UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

October 7, 1997

JOYCE J. AUSTIN, Complainant, v. JITNEY JUNGLE STORES OF AMERICA, INC., Respondent.	)))) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 97D00105))))

FINAL DECISION AND ORDER GRANTING ATTORNEY'S FEES

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.*, on behalf of Complainant.
Charles L. Brocato, Esq., Butler, Snow, O'Mara, Stevens & Cannada, PLLC, for Respondent.

I. *Procedural History*

On May 13, 1997, Jitney-Jungle Stores of America, Inc. (Respondent or Jitney-Jungle), filed a Motion for Attorney's Fees in *Joyce J. Austin v. Jitney-Jungle Stores of America*[1], 6 OCAHO 923

[1]*Austin* resolved three issues: (1) whether an employee whose wages are garnished in compliance with an Internal Revenue Service (IRS) Notice of Levy in satisfaction of unpaid taxes may successfully circumvent wage garnishment by suing her employer for discrimination under 8 U.S.C. §1324b, an immigration-related cause of action; (2) whether an employer who complies with an IRS Notice of Levy and is sued as a consequence may implead the United States in its role of tax collector; and (3) whether an employer's refusal to honor gratuitously tendered, unofficial documents purporting to exempt an employee from tax withholding and social security contribution constitutes discrimination. *Austin* held that (1) an employee cannot utilize 8 U.S.C. §1324b anti-discrimination provisions to avoid IRS tax obligations, including wage levies; (2) an employer sued for 8

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(1997), 1997 WL 235918 (O.C.A.H.O.), and a Brief in Support of Motion and Proof of Service. Jitney-Jungle requested **$4,751.61** for attorney's fees and related expenses, provided counsel Charles L. Brocato's affidavit, which summarized the basis for the amount requested, including information related to certain of twelve factors indicating reasonable attorney's fees enumerated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717–719 (5th Cir. 1974) (the so-called *Johnson* factors).

To document the amount requested, on September 3, 1997, I ordered Jitney-Jungle to provide copies of itemized statements submitted by counsel. *See* 28 C.F.R. §68.52(c)(2)(v) (1996). On September 30, 1997, Jitney-Jungle responded, filing an Amendment to its request, which asked for **$4,971**, as documented in the Supplemental Affidavit of Charles L. Brocato.

II. *Discussion*

A. *Test for Awards of Attorney's Fees Under 8 U.S.C. §1324b*

Title 8 U.S.C. §1324b(h) provides in pertinent part that

> an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

Furthermore,

> [T]he Supreme Court has held that a . . . [c]ourt may, in its discretion, award attorney's fees to a prevailing Defendant in a [discrimination] case upon a finding that the plaintiff's action was frivolous, unreasonable, groundless and without foundation, even though not brought in subjective bad faith.

Jasso v. Danbury Hilton & Towers, 3 OCAHO 566, at 6 (1993), 1993 WL 544051, at *10–11 (O.C.A.H.O.), citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

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U.S.C. §1324b discrimination may not implead the United States; and (3) an employer's refusal to honor gratuitously tendered, improvised tax-exemption documents is not a violation of 8 U.S.C. §1324b. Austin's Complaint was dismissed with prejudice because this forum lacks subject matter jurisdiction over tax and social security matters; 8 U.S.C. §1324b does not confer subject matter jurisdiction over terms and conditions of employment; the Anti-Injunction Act, 26 U.S.C. §7421(a), explicitly deprives courts of jurisdiction in actions meant to restrain tax collection; and Austin's Complaint failed to state a claim upon which relief can be granted under the relevant statute, 8 U.S.C. §1324b(a)(1).

An award of attorney's fees depends on satisfaction of a two-part test:

> (1) the party claiming attorney's fees must prevail, and
>
> (2) the complainant must have been unreasonable in filing the underlying action.

Id.

1. *Jitney-Jungle Is the Prevailing Party*

The Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (discussing fee awards under Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988) and *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (discussing fee awards under 42 U.S.C. §§1983, 1988), defined the prevailing party as the one who succeeds or prevails "on a significant issue in the litigation" and achieves "some of the relief they sought. . . ." In *Texas State Teachers*, the Court found that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." 489 U.S. at 792–93. Those "who prevailed on a significant issue in the litigation and . . . obtained some of the relief sought . . . are thus 'prevailing parties' within the meaning of [the statute]." *Id.* at 793.

