ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access to Justice Act --	)	
Elrich Contracting, Inc.	)	ASBCA No. 50867
Under Contract No. N62477-94-C-0140	)	

APPEARANCES FOR THE APPELLANT: Robert G. Watt, Esq.
Robert K. Cox, Esq.
Watt, Tieder, Hoffar & Fitzgerald L.L.P.
McLean, VA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Trial Attorney
Engineering Field Activity Chesapeake
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE THOMAS
ON AN APPLICATION FOR AN AWARD UNDER
THE EQUAL ACCESS TO JUSTICE ACT

Applicant Elrich Contracting, Inc., seeks attorney's fees and other expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. Elrich appealed pursuant to section 6 of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605, from a contracting officer's decision terminating its contract for default. After the contracting officer confirmed on the first day of the hearing that he was willing to convert the termination for default to one for convenience, the Board issued an order signed by the presiding judge dismissing the appeal as moot. We decide that under *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835 (2001) (*Buckhannon*), Elrich does not qualify for an award because it is not a prevailing party. Because this issue is dispositive, we do not reach any other issues relating to the application.

FACTUAL AND PROCEDURAL BACKGROUND

On 9 September 1996, the Navy awarded Elrich Contract No. N62477-94-C-0140 for the renovation of Building 1, Naval Research Laboratory, Washington, D.C. The contract included standard clauses FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED - PRICE) (APR 1984) - ALTERNATE I (APR 1984) and FAR 52.249-10 DEFAULT (FIXED - PRICE CONSTRUCTION) (APR 1984). The Default clause provides that

"[i]f, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Government." (R4, tab 1)

On 2 July 1997, the contracting officer terminated the contract for default for "failure to make progress in the work and for default in performance" (R4, tab 60). Appellant's subsequent appeal from the termination for default was docketed as ASBCA No. 50867. In its complaint, appellant asked "that its appeal be sustained and that the termination for default be converted to a termination for the convenience of the Government." (Compl. at 2)

Appellant had separately appealed from the denial of a claim for an equitable adjustment, and that appeal was docketed as ASBCA No. 50789. On 7 December 1999, the Board set both appeals for hearing at the Board starting 1 February 2000 (corres. file).

On 1 February 2000, before the start of the hearing, the Government stated that it was willing to convert the termination for default to one for the convenience of the Government. After convening the hearing, the presiding judge confirmed on the record that the contracting officer agreed to the conversion and was authorized to make that agreement. Elrich stated that it was willing to accept the Government's authorized offer to convert the termination for default to one for convenience. (Tr. 4) Both sides reserved their rights with respect to the quantum which might be due as a result of the conversion (tr. 5-6).

The presiding judge continued that "[s]ince we have made this disposition of the appeals, then I propose that the board will dismiss the appeal [ASBCA No. 50867] by reason of the conversion, and I think we'll dismiss it without prejudice, pending the outcome of the negotiations" on the quantum which would be due as a result of the conversion. Government counsel responded that she did not understand that, "because the only thing before the board is the propriety of the default, so that's now moot." (Tr. 6) The presiding judge replied "I suppose if the conversion is final, then we can – the appeal would be dismissed with prejudice." The Government and Elrich each stated that dismissal with prejudice was satisfactory. (Tr. 7) Neither party raised the possibility of the Board's sustaining the appeal or rendering a decision in the nature of a consent judgment. The presiding judge then concluded the hearing without taking evidence or commenting on the merits of ASBCA No. 50867 (tr. 8).

On 2 February 2000, the Board issued the following order, signed by the presiding judge:

ORDER OF DISMISSAL

At a hearing with respect to ASBCA Nos. 50867 and 50789, convened on 1 February 2000, pursuant to a statement

> made on the record by the contracting officer, Mr. Jon F. Soderstrom, the termination of the contract for default was converted by the Government to a termination for the convenience of the Government. Appellant did not object to that action and consented to the dismissal of ASBCA No. 50867 by reason thereof.
>
> The conversion of the default termination to one for the convenience of the Government moots the appeal in ASBCA No. 50867. The appeal is accordingly dismissed.

On 3 February 2000, the Board sent a copy of the order to each of the parties. Neither party took exception to the form of the order or requested a different disposition.

On 2 March 2000, Elrich filed an EAJA application for its attorney's fees and other expenses relating to ASBCA No. 50867. The Government responded to the application, and Elrich subsequently amended it. These exchanges are immaterial for present purposes.

DECISION

The EAJA provides in relevant part that:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1). An adversary adjudication includes any appeal of a contracting officer's decision pursuant to section 6 of the CDA, 41 U.S.C. § 605, before an agency board of contract appeals. 5 U.S.C. § 504(b)(1)(C). The issue before the Board is whether, in light of *Buckhannon*, Elrich was a prevailing party.

In *Buckhannon*, petitioners brought suit against the State of West Virginia seeking declaratory and injunctive relief that two provisions of the West Virginia Code violated the Fair Housing Amendments Act of 1988 (FHAA), 42 U.S.C. § 3601 *et seq*., and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*. While the case was in discovery, the West Virginia legislature eliminated the provisions. The district court dismissed the case as moot and subsequently denied a request for attorney's fees. The Fourth Circuit affirmed the denial of attorney's fees. 121 S. Ct. at 1838-39.

Before the Court, petitioners "argued that they were entitled to attorney's fees under the 'catalyst theory,' which posits that a plaintiff is a 'prevailing party' if it achieves the

desired result because the lawsuit brought about a voluntary change in the defendant's conduct." 121 S. Ct. at 1838. The Court rejected the catalyst theory. It said that it was established that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." 121 S. Ct. at 1840, quoting *Texas State Teachers Ass'n. v. Garland Independent School Dist.*, 489 U.S. 782, 792-93 (1989) (*Texas State Teachers*). It continued (*id*.):

> We think, however, the "catalyst theory" falls on the other side of the line from these examples. It allows an award where there is no judicially sanctioned change in the legal relationship of the parties.

It concluded that petitioners did not qualify as "prevailing parties" because:

> A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term "prevailing party" authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.

In *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (Fed. Cir. 2002), *rev'g* 49 Fed. Cl. 738 (2001), the Federal Circuit decided three issues about the applicability of *Buckhannon*, the first two of which are relevant to the case before us. Plaintiff had filed a bid protest in the Court of Federal Claims and a hearing was held on its request for a temporary restraining order (TRO). Before the court issued a decision on the TRO request, the Navy canceled the solicitation. The court dismissed the protest without reaching the merits. Subsequently, the court awarded attorney's fees under the EAJA. The Federal Circuit reversed. First, the Federal Circuit held that the Supreme Court's construction of the term "prevailing party" applied to the use of that term in the EAJA. Second, the Federal Circuit held that the Court's ruling applied to cases in which a defendant's voluntary change in conduct resulted from the litigation itself as opposed to legislation. The Federal Circuit said that the lower court had erroneously suggested that:

> the "catalyst theory" might be alive and well-even under FHAA and the ADA-if litigation rather than legislative action is found to cause a change. We reject such an analysis. In our view, the Supreme Court in *Buckhannon* unambiguously rejected the "catalyst theory" except in instances where there is an enforceable judgment on the merits or a court-ordered consent decree, both of which create a material alteration in the legal relationship of the parties.

288 F.3d at 1380. Third, the Federal Circuit held that the lower court's "very preliminary" remarks at the TRO hearing on the possible merit of the protester's position, which may have led to the withdrawal of the solicitation, were "clearly not sufficient to establish a judicial imprimatur." 288 F.3d at 1380.

In applying these precedents, we start from the premise that the equivalents of an enforceable judgment on the merits and a court-ordered consent decree at the Board are a decision sustaining (or denying) an appeal and a decision in the nature of a consent judgment. The CDA provides that "[a]n agency board . . . shall issue a decision in writing or take other appropriate action on each appeal submitted . . . ." 41 U.S.C. § 607(e). Under our practice, the Board issues decisions in the nature of a consent judgment upon request of the parties. Pursuant to our charter, the Board reaches decisions by the "majority vote of the members of a division participating and the chairman and a vice-chairman." 48 C.F.R. Ch. 2, App. A, Pt. 1, ¶ 4 (2001). Normally the majority consists of three judges. A single judge has the authority to order the dismissal of an appeal with the consent of the parties, as was done here. A single judge does not have the authority (except in limited circumstances, such as an expedited appeal) to render a decision for the Board.

In the case before us, appellant appealed from the contracting officer's termination of its contract for default. In its complaint, appellant asked that the appeal be sustained and the termination for default be converted to a termination for the convenience of the Government. The Board set the appeal for hearing. Prior to the start of the hearing, the Government announced that the contracting officer was willing to convert the termination for default to one for the convenience of the Government. The presiding judge confirmed this statement on the record and Elrich stated that it was willing to accept the Government's authorized offer. The parties agreed to dismissal of the appeal with prejudice. Neither party raised the possibility of the Board's sustaining the appeal or rendering a decision in the nature of a consent judgment. The presiding judge concluded the hearing without taking evidence or commenting on the merits of the appeal. The Board issued an order of dismissal signed by the presiding judge dismissing the appeal as moot. Neither party took exception to the order as issued.

It seems clear to us, on these facts, that Elrich is not a prevailing party. *Brickwood* establishes that *Buckhannon* applies to the EAJA and that it does not matter that a voluntary change in conduct resulted from the litigation rather than legislation. The Board dismissed Elrich's appeal as a result of the Government's voluntary change in conduct, *viz.*, its conversion of the termination for default to one for convenience. We assume for the sake of argument that the Government may have concluded that its litigation position was weak and that appellant's appeal left it little choice but to convert the termination for default to one for convenience. Nonetheless, the change was voluntary in the sense that it was not ordered by the Board. The Board neither issued a decision on the merits or a decision in the nature of a consent judgment. Rather, as requested by the parties, it issued an order of dismissal. The case is similar in this respect to *Poly Design, Inc.*, ASBCA Nos. 48591 *et*

al., 01-2 BCA ¶ 31,644, in which the Board held that where an appellant settled its appeals in advance of the hearing, and the parties requested that the appeals be dismissed, the appellant was not a prevailing party.

In a supplemental brief dated 17 May 2002 addressing *Brickwood*, Elrich argues that it is a prevailing party for two reasons: first, that the Board's 2 February 2000 dismissal order is the equivalent of a consent decree, and second, that the Board's dismissal order incorporated the terms of the agreement with the Government. Elrich assumes in each case that there was a settlement as opposed to a unilateral conversion by the Government. We address each argument in turn. Because the Federal Circuit has not yet decided a number of the issues under *Buckhannon*, we turn for guidance on some issues to others of the circuit courts which have.

1. Equivalence to a Consent Decree

On the first point, Elrich argues that "this Board's Order of Dismissal, incorporating and reciting the terms of the parties' settlement on the first day of the appeal hearing, (and as also recorded in the hearing record transcript), is, in effect, a consent decree as set forth in prior ASBCA decisions" (supp. br. at 2, footnote omitted). Elrich emphasizes the presiding judge's statement quoted above that "[s]ince we have made this disposition of the appeals, then I propose that the board will dismiss the appeal by reason of the conversion . . ." (*id*. at 6). Elrich cites *J.B. Engineering Contractors, Inc.*, ASBCA No. 33390, 88-2 BCA ¶ 20,621 at 28419 (should be 104,217), and *Reid Associates, Inc.*, ASBCA No. 44633, 98-1 BCA ¶ 29,657 at 146,942, both of which were concerned with the timeliness of EAJA applications. As Elrich points out, *J.B. Engineering Contractors* contains *dictum*, quoted in *Reid*, that a Board order of dismissal following a settlement is, "in effect, nothing more than a consent decree based upon a contract between the parties" (supp. br. at 6-7). This *dictum* must, however, give way to more current law on the issue before us.

In *Buckhannon*, the Court stated that "court-ordered consent decrees" permit an award of attorney's fees. The Court explained that "[a]lthough a consent decree does not always include an admission of liability by the defendant, . . . it nonetheless is a court-ordered 'chang[e] [in] the legal relationship between [the plaintiff] and the defendant.'" 121 S. Ct. at 1840, quoting *Texas State Teachers*, 489 U.S. at 792. Prior cases also make clear that consent decrees include an element of court-ordered change. *See, e.g., Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992) (a consent decree is "an agreement that the parties . . . expect will be reflected in, and be enforceable as, a judicial decree"); *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. Cleveland*, 478 U.S. 501, 519 (1986) (consent decrees are hybrids, with attributes both of contracts and judicial decrees).

The 2 February 2000 order does not state that it is a consent decree or in the nature of a consent judgment, the usual formulation at the Board. *Buckhannon* does not require,

however, that an order state explicitly that it is a consent decree. A party may be a prevailing party if an order containing an agreement reached by the parties is functionally the equivalent of a consent decree. *American Disability Association, Inc. v. Chmielarz*, 289 F.3d 1315, 1320 (11th Cir. 2002) (*American Disability Ass'n*); *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002) (*Smyth*). (We discuss these cases in connection with appellant's second argument.)

Two recent appellate authorities decide with different results whether an order qualified as a consent decree under *Buckhannon*. In *Oil, Chemical and Atomic Workers Int'l Union, AFL-CIO v. Department of Energy*, 288 F.3d 452 (D.C. Cir. 2002) (*Oil, Chemical and Atomic Workers*), a FOIA case, the circuit court reversed an award of attorney's fees. The district court had signed a 10 December 1999 Stipulation and Order which stated that "[i]n light of defendant's production of substantial amounts of material responsive to plaintiff's claim for relief in this action, the action is hereby dismissed with prejudice . . ." (288 F.3d at 457). The district court also awarded attorney's fees. On appeal, plaintiff claimed that the Stipulation and Order was a court-ordered consent decree. The circuit court rejected this argument. It pointed out that under FRCP 41(a)(1), an action may be dismissed without order of the court by filing a stipulation of dismissal. It said that:

> The December 10 Stipulation and Order of Dismissal did not meaningfully alter the legal relationship of the parties. Its only effect was to dismiss the union's lawsuit with a court order when no court order was needed. That cannot represent "judicial relief" for the union. . . . This contrasts with the consent decree in *Maher v. Gagne*, 448 U.S. 122, 126 . . ., which increased AFDC allowances and gave recipients the right to prove that their individual expenses exceeded the standard levels. The decree in *Maher* constituted "judicial relief" that "materially altered" the rights of the parties . . . .

288 F.3d at 458.

In *Truesdell v. Philadelphia Housing Authority*, 290 F.3d 159 (3d Cir. 2002) (*Truesdell*), a housing rights case, the circuit court allowed an award of attorney's fees. On 24 January 2000, the district court issued an order which included the terms of the parties' settlement, such as that the housing authority (PHA) was required to provide rental assistance. The district court denied attorney's fees. On appeal, the housing authority argued that the 24 January 2000 order "was a stipulated settlement--not a court approved consent decree." 290 F.3d at 164-65. The circuit court rejected this argument. It said, "under *Buckhannon*, attorney's fees may be awarded based on a settlement when it is enforced through a consent decree." It concluded that the order qualified as a consent decree:

> On its face, the January 24th Order (1) contains mandatory language (*e.g.*, "The [PHA] shall provide . . ."), (2) is entitled "Order," and (3) bears the signature of the District Court judge, not the parties' counsel. Moreover, the January 24th Order gave Truesdell the right to request judicial enforcement of the settlement against PHA . . . . For these reasons, we hold that the January 24th Order is a proper vehicle for rendering one side a "prevailing party" . . . .

290 F.3d at 165, brackets in the original.

The Board's 2 February 2000 dismissal of Elrich's appeal recites that at the hearing convened on 1 February 2000, pursuant to a statement of the contracting officer, "the termination of the contract for default was converted by the Government to a termination for the convenience of the Government." It further recites that appellant did not object to that action and consented to the dismissal of the appeal. It concludes that the conversion "moots the appeal" and that "[t]he appeal is accordingly dismissed." Like the order in *Oil, Chemical and Atomic Workers*, and unlike the order in *Truesdell*, the order does not provide "judicial relief" or contain "mandatory language." The order would not itself, as opposed to the contracting officer's conversion of the termination for default, give appellant the right to request judicial or Board enforcement of its entitlement to recovery pursuant to the Termination for Convenience clause. Like the order in *Truesdell*, the order is entitled "order" and bears the signature of the presiding judge, but we believe that these two factors are less important than the others. We conclude, therefore, under these authorities that the 2 February 2000 order is not the equivalent of a consent decree as that term is used in *Buckhannon*.

2. Incorporation of the Terms of the Agreement

In its supplemental brief, appellant continues that:

> There is also a second, independent basis by which Elrich qualifies as a "prevailing party" under Buckhannon for purposes of EAJA. This Board's Order of Dismissal, incorporating and reciting the parties' settlement terms, converting the Government's default termination to a termination for convenience, is a final order of this Board subject to enforcement.

(at 2, footnote omitted) Appellant again cites *J.B. Engineering* and *Reid*. It concludes "[c]onsequently, the Order constitutes a judicially sanctioned change in the legal relationship of the parties; thereby qualifying Elrich as a 'prevailing party' for purposes of recovery under EAJA" (*id.*). Elrich cites *Buckhannon* at n.7; *Poly Design*, 01-2 BCA at 156,303; *United States v. One 1997 Toyota Land Cruiser*, 248 F.3d 899, 904 (9th Cir.

2001); and *Sacco v. Department of Justice*, DC-0752-99-0219-A-1, 90 MSPR 37, 41, 2001 MSPB LEXIS 918 (2001).

In *Buckhannon* at note 7, the Court said that:

> Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal. See *Kokkonen v. Guardian Life Ins. Co. of America*, 511 US 375, 128 L Ed 2d 391, 114 S Ct 1673 (1994).

121 S. Ct. at 1840. In *Poly Design*, the order of dismissal stated that "[t]he disputes in the above-referenced appeals having been settled by the parties, the appeals are dismissed with prejudice" (01-2 BCA at 156,302). In holding that Poly Design was not a prevailing party, we concluded that "[t]he Board did not approve or assume oversight of the settlement or incorporate the terms of the settlement agreement in the order of dismissal" (01-2 BCA at 156,303).

Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994), cited in note 7, is the leading case standing for the proposition that a dismissal order must incorporate the terms of a settlement agreement in order for it to be enforceable in the same action. (Alternatively, the order may include a provision retaining jurisdiction over the agreement.) The issue before the Court was whether a district court had jurisdiction to enforce a settlement agreement following dismissal of the underlying action. The district court had dismissed the action based upon a Stipulation and Order of Dismissal with Prejudice which, although it arose from a settlement, did not refer to the settlement agreement. Defendant sought to compel the return of files pursuant to the agreement. The Court held that the district court did not have jurisdiction to compel their return, stating that:

> The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist. That, however, was not the case here. The judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order.

511 U.S. at 381.

Since the Supreme Court's citation to this case in *Buckhannon*, a number of circuit courts have grappled with whether particular dismissal orders incorporated the terms of settlement agreements in accordance with *Kokkonen*. In *Smyth, supra*, the court denied fees. The action concerned welfare recipients' entitlement to "TANF" benefits. The district court dismissed the action as moot, following an 11 September agreement, *inter alia*, that the Government would not seek repayment of TANF benefits from the named plaintiffs. 282 F.3d at 273. In its order, the court found that the parties had agreed there would be no repayments. 282 F.3d at 284. The district court also awarded attorney's fees. On appeal to the Fourth Circuit, plaintiffs argued that they could be considered prevailing parties under *Buckhannon* "by virtue of the September 11 agreement, which they assert was incorporated in the district court's order and thus stamped with judicial imprimatur." 282 F.3d at 278. The Fourth Circuit rejected this argument:

> The obligation to comply with a settlement's terms must be expressly made part of a court's order for jurisdiction to enforce the settlement after dismissal of the action to exist. *See Kokkonen* . . . . Where a court merely recognizes the fact of the parties' agreement and dismisses the case because there is no longer a dispute before it, the terms of the agreement are not made part of the order and consequently will not serve as a basis of jurisdiction.

282 F.3d at 283. The Court concluded that "[n]othing in this [dismissal] order suggests that the terms of the parties' agreement are 'incorporated' into the order by a clear indication that they must be complied with pursuant to the order itself, as opposed to the principles of contractual obligation. The court's findings are most properly read as noting and reciting the agreement in question as a component of its analysis of the mootness of the case . . . ." 282 F.3d at 284.

In *American Disability Ass'n, supra,* where attorney's fees were allowed, the district court had "entered a Final Order of Dismissal in which it specifically 'approved, adopted and ratified' the [parties'] Stipulation of Voluntary Dismissal With Prejudice, dismissed the case with prejudice, and expressly 'retain[ed] jurisdiction solely for the purpose of enforcing the Settlement Agreement.'" 289 F.3d at 1318. The Eleventh Circuit said that "[w]hen read together with *Buckhannon*, the case cited by the Court in its footnote regarding private settlements, *Kokkonen*, easily resolves this case." 289 F.3d at 1319-20. The Court explained that:

> In this case, the district court, in the order of dismissal, not only specifically "approved, adopted and ratified" the parties' settlement, but also expressly retained jurisdiction to enforce its terms. The formal entry of a consent decree was wholly unnecessary and would not affect the status of the

> parties or the district court's power to enforce the terms of the settlement.

289 F.3d at 1320-21. *See also Schaefer Fan Co. v. J&D Manufacturing*, 265 F.3d 1282 (Fed. Cir. 2001) (a dismissal "pursuant to a confidential settlement agreement" which, in turn, gave either party the right to bring a motion before the district court to enforce the settlement agreement, qualified as an enforceable judgment under *Kokkonen*).

Elrich's second argument is not tenable under these authorities. It is correct that there is a point of distinction between its case and *Poly Design* in that the order of dismissal in its case referred to the terms of the settlement, namely that the termination for default was converted by the Government to a termination for the convenience of the Government, and the order of dismissal in *Poly Design* merely referred to the appeals "having been settled by the parties." This distinction is not important. The key is whether, as stated in *Smyth*, the terms of the agreement (conversion of the termination for default) must be complied with pursuant to the order itself. We have no difficulty in concluding that the order did not require conversion of the termination for default; rather, as in *Smyth*, the order recites that the termination was converted to one for the convenience of the Government as part of the explanation for why the appeal was being dismissed. The order falls far short of the order in *American Disability Ass'n*, which specifically ratified the parties' agreement and retained jurisdiction to enforce its terms.

Elrich's two other citations, *United States v. One 1997 Toyota Land Cruiser*, *supra*, and *Sacco v. Department of Justice*, *supra*, do not change this result. The former, although it includes arguably favorable *dictum*, did not concern the requirement that an applicant be a prevailing party since the claimant had dropped its claim for attorney's fees under 28 U.S.C. § 2412(d)(1)(A), which is comparable to 5 U.S.C. § 504, and only sought attorney's fees under 28 U.S.C. § 2412(d)(1)(D). In *Sacco*, the MSPB denied attorney's fees. The MSPB stated that the appeal was dismissed as moot and that there was "no consent decree, judgment, order, or settlement agreement by which the Board could enforce any relief arising from the appeal or through the agency's action." 2001 MSPB LEXIS 918 at *11. This general language adds little to the argument.

CONCLUSION

As stated by the Eleventh Circuit in the *American Disability Ass'n* case, in *Buckhannon*, the Supreme Court "changed the landscape of the 'prevailing party' inquiry," 289 F.3d at 1318. *Buckhannon* insists "that a plaintiff must obtain formal judicial relief, and not merely 'success,' in order to be deemed a prevailing party. . . ." *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 667 (7th Cir. 2001). Elrich obtained success, but not formal judicial relief. Accordingly, we must deny its application for attorney's fees and expenses.

Dated: 7 August 2002

EUNICE W. THOMAS
Vice Chairman
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

(Signatures continued)
I dissent
(see separate opinion)

EDWARD G. KETCHEN
Administrative Judge
Armed Services Board
of Contract Appeals

I dissent
(see separate opinion)

PENIEL MOED
Administrative Judge
Armed Services Board
of Contract Appeals

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

DISSENTING OPINION BY ADMINISTRATIVE JUDGES
MOED AND PARK-CONROY

The majority rejects the arguments advanced by Elrich supporting its status as a prevailing party under EAJA. The Government did not brief the issue. The majority concludes that Elrich does not qualify as a prevailing party because the conversion of the termination for default into one for the convenience of the Government was effected by a Board order dismissing the appeal, instead of either a Board decision sustaining the appeal or a Board-ordered consent judgment. We believe that disqualification on that basis is unjustifiable under the facts and circumstances of this appeal and fails to acknowledge the informal flexibility attendant to Board practice. Further, the majority's decision produces a result which is contrary to Congress' intent in passing EAJA, with a scope so unnecessarily far-reaching as to potentially close the door to recovery of EAJA fees and expenses for other contractors, who, like Elrich, have obtained the full measure of relief from a termination for default.

