

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

BUD'S WOODFIRE OVEN, LLC d/b/a  
AVA'S PIZZERIA

and

Case 05-CA-194577

RALPH D. GROVES, AN INDIVIDUAL

**GENERAL COUNSEL'S MOTION TO DISMISS RESPONDENT'S  
APPLICATION FOR ATTORNEY FEES AND EXPENSES PURSUANT  
TO THE EQUAL ACCESS TO JUSTICE ACT**

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## **I. INTRODUCTION**

Bud's Woodfire Oven d/b/a Ava's Pizzeria ("Respondent") filed an application seeking an award of fees and expenses under the Equal Access to Justice Act ("EAJA"), asserting that the General Counsel was not substantially justified in pursuing a portion of this case. The General Counsel maintains that its litigation position was "substantially justified" within the meaning of the EAJA. Nevertheless, the General Counsel hereby moves that Respondent's application be dismissed because it fails to comply with the plain requirements set forth in the EAJA and the Board's Rules and Regulations. Accordingly, Respondent's application fails to meet the strict requirements for establishing an entitlement to an award of attorney fees and costs. Moreover, the defects in the application, described in greater detail below, are material and prevent the General Counsel from answering the allegations in the application.

## **II. PROCEDURAL HISTORY**

On March 16, 2018, the Acting Regional Director for Region 5 of the National Labor Relations Board issued an Amended Complaint and Notice of Hearing based on an amended charge filed by Ralph D. Groves ("Groves"). The Amended Complaint alleges that Respondent violated Section 8(a)(1) of the Act when it discharged Groves for engaging in protected concerted activity, and Section 8(a)(1) and (4) for maintaining a mandatory arbitration agreement that prevented employees' access to the Board's remedies.

On April 3, 2018, in Baltimore, Maryland, Administrative Law Judge ("ALJ") Michael A. Rosas presided over the unfair labor practice hearing. On May 18, 2018, Judge Rosas issued a decision and recommended order finding that Respondent violated Section 8(a)(1) by maintaining the arbitration agreement, and based on this finding, concluded he did not need to

reach the issue of whether the arbitration agreement also violated Section 8(a)(4). Judge Rosas dismissed the allegation regarding the discharge of Groves, concluding that there was insufficient evidence to establish that his activity was concerted or protected.

The General Counsel and Respondent each filed exceptions to portions of the ALJ's decision, and answering briefs in response to those exceptions. The General Counsel also filed a reply to Respondent's answering brief. Respondent later submitted a notice of supplemental authority under *Reliant Energy*, 339 NLRB 66 (2003) and Section 102.6 of the Board's Rules; and the General Counsel filed a response.

On August 16, 2019, the National Labor Relations Board affirmed the ALJ's decision. *Bud's Woodfire Oven, LLC d/b/a Ava's Pizzeria*, 368 NLRB No. 45 (2019). The Board adopted the ALJ's finding that Groves' conduct was not concerted, and therefore, affirmed the ALJ's dismissal of that allegation. *Id.* at slip op. 1 and fn. 1. The Board affirmed the ALJ's determination that Respondent violated Section 8(a)(1) by maintaining its mandatory arbitration agreement, but likewise concluded it did not need to analyze Respondent's policy under Section 8(a)(4). *Id.*

On September 10, 2019, Respondent filed its EAJA application. In an order dated September 12, 2019, the Board referred Respondent's EAJA application to Chief Administrative Law Judge Robert A. Giannasi.<sup>1</sup>

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<sup>1</sup> Under Sec. 102.148(b) of the Board's Rules and Regulations, the General Counsel believes Respondent's EAJA application should be referred to Judge Rosas.

### **III. RESPONDENT'S EQUAL ACCESS TO JUSTICE ACT APPLICATION SHOULD BE DISMISSED BECAUSE IT IS DEFICIENT.**

Under the Equal Access to Justice Act (EAJA), a respondent that prevails in an adversary adjudication, and meets requisite criteria is eligible to apply for an award of fees and other expenses. 5 U.S.C. Sec. 504(a)(1). Because the EAJA is a “partial waiver of sovereign immunity,” the statute is to be “strictly construed in favor of the United States,” *Ardestani v. INS*, 502 U.S. 129, 137 (1991), and therefore, cannot be “enlarged beyond what the language requires.” *U.S. v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). As a result, an applicant must satisfy the eligibility requirements. *Asphalt Supply & Service, Inc.*, 75 Fed. Cl. 598, 601 (2007). Section 102.143(c)-(h) of the Board’s Rules and Regulations list the criteria for determining a respondent’s eligibility for an award, while Section 102.147 sets forth the requirements for the contents of the application itself and the necessary supporting documentation. Applications that do not satisfy Board requirements are subject to dismissal. *Kut-Kwick Corp.*, 273 NLRB 838, 838 fn. 1 (1984), *aff’d* without op. 770 F.2d 173 (11th Cir. 1985).

#### **A. Respondent Failed to Verify Its Application, As Required Under the Board’s Rules and Regulations.**

Respondent’s application does not satisfy the mandatory requirement imposed by Section 102.147(e) of the Board’s Rules that its application “must also contain or be accompanied by a written verification under oath or penalty of perjury that the information provided in the application is true.” Neither Respondent’s application, nor any of its accompanying documents, contain the required written verification. The Board has held that even if it appears “harsh” to do so, an application should be dismissed if it fails to include an applicant’s “accurate and properly authenticated evidence of its net worth in order to satisfy the burden of eligibility that Congress has imposed.” *Industrial Security Services*, 289 NLRB 459, 459 (1988).

The burden of proof to establish that an applicant meets the threshold criteria is on the EAJA applicant. *Pacific Coast District Council*, 295 NLRB 156, 157 (1989) (“It is clear from the legislative history that the statute places the evidentiary burden on meeting the eligibility standards for net worth and where pertinent, number of employees on the party seeking relief under the statute.”) Failure to establish the net worth or the employee threshold is dispositive to an EAJA application. *Asphalt Supply*, 75 Fed. Cl. 598, 601 (2007). Here, Respondent did not satisfy its burden to demonstrate eligibility for an EAJA award through properly verified evidence. The ALJ and the General Counsel should not be placed in a position to speculate regarding the accuracy or completeness of the submitted application because Respondent failed to meet the plain requirements of the Board’s Rules.

The omission is more than a mere technical deficiency. Beyond the issue of determining Respondent’s eligibility for an award, Respondent makes numerous factual assertions in its application that are not contained in the administrative record of this case and without citing to their source(s). Moreover, in at least two instances, Respondent’s unverified application includes unsupported factual assertions which are demonstrably false, namely, the identities of individuals from whom the General Counsel sought and/or obtained affidavit testimony. (Application p.8, fn2 and p.9). Not only could the General Counsel establish that these assertions are false, but Respondent’s unverified application offers no evidentiary foundation for these claims, let alone any explanation of how Respondent *could* purport to know the full extent of the Region’s investigative efforts.

Similarly, the application, and its Exhibit B, fail to include a factual declaration that the expenses claimed in the application are ordinarily charged to clients as separate expenses.

Section 102.145(c). That omission is necessarily fatal to the Respondent's claim for non-attorney-fee expenses.

Given Respondent's failure to comply with the Rules' unambiguous requirement that it submit a verified application, and the requisite strict construction of the EAJA statute, the General Counsel respectfully requests that the ALJ dismiss Respondent's application.

### **B. Respondent Omitted Relevant Information in its Application.**

In similarly mandatory language, Section 102.147(f) of the Board's Rules and Regulations requires an applicant "must provide with its applications a detailed exhibit showing the net worth of the applicant and any affiliates..." so that it can be aggregated to determine eligibility. Upon information and belief, Respondent did not include this required detailed exhibit with its application filed with the Board on September 10, 2019.<sup>2</sup> Although Respondent is seeking to withhold the contexts of this exhibit from public disclosure pursuant to Board Rule 102.147(g)(1), that procedure does not relieve Respondent of its obligation to file the exhibit with its application to the Board.

This omission is compounded by the unverified application's other deficiencies. To determine Respondent's eligibility for an award, it must establish it meets the requirements in Section 102.143(c)(5) and (g). While Respondent's application shows that it is a limited liability

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<sup>2</sup> The Office of the Executive Secretary telephonically advised the General Counsel that it did not receive the required exhibit. On October 9, 2019, counsel for the General Counsel contacted Respondent's counsel to inquire about whether the exhibit was provided to the Office of the Executive Secretary. Respondent's counsel indicated that the exhibit was properly served, but did not provide details about the method or date of delivery. Counsel further stated that it would contact the Office of the Executive Secretary to resolve the matter. On October 10, 2019, Respondent electronically filed the exhibit with the Office of the Executive Secretary.

company with fewer than 500 employees, it omits any mention of any “affiliates,” whose assets and/or employees may be aggregated with Respondent’s assets and employees to determine eligibility. Even if Respondent believes it has no “affiliates” within the meaning of the Rules, its application fails to include any statement to that effect, though as the application is unverified, even if had, it would still fail to meet the Rules’ requirements. Again, these deficiencies are not merely academic: in the document received by the General Counsel and identified as Respondent’s “Confidential Financial Information” there is a reference to another limited liability company whose relationship with Respondent is wholly unexplained.<sup>3</sup> Accordingly, Respondent’s application leaves the General Counsel without the ability to fully examine Respondent’s eligibility for an EAJA award, and as such, its application should be dismissed for failing to comply with the Board’s Rules.

**C. Respondent Failed to Provide a Description of Specific Services Performed, Or the Rate at Which Fees Have Been Computed.**

Respondent’s application also fails to satisfy the requirements in Section 102.147(h) of the Board’s Rules and Regulations:

The application must be accompanied by full documentation of the fees and expenses for which an award is sought. A separate itemized statement must be submitted for each professional firm or individual whose services are covered by the application, showing the dates and 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...

A fee applicant bears the burden of documenting and submitting the appropriate hours expended.

*Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Any claims upon which an applicant did not

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<sup>3</sup> Because Respondent has filed a motion pursuant to Section 102.147(g)(1) to withhold its exhibit from the public, and that motion remains pending, the General Counsel will not specifically identify this entity in this filing.

prevail, and which are distinct “in all respects” from claims upon which it did prevail, should be excluded in considering the amount of a reasonable fee. *Id*; see also *Leeward Auto Wreckers*, 283 NLRB 574, 582 (1987) (applying *Hensley* in this context).

Though Respondent prevailed on the portion of the case regarding the discharge of Groves, the Board determined that Respondent’s arbitration agreement was unlawful. Thus, Respondent is not entitled to an EAJA award for the time and expenses spent on defending the meritorious allegation regarding its unlawful arbitration policy—an allegation distinct in all respects from the discharge allegation. Moreover, Respondent’s application does not merely omit any “description of the specific services performed” as required by the Rules, but shows this information was affirmatively withheld by redacting it as “Attorney/Client Privileged.” In doing so, Respondent application precludes the General Counsel from determining if Respondent is requesting attorney fees and costs for portions of the case that it lost, and for which it is not entitled to recover. Respondent’s failure to include this information also makes it impossible for the General Counsel to respond on the merits of Respondent’s fee requests, and to which Respondent might otherwise be entitled, because without any description of the services performed, the General Counsel cannot evaluate whether the specific services performed justified the claimed fees, and thus, whether those fees are allowable under Section 102.145. “[I]tems of expense or fees that may not be unreasonable between a first class law firm and a solvent client are not [always] supported by indicia of reasonableness sufficient to allow [the court] to tax the same against the United States.” *American Petroleum Inst. v. EPA*, 72 F.3d 907, 912 (D.C. Cir. 1996).

Further, Respondent’s application and Exhibit B do not meet the Rules’ requirement to show the rate at which fees have been computed. While it may be possible to calculate these

rates based on other information contained in Exhibit B, the fact remains that Respondent's submission does not meet the plain requirement for "full documentation"..."showing the rate at which each fee has been computed" mandated by Section 102.147(h).

#### **IV. CONCLUSION**

Given the deficiencies in Respondent's application, it cannot demonstrate that it is eligible to receive an award of attorney fees and costs under the EAJA. Moreover, Respondent's unverified application should be dismissed because its numerous and material defects preclude the General Counsel from evaluating and answering Respondent's allegations on the merits. Based on the foregoing, the General Counsel respectfully requests the ALJ dismiss Respondent's EAJA application because it fails to satisfy the plain requirements of Board's Rules and Regulations.

Date: October 15, 2019

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that on October 15, 2019, a copy of General Counsel Motion to Dismiss Respondent's Application for Attorney Fees and Expenses Pursuant to the Equal Access to Justice Act was served by e-mail on:

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