

SANDRA P. DAVIS v. U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Docket Nos. 00-05; 00-08

Date of Decision: March 2, 2005

Cite as: S. Davis v. GAO (3/2/05)

Before: Personnel Appeals Board *en banc* (Michael W. Doheny, Vice Chair; Anne M. Wagner, Chair; John P. Mahoney, Paul M. Coran, Members)

Attorney's Fees

Standards

Right to File

Intervention

Discretion

FINAL DECISION ON PETITIONER'S ATTORNEY'S FEE REQUEST

This matter is before the Personnel Appeals Board on appeal from the Administrative Judge's Decision on Petitioner's Request for Attorney's Fees and Costs. For the reasons stated below we AFFIRM the decision of the Administrative Judge (AJ).

Background

In July and August 2000, the Petitioner, a Band II Analyst in the Denver Regional Office of the U.S. General Accounting Office (now the U.S. Government Accountability Office) (hereinafter GAO or Agency), filed three Petitions for Review. The three Petitions were consolidated for hearing and decision. The Petitions charged the various Agency personnel with violations of: (1) 5 U.S.C. §2302(b)(8) (reprisal for whistleblowing); (2) 5 U.S.C. §2302(b)(9) (retaliation for engaging in protected activity and for assistance to another employee in the investigation of an EEO complaint); (3) 5 U.S.C. §2302(b)(10) (lowering Petitioner's performance appraisal on the basis of conduct that did not affect performance); and (4) 5 U.S.C. §2302(b)(12) (lowering Petitioner's performance appraisal in a manner inconsistent with the Agency's published Order governing appraisals). Following a protracted discovery process, an evidentiary hearing was conducted in October and November 2001. The Administrative Judge issued his decision on July 26, 2002. The Initial Decision rejected all of Petitioner's claims except the last, concluding therefore, that her 1999 performance appraisal had been lowered in a manner inconsistent with the standards published in GAO Order §2430.1. The Initial Decision ordered that Petitioner was

entitled to have her 1999 performance appraisal raised, and that she was entitled to any increase in earnings that would follow from the adjustment of her appraisal. All other remedial requests were denied. The full Personnel Appeals Board affirmed the Initial Decision on July 11, 2003 (hereinafter Final Decision).

Following the trial of this case, Petitioner terminated the services of her attorney, Janice F. Willis, Esq., and retained the services of new counsel, Nora V. Kelly, Esq. After the Final Decision, Ms. Kelly timely filed a Request for Attorney's Fees and Costs on behalf of Petitioner for all fees incurred during the appellate stage of the litigation and for that portion of Ms. Willis' fees that related to work prior to the evidentiary hearing. Ms. Willis then moved to intervene; both Petitioner and the Agency opposed the request. The Motion to Intervene was granted, but with the proviso that Intervenor could not seek payment for fees beyond those already requested by the Petitioner. Decision on Motion to Intervene (Nov. 17, 2003).

In her Request, Petitioner sought an award of \$128,867.17 for fees and costs incurred during the pretrial and appeals phases of the proceedings. Despite the limitation on Intervenor that prohibited her from seeking payment of fees beyond those sought by Petitioner, Intervenor submitted a brief in which she supported Petitioner's original request for fees and requested additional fees for her work during and after the trial. The Administrative Judge issued his decision on Petitioner's fee request on June 15, 2004 (hereinafter Attorney's Fees Decision (AFD)). The AJ ordered the Agency to pay Petitioner in the amount of \$46,345.60, as reimbursement for the attorneys' fees she had been charged by her counsel. In his decision the Administrative Judge denied the Petitioner's claims for certain costs as noncompensable under 5 U.S.C. §7701(g)(1). He also rejected Intervenor's separate request for fees not sought by Petitioner in her Fee Request. Both Petitioner and Intervenor have appealed from the Administrative Judge's decision. The Agency filed responsive briefs arguing for affirmance of the Attorney's Fees Decision.

