

# Rules and Regulations

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## FEDERAL LABOR RELATIONS AUTHORITY

### 5 CFR Part 2430

#### Amendment of Equal Access to Justice Act Attorney Fees Regulations

**AGENCY:** Federal Labor Relations Authority.

**ACTION:** Final rule.

**SUMMARY:** The Federal Labor Relations Authority (FLRA) amends its regulations implementing the Equal Access to Justice Act (EAJA) by adopting a cost of living adjustment to the maximum rate for the calculation of attorney fees permitted under the EAJA. Specifically, the FLRA will use the Bureau of Labor Statistics Consumer Price Index, All Urban Consumers, U.S. City Average, All Items to create an inflation-based adjustment to the

statutory cap on attorney fees. The FLRA also modifies its rules to allow an applicant to request an increase to the maximum fees rate based on special factors.

**EFFECTIVE DATE:** March 29, 2000.

#### FOR FURTHER INFORMATION CONTACT:

Peter Constantine, Office of Case Control, Federal Labor Relations Authority, 607 14th Street, NW, Washington, DC 20424-0001, or by telephone at (202) 482-6540.

**SUPPLEMENTARY INFORMATION:** The FLRA proposed revisions to Part 2430 of its EAJA regulations, which were published in the *Federal Register* on November 29, 1999 (64 FR 66589). Public comment was solicited on the proposed changes. However, no written comments were received in response to the notice of proposed rulemaking.

The EAJA, 5 U.S.C. 504(b)(1)(A) (1994 & Supp. III 1997), provides that an agency may not award attorney fees in excess of \$125 per hour (or \$75 for proceedings commenced prior to March 29, 1996), unless the agency determines by regulation that a higher fee is justified by (1) an increase in the cost of living or (2) some special factor. In a recent decision, 55 FLRA (No. 72) 444 (Apr. 30, 1999), responding to petitions requesting an adjustment to the EAJA fees cap, the FLRA announced its intention to engage in the instant

rulemaking to consider appropriate criteria for increasing the maximum rate based on cost of living and other special factors. The FLRA also announced in that decision its intention to amend its regulations implementing the EAJA to permit recovery, in conjunction with adversary adjudications commenced on or after March 29, 1996, of attorney fees not to exceed \$125.00 per hour. This was accomplished through the promulgation of the final rule published at 64 FR 30861 (Jun. 9, 1999).

#### Cost of Living

The FLRA amends its rule to allow for an increase in the maximum EAJA attorney fees rate based on cost of living increases. The FLRA's inflation-based adjustment to the statutory cap utilizes the Bureau of Labor Statistics Consumer Price Index, All Urban Consumers, U.S. City Average, All Items (CPI-U). This CPI-U is the generally understood "cost of living" index that is widely used as a price inflator in labor and contract matters.

To determine the appropriate attorney fees rate, adjusted for cost of living, the statutory cap (\$125 or \$75) is multiplied by an inflation factor. The inflation factor is the CPI-U for the year that legal services were rendered divided by the CPI-U for the base year. Phrased as a formula, the calculation is:

$$\frac{\text{CPI-U-Year of Service}}{\text{CPI-U-Base Year}} \times \$125 \text{ (or } \$75\text{)}/\text{hr} = \text{Adjusted Rate}$$

The base year for calculations premised on the \$75 statutory cap is 1981. The base year for calculations premised on the \$125 statutory cap is 1995.

#### Other Special Factors

The FLRA also amends its EAJA regulations to allow for an adjustment to the statutory fees cap based on "special factors." The EAJA, 5 U.S.C. 504(b)(1)(A), lists as a special factor the "limited availability of attorneys qualified to handle certain types of proceedings." This phrase refers to a narrow category of attorneys who have "some distinctive knowledge or specialized skill" such as those who practice patent law. *Pierce v. Underwood*, 487 U.S. 552, 572 (1988). Without specifying what other special

factors may exist, the Supreme Court noted that they "must be such as are not of broad and general application." *Id.* at 573.

#### Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the FLRA has determined that this regulation, as amended, will not have a significant economic impact on a substantial number of small entities, because this rule applies to Federal employees, Federal agencies, and labor organizations representing Federal employees.

#### Unfunded Mandates Reform Act of 1995

This rule change will not result in the expenditure by state, local, and tribal

governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### Small Business Regulatory Enforcement Fairness Act of 1996

This action is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment,

productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### Paperwork Reduction Act of 1995

The amended regulation contains no additional information collection or record keeping requirement under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

#### List of Subjects in 5 CFR Part 2430

Administrative practice and procedure, Equal access to justice, Government employees, Labor-management relations.

For the reasons stated in the preamble, the FLRA amends 5 CFR part 2430 as follows:

#### PART 2430—AWARDS OF ATTORNEY FEES AND OTHER EXPENSES

1. The authority citation for part 2430 is revised to read as follows:

Authority: 5 U.S.C. 504.

2. Revise § 2430.4(a) to read as follows:

#### § 2430.4 Allowable fees and expenses.

(a)(1)(i) No award for the fee of an attorney or agent under this part may exceed \$125.00 per hour, or for adversary adjudications commenced prior to March 29, 1996, \$75.00 per hour, indexed to reflect cost of living increases as follows:

$$\frac{\text{CPI-U-Year of Service}}{\text{CPI-U-Base Year}} \times \$125 \text{ (or } \$75) / \text{hr} = \text{Adjusted Rate}$$

(ii) The cost of living index to be used is the Consumer Price Index, All Urban Consumers, U.S. City Average, All Items (CPI-U). If legal services are provided during more than one year, each year shall be calculated separately. If an annual average CPI-U for a particular year is not yet available, the prior year's annual average CPI-U shall be used.

(2) No award to compensate an expert witness may exceed the highest rate that the Authority pays expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

\* \* \* \* \*

3. Revise § 2430.5 to read as follows:

#### § 2430.5 Rulemaking on maximum rates for attorney fees.

If warranted by special factors, attorney fees may be awarded at a rate higher than that established in § 2430.4. Any such increase in the rate for attorney fees shall be made only upon a petition submitted by the applicant, pursuant to § 2430.6. Determinations regarding fee adjustments are subject to Authority review as specified in § 2430.13.

Dated: February 23, 2000.

Solly Thomas,

Executive Director.

[FR Doc. 00-4569 Filed 2-25-00; 8:45 am]

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#### DEPARTMENT OF AGRICULTURE

#### Agricultural Marketing Service

#### 7 CFR Part 979

[Docket No. FV00-979-1 FR]

#### Melons Grown in South Texas; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

**SUMMARY:** This rule increases the assessment rate established for the South Texas Melon Committee (Committee) for the 1999-2000 and subsequent fiscal periods from \$0.04 to \$0.05 per carton of melons handled. The Committee is responsible for local administration of the marketing order which regulates the handling of melons (cantaloupes and honeydews) grown in South Texas. Authorization to assess melon handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program. The fiscal period began October 1 and ends September 30. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**EFFECTIVE DATE:** February 29, 2000.

**FOR FURTHER INFORMATION CONTACT:** Cynthia Cavazos, Marketing Assistant, McAllen Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, 1313 E. Hackberry, McAllen, Texas 78501; telephone: (956) 682-2833, Fax: (956) 682-5942; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-5698.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-5698, or E-mail: Jay.Guerber@usda.gov.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement No. 156 and Order No. 979, both as amended (7 CFR part 979), regulating the handling of melons grown in South Texas, hereinafter referred to as the "order." The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, South Texas melon handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable melons beginning on October 1, 1999, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection