

{{4-1-90 p.A-1509}}

[¶5151] n the Matter of Kenneth O. Arnold, Docket No. FDIC-85-82e and FDIC-85-83k (2-13-90).

FDIC denied application for attorney fees and other expenses filed under the Equal Access to Justice Act arising out of a consolidated civil money penalty and removal action. The FDIC found that the applicant failed to file adequate pleadings; failed to demonstrate that the agency's position in litigation was not "substantially justified;" and was not the prevailing party in the underlying litigation.

[.1] Equal Access To Justice Act—Statutory and Regulatory Requirements— Adequacy of Pleadings

Applicant for award under Equal Access to Justice Act must comply with statutory and regulatory requirements. Failure to produce a written verification under oath or penalty of perjury that the information provided in the application and supporting documents is true and correct, failure to provide more than bare assertions concerning net worth or to identify and describe all affiliates, failure to detail statements of the fees and expenses sought, and failure to identify those positions taken by the FDIC which applicant alleges were not "substantially justified," does not satisfy the statutory and regulatory requirements for adequate pleadings.

[.2] Definition—Equal Access To Justice Act—"Substantial Justification"

"Substantial Justification" connotes that the Government's position in litigation was justified to a degree that would satisfy a reasonable person.

[.3] Equal Access To Justice Act—Statutory and Regulatory Requirements— "Substantial Justification"

The standard for determining whether an agency's position in litigation was 'substantially justified' does not require either that the Government had a substantial probability of prevailing at the outset of the litigation or that it prevail therein. Reasonableness of the Government's position is determined by looking to the Government's position at the time it went into litigation.

[.4] Equal Access To Justice Act—Statutory and Regulatory Requirements— Prevailing Party

A Board decision in the underlying case to decline from ordering removal of applicant from the banking industry or to assess against applicant further civil money penalties, does not necessarily preclude a finding that applicant was not the prevailing party. The Board's reasoning behind such a decision as well as the Board's further rulings against the applicant on other issues in the same case should also be considered in determining whether the applicant is the prevailing party.

In the Matter of:

**KENNETH O. ARNOLD, individually
and as Chairman of the Board of Directors
and Principal Shareholder of
REPUBLIC BANK
BLANCHARD, LOUISIANA
(Insured State Nonmember Bank—In
Receivership)
DECISION AND ORDER
FDIC-85-82e
FDIC-85-83k
(Equal Access to Justice Act)
DECISION**

This proceeding concerns an application for attorney fees and other expenses filed under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, by Kenneth O. Arnold ("Respondent") arising out of a consolidated civil money penalty and removal action involving Republic Bank, Blanchard, Louisiana. Under the EAJA and the FDIC's implementing regulations at 12 C.F.R. § 308.114 *et. seq.*, attorney fees and other expenses may be awarded upon a showing that (1) Respondent meets the statutory qualifications, (2) Respondent is the prevailing party, and (3) the agency's position was not substantially justified. 5 U.S.C. § 504.

{{4-1-90 p.A-1510}} On October 25, 1989, the Administrative Law Judge ("ALJ") issued a recommended

decision finding that Respondent failed to comply with the FDIC's regulatory filing requirements, that Respondent was not the prevailing party, and that enforcement counsel's positions were substantially justified. The ALJ recommended that the application be denied. No exceptions were filed by either party to the ALJ's recommended decision. Thus, under 12 C.F.R. §§ 308.14(a) and (b), Respondent has abandoned the opportunity to contest the recommended decision before the FDIC's Board of Directors ("Board").

The Board has thoroughly reviewed the record in this matter, including the pleadings and the ALJ's recommended decision. The ALJ's recommended decision contains a thorough analysis of the issues and reaches a well-reasoned conclusion that Respondent's application should be denied.

Accordingly, the Board agrees with the ALJ's analysis and the ultimate decision of the ALJ to deny Respondent's application and adopts and incorporates by reference the recommended decision. The Board's decision in the underlying proceeding not to remand and further protract the proceedings in light of a \$1.2 million penalty assessed against Respondent in a related case and the fact that Respondent is no longer engaged in banking, and thus is no longer a threat to the industry, does not mean that Respondent prevailed on the merits. To allow individuals such as Respondent to benefit financially from the FDIC's decision made in the interests of economy and administrative convenience would make a travesty of the EAJA.