Decision on Attorney's Fees

In a very thorough and well considered decision, the Administrative Judge first discussed the standards for determining eligibility for and reasonableness of attorney's fee requests. The AJ noted that the question of entitlement must be determined under the criteria and applicable case law of 5 U.S.C. §7701(g)(1). He held that §7701(g)(1) requires the Petitioner to prove that: (1) she is the prevailing party; (2) an award of fees is warranted in the interest of justice; and (3) the fees requested are reasonable. AFD at 6-7 (citing *Ramey v. GAO*, PAB Docket No. 01-703-17-81 (Mar. 9, 1982); *Allen v. U.S. Postal Serv.*, 2 MSPR 420 (1980)).

The Administrative Judge concluded that under the definition set forth by the Supreme Court in *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992), and *Buckhannon Board & Care Home v. West Virginia*, 532 U.S. 598, 604-05 (2001), Petitioner is a prevailing party despite having failed to obtain most of the relief that she requested because "[b]y virtue of her litigation, the Agency was required to alter its behavior vis-à-vis Petitioner in a way that resulted in both direct and indirect benefits." AFD at 9. Since all three of the criteria for eligibility must be met (*Allen*, 2 MSPR at 428), the AJ next considered whether attorney's fees are warranted in the interest of justice.

Citing the MSPB decision in *Allen* and the Federal Circuit's approval of the criteria¹ therein in *Sterner v. Department of the Army*, 711 F.2d 1563, 1566 (Fed. Cir. 1983), the Administrative Judge held that because the PAB had concluded that the Agency had engaged in a prohibited personnel practice under 5 U.S.C. §2302(b)(12), that conclusion is sufficient to satisfy Petitioner's burden under the statute. AFD at 10. Additionally, however, the AJ noted that the change in performance appraisal was only a small part of the relief requested and therefore, by exercising the discretion called for by the Supreme Court in *Texas State Teachers Ass'n v. Garland*, 489 U.S. 782, 789-91 (1989), he held that "Petitioner's limited success in this case, coupled with other factors, warrants a reduction in her Fee Request...." AFD at 11.

Petitioner posited her Fee Request by reference to the *Laffey* Matrix, a spreadsheet of fees developed by the District Court for the District of Columbia in *Laffey v. Northwest Airlines*, 572 F.Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). Under the Matrix, Petitioner contended, the rate for fee awards in the District of Columbia is \$335 per hour for attorneys with the experience of her attorneys. Fee Request at 3 ¶9.

The Administrative Judge engaged in an exhaustive review of *Laffey* and its progeny. On the basis of that review and the supporting authorities, the AJ rejected the Agency's arguments that the *Laffey* Matrix is merely a guideline used by the U.S. Attorney's Office in settling cases and that *Laffey* is applicable only to civil rights or EEO litigation. AFD at 14. He also rejected the implied claim by Petitioner that the *Laffey* Matrix be applied "as if it were a foregone conclusion that it is binding law before the PAB or in the Federal Circuit." *Id.* at 15. The Administrative Judge further noted that the *Laffey* Matrix was intended to be applied in cases involving complex litigation and in cases where counsel charged "'reduced rates for public spirited or non-economic reasons'." *Id.* at 15-17 (quoting *Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996)). Thus, a petitioner requesting to be reimbursed at the rates in the *Laffey* Matrix, or at an hourly rate greater than the billable rate, must show that counsel charged her fees at a reduced level from fees usually charged in similar litigation and that the reduction was made in the interest of public spiritedness or for non-economic reasons. In addition, for application of the *Laffey* Matrix, the requestor must persuade the reviewer that the litigation was complex. The AJ also noted that the Matrix is intended to apply to counsel who routinely practice in Washington, D.C. AFD at 18.

Applying this analytical scheme, the Administrative Judge concluded that current counsel's hourly rate of \$190.00 per hour for which she contracted with Petitioner is the rate at which

¹ *Allen* set forth the following criteria as sufficient to satisfy the "interest of justice" standard:

1. The agency engaged in a prohibited personnel practice.
2. The agency's action was "clearly without merit."
3. The agency's action against the employee was in bad faith.
4. The agency committed a "gross procedural error."
5. The agency knew or should have known that it would not prevail.

Allen v. U.S. Postal Serv., 2 MSPR at 434-35; *see Price v. Social Security Admin.*, 2005 U.S. App. LEXIS 2762 (Fed. Cir. Feb. 17, 2005).

Petitioner is entitled to reimbursement for Ms. Kelly's time. He pointed out that there was no argument or evidence that the \$190 rate was a reduction from the normal rate. Moreover, he opined that the subject of the litigation was "'run of the mill,' with no great complexity and no issues beyond those normally confronted in federal employee personnel cases." AFD at 22. By applying that rate, he awarded Petitioner total fees of \$11,995.60 for services rendered by Ms. Kelly in the litigation and in advancing Petitioner's Fee Request.

In analyzing the Fee Request representing the work performed by Intervenor Willis, the Administrative Judge first noted that Petitioner's Fee Request sought the recovery of fees spent by prior counsel through the pretrial phase of the litigation, but not the time spent by her in the trial or in the preparation of a post-trial brief. Because he granted Ms. Willis' Motion to Intervene subject to making arguments only with respect to the issues raised in Petitioner's Fee Request and with respect to the opposition filed by the Agency, the AJ gave no consideration to any aspect of Intervenor's brief which sought payment for time not included in Petitioner's Fee Request. Based on his review of billing invoices and payments, and the absence of persuasive evidence or claim that the billing rate was reduced from that usually charged in similar litigation, the AJ determined that the hourly rate of \$150 is the presumptive market rate for award purposes for Ms. Willis' time. AFD at 27. The Administrative Judge set forth an extensive and detailed analysis of Petitioner's documentation in support of the request for Intervenor's services. He identified several hours that were found duplicative or unnecessary and 19 hours for which the documentation lacked specificity. AFD at 28-31. He calculated that the maximum number of hours reasonably expended in this portion of the case was 273.75. After describing at some length and in great detail the manner in which Intervenor conducted herself in the pretrial stages, including what he described as repeated filing of "pretrial papers that were repetitive or poorly drafted, resulting in added work for both the Board and the Agency" (AFD at 35), and considering the limited success of the Petitioner, the AJ reduced the number of hours from the maximum reasonable hours by 20%. AFD at 39-40. Accordingly, the Administrative Judge awarded Petitioner \$34,350 for 219 hours at \$150 per hour for litigation time and 20 hours at \$75 per hour for travel time.

The Administrative Judge analyzed Petitioner's claims for costs and found that all costs for which she sought reimbursement were "taxable costs" under 28 U.S.C. §1920 and thus, noncompensable under 5 U.S.C. §7701(g)(1).²

Appeals

Petitioner and Intervenor both filed appeals from the Administrative Judge's Decision on Petitioner's Request for Attorney's Fees.

² Entitlement to "attorney's fees" under 5 U.S.C. §7701(g)(1) does not include "all expenses." See *Bennett v. Department of the Navy*, 699 F.2d 1140, 1143 (Fed. Cir. 1983). "Taxable costs," as defined by 28 U.S.C. §1920, are not considered to be "attorney's fees," while costs that are reasonable and necessary out-of-pocket expenses of providing a lawyer's services are considered "attorney's fees." *Id.* at 1145. The former category includes such items as deposition and photocopying costs, while the latter includes postage, counsel travel and telephone calls. *Id.* at 1145-56.

Petitioner's Appeal:

In her brief, Petitioner contends that the Judge abused his discretion by further reducing the reimbursable hours she requested for services performed by Intervenor by 20 percent, after Petitioner had voluntarily reduced by 40% the total hours for which she was billed when she chose not to ask for reimbursement for time spent in trial and post-trial work. *See* Petitioner's Opening Brief at 2.