Jitney-Jungle "succeeded" on a significant claim when I dismissed Austin's Complaint with prejudice for failure to state a cause of action cognizable under §1324b(g)(3), thus affording Jitney-Jungle the "relief sought," and "materially altering" Jitney-Jungle's and Austin's legal relationship. To similar effect, Jitney-Jungle's legal relationship with Austin was "materially altered" when I dismissed her Complaint for lack of subject matter jurisdiction. Jitney-Jungle, therefore, satisfies the first of this two-part test; it is the prevailing party.

I find that Respondent meets the prevailing party test of *Texas State Teachers*, *i.e.*, (1) it prevailed on a significant issue in litigation by demonstrating that Austin failed to state a cause of action, and (2) it obtained the relief it sought in its Answer when I dismissed Austin's Complaint.

2. *Austin's Complaint, Without Reasonable Foundation in Law and Fact, Is Frivolous*

Fee shifting turns on a determination that the prevailing party has established that "the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. §1324b(h). *See Horne v.*

Hampstead, 7 OCAHO 959, at 6 (1997); *Jasso*, 3 OCAHO 566, at 5, 1993 WL 544051, at *2 (citing *Jones v. Dewitt Nursing Home*, 1 OCAHO 1235, 1268 (1990)).

Austin continued to press her frivolous 8 U.S.C. §1324b claims—*i.e.,* she did not withdraw her Complaint as well she might have in light of unanimous OCAHO precedent dismissing discrimination claims predicated on an employer's refusal to accept self-styled tax-exemption documents.[2] Austin was, therefore, on notice that her claims were without foundation in fact and law.

On the core issue of *Austin v. Jitney-Jungle*, 7 OCAHO 932, 1997 WL 235918, whether or not an employee may successfully sue an employer for withholding federal taxes from the worker's wages, the U.S. Court of Appeals for the Seventh Circuit has held that:

> Employees have no cause of action against employers to recover wages withheld and paid over to the government in satisfaction of federal income tax liability.

Edgar v. Inland Steel Co., 744 F.2d 1276, 1278 (7th Cir. 1984) (such lawsuits represent "yet another disturbing example of a patently frivolous appeal by abusers of the tax system merely to harass the collection of public revenue"). *See also Kaucky v. Southwest Airlines Co.*, 109 F.3d 349, 353 (7th Cir. 1997) ("Money collected in error by a lawful agent [such as an employer] . . . can be recovered only from the government, because a claim or suit to collect such money is a claim or suit for a tax refund"), *petition for cert. filed*, 66 U.S.L.W. 3171 (U.S. July 14, 1997) (No. 97–347); *Webb v. United States,* 66 F.3d 691, 697–98 (4th Cir. 1995), *cert. denied*, 117 S. Ct. 1079 (1997).

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[2]*See*—to cite only those cases decided prior to *Austin*—*Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919 (1997), 1997 WL 242208 (O.C.A.H.O.); *Costigan v. NYNEX*, 6 OCAHO 918 (1997), 1997 WL 242199 (O.C.A.H.O.); *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.); *Winkler v. Timlin Corp.*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Town of Hampstead* (*Horne II*), 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.); *Lee v. Airtouch Communications, Inc.,* 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O.), *appeal filed*, No. 97–70124 (9th Cir. 1997); *Toussaint v. Tekwood Assoc.*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96–3688 (3d Cir. 1996). Austin's representative, John B. Kotmair, Jr. (Kotmair), as Director, National Worker's Rights Committee (Committee), represented all but the *Tekwood* complainant. Although varying in detail, these precedents share a common factual nucleus: rejection by the employer of an employee's or applicant's tender of improvised, unofficial documents purportedly exempting the offeror from taxation. The documents are all self-styled "Affidavit(s) of Constructive Notice" (that the offeror is tax-exempt) and "Statement(s) of Citizenship" (exempting the offeror from social security contributions). In every case, the complaint was dismissed.

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, *supra,* addressed fee-shifting. In *Christiansburg*, the Supreme Court applied the prevailing party standard to civil rights defendants, holding that a court "may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith." 434 U.S. at 421. Subsequently, in *Hensley v. Eckerhart*, the Court explained that "[a] prevailing defendant [in a 42 U.S.C. §1988 civil rights action] may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant. See H.R. Rep. No. 94–1558, p. 7 (1976)." 461 U.S. at 429 n.2.

