that are in no way related to the official duties of that employee or to the functions of the NASA.

§ 1263.101 Definitions.

(a) *Agency*—As referred to in this regulation, Agency means the National Aeronautics and Space Administration.

(b) *Demand*—A subpoena, order, or authorized request for official information, or for the appearance and testimony of NASA personnel, issued as the result of a legal proceeding.

(c) *Employee*—Includes all present and former officers and employees of the National Aeronautics and Space Administration who are or have been appointed by, or subject to the supervision, jurisdiction, or control of the Administrator of the agency.

(d) *Legal proceeding*—Includes any proceeding before a court of law or equity, administrative board or commission, hearing officer, or other body conducting a legal or administrative proceeding.

(e) *Legal proceeding involving the United States*—Any proceeding before a court of law or equity brought on behalf of, or against the United States, NASA or NASA employees, and resulting from alleged NASA operations.

(f) *Official information*—All information of any kind, however stored, that is in the custody and control of NASA or was acquired by NASA personnel as part of official duties or because of official status while such personnel were employed by or on behalf of the NASA.