Intervenor's Appeal:

Intervenor argues that the Administrative Judge erred by "retroactively" applying new standards for the award of attorney's fees. She alleges that she did not have "the benefit of the Board's standards" prior to submitting her fee request. *See* Trial Attorney's Brief at 10. She contends that the AJ should have used the *Laffey* Matrix and awarded her fees at a rate of \$390³ per hour. *Id.* at 14. She also takes issue with the Administrative Judge's conclusion that the case did not constitute complex litigation. *Id.* at 12. Further, Intervenor contends that the AJ erred by ruling that she was not a "petitioner" for purposes of 4 C.F.R. §28.3 and could not assert a claim beyond those sought by the Petitioner herein (Ms. Davis). *Id.* at 18-19. In her argument she points out that "petitioner" is defined in §28.3 as "any person filing a petition for review for Board consideration." *Id.* at 17. She further argues that because the Administrative Judge barred her from asserting additional claims beyond those raised by Ms. Davis, she is foreclosed from being compensated for work that she performed that was not included in Petitioner's Fee Request. *Id.* at 28. She also contends that she should be awarded fees at the hourly rate of \$390 by application of the *Laffey* Matrix for her travel time, and that the Administrative Judge's reduction of the fee for this time was arbitrary, capricious and an abuse of discretion. *Id.* at 19. In addition, she argues that although Petitioner prevailed on one claim, the claims were "so commingled that they cannot be separated for purposes of isolating out and designating billing hours to a particular prohibited personnel practice allegation." *Id.* at 27. Finally, Intervenor contends that she now has "new" evidence that materially affects the decision.⁴ *Id.* at 22-23. The new evidence, which was submitted as an exhibit to her appeal (Exhibit 11), is a letter dated October 1, 2001, that purports to document an agreement with Petitioner increasing the hourly rate to \$250, effective August 1, 2001.

Analysis

4 C.F.R. §28.87(g) sets forth the standards for PAB review of an initial decision. Under section 28.87(g), the Board may substitute its own findings of fact and conclusions of law, but will generally defer to an administrative judge's credibility determinations. In determining

³ Both Petitioner's Fee Request and Intervenor's Fee Request initially sought reimbursement for Intervenor's services at the rate of \$335 per hour under the *Laffey* Matrix. On appeal, Intervenor seeks reimbursement at \$390 per hour by reference to an updated Matrix. *See* Trial Attorney's Brief at 14.

⁴ Intervenor's Brief also incorporates a request for fees incurred during the preparation of the Prior Attorney's Request for Attorney's Fees and the Trial Attorney's Brief Requesting Review by the Full Board. In view of our conclusion herein, the supplemental request also is denied.

whether an action other than the affirmance of an initial decision is required, the Board also considers whether: (1) new and material evidence is available that despite due diligence was not available when the record was closed; (2) the initial decision is based on an erroneous interpretation of statute or regulation; (3) the initial decision is arbitrary, capricious or an abuse of discretion, or otherwise not consistent with law; or (4) the initial decision is not made consistent with required procedures and results in harmful error.

In her Response to the Intervenor's Motion to Intervene, Petitioner stated that she did not request payment for \$63,325 that Intervenor claimed was still owed to her for three reasons: (1) the amount of hours and fees claimed were "preposterously high;" (2) Intervenor claimed she appeared at hearing on days on which a hearing was not even held; and (3) Intervenor had already billed Petitioner for \$15,000 for her appearance at the trial on this matter. She summed up by stating that "her credibility would be compromised by including Ms. Willis' inflated invoice for \$63,325.00 in her request for fees." Response at 3. Accordingly, the issue of reimbursement for services rendered during trial and post-trial by Intervenor was not put before the Administrative Judge. Nevertheless the AJ did take notice that the Petitioner voluntarily reduced her fee request by more than 40%, but then concluded that even taking that reduction into consideration, "the 273.75 work hours submitted by Petitioner for Ms. Willis' time that have been approved should be reduced further by 20% to account for Petitioner's limited success and for Ms. Willis' own excessive resort to litigating issues that were already decided or that were non-meritorious." AFD at 40.