Austin's Complaint was summarily dismissed for lack of subject matter jurisdiction *and* for failure to state a claim upon which relief could be granted. "[T]he *Christiansburg* standard is . . . likely to have been met where ***the plaintiff's case is dismissed for failure to state a claim on which relief could be granted. . . .***"[3] Austin maintains that her employer discriminated against her by refusing to accept her self-styled, gratuitously tendered documents,[4] subjecting her to the universal demands of the Internal Revenue Code and the Social Security Act, the legality of which are undisputed and long-settled.[5] Jitney-Jungle, moreover, is statutorily mandated to

[3]1 Court Awarded Attorney Fees (MB) ¶10.04, at 10–77—10–78 (May 1997) (footnote omitted) (emphasis added). *See, e.g., Patton v. County of Kings*, 857 F.2d 1379 (9th Cir. 1988) (upholding attorney's fees awarded to prevailing defendant where action dismissed for plaintiff's failure to state a cause of action and where plaintiff's action found frivolous); *Harbulak v. Suffolk County*, 654 F.2d 194, 197 (2d Cir. 1981) (reversing and remanding for award of attorney's fees to defendant after finding "no basis whatsoever for a suit against" the defendant and plaintiff's claim "unreasonable and groundless, if not frivolous"); *Rivera Carbana v. Cruz*, 588 F. Supp. 80 (D.P.R. 1984) (holding that plaintiff failed to allege or state a cause of action and stating that even if plaintiff had stated a cause of action, "'federal courts are without power to entertain claims if they are so attenuated and unsubstantial as to be absolutely devoid of merit' or if they are obviously, as in the instant case, frivolous") (citation omitted), *aff'd sub nom. Carbana v. Cruz*, 767 F.2d 905 (1st Cir. 1985) (Table).

[4]*See* Complaint, at ¶16a (identifying the documents which Respondent refused to accept as "Statement of Citizenship" and "Affidavit of Constructive Notice" which Austin presented to prove tax exemption and social security secession). *See also* OSC Charge, wherein Austin characterizes as an "unfair employment practice" Jitney Jungle's refusal to forward her self-styled and gratuitously proffered Statement of Citizenship to the IRS, or to "acknowledge her Affidavit of Constructive Notice that she was exempt from social security taxes.

[5]All employees residing in the United States are subject to withholding taxes and social security (FICA) contributions, which employers must collect "at the source"—*i.e.*, in the workplace, through payroll deductions. 26 U.S.C. §§3101, 3102, 3402(a)(1), 3403. *See Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

withhold income taxes[6] and social security contributions[7] and is immunized from legal liability for withholding by 26 U.S.C. §3102(b),[8] 26 U.S.C. §3403,[9] and the Anti-Injunction Act, 26 U.S.C. §7421(a),[10] which has been interpreted to prohibit suits against employers who withhold taxes. *See United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974). "[T]o take a position which indicates a desire to impede the administration of tax laws is a legally frivolous action." *McKee v. United States*, 781 F.2d 1043, 1047 (4th Cir.), *cert. denied*, 477 U.S. 905 (1986).

Where an employer is statutorily immunized from liability, an action brought against the employer for the performance of that duty is frivolous *per se*. "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory. . . ." *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). "A claim is based upon an indisputably meritless legal theory if the defendants are immune from suit." *Graves v. Hampton*, 1 F.3d 315, 317 (5th Cir. 1993) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923, at 22, 1997 WL 235918, at *17 (citing *Neitzke*, 490 U.S. at 325, *cited in Graves*, 1 F.3d at 317). Because Jitney-Jungle, "an employer who in compliance with statutory obligations . . . deducts withholding tax and social security contributions, . . . is statutorily immunized from suit[,]" Austin's action is frivolous and meritless. *Austin*, 6 OCAHO 923, at 22, 1997 WL 235918, at *17.

Therefore, I find that there is "no legal or factual basis for any of [Austin's] allegations," and I award Jitney-Jungle **$4,971** in attorney's fees and related expenses, the computation of which is explained at **II, B.**, below. *Lee v. Airtouch Communications*, 7 OCAHO 926, at 6. Respondent's prevailing party status and Austin's action against an employer legally immunized from liability satisfy the threshold requirements of the 8 U.S.C. §1324b(h) two-part test for award of attorney's fees.

