

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

WILLIAM H. JOHNSTON, et al., )  
 )  
 Plaintiffs, )  
 )  
 v. ) Civil Action No. 81-0147-A  
 )  
 JOHN O. MARSH, Secretary of the )  
 Army, )  
 )  
 Defendant. )

MEMORANDUM OPINION

1981  
CLERK, U. S. DISTRICT COURT  
ALEXANDRIA, VIRGINIA

This matter comes before the court on plaintiffs' motion for attorney's fees and costs under the Equal Access to Justice Act. 28 U.S.C. § 2412 (d)(1)(A) (1976, as amended Oct. 21, 1980, Pub. L. 96-481, Title II, §204). For reasons given below, the plaintiffs' motion is denied.

I. FACTUAL BACKGROUND

The case derives from an action three General Schedule employees of the Army brought against the Secretary of the Army, alleging that the reclassification of their jobs under the Merit Pay System was arbitrary and capricious, under 5 U.S.C §5401, et seq. On June 12, 1981, this court dismissed the action on the grounds that the change was not yet effective and, therefore, the case was not yet ripe for judicial consideration. Plaintiffs noticed their appeal to the Fourth Circuit. But during

the pendency of the appeal, the pay change became effective. The defendant's original motion to dismiss was therefore moot. The defendant filed a motion to dismiss the appeal and for remand, acknowledging that the case was now ripe for judicial consideration. The case was remanded. However, on May 13, 1982, the plaintiffs' jobs were reconverted to the General Schedule. The parties stipulated to a dismissal on July 13, 1982.

## II. LEGAL ANALYSIS

The Equal Access to Justice Act provides that

a court shall award to a prevailing party other than the United States fees and other expenses incurred in any civil action... brought by or against the United States in any court having jurisdiction of the action unless the court finds the position of the United States was substantially justified...

Plaintiffs claim that this provision entitles them to attorney's fees and costs incurred in pursuing their action against the Secretary.

In order for the plaintiffs to prevail on this claim, the plaintiffs must show that they were "prevailing parties". According to the case law, the burden is on the plaintiff to make a demonstration establishing that the plaintiff's action was the "catalyst" of the result. See, e.g., Citizens' Coalition v. City of Euclid, 537 F.Supp. 422 (N.D. Ohio 1982). See also Smith v. University of North Carolina, 632 F.2d 316, 347 (4th Cir. 1980). (relating to standard for "prevailing party" under 42 U.S.C

§2000e-5(k)). Plaintiffs say only that "since reclassification by the Army resolved plaintiffs' complaints, the parties jointly applied for and were granted by the Court, a dismissal without prejudice." Petition, ¶ III. This statement does not really suggest that plaintiffs' law suit had anything to do with the Army's reclassification. Indeed, the defendant presents materials which suggest that the reclassification was due to independent action of the Federal Labor Relations Authority, which is the controlling statutory body authorized to make job definitions such as that involved in this case. In other words, plaintiffs have made no showing that these changes were in any way the product of their law suit. Indeed, it appears that the changes would have come about even had the plaintiffs not brought this suit. Thus, it hardly seems as if the plaintiffs were a catalyst of the classification change; therefore, they cannot be said to be prevailing parties within the meaning of the Act.

However, even if the plaintiffs were characterized as prevailing parties, a separate and independent reason exists for denying plaintiffs' motion. The Act requires that such motion be denied if the court finds that the government's position is "substantially justified". The burden is on the government to show that its position was substantially justified and the test is one of reasonableness. See, e.g., Kennedy v. United States, 542 F.Supp. 1046 (D.N.H. 1982). The government argues it was justified in its initial challenge of this action on Article III grounds. Since this court found that argument meritorious at the time it was presented, it is not now prepared to find that

the government's argument was unreasonable. After the classification change became effective, the defendant agreed to litigate the case on the merits. The defendant voluntarily dismissed the action after the redefinition of the plaintiffs' jobs.

Thus, it appears that throughout the history of this case, the government's position was one of reasonableness. The plaintiff says only that the "government had the power to reclassify the plaintiffs and did not." Petition, ¶ IV. Plaintiffs' argument seems to be that the government was unreasonable because it did not give the plaintiffs what they wanted.

For the separate and independent reasons that the plaintiffs were not "prevailing parties" within the meaning of the Act, and that the government's position was substantially justified, the plaintiffs' motion is denied.

DATE: Oct. 13, 1982

Richard L. Williams  
UNITED STATES DISTRICT JUDGE