IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

FRANK J. KELLOGG, Appellant,	)	
v.	)	
ROBERT L. WILKIE Secretary of Veterans Affairs, Appellee.	)	Vet. App. No 17-2348

APPELLANT'S REPLY TO THE SECRETARY'S RESPONSE TO THE APPLICATION FOR FEES AND EXPENSES

Pursuant to U.S. Vet. App. R. 39(a)(2) of the Court's Rules of Practice and procedure, Mr. Kellogg, through his counsel, files this reply to the Secretary's response to the Appellant's Application for Fees and Expenses under the Equal Access to Justice Act, codified at 28 U.S.C. §2412.

I. Initial Matters

On April 28, 2020, the Appellant filed her EAJA application with the Court. On May 15, 2020, the Secretary filed an unopposed motion for a 45 day extension of time, until July 13, 2020 to respond to Appellant's EAJA application. On July 10, 2020, the Secretary filed his Response to the Appellant's EAJA application. The Secretary concedes that the Court has jurisdiction over the application, that Appellant's EAJA application satisfies the jurisdictional requirements of the statute, that Appellant was a prevailing party. The Secretary also concedes the timeliness of filing of the application, the absence of special circumstances that would make

an award unjust, and that the government's position in this matter was not substantially justified. Finally, in this case, the Secretary does not dispute the hourly rates sought.

The Secretary concedes the reasonableness of the hourly rates sought and the reasonableness of Appellant's counsel's professional attorney time expended during the course of this appeal. So, the Secretary does not dispute attorney EAJA **fees** for professional services rendered, but rather disputes *only* a hotel **expense** which was incurred by appellant's counsel as the result of a Court ordered oral argument scheduled in Washington, D.C. (*ie. outside this counsel's home state of New York*). He disputes Mr. Kellogg's expense for a nightly hotel rate in the amount of $746.03, despite the fact that this expense is supported by documentary evidence (*ie. hotel bill*) attached to the EAJA application. In so disputing, the Secretary, who has apparently accredited himself as a hotel rate expert, sets his own "reasonable rate" for a Washington, D.C. hotel rental rate of $300.00 per night. He sets this "reasonable rate" despite the fact that the oral argument was scheduled during the peak month of September (when Congress reopens, conventions resume and business travelers return after Labor Day). See Secretary's brief at pages 8-9.[1]

[1] The Secretary appears to have "supported" his expertise as a hotel rate expert by increasing a 2016 hotel rate of $250.00 by 20% in an "attempt to account for and estimate any potential increase in rate in the three-and-a-half year period of time between the argument in Robinson and the argument in this case".

The first line of Appellant's EAJA application separates EAJA "attorney fees" in the amount of $21,884.39 from "costs" (expenses) in the amount of $2,188.06 for a total amount sought in the amount of $24,072.45. As such, it is both misleading and inappropriate for the Secretary to have attacked the reasonableness of Appellant's **entire** EAJA fee rather than mounting a challenge to just the costs/expenses of the application. The Secretary has presented the issue as:

> Whether the $24,072.45 in attorneys' fees requested in Appellant's April 28, 2020, Equal Access to Justice Act (EAJA) application should be reduced based on a lack of reasonableness

(See Secretary's Response, "Issue Presented"). This Court should not condone the Secretary's irresponsible bad judgment in this regard.

II. Issue Presented

> **Whether, in light of Appellant's prima-facie documentary evidence (ie. an actual hotel bill), the Court should rule, as a matter of law, that while conceding the hotel bill's authenticity, the Secretary knowingly argued a false legal position and, accordingly, acted in bad faith thereby entitling Appellant to recovery of EAJA fees under 28 U.S.C. §2412(b).**

At page 2 of his response, the Secretary argues that the Court should "reduce the amount sought based on ***insufficiently supported expenses***. (emphasis added). The Secretary expands his argument on page 3 in his summary stating that:

> "lack of reasonableness/billing judgment in seeking reimbursement for $1,492.06 associated with Appellant's attorney's lodging at the Watergate Hotel in September 2019. Appellant has failed to establish

> the reasonableness of seeking reimbursement for two nights at the Watergate Hotel at the nightly rate of $649.00 with an additional $97.03." DC Room Tax per night, for a total of $1,492.06. [EAJA App. at 9, 27]

The Secretary's Pleading is Misleading and Dishonest

The Secretary first cites to *Blum v. Stenson*, 465 U.S. 886, 897 (1984) to support his argument that "Appellant has the burden of demonstrating that the fees **and expenses** requested are reasonable". (emphasis added) See Secretary's brief at page 4. Contrary to the Secretary's argument, the *Blum* case says nothing whatsoever about "expenses". Indeed, the *Blum* case is not an EAJA case at all, but rather a case under The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, *Id*. Moreover, the issue in *Blum* was whether to "allow the prevailing party, other than the United States, a reasonable attorney's fee **as part of the costs**." *Id*. This is a *significant distinction* from the claimant's entitlement to recovery of EAJA *attorney fees and expenses* under 28 U.S.C. §2412.

Likewise, the Secretary's citation to *Baldridge v. Nicholson*, 19 Vet. App. 227, 233 (2005), as it relates to the issue of expenses in this case, is equally as mis-leading. In *Baldridge*, the Secretary challenged double attorneys fees for dual EAJA applications presented by two related attorneys for two identical cases. Expenses were not the subject of that case. Moreover, the Secretary's citation to *Baldridge, Id.* and *Andrews v. Principi*, 17 Vet. App. 319, 321 (2003) at page 4 of his pleading, (ie. "To the contrary, it is in all cases the applicant's burden to demonstrate the reasonableness of the fees **and expenses** requested.") is simply

false. In no place, neither at page 233 of the *Baldridge* case nor page 321 of *Andrews*, does either case mention a demonstration of "reasonable expenses".

Finally, the Secretary's citation to *Am. Civil Liberties Union of Georgia v. Barnes*, 168 F.3d 423, 438 (11th Cir. 1999), at page 8 of his pleading, to make his case on the issue of expenses is further misleading because he obviously mis-construed the facts of that case. This case is distinguished on its facts from Mr. Kellogg's case. In *Am Civil*, the main issue regarding expenses was whether it was necessary for out-of-state attorneys to travel from New York to Atlanta to a status conference on the case, when it was established that local lawyers in Atlanta could have handled that part of the case. The court disallowed travel expenses to two New York counsel for that reason. Also, the *Am Civil* case is not an EAJA case, but rather a 42 U.S.C. §1988 case in which lawyers submit "full market rate" applications, as opposed to EAJA's "presumptively reasonable statutory rate" fees of $125.00 per hour. So, unless the Court determines that it was neither reasonable nor necessary for Kellogg's counsel to travel from New York to Washington, D.C. for a court ordered oral argument, the Court should find the Secretary's arguments, urging "unreasonable expenses", as unavailing in this regard.

The Secretary Has the Burden to Establish that Expenses are Unreasonable

The reason that the Secretary provided the false and mis-leading citations to the cases above in an attempt to establish Appellant's burden to

prove reasonable expenses is because there exists no such burden on the Appellant.

In *Cline v. Shinseki*, 26 Vet. App. 325, 331 (2013), the Court denied the appellant's request for reimbursement of travel expenses. The Court held, however, that the appellant has the burden of proving only the validity of his expenses and the nature of the "travel expenses". In other words, the appellant is required to either specify his expenses on his application **or** provide "[s]pecific documentation ... necessary to support an application for fees under EAJA".

