

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

MARK BUMBLIS,
Appellant,

DOCKET NUMBER
SF-0752-03-0229-A-1

v.

DEPARTMENT OF THE NAVY,
Agency.

DATE: May 26, 2004

Steven E. Brown, Esquire, Westlake Village, California, for the appellant.

Lynn M. Rizer, San Diego, California, for the agency.

BEFORE

Anthony L. Ellison
Administrative Judge

INITIAL DECISION

The appellant timely filed a motion for attorney fees for work performed in her successful appeal of his termination. The Board has jurisdiction over this matter under 5 U.S.C. § 7701(g)(1). For the reasons stated below, the appellant's motion is GRANTED.

ANALYSIS AND FINDINGS

In seeking an award of attorney fees, the appellant has the burden of showing that he has met the following criteria before attorney fees will be awarded under 5 U.S.C. § 7701(g):

1. The appellant incurred fees in the course of an attorney-client relationship;
2. The appellant is the prevailing party;
3. An award of fees is warranted in the interest of justice;
4. The fees requested are reasonable.

Hutchcraft v. Department of Transportation, 55 M.S.P.R. 138 (1992); *Allen v. United States Postal Service*, 2 M.S.P.R. 420, 427 (1980). Here, it is undisputed that the appellant incurred such fees, and that he is the prevailing party. Further, the agency does not dispute that the appellant is entitled to an award of fees in this case in the interests of justice. However, the agency argues that the fee petition does not contain sufficient information "regarding the hours logged and the worked performed to permit a correct fee determination." It also contends that some of the requested fees are duplicative, inappropriate and/or otherwise not recoverable. Finally, it contends that the fee agreement between the appellant and his counsel does not reflect the rate used in the fee petition.

The appellant's requested fee rate is reasonable

In *Kling v. Department of Justice*, 2 M.S.P.R. 464 (1980), the Board explained that the reasonableness of the fee requested is based on the attorney's customary rate, and the number of hours worked on the appeal. In this case, the agency contends that the appellant's counsel has not established the propriety of his claimed hourly rate of \$300, inasmuch as the Legal Services Agreement (LSA) he had with the appellant stated that the rate to be charged to the appellant would be "reasonable hourly rates, based on the prevailing rates in Lawfirm's community for the same or similar work performed by others of the same or similar degree of experience and training, which rates in no event shall be less than the following: \$200.00 per hour for attorneys, \$75.00 per hour for paralegals, and \$25.00 per hour for lawclerks." Appellant's Exhibit E. It

contends that counsel has not established that the relevant prevailing hourly rate is the \$300 claimed in the fee petition.

Under 5 C.F.R. § 1201.203(a)(3), counsel is obliged to provide the Board with evidence of his “customary billing rate for similar work if the attorney has a billing practice or, in the absence of that practice, other evidence of the prevailing community rate that will establish a market value for the attorney’s services.” The applicable prevailing market rate for fee determinations is one that is “consistent with the prevailing community rate for similar services in the community in which the attorney ordinarily practices.” 5 C.F.R. § 1201.203(a)(3)(2000)(modifying the previously accepted Board practice pursuant to *Crumbaker v. Department of Labor*, 40 M.S.P.R. 71, 78 (1989), cited by the agency in its response to the fee petition).

Here, counsel has supported his claimed hourly rate by submitting affidavits and representations by counsel and other practitioners of similar skill and experience. See *Gerlach v. Federal Trade Commission*, 9 M.S.P.R. 268, 275 (1981). He submits one such affidavit from a practitioner from Ventura County, California, where his own Westlake Village office is located,¹ and two from practitioners in Los Angeles County.² Appellant’s Exhibits C-E. While the agency avers that Ventura and Los Angeles counties “do not share the same community customary fees,” it provides nothing to support such claim. Further, as noted by counsel, his Westlake Village office is only two miles from the Los Angeles County line, and his practice regularly encompasses cases in all the nearby Southern California counties. Attorney Fee File (AFF), Tab 4.

¹ Suggesting that, in 2000, an hourly rate of \$275.00 was reasonable for such work by similarly credentialed practitioners in Westlake Village.

² Suggesting that, in 2003, an hourly rate of anywhere from \$225.00 to \$350.00 was reasonable for such work by similarly credentialed practitioners in Los Angeles County.

Additionally, counsel has submitted evidence of his education, experience and other relevant qualifications. Finally, based on my knowledge of the issues in this case, and practice before the Board generally, I find that the skill and knowledge demonstrated by counsel support his petition, and that he is entitled to the rate claimed. Thus, I find that he has established that the prevailing rate in the relevant community for similar work by representatives of similar experience is \$300.00 per hour.

The agency also contends that the appellant would not have been billed at the full \$300 rate if he had not prevailed in his case and moved for an award of fees from the agency. While such an assertion is, of course, purely speculative, in any event, the Board has upheld fee agreements whereby counsel bill clients at a reduced rate, with the understanding that, if they prevail, he will petition for a fee award at the prevailing market rates. *Crawford v. Department of Treasury*, 60 M.S.P.R. 614, 621-2 (1994).

The fees claimed are reasonable

The agency contends that a majority of counsel's entries on his time-log are insufficiently specific. It argues, for example, that entries stating, "review e-mail from client," "file follow up," "call from client," "scan incoming mail," "fax to agency," "letter to client," "call from agency rep," "call to client," "letter to Judge Ellison," "review fax from agency rep," "conference with client," "hearing preparation," "return call from client ... conference with client and wife at hotel," provide no information "regarding the relevancy to the appellant's appeal, *i.e.* the content of e-mail reviewed, the purpose of file follow ups, the subject of telephone calls, the subject of sent/received faxes, the purpose of conferences and what was discussed, etc." It claims that, without a detailed explanation for the charged fees, it is impossible to determine exactly what work was performed and how the work related to the appeal. AFF, Tab 3.

In response, the appellant's counsel notes that the declaration he provided with his time-log states that all work listed on it was performed "in connection with this appeal," and that the time entries were made contemporaneously with the work done and recorded by computer." The Board has found that entries of the kind listed above, in conjunction with counsel's declaration that "every hour claimed was spent on work performed directly relating to the appellant's appeal," is sufficient to justify the hours claimed. *Harris v. Department of Agriculture*, 48 M.S.P.R. 189, 196-7 (1991). Although the agency claims that counsel's itemization should have been more detailed, it does not present a specific basis upon which to question his billing practices or the propriety of the number of hours claimed. The documentation of time spent on the appeal is adequate, inasmuch as it sufficiently identified the client served, the attorney or clerk performing the task, the nature of the work performed and the amount of time expended. *Heath v. Department of Transportation*, 66 M.S.P.R. 101, 106-7 (1995), citing *Key v. U.S. Postal Service*, 33 M.S.P.R. 142, 153 (1987).

The agency also challenges counsel's claim for time spent making telephone calls "where no communication with the person called ever took place," i.e., where the calls' recipients were unavailable and messages were left by counsel. The agency presents no rationale basis for excluding the minimal time spent in this manner, and I know of none. The agency also challenges a telephone call to an attorney Chuck Allen, and a letter sent to a Brian East, noting that neither man is mentioned in the record and that no explanation is provided for their relevance to this appeal. It also questions claimed fees for work performed by "alleged staff members with the initials 'RU' and 'MB,'" who are "not identified in the fee petition as either a paralegal or a law clerk" working under counsel's supervision. Counsel, however, has provided such explanation and information in his response to the agency's objection. AFF, Tab 4.

The agency also challenges as excessive counsel's hourly rate while traveling, suggesting instead the 34.5 cents per mile rate allowed by the

Department of Labor. It is well-settled, however, that the appropriate rate for travel time is counsel's full hourly rate. *Crumbaker, supra, modified*, 827 F.2d 761 (Fed. Cir. 1987); *SSA v. Balaban*, 33 M.S.P.R. 309, 322 (1987).

The agency also avers that the 21.6 hours counsel claims for work preparing his closing brief are excessive in light of his experience and the complexity of the appeal, arguing that counsel is a "superior Board practitioner and has practiced law for over 30 years[, that t]he appeal at bar was a simple separation from employment for reasons of disability[, and that t]he hearing lasted only 7 to 8 hours over a two-day period." It asserts that 21.6 hours was spent writing the closing brief was excessive inasmuch as the appeal concerned "a very simple, and well-settled issue." I cannot find that 21.6 for the research, preparation and drafting of a 23-page brief, plus an addendum, is excessive. Nor can I agree with the characterization of the case as simple and well-settled, in light of the agency's unwillingness to stipulate to or concede even the simplest and best-settled aspects of the case.

Finally, I find that counsel's claim of \$1,500.00 for 5 hours for preparation of his reply to the agency's response to the petition for fees is appropriate in this case. *Bartel v. Federal Aviation Administration*, 30 M.S.P.R. 451, 455 (1986).

In sum, I find that the number of hours claimed by counsel for work done on the appeal and fee petition is reasonable under the circumstances.

Costs and Expenses

Reimbursement for costs are awardable in this case under 5 U.S.C. § 7701(g)(2), which provides for the payment of fees and costs if the decision in the appellant's favor is based on a finding of discrimination prohibited under 5 U.S.C. § 2302(b)(1), including disability discrimination, as was found in this case.

The agency challenges the claims for reimbursement of the cost of serving several documents by both facsimile transmission and regular mail, arguing that

they are duplicative. The Board, however, has rejected such a challenge, despite the fact that there was "no necessity" for use of both service methods, where, as here, nothing in the record *otherwise* suggests that the claimed costs are inflated or excessive. *Stein v. U.S. Postal Service*, 63 M.S.P.R. 537, 542 (1994). The agency also contests a charge for a 112-page out-going fax on September 9, 2003, that was "allegedly sent," noting that the entry does not reveal the content of the fax or where the fax was sent, and claiming that it "never received a 112-page fax from the appellant." In his response, counsel, acknowledging that the date should have been September 19, 2003, explains that the entry reflects two transmissions each (evidently to agency counsel and the Board) of his Closing Argument (47 pages each, including attachments) and the Addendum thereto (9 pages each), for a total of 112 pages. The agency has not specifically challenged the per-page cost of this charge, which, in light of counsel's clarification, is approved.

The agency contends that the appellant's charge of \$85.50 for 855 photocopies is excessive, noting that there is no explanation as to what was photocopied and how it relates to appellant's appeal. The Board may award photocopying costs under 5 U.S.C. § 7701(g)(2). *Mitchell v. Department of Health & Human Services*, 19 M.S.P.R. 206, 215-16 (1984). The agency has presented nothing, over and above a bare assertion, to indicate that the number of copies claimed by the appellant was inherently unreasonable in this case. Finally, the agency contends that counsel's claim for \$43.00 for meals was excessive, inasmuch as it is "not required to pay for appellant's meals." As noted in his response, however, the cost of counsel's meals, in the context of appropriate appeal-related travel, is permissibly awardable as a travel expense. *Smit v. Department of Treasury*, 61 M.S.P.R. 612, 622 (1994); *Garcia v. U.S. Postal Service*, 75 M.S.P.R. 198, 201-2 (1997) and cases cited therein.

Accordingly, I find that the appellant is entitled to payment of attorney fees in the amount of \$43,252.25, and costs in the amount of \$2,027.38, for a total of \$45,279.63.

DECISION

The appellant's motion for attorney fees is GRANTED.

ATTORNEY FEES

I **ORDER** the agency to pay attorney fees in the amount of **\$45,279.63** by a check made payable to the appellant's counsel. Payment must be made no later than 20 calendar days after the date this initial decision becomes final.

FOR THE BOARD:



Anthony L. Ellison
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on June 30, 2004, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), or personal or commercial delivery. A petition for review may also be filed by electronic mail (e-mail) if the petitioning party makes an election under 5 C.F.R. § 1201.5(f), which requires a written statement of the election that includes the e-mail address at which the party agrees to receive service. Such an election may be filed by e-mail at the following address: e-FilingHQ@mspb.gov.

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. The date of filing by mail is determined by the postmark date. The date of filing by fax or e-mail is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. If the petition is filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

ENFORCEMENT

If the agency fails to pay the attorney fees awarded within 20 calendar days after the date this initial decision becomes final, you may ask the Board to enforce its decision by filing a motion with this office.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.