

UNITED STATES COURT OF VETERANS APPEALS

No. 95-1000

VIOLET V. MCNEELY, APPELLANT,

v.

HERSHEL W. GOBER,  
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before FARLEY, HOLDAWAY, and GREENE, *Judges*.

**ORDER**

On February 24, 1997, this Court, in a memorandum decision, affirmed in part and remanded in part a September 22, 1995, Board of Veterans' Appeals decision. Thereafter, on March 4, 1997, the Court granted the motion of the attorney then of record, Mary Ellen McCarthy, Esq., to withdraw as counsel. On the same date, the Court granted the motion of attorney Jon L. Sasser, Esq. to appear as counsel pro hac vice. The Court issued its mandate on May 19, 1997.

On June 16, 1997, the Court received an application for an award of attorneys fees and expenses pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (EAJA). Neither of the two attorneys who submitted the application, Barton F. Stichman, Esq., and Stephanie Forester, Esq., had filed a notice of appearance prior to, or simultaneously with, the application. *See* U.S. VET. APP. R. 46(d)(1). Furthermore, the Court had not received a motion from the attorney then of record, Jon L. Sasser, to withdraw as counsel. *See* U.S. VET. APP. R. 46(d)(2). On July 18, 1997, the Secretary moved to stay the proceedings pending resolution of a similar case before the Court.

By order dated August 4, 1997, the Court directed attorneys Barton F. Stichman and Stephanie Forester to show cause why the Clerk should not be directed to reject and return the application for award of attorney fees and expenses for failure to submit a statement of representation before this Court, as required by Rule 46(d)(1), and failure to demonstrate their representative capacity to file such an application on behalf of the appellant. On August 4, 1997, the Court received a notice of appearance from attorney Stephanie Forester. The Court received a response to the order to show cause (Response) on October 9, 1997. Together with the Response, attorneys Barton F. Stichman and Charlene Stoker Jones filed notices of appearance on behalf of the appellant. Stephanie Forester, Barton Stichman, and Charlene Stoker Jones each submitted their appearances as employees of the National Veterans Legal Services Project (NVLSP).

"No attorney . . . may participate in any proceedings in any case unless that individual has entered an appearance." U.S. VET. APP. R. 46(d)(1). The signing of a pleading or motion constitutes an appearance pursuant to Rule 46(d)(1). Rule 46(d)(1) also requires that an appearance be

accompanied by the filing and service on all parties of a signed written statement that the representative is representing a designated client, giving the name, address, and telephone number of the representative. *Id.* Rule 46(d)(2) provides that "a representative, other than a government attorney who has been properly replaced, may not withdraw without the Court's permission upon motion and written notice to the client and all other parties who have appeared." U.S. VET. APP. R. 46(d)(2). "The authority and duty of the representative will continue until he or she is relieved by order of the Court." *Id.*

The only attorney authorized to represent the appellant at the time the EAJA application was filed and, in fact, up to the present time, is Jon Sasser. *See id.* The Court has not granted permission, nor has permission been requested, for Mr. Sasser to withdraw as counsel. *See id.* Mr. Sasser therefore maintains the "authority and duty" to represent the appellant "until he . . . is relieved by order of the Court." *Id.* Because Mr. Sasser has neither sought nor been granted permission to withdraw pursuant to Rule 46(d)(2), the NVLSP attorneys did not have the authority to file an EAJA application in this case as replacement counsel for Mr. Sasser.

In the Response, attorney Forester stated that she had believed at the time of the filing of the fee petition that where one attorney had previously filed a notice of appearance in a particular case, "other attorneys who later *join* this attorney of record in the representation of a party need not themselves file a Notice of Appearance." Response at 5 (emphasis added); *see also* Declaration of Stephanie Forester, ¶ 3. Nothing in the Response, the declarations of the interested parties, or the Court file indicates that the NVLSP actually "joined," rather than replaced, Mr. Sasser in the representation of the appellant. In any event, even if the NVLSP attorneys had joined in the appellant's representation, the language of Rule 46(d)(1) is clear: "*no attorney*" may participate in proceedings "*in any case*" before this Court unless "*that individual*" has entered an appearance. The Court need not decide if the filing of an application for EAJA fees, particularly as a first appearance in a particular case, constitutes an appearance pursuant to the second sentence of Rule 46(d)(1) because, even assuming it does, the NVLSP attorneys had not complied with the third sentence of Rule 46(d)(1) requiring that the "appearance" be accompanied by a written statement of representation.

The Response acknowledges that "the unambiguous language of Rule 46(a)(1) leads to the conclusion that there is at least a reasonable possibility that the Court's rules required Ms. Forester and Mr. Stichman to file such a statement on or before the filing of the fee petition," and that "filing such a statement would have been the better course of action." Response at 7. Ms. Forester argues, however, that the appellant's fee petition should not be dismissed for this omission because of her "good faith belief" that she was not required to file the statement described in Rule 46 and because the attorneys who filed the petition were "authorized to represent the appellant before the Court." *Id.* Ms. Forester also argues that the failure to comply with the third sentence of Rule 46(a)(1) does not justify the extreme remedy of dismissing the fee petition. Finally, the NVLSP attorneys represented that any misunderstanding of the Court's Rules was colored by the "long and unquestioned" practice of the Secretary to often change counsel during the course of proceedings before this Court.

The Court finds Ms. Forester's arguments unpersuasive. Attorneys are responsible for observing the Court's rules and, particularly in the context of an EAJA application, are held to a higher standard of compliance. *Bazalo v. Brown*, 9 Vet.App. 304, 311 (1996) ("Counsel, unlike a pro se appellant, is held to a higher standard and is responsible for following the dictates of [EAJA]."); *see also Grivois v. Brown*, 7 Vet.App. 100, 101 (1994) (Because EAJA is a waiver of sovereign immunity, its provisions are to be strictly construed.). For the same reason, Ms. Forester's after-the-fact submission of her notice of appearance was insufficient to cure the defects in the EAJA application. *C.f. Bazalo*, 9 Vet.App. at 310 (amendment of a defective application after to the 30-day filing period is insufficient to meet the jurisdictional requirements of EAJA). "[A] seriously deficient pleading cannot be treated lightly, and should result in dismissal." *Id.* With respect to the "long and unquestioned" practice of the Secretary to change counsel during proceedings before this Court, the Court notes that counsel for the Secretary is, has been, and statutorily must remain, the General Counsel of the Department of Veteran's Affairs. *See* 38 U.S.C. § 7263(a) ("The Secretary shall be represented before the Court of Veterans Appeals by the General Counsel of the Department."). Moreover, the rule for withdrawal contains different provisions for government attorneys. *See* Rule 46(d)(2) ("A representative, *other than a government attorney who has been properly replaced*, may not withdraw without the Court's permission . . .") (emphasis added).

On consideration of the foregoing, it is

ORDERED that the Clerk is directed to reject and return the appellant's application for attorneys fees. It is further

ORDERED that the Secretary's motion for a stay is denied as moot.

DATED: December 30, 1997

PER CURIAM.