Mr. Kellogg did both. First, he specified his expenses on his EAJA application. In so doing, he has not only proven, by attorney declaration, that the reason for the hotel is valid (ie. the hotel stay was necessary due to out of state travel to oral argument). Second, while not additionally required, he actually provided actual documentation in the form of an actual hotel bill attached to his application. This is far more than what is necessary to support the EAJA application. See also *Golden v. Gibson*, 27 Vet. App. 1, 8 (2014) citing to *Cline, Id.*, (Sufficient detail on specificity for hotel bill is all that is required for EAJA). *Filtration Dev. Co., LLC v. United States*, 63 Fed. Cl. 612, 626 (2005), citing to *Baldi Bros. Constructors v. United States*, 52 Fed.Cl. 78, 88 (2002) (explaining that hotel expenses would have been recoverable if they were properly substantiated); *Int'l Woodworkers of Am., AFL-CIO, Local 3-98 v. Donovan*, 792 F.2d 762, 767 (9th Cir. 1985) (attorney travel expenses are considered as costs under EAJA

2412.). Moreover, for EAJA expenses, a counsel's declaration alone actually suffices. *Lozano v. Astrue*, No. 06-15935, 2008 WL 5875573, at page 3 (9th Cir. Sept. 4, 2008)[2].

Although it is the appellant's burden to prove the *validity of expenses*, it is the losing party's burden, (here, the Secretary) to prove that the expenses and costs, to include in the EAJA context, are *unreasonable*. *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 462 (3d Cir. 2000), as amended (Sept. 15, 2000). The *Paoli* Court, in citing to FRCP Rule 54(d)(1) which states, in pertinent part, that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs....". The EAJA statute is such a statute as referred to in Rule 54, *Id*. Under the EAJA statute, therefore, there is a "strong presumption" that costs and expenses are to be awarded. "Moreover, the losing party bears the burden of making the showing that an award is inequitable under the circumstances". *Id*., at 462-463.

In order to overcome this burden of reasonableness, the Secretary must make some showing of **bad faith** on the part of the winning party in addition to

[2] As will be further discussed later in this pleading, in most all other EAJA applications of record at the CAVC, a Counsel's declaration as to expenses has sufficed, as in the *Lozano* case. But Mr. Kellogg's counsel has been repeatedly subjected to disparate treatment by the Secretary's counsel; treatment which she perceives as racial bias or other discriminatory treatment, because unlike her Caucasian colleagues, she has been challenged for EAJA travel, hotel and expense receipts/bills for all cases orally argued at this Court.

introducing evidence supporting a reduction. *Paoli, Id.* at 467. In other words, there is a strong presumption that expenses and costs are valid unless there is a showing of bad faith or dilatory tactics. The EAJA, as a statutory authority, gives rise to the plaintiffs' entitlement to reimbursement for costs. *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546, 610 (D.N.J. 2010), rev'd and remanded sub nom. *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012). The *Paoli* court laid out the eqitable factors which would come into play in determining whether to reduce a requested costs award once the losing party makes a showing of bad faith and inequitable facts.[3] These factors include: (1) the unclean hands, or bad faith or dilatory tactics, of the prevailing party; (2) the good faith of the losing party and the closeness and difficulty of the issues they raised; (3) the relative disparity of wealth between the parties; and (4) the indigence or inability to pay a costs award by a losing party. *Paoli, Id.*, at 463. Again, none of these factors which would justify a reduction of costs and expenses has been shown by the Secretary in Mr. Kellogg's case.

The Secretary Acted in Bad Faith

In the legal and litigation context, the perfect example of bad faith is when an attorney argues a legal position that he knows to be false. Despite the actual hotel bill which is attached to his EAJA, the Secretary's General Counsel, has

[3] The Court should note that there has been no such showing by the Secretary of bad faith or dilatory tactics which would justify a costs reduction to Mr. Kellogg's EAJA award.

shamelessly pled that Mr. Kellogg's EAJA application contains "insufficiently supported expenses". The Secretary's pleading, on its face, is a "per se" bad faith pleading, and the Secretary should be taxed with the consequences and the costs of filing such a knowingly dishonest and false pleading . What more could Mr. Kellogg have provided to document his hotel expenses? The fact is...there is nothing more documentary than an actual hotel bill. Moreover, the Secretary's deliberately misleading attack on his entire application including attorneys fees, rather than just EAJA costs and expenses is equally disturbing.[4] Therefore, this Court should find that the Secretary's behavior, to include his proffer of a knowingly false pleading is an act of bad faith, which entitles Mr. Kellogg to EAJA fees under 28 U.S.C. §2412(b).

III. The Secretary's Unsupported Accusations to Counsel Is indicative of Bad Faith

The Secretary's actions in contesting Kellogg's EAJA are easily described, plain and simple, as a shake-down, and an act of bad faith on its face. Mr. Kellogg's counsel establishes a showing of bad faith with the attached email documents.

The Secretary's June 12, 2020 email[5] confirms the Secretary's baseless efforts to wrestle this counsel into a fee reduction. While Assistant General

[4] Later in this brief, Mr. Kellogg will discuss how the Secretary's approach from his initial contact with Appellant's counsel was in bad faith.

[5] See attached Exhibit "A".

Counsel Robert Schneider admits that a $24,000.00 fee "is not per se unreasonable for a case with an oral argument" and also admits that "I was not involved in this case until after the oral argument...[and] I cannot speak to some of the specifics of the case", the Secretary's counsel was clearly focused on making baseless and unsupported accusations. Among his baseless allegations, he claimed that there "is a reasonableness issue" because the hotel rate paid was "more than the government rate". He further claims that he reviewed the "office file in this case and [had] discussions with Nicole [which] reflect[s] that VA offered a remand at the January 2018 briefing conference and that offer was rejected. He concludes the email with:

> All that being said, I am fairly confident that I can convince my supervisors that we should not contest if you can come down somewhat – is there an amount that you would be ok with? Unfortunately, **anything less than $2,000** might be a tough sell from my end, but I'm happy to try first with whatever, if anything, works for you.[6]

This counsel strongly countered these **baseless accusations** in an extensive responsive email detailing the exchange of emails and circumstances which took place with the Secretary's former counsel.[7]

From the start, it appears that GC Schneider seems to have made

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[6] It is telling to note that Mr. Kellogg's fee application has already been gratuitously self-reduced by 18.80 hours for a total of 15% reduction in the amount of $3,852.30 despite the fact that there are no challenges to the attorney fee charges for the hours worked.

[7] See Exhibit "B"

unsupported allegations just to see which ones would stick. First, he started off claiming that there was a remand offer at the Rule 10 conference. After I countered with email documentation, he moved on to a second false allegation claiming an offer of remand prior to the GC's brief. I responded in an extensive email denying this false allegation[8]. Third, the Secretary consistently continued to claim that there are "government hotel rate limitations". So, in a June 19, 2020 email, I asked Mr. Schneider the following:

> Robert -- It is my understanding that the basis for the Secretary's request that the hotel expense be reduced is grounded in some internal policy regarding "the federal rate." If you have any statutory authority and/or case law to support this policy, in an EAJA context, please forward as I would be pleased to review it. Otherwise, as previously discussed, it is the appellant's position that the hotel expense incurred in connection with compliance with the Court's oral argument order is reasonable, and reimbursement is required under the EAJA if the appellant is a prevailing party. Regards -- Tara.

In a June 20, 2020 email, Mr. Schneider responded as follows:

> Tara – sorry for any misunderstanding. The basis for our challenge is **not related to any internal policy regarding the "federal rate."** It is that, without some explanation as to the appropriateness of such a charge, we do not agree that it is reasonable to charge the Government for a 5 star luxury hotel. Obviously if there were no other options available or if there were other extenuating circumstances that made such expensive lodging a necessity, we could concede such reasonableness. With just the charge by itself, we will contesting based on general reasonableness principles. **There is nothing directly on point with lodging in terms of caselaw/statutes/regs**, but we will argue that the reasonableness requirements applied to fees/hours apply to expenses as well. We would analogize this with flying first class without any explanation as to why such was needed/reasonable.

[8] See Exhibit "C" for both emails.

> Again, if this is something you could potentially agree on, I'd be happy to discuss further. If not, we will just continue to draft our response contesting that aspect of the application. (Emphasis added).

This counsel responded with the attached Exhibit "D" email and supporting documentation. This email and supporting documentation largely responds to the General Counsel's insulting accusations. The documentation supplied by Mr. Kellogg demonstrates the great increase in rates during the month of September when Congress and business travelers return to the District after Labor Day and the official end of summer.[9] Later in a June 22, 2020 email Mr. Schneider made the **ridiculous and insulting** suggestion that I am required to show

> "extenuating circumstances that make staying at the Watergate or that price point a necessity. If there were **no other rooms available** at the Watergate or no more reasonably priced vacancies in any hotels, **a printout of such made at the time of reservation** could have been **recorded/documented and attached to the application**. There is nothing in your application (or your emails/attachment) that establishes this to be the case." (Emphasis added).

Mr. Schneider ends his email with the words "**No need to respond**." Mr. Schneider's email was followed by his July 10, 2020 Response to Appellant's EAJA application.

In light of this counsel's gratuitous self-reduction of nearly $4,000.00 on an application which was unchallenged as to attorney's fees, the Secretary's foregoing baseless allegations, is an attempt to choke or force Appellant's counsel

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[9] The Court should note that Mr. Kellogg's case is the only case in at least the last ten years which has been scheduled for Oral Argument at the CAVC in the month of September with representation by out-of-state counsel.

to further reduce her fees and expenses for presumptively reasonable rates set by statute. The Secretary's behavior signifies a grave departure from what Congress intended in promulgating the EAJA statute in the first instance. The facts in this case are clear. The Secretary has failed to find fault in Mr. Kellogg's EAJA application; and he has also failed to cajole this counsel into further reducing an already substantially reduced application. So, the Secretary did the only thing he usually does...and that is to look for a way to blame the veteran. However, Mr. Kellogg has already, heretofore, shown that it is the Secretary's burden, not Appellant's burden to prove that any declared and documented costs or expenses are unreasonable.[10]

IV. The Secretary's Disparate Treatment of this Counsel

The Secretary selectively singled out this counsel as his target to dispute travel expenses in EAJA cases argued at this Court. In fact, after a broad review of EAJA cases which involved oral argument, it would appear that the Secretary has elected to challenge the travel expenses of only this counsel for each case which she has argued before the court. See Robinson, Docket # 15-715 and the instant case. So, the question becomes, why has this counsel been singled out for this apparent disparate treatment? One is only left to speculate. But as an African

[10] At the EAJA settlement conference, the CLS attorney agreed that case law supports that it is the losing party's (the Secretary's) burden to prove the unreasonableness of costs and expenses in the fee shifting EAJA context. With that knowledge, the Secretary still refused to settle and elected to continue his challenge.

American, it is this counsel who has personally experienced this treatment. And to her, it certainly feels to her like racist bigotry.

The Secretary has disputed this counsel's hotel expense nightly rate as "insufficiently supported" (Secretary's pleading, page 2). However, in most of the EAJA cases on this Court's docket involving oral arguments, the Secretary has voiced no disputes or concerns over other cases which involve hefty EAJA expenses.

For example, in *Gray v. McDonald*, Docket # 13-3339, how does the Secretary explain reimbursing counsel (MDH) for what can only be a $839.20 first class airline ticket purchased in 2015[11], plus $490.49 for hotel, plus $290.72 for a taxi AND $72.00 for parking for one of the two attorneys in this case? And, although only one attorney is required to argue a case, the Secretary did not hesitate to reimburse a second attorney (MEW) for his airfare of $421.70, plus hotel at $176.97, car rental at $114.77 AND a taxi at $61.20 on that same case.

In *Bozeman v. Snyder*, Docket # 13-1992, the Secretary happily paid my colleagues, Chisholm Chisholm and Kilpatrick LTD (hereafter CCK), an EAJA fee in the amount of $45,215.86 which included airfare, hotel and parking expenses for two attorneys in the amount of $1,078.78. In *Tolliver v. Wilkie*, Docket # 16-3466, the Secretary, without challenge, gladly paid an EAJA fee in the amount of

[11] At page 7 of his pleading, the Secretary likened Mr. Kellogg's counsel's hotel rates to a first class airline ticket. So, how does the Secretary justify actually paying for a first class airline ticket in *Gray* without a challenge?

$25,234.59, including airfare and hotel expenses for two attorneys totaling $1,061.26. In *Ward/Neal v. Wilkie*, Docket # 16-2157/17-1204, a consolidated case, but with both cases represented by CCK, the Secretary did not hesitate to pay a $50,875.47 EAJA fee to include **full airfare for five people** in the amount of $1,482.92, **hotel bills for four people** in the amount of $593.60[12], and taxi fees in the amount of $59.80.

Notably, however, the declarations of counsel as to travel expenses in the above cited cases were not disputed as untrue or unsupported; and no counsel was required to provide an actual hotel bill or proof of the amount of other travel expenses. So, why has Mr. Kellogg's counsel not been afforded that same professional deference? Even with Mr. Kellogg's production of the actual receipts documenting expenses, why is that not enough? Why has the Secretary still challenged the bill as insufficiently supported? At minimum, this is selective harassment by the Secretary, amounting to bad faith behavior which this Court should not tolerate.

V. Why Is a Gratis $3,852.30 EAJA Reduction Not Enough?

Mr. Kellogg's attorney's fees EAJA application was not challenged. In fact, the Secretary conceded that there was nothing to challenge. Yet, Mr. Kellogg still gratuitously reduced his total attorney fee by approximately fifteen percent for a

[12] Upon information and belief, due to frequency of travel to D.C. for oral argument, CCK has a negotiated hotel rate.

total reduction of $3,852.30.[13] Despite this significant fee reduction, the Secretary wants more.

The Secretary reasons that there is a distinct dissection between reasonable attorney fees as opposed to costs and expenses. In doing so, the Secretary implies that there are two government coffers, including one for attorney fees and the other for expenses. He argues that he must protect the government fisc (one pocket for attorney fees and one pocket for expenses). The Secretary is wrong. Protection of the government fisc is one unit. Government coffers for EAJA fees and costs come from the same source.

During the parties dispute negotiations, this counsel gave the Secretary a proposal for settlement. At the CLS conference, counsel's proposal was to amend her application to remove the gratis $3,852.00 gift to the government in exchange for deducting the $1,492.00 hotel bill from Mr. Kellogg's application. The Secretary remained silent on this proposal. He did not respond.

WHY IS A $3,852.30 GRATIS EAJA FEE REDUCTION NOT ENOUGH?

[13] A broad review of other EAJA filings reveals that most attorneys rarely reduce their EAJA fees. But when they do elect to do so, the average reduction is between five (5%) to ten (10%) percent. When the Secretary randomly disputes a fee regardless of a significant reduction, it causes one to second guess whether any gratuitous reduction is worth it, since the Secretary will raise an unreasonable challenge regardless of that effort.

CONCLUSION

Veterans' advocacy at this Court is important. But it is also important that the advocate be entitled to recover a reasonable fee as well as expenses, free from the forces which diminish EAJA's purpose. This EAJA process is not supposed to turn into a second major litigation, because it is Congress' intent that the little man will be able to continue to be represented against the government.

WHEREFORE, the Appellant respectfully requests that this Court grant Appellant's EAJA award request for attorneys fees and expenses in full, and for such further relief as requested in this pleading; and for such different relief to which this Court finds just and proper.

Respectfully submitted,

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