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[6]26 U.S.C. §3402(a).

[7]26 U.S.C. §3102(a).

[8]26 U.S.C. §3102(b) ("Every employer . . . shall be indemnified against the claims and demands of any person. . . .").

[9]26 U.S.C. §3403 ("The employer . . . shall not be liable to any person. . . .")

[10]26 U.S.C. §7421(a) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . .").

B. *Reasonableness of Attorney's Fees Request*

To support fee-shifting, "[a]ny application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed." 28 C.F.R. §68.52(c)(2)(v). Counsel supplies the following facts and figures to support Jitney-Jungle's request for **$4,971** in attorney's fees and related expenses:

1. *Attorney Charles L. Brocato*

Qualifications: Partner, Butler, Snow, O'Mara, Stevens, & Cannada, PLLC, Jackson, MS; 1961 graduate of the University of Mississippi School of Law; advanced degree in Taxation, New York University; thirty-six (36) years' experience.[11]

Rate Charged: discounted rate of $175 an hour
Number of Hours: 27.59[12] hours x $175 = $4,828.35

2. *Attorney Jeff Walker*

Qualifications: Partner, Butler, Snow, O'Mara, Stevens, & Cannada, PLLC, Jackson, MS; nineteen (19) years' labor and employment experience.[13]

Rate Charged: discounted rate of $175 an hour
Number of Hours: .20 hours x $175 = $35

3. *Misc. Costs*

1996 Copy Costs =	$ 72.00
Postage Costs =	35.65
Total =	$107.65

Total Charges: $4,971.00

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation

[11]*See* WESTLAW Database WLD-PRI.

[12]According to the amended motion; the first request for attorney's fees gave Brocato's time as 26.70 hours.

[13]*See* WESTLAW Database WLD-PRI.

provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley*, 461 U.S. at 433. The *Hensley* calculation is the "lodestar" amount. "The courts may then adjust this lodestar calculation by other factors. . . . [I]n *Hensley* and in subsequent cases, [the Supreme Court has] adopted the lodestar approach as the centerpiece of attorney's fee awards." *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989).

"The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the . . . court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U.S. at 434. "The . . . court also may consider other factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–719 ([5th Cir.] 1974), though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley*, 461 U.S. at 434 n.9. "The *Johnson* factors may be relevant in adjusting the lodestar amount, but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." *Blanchard*, 489 U.S. at 94. "The amount of the fee, of course, must be determined on the facts of each case. On this issue the House Report simply refers to twelve factors set forth in *Johnson*. . . . The Senate Report cites to *Johnson* as well. . . ." *Hensley,* 461 U.S. at 430.

"A number of circuits, following the lead of the Fifth Circuit in *Johnson v. Georgia Highway Express*, . . . have announced that their district courts are to consider and make detailed findings with regard to twelve factors relevant to the determination of reasonable attorneys' fees. . . ." *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978).[14] These twelve factors are:

> (1) . . . time and labor required. . . . (2) . . . novelty and difficulty of the questions. Cases of first impression generally require more time and effort on the attorney's part. . . . (3) . . . skill requisite to perform the legal service properly. . . . (4) . . . preclusion of other employment by the attorney due to accep-

[14] *See Barber*, 577 F.2d at 226:

> *We agree that these factors must be considered by district courts in this circuit in arriving at a determination of reasonable attorneys' fees in any case where such determination is necessary; and in order to make review by us effective, we hold that any award must be accompanied by detailed findings of fact with regard to the factors considered.*

> tance of the case. . . . (5) . . . customary fee. . . . (6) Whether the fee is fixed or contingent. [*But see Blanchard v. Bergeron*, 489 U.S. 87 (1989)]. . . . (7) Time limitations imposed by the client or the circumstances. . . . (8) . . . amount involved and the results obtained. . . . (9) . . . experience, reputation, and ability of the attorneys. . . . (10) . . . "undesirability" of the case. . . . (11) . . . nature and length of the professional relationship with the client. . . . (12) Awards in similar cases.

Johnson, 488 F.2d at 717–19. The Fourth Circuit held that to award attorney's fees, a "court must first apply the *Johnson* factors in initially calculating the reasonable hourly rate and the reasonable number of hours expended by the attorney; the resulting 'lodestar' fee, which is based on the reasonable rate and hours calculation, is presumed to be fully compensatory without producing a windfall."[15] *Trimper v. City of Norfolk, Va.*, 58 F.3d at 73.

