

**§ 16.102 Definitions.**

As used in this part:

(a) *The Act* means section 504 of title 5 U.S.C., as amended by section 203(a)(1) of the Equal Access to Justice Act, Public Law No. 96-481.

(b) *Adversary adjudication* means an adjudication under 5 U.S.C. 554 or other proceeding required by statute to be determined on the record after an opportunity for an agency hearing, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license.

(c) *Adjudicative officer* means the official who presides at the adversary adjudication, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise.

(d) *Department* refers to the cognizant departmental component which is participating in the adversary adjudication, (e.g., Occupational Safety and Health Administration, Mine Safety and Health Administration, and Employment Standards Administration).

(e) *Proceeding* means an adversary adjudication as defined in paragraph (b) of this section.

**§ 16.103 When the Act applies.**

The Act applies to any adversary adjudication pending before the Department at any time between October 1, 1981 and September 30, 1984. This includes proceedings begun before October 1, 1981 if final agency action has not been taken before that date, and proceedings pending on September 30, 1984, regardless of when they were initiated or when final agency action occurs, except that it shall not apply in any case pending on October 1, 1981 in which a decision has been issued, but final agency action has not been taken by reason of an abatement.

**§ 16.104 Proceedings covered.**

(a) The Act applies in adversary adjudications in which the position of the Department or another agency of the United States is presented by an attorney or other representative who enters an appearance and participates in the proceeding in an adversarial capacity. Any proceeding which prescribes a lawful present or future rate or is pri-

marily rule-making is not covered. Proceedings to grant or renew licenses are also excluded, but proceedings to modify, suspend or revoke licenses are covered if they are otherwise adversary adjudications. The following types of proceedings are deemed to be adversarial adjudications which will be covered by the Act, when all other conditions in the Act and in these rules are met:

(1) Hearings conducted by the Occupational Safety and Health Review Commission under the authority of 29 U.S.C. 661 of the Occupational Safety and Health Act; and hearings conducted by the Federal Mine Safety and Health Review Commission under the authority of 30 U.S.C. 823 of the Mine Safety and Health Act. In these proceedings, the rules of the respective Commissions rather than the instant rules will be applicable.

(2) Wage and Hour Division, Employment Standards Administration:

(i) Civil money penalties under the child labor provisions of the Fair Labor Standards Act at 29 U.S.C. 216(e) and 29 CFR part 579.

(ii) Violations and debarment in Federal contracts under the Walsh-Healey Act at 41 U.S.C. 39 and 41 CFR 50-203.1.

(iii) Revocation, modification and suspension of licenses under the Farm Labor Contractor Registration Act at 7 U.S.C. 2045(b) and 29 CFR 40.101.

(iv) Civil money penalties under the Farm Labor Contractor Registration Act at 7 U.S.C. 2048(b)(2) and 29 CFR 40.101.

(v) Revocation and suspension of certificates under the Migrant and Seasonal Agricultural Worker Protection Act at 29 U.S.C. 1813(b) and 29 CFR 500.200.

(vi) Civil money penalties under the Migrant and Seasonal Agricultural Worker Protection Act at 29 U.S.C. 1853(b) and 29 CFR 500.200.

(3) Office of Federal Contract Compliance Programs, Employment Standards Administration hearings prior to the denial, withholding, termination or suspension of a government contract or any portion of a contract under title VII of the Civil Rights Act of 1964, as amended, at 42 U.S.C. 2000e-17 and 41 CFR part 60-30.

(4) Civil Rights Center:

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(i) Fund termination under title VI of the Civil Rights Act at 42 U.S.C. 2000d2 and 29 CFR part 31.

(ii) Fund termination under the Age Discrimination in Federally Assisted Programs Act of 1975 at 42 U.S.C. 6104(a).

(iii) Fund termination or refusal to grant because of discrimination under 20 U.S.C. 1682.

(5) Employment and Training Administration:

(i) Proceedings under the Workforce Investment Act at 29 U.S.C. 2936, where the Department determines that a recipient of WIA funds is failing to comply with the requirements of the Act and the implementing regulations.

(ii) Conformity and compliance under the Federal Unemployment Tax Act at 26 U.S.C. 3303(b) and 3304(c).

(iii) Proceedings under section 303(b) of the Social Security Act of 1935, as amended, 42 U.S.C. 503(b).

(6) Mine Safety and Health Administration:

(i) Petitions for modification of a mandatory safety standard under the Mine Safety and Health Act at 30 U.S.C. 811(c) and 30 CFR 44.20.

(7) Occupational Safety and Health Administration:

(i) Exemptions, tolerances and variances under the Occupational Safety and Health Act at 29 U.S.C. 655 and 29 CFR 1905.3.

(b) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to the covered issues.

[46 FR 63021, Dec. 29, 1981, as amended at 48 FR 43322, Sept. 23, 1983; 72 FR 37098, July 9, 2007]

### § 16.105 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party, as that term is defined in 5 U.S.C. 551(3), to an adversary adjudication for which it seeks an award; the applicant must prevail; and must meet all the conditions of eligibility set out in this subpart and subpart B.

(b) To be eligible for an award, the applicant must be:

(1) An individual with a net worth of not more than \$1 million;

(2) The sole owner of an unincorporated business which has a net worth of not more than \$5 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees;

(5) Any other partnership, corporation, association or public or private organization with a net worth of not more than \$5 million and not more than 500 employees. A unit of state or local government is not a public organization within the meaning of this provision.

(c) For purposes of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered as an *individual* rather than a *sole owner of an unincorporated business* if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares of another business, or controls, *in any manner*, the election of a majority of that business' board of directors, trustees or other persons exercising similar functions, shall be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in