ORDER

IT IS HEREBY ORDERED, for the reasons set forth in the Decision of the Board of Directors and in the recommended decision of the Administrative Law Judge incorporated therein, that Respondent's application for an award under the Equal Access to Justice Act, 5 U.S.C. § 504, is denied.

By direction of the Board of Directors.

Dated at Washington, D.C. this 13th day of February, 1990.

RECOMMENDED DECISION AND ORDER

**In the Matter of
KENNETH O. ARNOLD, individually
and as Chairman of the Board of Directors
and Principal Shareholder of
REPUBLIC BANK
BLANCHARD, LOUISIANA
(Insured State Nonmember Bank)
FDIC-85-82e
FDIC-85-83k**

EQUAL ACCESS TO JUSTICE ACT

1. *Statement of the Case*

MICHAEL O. MILLER, Administrative Law Judge: On October 24, 1988, following the September 27, 1988 issuance of an Order of the Board of the Federal Deposit Insurance Corporation (herein called FDIC) in FDIC-85-82e and FDIC-85-83k, Kenneth O. Arnold, (herein called Applicant, Respondent, or Arnold) filed an application for the payment of fees and other expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (herein called EAJA). In that application, the Applicant claimed to be a prevailing party in those cases and submitted a statement of expenses totalling \$387,907.06.

On November 14, 1988, FDIC enforcement counsel filed an answer to the application in which it was asserted: (1) that Applicant was not a prevailing party; (2) that the position of the FDIC was substantially justified; (3) that the Applicant had unduly prolonged the proceedings by unwarranted attempts to secure discovery; (4) that special circumstances, including Applicant's bad faith made an award of fees and expenses unjust in this case; (5) that Applicant sought fees and expenses incurred before the initiation of the litigation or incurred in connection with the litigation of another matter; (6) that Applicant's financial net worth at the time the litigation was initiated exceeded the statutory limit of \$1,000,000; (7) that the application was deficient in that the Applicant failed to identify each issue on which he believed that the FDIC's position was not substantially justified, failed to submit a description of affiliated individuals or entities, failed to submit a statement of his financial net worth, failed to submit a statement with respect to the financial net worth of affiliated individuals and entities, and failed to submit a statement detailing the nature of the expenses and fees claimed;

{{4-1-90 p.A-1511}} (8) that he was not entitled to an award for fees and costs in connection with his *pro se* representation; (9) that his application was not submitted under oath or penalty of perjury; (10) that his application was untimely; and (11) that any award granted should be set off against a civil money penalty ordered in a separate action by FDIC against Respondent-Applicant.¹

II. Findings of Fact

A. Summary of Litigation

On April 1, 1985, the FDIC issued to the Applicant a Notice of Intention to Remove From Office and Prohibit From Further Participation, pursuant to § 8e of the Federal Deposit Insurance Act, 12 U.S.C. § 1818(e) (herein called the Act) and Part 308 of the FDIC Rules and Regulations, 12 C.F.R. Part 308 (herein called the Rules), FDIC-85-82e. On April 3, 1985, the FDIC issued a Notice of Assessment of Civil Money Penalty against the Applicant, FDIC-85-83k, pursuant to § 1828(j)(3) of the Act, levying an assessment of \$923,000 upon him.

Both the Removal and Assessment Notices were premised upon allegations that Applicant had breached his fiduciary duties with respect to Republic Bank, Blanchard, Louisiana (herein called the Bank), violated various laws and regulations and exhibited personal dishonesty and/or a continuing disregard for the safety and soundness of the Bank, all of which resulted in, or were likely to result in, substantial loss to the Bank and its depositors, and which provided financial gain to the Applicant. As set forth in the Board's July 26, 1989 Decision, it was specifically alleged that:

Respondent had committed or engaged in acts or omissions during a two year period from 1982 to 1984 which caused Respondent or the Bank to violate:

(1) Section 22(h) of the Federal Reserve Act . . . [12 U.S.C. § 375(b)] and section 215.4(c) of Regulation O of the Board of Governors of the Federal Reserve System [12 C.F.R. § 215.4(c), by repeatedly permitting extensions of credit to be made to Respondent and/or his related interests . . . which exceeded the Bank's aggregate lending limits as imposed by section 215.2(f) of Regulation O . . .

(2) Section 215.4(b) of Regulation O . . . by failing to obtain the prior approval of the Bank's board of directors with respect to numerous extensions of credit;

(3) Section 23A of the [Federal Reserve] Act, 12 U.S.C. § 371(c), by reason of certain covered transactions . . . which extensions of credit exceeded the amount of covered transactions that a bank may engage in with an affiliate . . . and which were not secured by collateral which satisfied the requirements under section 23A . . .

A hearing on the consolidated Removal and Assessment Notices was held before Administrative Law Judge Thomas F. Howder² on 21 days between December 8, 1986 and March 12, 1987; the record included 3,126 pages of transcript and 86 exhibits.

Judge Howder issued his Initial Decision on April 28, 1988, recommending dismissal of both proceedings in their entirety. At issue, he stated, had been charges based upon transactions involving Centenary Investments, Inc., David and Tonya Touchstone (and others), Burton Management, Inc., and Republic Corporate Center, Inc. As to these, he, and subsequently the FDIC

¹ On September 25, 1989, Applicant moved to strike references to American Bank & Trust, Coushatta, Louisiana, FDIC-85-87k, from FDIC Counsel's September 11, 1989 Memorandum of Points and Authorities. Inasmuch as there are references by all parties to the American Bank case throughout his proceeding, and as the evidence introduced and the conclusions reached therein have some bearing here, that motion is denied.

² The cases had initially been assigned to Administrative Law Judge Fred E. Pickett. However, following reversal of his initial rulings arising from discovery issues, including his Order Recommending Dismissal for failure to honor a subpoena to depose the members of the FDIC Board of Review, issued while his denial of a motion to quash that subpoena was pending an interlocutory appeal. Judge Pickett granted the motion of FDIC enforcement counsel that he disqualify himself for bias, prejudice or the appearance thereof. Judge Howder was then assigned by the Office of Personnel Management (OPM) to hear the proceedings. Judge Howder retired subsequent to the issuance of his Initial Decision herein and the undersigned was assigned by OPM to preside over this EAJA proceeding. Applicant has repeatedly asserted alleged improprieties by FDIC in the assignment of Administrative Law Judges to the actions involving him; these assertions are unwarranted.

{{4-1-90 p.A-1512}}Board following the filing of exceptions, concluded the following:

A. The Notices charged violations of the pertinent laws and regulations based, in part, upon loans extended to Centenary Investments, an entity allegedly affiliated with Arnold. Arnold admitted the loans but denied that Centenary was one of his related interests. In a discussion of the facts encompassing approximately 13 pages, Judge Howder concluded that allegedly dishonest officers and directors of the Bank had misled the examiners to their conclusion that Centenary was held by another Arnold interest, All Servicing, Inc. Thus, he found that the FDIC had failed to sustain its burden of proving by a preponderance of the evidence that Arnold and Centenary were affiliated. However, in so finding, he expressly stated: "While examiners should be entitled to rely upon the word of bank officials (and should not be faulted for doing so), their reliance in this case was clearly misplaced."⁴

B. The Notices charged that loans were made to a group of investors which included the Touchstones, enabling that group to purchase property which was then leased to Colony Properties, an admitted Arnold interest, thus giving Arnold a "tangible economic benefit." Arnold denied that he caused the credit to be extended or that this transaction violated applicable law. Judge Howder found insufficient "reliable, probative evidence" to support the theory of violation set forth in the charges. As he read the evidence, the loan was made to the Touchstone group which was liable for its repayment; that the lease called for payments identical to the interest charges, he found, was merely an ancillary matter. It was, he held, a straightforward business arrangement on which everyone hoped to prosper but which resulted in a substantial loss to Arnold. Thus, he found that the FDIC had failed to sustain its burden of proof with respect to the Touchstone transaction.⁵

The Board, while noting that the Touchstone "transaction most likely was for the benefit or tangible economic benefit of Respondent," affirmed the Judge's findings that FDIC enforcement counsel had failed to carry its burden of proof by a preponderance of the evidence with respect to the extensions of credit to Centenary and Touchstone.