Applying the twelve *Johnson* factors, to Jitney Jungle's request, I find that the hourly rates are reasonable in light of recent OCAHO caselaw in which ALJs awarded attorney's fees ranging from $75 per hour to $284 per hour: *Kosatchkow v. Allen-Stevens* Corp., 7 OCAHO 966 (1997) (awarding $4,474 in attorney's fees and related expenses at rates of $180 per hour for a partner with twelve (12) years' experience; $160 an hour for an attorney with nine (9) years' experience, and $95 an hour for a new attorney in Detroit, MI); *Lareau v. US Airways*, 7 OCAHO 963 (1997) (awarding $5,296.47 in attorney's fees at rates ranging from $284.75 an hour for work by a senior partner with twenty-six (26) years' experience, $243 for "Of Counsel" with thirteen (13) years' tax experience, and $207 an hour for "Of Counsel" with ten (10) years' experience, to $30 an hour for work performed by a law clerk at a major Washington, DC law firm); *Horne v. Hampstead,* 7 OCAHO 959 (1997) (awarding $630 in attorney's fees at $150 an hour for work by a partner and an associate in Towson, MD, a suburb of Baltimore); *Werline v. Public Service Electric & Gas Company*, 7 OCAHO 955 (1997) (awarding $512.50 in attorney's fees at $125 per hour for work by an associate attorney general for respondent in Cedarville, NJ); *Jarvis v. AK Steel*, 7 OCAHO 952 (1997) (awarding "legal fees" in the amount of

[15]"In determining a 'reasonable' attorney's fee . . . this Court has long held that a district court's discretion must be guided strictly by the factors enumerated by the Fifth Circuit in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). *See Daly v. Hill*, 790 F.2d 1071, 1077 (4th Cir. 1986). . . . *Daly*, 790 F.2d at 1075 n.2 (noting that the Johnson approach has been approved by Congress and by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 . . . (1983))." *Trimper v. City of Norfolk, Va.*, 58 F.3d 68, 73 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 535 (1995).

$1,833.75, with compensation for attorneys in Pittsburgh, PA, at rates of $275 per hour and $240 per hour); *Lee v. Airtouch*, 7 OCAHO 926 (1997) (awarding $7,531.26 for attorney's fees including $15.70 in costs billed for the San Diego, CA, market at rates of $155 per hour for in-house counsel and $216.75 per hour for outside counsel); and *Wije v. Barton Springs/Edwards Aquifer Conservation District*, 5 OCAHO 785 (1995), 1995 WL 626204 (O.C.A.H.O.) (awarding "legal fees" of $51,530.34 in the Austin, TX, market at the rate of $185 per hour for a partner and the rates of $120 per hour and $75 per hour for associate attorneys).[16] I find attorney's fees of **$4,971,** representing $175 dollars an hour for a senior partner with thirty-six (36) years' experience and for a partner with nineteen (19) years' experience, is reasonable in the Jackson, MS, market.

III. *Conclusion and Order*

By this Order, I find Jitney-Jungle's request reasonable and award **$4,971** in attorney's fees and related expenses for the services of senior attorney Charles L. Brocato (University of Mississippi School of Law, LL.B., 1961; Master of Laws in Taxation, New York University; former Clarksdale, MS, prosecuting attorney), a senior partner in the law firm of Butler, Snow, O'Mara, Stevens, & Cannada, PLLC, of Jackson, Mississippi, and for the services of Jeffrey A. Walker, Esq., an attorney with nineteen (19) years' experience in labor and employment law, in the same firm.

Jitney-Jungle is the prevailing party and the Complaint is without reasonable foundation in law and fact. Austin is directed to pay Jitney-Jungle **$4,791** in attorney's fees and related expenses.

SO ORDERED.

Dated and entered this 7th of October, 1997.

MARVIN H. MORSE
Administrative Law Judge

[16]As this is not a fee award under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504, I am not bound by the generally applicable EAJA statutory limit of $125 per hour. 5 U.S.C. §504(b)(1)(A)(ii) ("attorney or agent fees shall not be awarded in excess of $125 per hour. . . .") or by the failure of EAJA to address the award of other fees and expenses.