The Government has the burden of proof on the default termination. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987). The Default clause of the contract, FAR 52.249-10(c), states that, where there is a finding that "the contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Government." Thus, the contracting officer's decision at the hearing of this appeal to convert the default termination into one for convenience was an admission that it could not carry its burden of proof and that the default termination was improper. *E.g.*, *Alta Construction Co.*, PSBCA Nos. 1463, 2920, 94-3 BCA ¶ 27,053. Elrich succeeded in obtaining all of the relief it sought when the contracting officer made this admission and, therefore, was entitled to a Board decision on the merits sustaining its appeal. *Electronic Systems & Equipment, Inc.*, ASBCA No. 44056, 97-2 BCA ¶ 29,198; *Information Systems & Network Corp.*, ASBCA No. 41514, 92-3 BCA ¶ 25,049; *Telimed Health Systems, Inc.*, ASBCA No. 42886, 92-1 BCA ¶ 24,401. As we stated in *AIW-Alton, Inc.*, ASBCA No. 47439, 96-2 BCA ¶ 28,399 at 141,809, when the contracting officer unilaterally converted the default termination into one for the Government's convenience:

> [A]ppellant received the full measure of the relief available through this appeal. In effect, the appeal was sustained, leaving no justiciable matter for judicial review.

Our view that Elrich is entitled to have its appeal sustained is consistent with our decisions sustaining appeals from Government monetary claims where the contracting officer decisions asserting such claims have been withdrawn. *Grumman Aerospace Corp.*, ASBCA Nos. 35941, 35942, 35943, 90-3 BCA ¶ 23,205; *McDonnell Douglas Astronautics Co.*, ASBCA No. 36770, 89-3 BCA ¶ 22,253; *Texas Instruments, Inc.*, ASBCA Nos. 28918, 33898, 89-3 BCA ¶ 21,934.

The majority says that Elrich is not a prevailing party because it did not request that the appeal be sustained. On 1 February 2000, however, when the hearing on Elrich's appeal from the default termination commenced, it was governing Board precedent that a contractor was a prevailing party for EAJA purposes if it obtained the relief it sought. *Building Services Unlimited, Inc.*, ASBCA No. 33283, 88-2 BCA ¶ 20,611 at 104,151. The method of disposition was irrelevant. When the appeal was dismissed, the *Buckhannon* decision had not yet been issued and there was no reason for Elrich to ask for a Board decision sustaining the appeal. This was not required for Elrich to qualify as a prevailing party.

The majority opines that the dismissal order issued here cannot be deemed to be a Board decision because it does not bear the signatures of three Board members, as is normally required under our Charter. The majority notes, however, that dismissal orders are properly issued by a single member of the Board, upon consent of the parties, as occurred here. The procedure is one of administrative efficiency. The present order was issued in conformity with Board practice and is not objectionable simply because it amounts to a decision on the merits of the appeal.

The majority is of the view that the Board's order does not qualify as a consent judgment because it "does not refer to judicial (or Board) enforcement." Under that criterion, none of our orders or decisions would qualify as consent judgments for the obvious reason that none of them contain such a recitation. In any event, the criteria for determining what qualifies as a consent judgment should reflect the Board's practice. None of the cases relied upon by the majority address established Board practice which permits an agreement by the parties to resolve a challenge to a termination for default by converting it into one for the Government's convenience to be effected either by an order of dismissal or by issuance of a consent decision. Thus, for example, in *Arapaho Communications, Inc./Steele & Sons, Inc., Joint Venture*, ASBCA No. 48235, 98-1 BCA ¶ 29,563, the parties requested that we issue an order sustaining the appeal, instead of dismissing it on the merits. We did so in a decision "in the nature of a consent judgment." *Id.* at 146,544. The substance of the facts and circumstances in the present appeal likewise qualified for consent judgment disposition.

