



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 6, 2017

CBCA 5693-C(4360-ISDA)

NAATSI'S' AAN COMMUNITY SCHOOL, INC.,

Applicant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Alex D. Ivan and Samantha B. Kelty of Hufford, Horstman, Mongini, Parnell & Tucker, P.C., Flagstaff, AZ, counsel for Applicant.

Chaitna Sinha, Office of the Solicitor, Department of the Interior, Albuquerque, NM, counsel for Respondent.

Before Board Judges **VERGILIO**, **SULLIVAN**, and **LESTER**.

SULLIVAN, Board Judge.

Following the voluntary dismissal of its appeal, applicant, Naatsis' Aan Community School, Inc. (Naatsis' Aan), filed an application for attorney fees and costs pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2012). Because Naatsis' Aan was not a prevailing party in the underlying appeal, we deny the application.

Background

Naatsis' Aan filed an appeal of the findings and determination (F&D) issued by the Bureau of Indian Affairs (BIA) for fiscal year 2012. BIA had determined that \$32,603 in costs incurred in that year were not allowable and demanded repayment.

Soon after the appeal was filed in December 2014, the Board granted the parties' request for a stay to allow them time to discuss settlement. The matter remained stayed until the parties filed a joint motion to dismiss the appeal, stating that "the parties have resolved the matter, and all costs have been reinstated." On March 1, 2017, the Board dismissed the matter with prejudice.

Naatsis' Aan filed its application on April 12, 2017, seeking costs and fees totaling \$12,549.19. Respondent, Department of the Interior, filed its objection to the application on May 1, 2017, and Naatsis' Aan filed a reply on May 26, 2017.

Discussion

Disputes arising from contracts and grants issued pursuant to the Indian Self-Determination Act (ISDA) may be appealed to the Board. 25 U.S.C. § 5331(d). Fees and costs incurred to prosecute such appeals may be sought under EAJA. *Id.* § 5331(c). Prior to awarding fees and costs, the Board must determine that the party seeking fees and costs was the prevailing party in the underlying appeal and meets specific size and income limits and that the agency's position was not substantially justified. 5 U.S.C. § 504; *Silver Enterprises v. Department of Transportation*, CBCA 63-C (DOT BCA 4459, et al.), 07-1 BCA ¶ 33,496, at 166,016.

Because Naatsis' Aan sought voluntary dismissal following the parties' negotiated settlement of the matter, it is not a prevailing party. *Comter Systems, Inc. v. General Services Administration*, CBCA 4878-C(3534), 16-1 BCA ¶ 36,283, at 176,947. To be a prevailing party for the purposes of a fee-shifting statute, a party must secure a judgment on the merits or a court-ordered consent decree. *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 604 (2001). That rule applies to requests for fees and costs under EAJA. *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1379 (Fed. Cir. 2002). "[A] prevailing party does not include a party who obtained relief through 'a defendant's voluntary change in conduct.'" *Dellew Corp. v. United States*, 855 F.3d 1375, 1380 (Fed. Cir. 2017) (quoting *Buckhannon*, 532 U.S. at 605).

Naatsis' Aan asserts that the Board's dismissal order, wherein the Board recited the language of the parties' motion to dismiss and stated that "all monies had been reinstated,"

was the equivalent of a consent decree. Naatsis' Aan is incorrect. A consent decree is an order entered by a court or board that embodies all the terms of a negotiated resolution between the parties. *Rice Services, Ltd. v. United States*, 405 F.3d 1017, 1026-27 (Fed. Cir. 2005). The Board's order did not direct or limit future action or create enforceable obligations for either of the parties. *Carbonell v. Immigration & Naturalization Service*, 429 F.3d 894, 901 (9th Cir. 2005). Instead, the parties negotiated their own resolution of the matter and only sought an order of dismissal from the Board after the terms of that settlement had been implemented. The Board's order did not materially alter "the legal relationship of the parties' necessary to permit an award of attorney's fees." *Buckhannon*, 532 U.S. at 604.

Decision

Naatsis' Aan's application for attorneys' fees and costs is **DENIED**.

MARIAN E. SULLIVAN
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

HAROLD D. LESTER, JR.
Board Judge