Petitioner presents mere disagreement with the Administrative Judge's decision. No authorities are cited for the proposition that the AJ should defer to the Petitioner's determination as to an appropriate reduction or that failure to do so constituted an abuse of his discretion. She cites only to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), for the proposition that in making such a determination a court makes an equitable judgment. See Petitioner's Opening Brief at 3. However, as the Court stated in *Hensley*:

[T]he district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters. It remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award. When an adjustment is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained.

Id. at 437.

The Board finds that the Administrative Judge provided concise and clear explanation of his reasons for the fee award and that his reductions beyond the reductions voluntarily taken by Petitioner are explained and supported and do not reflect an abuse of his discretion.

Intervenor's argument that she was held to new standards adopted by the Administrative Judge and applied retroactively to her is simply not supportable. *See* Trial Attorney's Brief at 9-11. As stated above, the AJ noted the lack of precedent in PAB litigation and saw the opportunity provided by this case to set forth guidelines for this and future cases involving attorney's fee requests. The Administrative Judge conducted a thorough and exhaustive review of the case law, particularly those cases that explicated the considerations necessary to reach appropriate determinations under 5 U.S.C. §7701(g)(1). In reaching his conclusions and making his award, the AJ relied on and cited to precedent of the MSPB and the courts. The Board finds that the Administrative Judge's conclusions of law are consistent with legal precedent and amply supported by reference to those authorities.

Intervenor makes no supportable argument for her contention that her fees should have been reimbursed at the rate provided in the *Laffey* Matrix. She premises her argument on the fact that she relied on that rate, the absence of PAB precedent that would support denial of reimbursement at that rate, and her unsupported claim that the case was complex. Trial Attorney's Brief at 12, 15, 28. As the Administrative Judge stated, both Petitioner and Intervenor gave no persuasive argument for application of the *Laffey* Matrix and cited to the Matrix reflexively without regard for the principles supporting its adoption. AFD at 15, 25-26. After pointing out that neither Petitioner nor Intervenor made the sort of showing required to support the higher fees authorized by the Matrix, and after reiterating his conclusion that the "issues, no matter how important to Petitioner, were relatively common to any experienced practitioner of federal employment law," the AJ stated, "[i]n the end, payment of Ms. Willis' time at the rate of \$335 per hour would be an example of wish fulfillment. There is no evidence that she has ever received this hourly rate or that she could reasonably have expected to receive such a rate in the legal marketplace." AFD at 25-26. The Board concurs. Intervenor has failed to make the necessary showing to support an award to Petitioner at the rate of \$335 or at the rate of \$390, which she now requests.⁵

Intervenor objects to the limitations placed on her that resulted in the Administrative Judge's refusal to consider her Request for Attorney's Fees beyond those requested in the Petitioner's Request. She argues that by virtue of 4 C.F.R. §28.3, a petitioner is defined as "any person filing a petition for review for Board consideration." She contends that because she is a person who, as attorney for Petitioner, participated in the filing of the underlying Petition in this case, she falls within the definition. Trial Attorney's Brief at 17-18. Intervenor ignores the definition of "person," also in §28.3, which is "an employee, an applicant for employment, a former employee, a labor organization or the GAO." Ms. Willis is none of these. Ms. Willis has no independent right to file a Request for Attorney Fees because 4 C.F.R. §28.89 provides that "the petitioner, if he or she is the prevailing party, may submit a request for the award of reasonable attorney's fees and costs." Absent a right to file her own separate petition, the Administrative Judge permitted Ms. Willis to enter the case as a permissive Intervenor pursuant to 4 C.F.R. §28.27, which allows intervenors to participate "only on the issues affecting them."

Permission for intervenors to participate on issues affecting them must be construed consistent with the general rule of litigation that intervenors may only argue issues that have been raised by

⁵ *See* n.3, *supra*.

the principal parties. *See Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) (an intervening party is admitted to the proceeding as it stands, and in respect to the pending issues, but is not permitted to enlarge those issues). Accordingly, the Administrative Judge acted correctly when he rejected Petitioner's attempts to expand the claims beyond those sought by Petitioner in this case.⁶ Intervenor contends that because the AJ did not consider her claims for time spent in trial, she is precluded from recovering her fees. This is not so and, as the AJ stated, the provision of 4 C.F.R. §28.89 is not intended to serve as a fee collection procedure. Decision on Motion to Intervene at 6.

Intervenor argues that the reduction by reason of the limited success was arbitrary, capricious and unreasonable because "the litigation involving the (b)(8), (b)(9) and (b)(12) causes and claims were interdependent." Trial Attorney's Brief at 26. She contends that the issues are "so co-mingled that they cannot be separated for purposes of isolating out and designating billing hours to a particular prohibited personnel practice allegation." *Id.* at 27. In his very detailed analysis, the Administrative Judge acknowledged the difficulty, noting that while the underlying theories of the successful and meritless claims were distinct, all the claims had some facts and witnesses in common. AFD at 34. Nevertheless, in accordance with the direction of the Supreme Court in *Hensley*, 461 U.S. 424, and *Texas State Teacher Ass'n*, 489 U.S. 782, the Administrative Judge appropriately and painstakingly exercised the discretion called for in those decisions. In reaching his conclusion, the Judge described the litigation in some detail and concluded that based on his review,

it seems that there should have been a point prior to trial at which it was apparent that the three claims under 5 U.S.C. §§2302(b)(8), 2302(b)(9) and 2302(b)(10) could not be sustained. Yet, a significant portion of the witness and document work immediately prior to trial went towards the preparation of these claims for presentation at trial.... This time and effort was unavailing and its futility should have been apparent to Ms. Willis well before trial.

AFD at 33.

The Board finds no evidence of abuse of discretion by the Administrative Judge in making the reductions to which the Intervenor and Petitioner object.

Intervenor's claim of "new" evidence is clearly specious. The "new" evidence is a letter dated October 1, 2001 signed by both Intervenor and Petitioner that purports to show a fee agreement requiring Petitioner to pay Intervenor at a rate of \$250 per hour. Intervenor admits that she did not submit the letter previously because she was arguing for rates under the *Laffey* Matrix and decided the letter "had no bearing on the hourly rate issue." Trial Attorney's Brief at 22-23. On the other hand, she also contends that she had archived her files and was unable to locate the

⁶ It should be noted that the AJ did take into account that Petitioner had not submitted a request for all of her prior attorney's time when he determined to reduce the award by 20%: "bearing in mind that a percentage reduction of fees is a discretionary action to be taken in the interest of justice, I have also considered the fact that Petitioner substantially reduced the amount of her own Fee Request by not seeking reimbursement for the hours expended at the evidentiary hearing." AFD at 39.

letter earlier when she looked in her files. Intervenor was aware of the letter, however, and did not advise the Administrative Judge of its existence or significance. In any case, the letter is not new and failure to produce it because of the difficulty involved in finding it is not reflective of due diligence. The Board refuses, therefore, to consider Intervenor's untimely submission.

In his Initial Decision on the Fee Request, the Administrative Judge noted the lack of current PAB precedent on attorney's fee issues and stated that "[t]he instant case presents an opportunity to summarize the current state of the law and to explicate the standards that should guide the PAB in deciding the matter at hand, as well as future cases." AFD at 7-8. The Board finds that the Administrative Judge has succeeded in meeting his stated goal and it hereby AFFIRMS and ADOPTS his decision. The Appeals by Petitioner and Intervenor are DENIED.

SO ORDERED.