Our practice of dismissing an appeal does not mean that the disposition does not satisfy the criteria for issuance of a consent judgment. On the contrary, the Federal Circuit defines a consent judgment as one "the provisions and terms of which are settled and agreed to by the parties to the action." *Kearns v. Chrysler Corp*., 32 F.3d 1541, 1546 (Fed. Cir. 1994). The definition is widely held:

> Consent judgments entered upon settlement by the parties may assume forms that range from simple orders of dismissal without prejudice to detailed decrees. Whatever form is taken the central characteristic is that the court has not actually resolved the substance of the issues presented.

18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4443 at 383 (1981).

Thus, to conclude that appellant has not prevailed upon the merits of the appeal solely because of the manner of the disposition, as the majority has done, is to ignore the substance of the dismissal and its effect. This is improper. We are to "look to the substance of the litigation to determine whether an applicant has *substantially* prevailed in its position, not merely to the technical disposition of the case or motion. In effect, substance should prevail over form." *Schultz v. United States*, 918 F.2d 164, 166 (Fed. Cir. 1990), *cert. denied*, 500 U.S. 906 (1991), *quoting Devine v. Sutermeister*, 733 F.2d 892, 898 (Fed. Cir. 1984) (emphasis in original). *See Hallco Mfg. Co., Inc. v. Foster*, 256 F.3d 1290 (Fed. Cir. 2001) (no legally dispositive difference for claim preclusion purposes between consent judgments and dismissal with prejudice based upon settlements). The dismissal here "operated as an adjudication on the merits, barring any further consideration of the merits of the default termination of the contract." *Carolina Security & Fire, Inc.*, ASBCA No. 46154, 95-2 BCA ¶ 27,712 at 138,112. It is the judicial *imprimatur* required by *Buckhannon* and *Brickwood*..

Moreover, the artificial distinction made by the majority between the Board's dismissal order and a consent judgment conflicts squarely with the goals of EAJA. In enacting EAJA, Congress expressed its concern that "certain . . . organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in the vindication of their rights." H.R. REP. NO. 96-1418, at 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984. It attempted to "reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States." *Id*., at 6. Thus, Congress made "those persons and small businesses for whom costs may be a deterrent to vindicating their rights" eligible for EAJA fees and expenses. *Id*., at 15; *See* 5 U.S.C. § 504(b)(1)(B). That purpose would be frustrated if success were made to depend upon the form, rather than the substance of the vindication obtained. Yet, that is precisely the result here inasmuch as Elrich is disqualified from relief under EAJA simply because its success in overturning the default termination was recorded in a dismissal order.

Finally, the majority relies upon *dicta* from *Buckhannon*, just as it did in *Poly Design*. In doing so, the majority has effectively denied contractors who successfully challenge a default termination the opportunity to obtain an EAJA award of fees and expenses. Disturbingly, the majority has placed the Government, the losing party, in the position of precluding an EAJA award when it capitulates and admits the default sanction was improper. The majority has thus promoted the very deterrence from seeking review of unreasonable Government action that Congress sought to remove when enacting EAJA.

The *Buckhannon* case involved the resolution of social health care issues, a concern wholly different from resolving the propriety of the drastic sanction against a small

business occasioned by the Government's termination for default, which is to be imposed only for good cause in the presence of solid evidence. *Lisbon Contractors*, 828 F.2d at 765. The use, in both *Poly Design* and *Brickwood*, of the dicta in *Buckhannon* regarding enforceable judgments and consent decrees in order to expand the Court's narrow holding has the unsettling result of transforming every lawsuit into a catalyst. It leads the majority here to conclude that an appellant cannot qualify as a prevailing party where there is a belated, unilateral decision to withdraw the contracting officer's sanction decision from which the appeal was taken. The majority thus gives the Government power to arbitrarily prevent a small business contractor from obtaining recovery of the attorneys' fees and costs it has incurred and which Congress intended for it to recover. Surely the decisions in *Buckhannon* and *Brickwood* do not require such a result.

We respectfully dissent.

PENIEL MOED
Administrative Judge
Armed Services Board
of Contract Appeals

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals on an application for fees and other expenses incurred in connection with ASBCA No. 50867, Appeal of Elrich Contracting, Inc., rendered in accordance with 5 U.S.C. § 504.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals