

IN THE MATTER OF
ROBERT G. KOSKI, D.O.

Docket 9225. Initial Decision, January 25, 1990*

INITIAL DECISION BY

LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

JANUARY 25, 1990

INITIAL DECISION ON RESPONDENT'S APPLICATION FOR AWARD
OF FEES AND EXPENSES PURSUANT TO THE EQUAL ACCESS
TO JUSTICE ACT¹

I. INTRODUCTION

On February 13, 1989, the Commission issued its complaint in this proceeding, charging that the respondent, Robert G. Koski, D.O., had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. 45, by conspiring with other health care providers in the Dickinson County, Michigan area to coerce, intimidate, threaten to boycott, or boycott Marquette General Hospital and its physicians to prevent its proposed new medical office from offering services to consumers in competition with the providers (Cplt., ¶10).

On September 13, 1989, complaint counsel moved to dismiss the complaint against Dr. Koski because post-complaint discovery revealed that he had left a meeting of his alleged co-conspirators before a boycott vote was taken. Since the principal allegation of the complaint connecting Dr. Koski to the alleged conspiracy was his participation in this meeting, complaint counsel concluded that they had no evidence that he joined the alleged conspiracy at this meeting, and that the remaining evidence in their possession was not sufficient to show that Dr. Koski joined the conspiracy at any other time.

On October 10, 1989, the Commission dismissed the complaint. Thereafter, Dr. Koski filed an application for the award of fees and expenses under the EAJA. Complaint counsel filed their response to

*Dismissal Order issued October 10, 1989 (112 FTC 500).

¹Section 3.83(g) of the Rules of Practice requires the entry of an initial decision on an application for award of fees and expenses filed pursuant to the Equal Access to Justice Act, 5 U.S.C.A. 504 ("EAJA").

this motion on December 8, 1989, and Dr. Koski filed his answer on January 8, 1990.

II. FINDINGS OF FACT

A. The Reason For Dismissal Of The Complaint

1. Respondent Robert G. Koski, D.O. is a doctor of osteopathy licensed by the State of Michigan who specializes in the practice of anesthesiology in the Upper Peninsula of Michigan in Dickinson County. His office is located at Dickinson County Memorial Hospital, Iron Mountain, Michigan ("the Hospital") (Cplt., ¶1; Ans., ¶1).

2. Dr. Koski has been on the Hospital's medical staff, and has been an associate member of the Dickinson—Iron County Medical Society ("the Society") since September 1986. His answer denied that he was, as the complaint alleged, a member of the Society (Cplt., ¶¶2, 3; Ans., ¶¶2, 3).

3. Dr. Koski is engaged in the business of providing health care services to patients for a fee, but denied, as the complaint alleged, that he was in actual or potential competition with other physicians or health care providers in or near Dickinson County (Cplt., ¶4; Ans., ¶4).

4. The complaint alleged that, on September 3, 1986, Marquette General Hospital announced plans to build a multispecialty medical office in Kingsford, Michigan, the second largest city in Dickinson County (Cplt., ¶9) and that Dr. Koski and other health care practitioners in the Dickinson County area saw as a competitive threat the prospect of increased competition from Marquette General Hospital's planned office in Dickinson County. Therefore, the complaint alleged, they conspired to suppress competition from Marquette General's proposed new facility (Cplt., ¶10).

5. The principal allegation of the complaint connecting Dr. Koski to the alleged conspiracy was Paragraph 13, which charged that:

On September 13, 1986, the Medical Staff [of the Hospital] met and the physicians and other health care practitioners present, including respondent Koski, voted unanimously to approve the following commitment and to seek a written commitment to that effect from each Medical Staff member:

We the Medical Staff of DCH, support the right of the individual practitioner to be non-aligned to any specific institution and, therefore, pledge that we will not cooperate or be hired by the Marquette Hospital Clinic or any subsidiary thereof (Cplt., ¶13).

6. Dr. Koski's answer to the complaint denied that he was present when the September 13, 1986 vote was taken (Ans., ¶13) and the motion to dismiss the complaint states that: "Recently completed post-complaint discovery shows that Dr. Koski left the September 13th meeting before the boycott vote, and that he did not return before the meeting adjourned" (Motion to dismiss, p. 1).

7. Without proof that Dr. Koski was present when the vote was taken at the September 13th meeting, there is insufficient evidence that he joined the alleged conspiracy (Motion to dismiss, pp. 1-2).

B. Dr. Koski's Eligibility Under The Act

8. Dr. Koski seeks an award of attorney fees and other expenses under the EAJA because of the charges against him as the named party in the Matter of Robert G. Koski, D.O., Docket No. 9225.

9. Dr. Koski was the prevailing party in Docket No. 9225. *Order Dismissing Complaint*, FTC Docket No. 9225 (October 10, 1989). The Secretary's office informs me that Dr. Koski received a copy of the dismissal order on October 14, 1989. His application, dated November 9, 1989, was received by the Secretary on or about November 13, 1989 and was accepted for filing by the Secretary on November 16, 1989.

10. Complaint counsel do not dispute the claim that Dr. Koski is eligible under the EAJA's net worth provision. *Rules of Practice*, Section 3.81(d)(2)(i) (*Complaint Counsel's Response to Dr. Koski's Motion*, p. 3, n. 1 (hereinafter "Response"))).

11. Dr. Koski claims attorney's fees and expenses of \$22,597.98.

C. The Merits of Dr. Koski's Claim

12. Dr. Koski seeks an award of fees and expenses under the Act for the following reasons:

a. Prior to the issuance of the complaint, FTC investigators knew that he did not refer patients.

b. FTC investigators failed to make a thorough investigation of the facts used as a basis for the complaint's allegations.

c. FTC investigators confused Dr. Koski with his wife during the investigation and depositions even though they were told of this fact.

d. FTC investigators did not determine who was actually present at the meetings mentioned in the complaint and whether Dr. Koski voted at the meetings.

e. FTC investigators ignored Dr. Koski's statement to them that he had in the past applied for employment at Marquette General.

f. FTC investigators were told that Dr. Koski was not a member of medical societies involved in the alleged conspiracy.

13. Dr. Koski does not seek an award because of complaint counsel's conduct after the complaint issued, and the affidavit of Gary Gibbs satisfies me that after Dr. Koski filed his answer to the complaint, complaint counsel promptly and thoroughly investigated his claim, made for the first time in his answer, that he left the boycott meeting before the boycott vote was taken. Once complaint counsel were satisfied that Dr. Koski's claim was true, they promptly moved for dismissal of the complaint (Affidavit of Gary Gibbs, Response).

14. The principal factual complaint allegation related to the formation of the alleged conspiracy was that the medical staff of the Hospital voted unanimously on September 13, 1986, not to cooperate with or be hired by the Marquette Hospital Clinic (Cplt., ¶13).

15. This allegation was based on the minutes of the September 13 meeting which state that Dr. Koski was present, that the meeting was "called to plan strategy to counteract the move by Marquette General to construct a clinic in the Kingsford area" and that the motion referred to in paragraph 13 was unanimously approved (Affidavit of Paul Nolan, Exhibit 1, Response).

16. Other evidence gave complaint counsel reason to conclude that Dr. Koski knew of and approved the alleged conspiracy:

a. He was a member of the medical staff which voted on the motion referred to in paragraph 13 of the complaint.

b. He had indicated during investigational hearings that he was a member of the Dickinson-Iron County Medical Society which joined the alleged boycott:

(1) Dr. Koski's September 21, 1987 investigational hearing, at 7-8.

Q. Are you the member of any professional associations?

A. . . . the county medical society or I guess its Dickinson/Iron County Medical Society

I'm not even sure I'm an official member of society . . . I don't know if I'm a member of the society or not to tell you the truth . . . But I pay my dues so I suspect I am.

(2) In his answer to the complaint, ¶3, Dr. Koski denied that he was

a member of the Society but admitted that he was an associate member, a distinction without any significant difference in this case.

c. Dr. Koski signed a statement opposing the clinic (Nolan Affidavit, Exhibit 6).

d. Dr. Koski, his wife and another doctor attended, as guests, a meeting of the Tri-County Medical Society where support was sought in opposing the clinic (Nolan Affidavit, Exhibit 7).

17. Paragraph 13 of the complaint contains the most significant allegation relating to the boycott theory: that the medical staff of Dickinson County Memorial Hospital voted unanimously to not cooperate with or be hired by the Marquette Hospital Clinic.

18. Dr. Koski knew, before the complaint issued, that his apparent participation in the meeting, as evidenced by the minutes, was a central issue in the investigation, for the minutes were shown to him at an investigational hearing and he was questioned about them; furthermore, a draft complaint sent to him during settlement negotiations referred to the boycott motion and he and his attorneys were told by complaint counsel prior to issuance of the complaint that they believed his participation in the meeting proved that he had violated the law (Nolan Affidavit).

19. At no time prior to issuance of the complaint did Dr. Koski or anyone else inform complaint counsel that he did not attend the boycott meeting (Nolan Affidavit).²

20. That Dr. Koski might not have attended the boycott meeting was revealed for the first time in his answer to the complaint (Ans., ¶13), and shortly thereafter, complaint counsel sought evidence from Dr. Koski supporting his claim. Dr. Koski refused to supply this information voluntarily and complaint counsel began to seek evidence either supporting or refuting his claim. When complaint counsel were satisfied that Dr. Koski's claim was true, they moved to dismiss the complaint (Gibbs Affidavit).

21. Dr. Koski's motion lists several reasons why the Commission's claim that he joined and supported the boycott was not substantially justified, but, with the exception of the argument relating to the September 13th meeting, they are irrelevant even if true, for they have nothing to do with allegations of paragraph 13 which alone gave the Commission sufficient reason to issue the complaint.

22. Dr. Koski's refusal to discuss voluntarily with complaint counsel

²Dr. Koski's answer to complaint counsel's response to his motion claims that he told complaint counsel during the investigation that he did not believe he was present for any boycott vote (p. 3), but this claim is unsupported since Dr. Koski has filed no affidavit describing his interviews with complaint counsel.

his statement that he was not present at the meeting when the boycott vote was taken protracted this proceeding, but the extent of delay is unknown, for it is not clear that complaint counsel would have moved to dismiss the complaint on the basis of Dr. Koski's unsworn statements.

III. CONCLUSIONS OF LAW

A. *Dr. Koski's Application Was Untimely Filed*

Complaint counsel argue that Dr. Koski's application should be rejected as untimely filed because under the EAJA, a party seeking an award "shall, within thirty days of a final disposition in the adversary adjudication," submit his application to the agency. 5 U.S.C.A. 504(a)(2). Courts have construed this requirement of the EAJA strictly and have rejected applications under the EAJA which have been 12, 11 and only one day late, *ASH v. C.A.B.*, 724 F.2d 211, 225 (D.C. Cir. 1984); *Clay v. Secretary of HHS*, 639 F. Supp. 1322, 1324 (D.N.H. 1986), *aff'd*, 823 F.2d 679 (1st Cir. 1987); *Monark Boat Co. v. N.L.R.B.*, 708 F.2d 1322, 1324 (8th Cir. 1983).

The Commission issued its dismissal order on October 10, 1989, which was the date of final disposition of this proceeding (*Rules of Practice*, Section 3.82(d)(3)). Dr. Koski received notice of the dismissal order on October 14, 1989, and his application was received by the Secretary on or about November 13, 1989, but was only accepted for filing on November 16, 1989 because of his attorney's failure to file an original and 10 copies.

Complaint counsel argue that documents in EAJA proceedings are deemed to be served on the Commission on the date they are accepted for filing by the Secretary—either the 13th or 16th of October in the case of Dr. Koski's application. In either case, the application, if complaint counsel's theory is correct, was not timely filed because it was received more than 30 days after the Commission's final disposition of this case. *Rules of Practice*, Section 3.82(d)(1); EAJA, 5 U.S.C.A. 504(a)(2).

On the other hand, if service of the order was completed only when Dr. Koski received it (October 14, 1989) and service of his application was accomplished when Dr. Koski's attorney mailed the application on November 10, 1989, the EAJA's 30-day requirement would be satisfied.

Complaint counsel emphasize that courts construing the 30-day provision of the EAJA strictly interpret its requirements. *See*

Columbia Mfg. Corp. v. N.L.R.B., 715 F.2d 1409, 1410 (9th Cir. 1983), in which the Ninth Circuit found that, despite the agency's rule adding three extra days to the limitation period when an order was served on respondent by mail, an application was untimely filed even though it was filed 30 days after the applicant received notice of the dismissal of the complaint. *See also Long Island Radio Co. v. N.L.R.B.*, 841 F.2d 474, 478 (2d Cir. 1988).

Under the Commission's rules governing an EAJA application, the relevant time period began to run when the dismissal order was issued and service of the application was not accomplished when it was mailed (which, in this case, was apparently on November 9th) but when it is received by the Secretary (in this case either November 13th or 16th), for Section 4.4(b) of the Rules of Practice, which applies in this case, states:

Documents served in adjudicative proceedings under Part III of the Commission's Rules of Practice shall be deemed served on the day of personal service or the day of mailing. All other documents shall be deemed served on the day of personal service or on the day of delivery by the Post Office (emphasis added).

Therefore, I find that respondent's application under the EAJA was untimely filed since its service was not accomplished until the Secretary received it—*i.e.*, on November 13, 1989, more than 30 days after the Commission issued its dismissal order.

B. The Commission's Position In Issuing The Complaint Was Substantially Justified

Dr. Koski, who prevailed in this proceeding, is entitled to attorney fees and expenses under the EAJA unless the position of the agency in the proceeding—that is, “the action . . . by the agency upon which the adversary adjudication is based” and “the position taken by the agency in the adversary adjudication,” 5 U.S.C.A. 504(b)(1)(E)” was substantially justified or . . . special circumstances make an award unjust.” 5 U.S.C.A. 504(a)(1).

Dr. Koski's application challenges only the Commission's actions prior to issuance of the complaint. Those actions, which led to the issuance of the complaint, were substantially justifiable because they had a “reasonable basis in law and fact.” *Pierce v. Underwood*, 108 S. Ct. 2541, 2550, n. 2 (1988).

The Commission's decision to issue the complaint was reasonable because it appeared that Dr. Koski had joined the alleged conspiracy

by voting to boycott Marquette General Hospital, and proof of his action would justify charging him with participation in the boycott. *U.S. v. Moya-Gomez*, 860 F.2d 706, 758-61 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 322 (1989); *United States v. Marsh*, 747 F.2d 7 (1st Cir. 1984):

In other words, if the government proves, beyond a reasonable doubt at least a slight, though willing and knowing, connection between a defendant and a conspiracy, an appellate court will affirm the defendant's conviction for participation in that conspiracy. *Id.* at 13.

Dr. Koski did not, in fact, cast a vote in favor of the alleged boycott, but the minutes of the September 13th staff meeting indicated that he did, and complaint counsel justifiably assumed that the minutes were accurate. Dr. Koski and his attorney, who were, or should have been, aware of the significance of these minutes, did nothing until the complaint issued to clear up this misunderstanding. Since complaint counsel were given no reason to suspect that the minutes were inaccurate, *see Leeward Auto Wreckers, Inc. v. N.L.R.B.*, 841 F.2d 1143, 1147 (D.C. Cir. 1988), I find that the Commission's position was substantially justified when it issued the complaint.

Complaint counsel also argues that Dr. Koski's protraction of this proceeding makes an award to him unjust, that he seeks an award of fees and expenses which are not allowed under the EAJA, and that the expenses sought are insufficiently documented.

Since the Commission's position in this proceeding was substantially justified and Dr. Koski untimely filed his application, the subsidiary issues raised by complaint counsel need not be resolved.

Therefore, *it is ordered*, That respondent's application for award of fees and expenses pursuant to the Equal Access to Justice Act be, and it hereby is, denied.

IN THE MATTER OF

OKLAHOMA STATE BOARD OF
VETERINARY MEDICAL EXAMINERSCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3283. Complaint, Jan. 31, 1990—Decision, Jan. 31, 1990*

This consent order prohibits, among other things, the five member board, that is the sole licensing authority for veterinarians in Oklahoma, from restricting any veterinarian from being partners with, employed by or otherwise associating with non-veterinarians or veterinarians licensed in other states. Respondent also is prohibited from restricting any veterinarian from providing testimonials or making endorsements regarding veterinary products and services.

Appearances

For the Commission: *James E. Elliott* and *Thomas B. Carter*.

For the respondent: *Janie Simms Hipp*, Assistant Attorney General, Oklahoma City, OK.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Oklahoma State Board of Veterinary Medical Examiners has violated Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges in that respect as follows:

RESPONDENT

PARAGRAPH 1. Respondent Oklahoma State Board of Veterinary Medical Examiners ("the Board") is organized, exists and transacts business under the laws of the State of Oklahoma, and has its principal office and place of business at 5629 North Pennsylvania, Oklahoma City, Oklahoma. The Board is subject to the Commission's jurisdiction pursuant to Section 5 of the Federal Trade Commission Act.