C. Included in the transactions considered in order to determine whether Section 23A and Regulation O had been violated was the Bank's purchase of consumer contracts from Burton Management, Inc., a health club organization affiliated with Arnold. As urged by Arnold, Judge Howder applied the twenty-five percent limitation of 12 U.S.C. 84(c)(8)(A), applicable to "loans or extensions of credit arising from the discount of negotiable or non-negotiable installment consumer paper which carries a full recourse endorsement" rather than the fifteen percent limitation otherwise applicable. He credited the testimony of Bank officer Buckalew to the effect that each contract had been individually evaluated and purchased on its own merit at a discount. He also found that, while there had been no "written certification" to the effect that the Bank relied primarily upon the responsibility of the maker for payment of the loans, as set forth in 12 U.S.C. § 84(c)(8)(B), the Bank's purchase of this paper appeared "to be covered in substance by the statutory exception." He applied the exceptions to those transactions and found them exempt as a matter of law.

The Board expressly rejected the Judge's findings and conclusions with respect to the Burton Consumer Paper. It found, with respect to the exception of § 84(c)(8)(A), that the credible evidence did not warrant a conclusion that the notes had been purchased at a discount. Rather, it concluded on the basis of record testimony, that the Bank had established and maintained a dealer reserve, evidence it found inconsistent with the purchase of the paper at a

³ The Board's Order of September 27, 1988 found that Applicant had engaged in violations of Sections 22(h) and 23A of the Act and Regulation O. The Decision, which did not issue until July 26, 1989, contained the Board's rationale.

⁴ The Judge also noted that the record contained what he deemed to be an inexplicable document, FDIC Exh. 2, which seemed to indicate that All Servicing had held an option to purchase 50 shares of Centenary's Class A voting stock as early as five days after Centenary's incorporation. He placed no reliance upon that document.

⁵ American Bank became a participant in the Republic loan to the Touchstone group and the transaction was also at issue in the Arnold/American Bank case. In that litigation, Judge Charno found that since Colony was obligated to pay the loan if requested to do so by the Touchstone group, Colony had effectively guaranteed the loan. "Conversely," he found, "since Colony had the option to acquire title to the property purchased with the proceeds of the loan . . . those proceeds were indirectly used for Colony's tangible economic benefit." The FDIC expressly affirmed Judge Charno's findings and conclusions. FDIC-85-87k, 7-8 and ALJD at p. 5.

{{6-30-91 p.A-1513}}discount. Further, the Board indicated an unwillingness to credit the testimony of either Arnold or Buckalew, Arnold's "close confidant," who had been a Bank official and Arnold employee

and affiliate for many years.

With respect to the exception of § 84(c)(8)(B), the Board concluded that strict compliance with each each of the requirements, including that calling for a "written certification," was mandated. As there has been no written certification, as the record failed to indicate that the Bank's officers had adequately investigated the financial condition of each individual maker so as to permit the Bank to rely upon each maker individually, and as the Bank knew of the poor condition of Burton Management, the Board held that the Judge erred in implicitly applying the second exception to these transactions.

D. The Notices alleged a January 5, 1984 loan to Republic Corporate Center as a Section 23A violation. Judge Howder found that "any violation attributable to the Corporate Center credit is only a technical one, causing no harm to the Bank." In reaching that conclusion, he noted that while this loan was for a building to be constructed which would be a general office building as well as house a branch of the Bank, it was similar to unquestioned loans for the construction of Bank branches (such loans being exempt from the requirements of Section 23A.) He also noted that, as he computed the various extensions of credit, the violation, if any, arising from this loan existed for only seven weeks prior to the examination and resulted in no loss to the Bank inasmuch as the building was subsequently sold at no loss. He concluded that, "In consideration of all that has occurred in this case, to find the Corporate Center loan a violation of law would fly in the face of any notion of fairness, or negate any sense of a realistic view of events."

The Board expressly found that the Judge erred. It held that the ultimate recovery of the Republic Corporate Center loans did not eliminate or excuse the violation. It further found that the Judge had erred in placing great significance in this transaction; it noted that its findings with respect to the overall lending limitations and the Burton Consumer Paper transaction made this particular transaction less important in determining the point at which Respondent exceeded the lending limitations.

E. Regulation O, Section 215.4(b), requires that bank insiders abstain from voting on extensions of credit to themselves which are in excess of certain limits. The Notices asserted that Arnold did not refrain from voting on such loans. That allegation was supported by the minutes of a meeting of the Bank's board of directors which show that Arnold had seconded a motion with respect to his personal line of credit. However, Arnold had disputed that testimony, the testimony of the secretary who prepared the minutes was inconclusive, other witnesses refused to testify, and the Bank president was not called. Based upon this state of the record, the Judge refused to rely upon the minutes, noting that they had been prepared under the supervision of the Bank president, whom he found to be unreliable, and recommended dismissal of this allegation.

The Board, on the other hand, found the minutes to be more reliable than the self-serving testimony of Respondent. It therefore modified the Judge's findings and held that Respondent had violated Regulation O by failing to obtain the proper prior approval of the Bank's board for extensions of credit received in his personal capacity.

In its conclusions, the Board stated that "The record in this case clearly establishes multiple violations of law and regulation by Respondent over at least a seventeen month period of time." It noted that, while Respondent could be assessed a civil money penalty of \$1000 per day for each day during which such violations continued, a lengthy and costly remand would be required to determine the amount of such a penalty. In the alternative, the Board held that it could, in the interest of justice, decline to assess a penalty and bring these proceedings to a conclusion. It chose the latter alternative, pointing out that the deterrent effect of a civil money penalty had been satisfied by the assessment of a substantial penalty (\$1,200,000) against Arnold in the American Bank case.

Similarly, the Board was faced with the same alternatives with regard to the removal proceeding, remand or dismissal without prejudice. In order to avoid the costs and delay of a remand, and in view of the facts

[{{6-30-91 p.A-1514}}](#) that the Bank was long closed and the Respondent was no longer involved in banking, it chose the latter course. In doing do, it expressly notes that it could proceed against Arnold under 12 U.S.C. § 1818(e)(2), on the basis of the records in both this and the American Bank case, if circumstances changed and it was determined that he posed a threat to the banking industry.

B. Resolution of the EAJA Issues

1. Adequacy of Applicant's Pleadings

As a waiver of sovereign immunity, the Equal Access to Justice Act must be strictly construed. *Columbia Manufacturing Corp., v. NLRB*, 715 F.2d 1409, 1410 (9th Cir. 1983). Thus, there must be compliance with both the statutory requirements and the those of regulations issued thereunder in order for an applicant to secure relief. *Action on Smoking & Health v. CAB*, 724 F.2d 211 (D.C. Cir. 1984): *National*

Latino Media Coalition v. FCC, 816 F.2d 785 (D.C. Cir. 1987).⁶

In the instant case, the Board's Order issued on September 27, 1988. Respondent filed an application on October 24, 1988 which, other issues of adequacy aside, satisfied the requirement, both statutory and regulatory, that an application be filed within thirty days of an agency's final disposition.⁷

[.1] However, timeliness was virtually the only area of Applicant's compliance with the statute and the FDIC's implementing regulations. Even assuming that Applicant's November 23, 1988 reply to the FDIC's answer were to be deemed a timely amendment of its application,⁸ it was inadequate for each of the following reasons:

a. Section 308.101(b) (12 C.F.R. 308.101(b))^{*} requires that an application contain or be accompanied by a written verification under oath or penalty of perjury that the information provided in the application and supporting documents is true and correct. Neither the original application nor the Applicant's reply, submitted after this defect was pointed out, include any such verification.

b. Both the statute, 5 U.S.C. § 504(a)(2), and the regulations, § 308.97, § 308.101(a)(5) and (6) and § 308.102,^{**} require that an applicant identify and describe all affiliates, declare that the applicant and its affiliates met the statutory ceiling on net worth in effect at the time the litigation was instituted (here \$1,000,000), and submit a net worth statement. The original application contained no such statements of information. In his reply, the Applicant merely asserted that he had a negative net worth when the adjudication was initiated, that his financial statement is in the trial record, that "the FDIC is fully aware" of his affiliated entities and that there were no affiliated individuals involved.

Whether the regulatory requirements must be strictly construed and complied with, as *National Latino Media Coalition, supra*, would indicate, or are merely entitled to due consideration (See FDIC Decision, FDIC-87-66b). Respondent has shown no reason why he should not be deemed bound by them. They are not arbitrary, an abuse of the Board's discretion or unduly burdensome. Moreover, Applicant was fully apprised of them, or should have been from the references he had been given. I note that Respondent has purported to act as his own counsel, even to the point of claiming legal fees for his own time spent in *pro se* representation; he can hardly claim ignorance of the law or inexperience. In particular, I note that the record is replete with evidence concerning the existence and involvement of Arnold affiliates holding substantial assets. His bare assertions concerning net worth are subject to serious question and require the type of proof required by the regulations. The Applicant has failed, without justifica-

⁶ Contrary to the Applicant's contention, there has been no lapse in the applicability of the FDIC regulations implementing EAJA.

⁷ No Decision was included within that Order; the Decision did not issue until July 26, 1989. I find it unnecessary to determine whether this jurisdictional time limitation ran from the earlier or the later date as the Applicant did not submit any new application following issuance of the Decision. See *Center for Nuclear Responsibility v. NRC*, 781 F.2d 935 (D.C. Cir. 1986).

⁸ But see *Wardworth v. United States*, 841 F.2d 503 (5th Cir. 1983) holding that a late correction of an inadequate filing under the Federal Tort Claims Act will not render it timely or otherwise satisfy statutory requirements.

Editor's Note: The sections of the FDIC regulations cited here are incorrect. The correct sections are:

* § 308.120(b) (12 C.F.R. 308.120(b))

** § 308.120(a)(5), § 308.120(a)(6) and § 308.121
{{6-30-91 p.A-1515}}tion, to comply with the regulations and his application warrants dismissal because of those failures.

c. The regulations, § 308.103,^{*} require detailed statements of the fees and expenses sought. The must include, *inter alia*, a showing of the hours worked, the hourly rates charges and a description of the services performed. While the Applicant submitted a host of invoices along with his total figure, the required particulars were not submitted and the application is thus fatally defective.⁹

d. The regulations, § 308.101,^{**} require an applicant to identify each issue with regard to which he believes the position of the FDIC was not substantially justified. No such identification was made in the initial application. The reply merely contends that he prevailed on all issues and that the FDIC was aware of that "fact." Even if timely, this reply is inadequate and inaccurate.

2. Substantial Justification

[.2] A party prevailing in an adversary adjudication with an agency of the United States Government is entitled to fees and expenses unless the position of the agency was "substantially justified." The Supreme Court in *Pierce v. Underwood*, 108 S.Ct. 2541 (1988), has recently provided the definitive construction of "substantial justification."

We are of the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed before us here is not "justified to a high degree," but rather "justified in the substance or in the main" —that is, justified to a degree that would satisfy a reasonable person. That is no different from the "reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue.

[.3] This standard does not require either that the Government had a substantial probability of prevailing at the outset of the litigation or that it prevail therein. *Tyler Business Services, Inc., v. NLRB*, 695 F.2d 73 (4th Cir. 1982).

In the instant case, there can be no doubt that the positions taken by FDIC enforcement counsel were substantially justified. Those positions prevailed, on both the facts and the law, before the Board on the issues involving the Burton Consumer Paper, the Republic Corporate Center and Arnold's personal loan approvals. It is stating the ludicrously obvious to point out that a prevailing position was substantially justified.

Even in those limited areas where the Board accepted the Judge's conclusions, the agency position going into the litigation was substantially justified. The contentions regarding Centenary were supported by evidence furnished by Bank officers and the trial judge recognized that bank examiners are generally entitled to rely upon such evidence and should not be faulted for doing so. Similarly, with respect to the Touchstone transaction, the Board found evidence indicating a likelihood that they were for Arnold's benefit and, on similar evidence, found that transaction violative in the subsequent case against Arnold.

Applicant argues that the FDIC's position was not substantially justified because Judge Howder found that the FDIC had not met its burden of proof. This argument ignores both the reasonableness of the government's positions going into the litigation, when reasonableness must be assessed, and the outcome of the litigation before the Board, which fully vindicates those positions in this case.

3. Prevailing Party

[.4] Applicant contends that he was a prevailing part because the Board declined to issue an Order removing him from the banking industry or assess a further civil money penalty against him. This argument ignores the fact that the Board ruled against him on nearly every point and declined to issue either a removal order or a monetary penalty only in the interests of administrative efficiency. The Order would have supported

⁹ The Applicant also sought approximately \$68,000 in "legal fees" for his own time expended in *pro se* representation. Such fees are not compensable under EAJA. *Merrill v. Black*, 809 F.2d 639 (9th Cir. 1987); *Crooker v. Environmental Protection Agency*, 763 F.2d 16 (1st Cir. 1985); 5 U.S.C. § 504(a)(2).

Editor's Note: The sections of the FDIC regulations cited here are incorrect. The correct sections are:

* § 308.122

** § 308.120(a)(2)

{{6-30-91 p.A-1516}}such remedies had the Board been willing to subject all parties to lengthy remands and remands would likely have been ordered had the Board not believed both that the penalty assessed in the American Bank case was a sufficient deterrent and that pursuit of the removal action was moot. It would still support a removal action if Arnold were to seek reentry into banking and that reentry were deemed a threat to the industry. Applicant did not prevail.

III. Proposed Conclusions of Law

1. The Application was timely filed.
2. The Applicant failed to comply with the requirements of § 308.97, § 308.98, § 308.101, § 308.102 and § 308.103^{*} of the FDIC Rules and Regulations.
3. The positions of FDIC enforcement counsel were substantially justified.
4. The Applicant was not a prevailing party.

IV. Recommended Order

Based upon Proposed Conclusions of Law, Numbers 2, 3 and 4, above, it is recommended that the application for an award under the Equal Access to Justice Act be denied.¹⁰

CERTIFICATION OF RECORD

I, Michael O. Miller, Administrative Law Judge, hereby certify that the following documents, consisting of:

Transcript of Hearing in FDIC-85-82e and FDIC-85-83k, volumes 1 through 21, inclusive;
Proposed Findings of Fact, Conclusions of Law, Order, and Brief of Federal Deposit Insurance Corporation, dated August 24, 1987;
Respondent's Reply to FDIC's Proposed Findings of Fact, Conclusions of Law, Order and Brief; FDIC Exceptions to Proposed Findings of Fact and Conclusions of Law or Recommended Decision, dated June 30, 1988; FDIC Order, dated September 27, 1988, with Initial Decision of Administrative Law Judge Thomas F. Howder, dated April 28, 1988, attached;
EAJA Application, dated October 24, 1988;
FDIC Answer, dated November 14, 1988;
FDIC Motion that ALJ Withdraw, with supporting memorandum, dated November 18, 1988;
Applicant's Response and Cross-Motion, dated November 22, 1988;
Applicant's Reply to FDIC Answer, dated November 23, 1988;
Order to Show Cause, dated November 28, 1988;
FDIC Objection to Applicant's Motion to Strike Answer and Supporting Brief, dated December 6, 1988;
Applicant's Response to Order to Show Cause, dated December 8, 1988;
FDIC Response to Order to Show Cause, dated December 19, 1988;
Orders, dated January 11, 1989;
Decision of FDIC, dated July 26, 1989;
FDIC Motion, dated August 16, 1989;
Order, dated August 21, 1989;
Applicant's Motion, dated September 14, 1989;
FDIC Memorandum of Points and Authorities, with attachments Numbers 1 through 8, dated September 11, 1989;
Applicant's Reply to FDIC Decision, dated September 22, 1989;
Applicant's Motion to Strike, dated September 25, 1989; and,
FDIC Opposition to Motion to Strike, dated September 29, 1989;

constitute the complete administrative record in the matter of the Application for Fees and Expenses under the Equal Access to Justice Act in FDIC-85-82e and FDIC-85-83k.

¹⁰ Accordingly, I find it unnecessary to determine whether there are any special circumstances present which make an award unjust, whether any of the fees and costs alleged were incurred before the initiation of this litigation or in connection with any other litigation, whether the Applicant unduly or unreasonably protracted this litigation or whether there should be any set-off of an award against applicant's outstanding civil money penalty.

Pursuant to § 308.109,^{**} the Applicant or Counsel for the FDIC may file written exceptions and a supporting brief with the Executive Secretary of the Board within twenty days of the service of this Recommended Decision.

Editor's Note: The sections of the FDIC regulations cited here are incorrect. The correct sections are:

* § 308.120, § 308.121 and § 308.122

** § 308.126