Sandra P. Davis v. U.S. General Accounting Office

Docket No. 00-05; Docket No. 00-08

Date of Decision: June 15, 2004

Cite as: S. Davis v. GAO (6/15/04)

Before: Michael Wolf, Administrative Judge

Attorney's Fees

Costs

Standards

Prevailing Party

Interest of Justice

Reasonableness

DECISION ON PETITIONER'S REQUEST FOR ATTORNEY'S FEES AND COSTS

This Request for Attorney's Fees and Costs (Fee Request) finds it genesis in three Petitions for Review filed with the Personnel Appeals Board (PAB or the Board) in 2000. Petitioner charged the General Accounting Office (the Agency or GAO) with four separate violations of 5 U.S.C. §2302(b). Specifically, she alleged that the Agency: (1) punished her for whistleblowing activities; (2) retaliated against her for engaging in protected activities and for assisting another employee who had filed an EEO complaint; (3) lowered her performance appraisal on the basis of conduct that did not affect performance; and (4) lowered her performance appraisal in violation of the procedures set forth in the Agency's published orders.[1] Petitioner requested a variety of equitable remedies, as well as attorney's fees and costs and "any other relief consistent with law."[2]

After protracted pretrial discovery, a trial was conducted between October 29 and November 7, 2001. The Initial Decision, rejecting all of Petitioner's claims except for the last one, was issued

[1] Petitioner had also alleged retaliation based on "group hate," but no evidence was ever adduced regarding this allegation and it was not the subject of any litigation at or before trial.

[2] Petitioner prepared a hearing exhibit purporting to justify a request for $300,000 in compensatory damages, and costs and fees totaling an additional $112,798.79. *See* Hearing Transcript (Tr.) at 755. That document, Petitioner's proposed Exhibit 62A, was not admitted into evidence but appears in the pleadings on attorney's fees. *See* Motion to Intervene (attachment).

on July 26, 2002; Stephen Backhus, then Director of the Veterans' Affairs and Military Health Care issue area, was found to have improperly lowered Petitioner's 1999 performance appraisal, in violation of the standards published in GAO Order 2430.1. The Decision therefore concluded that the Agency had violated 5 U.S.C. §2302(b)(12), 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.

Petitioner has now requested reimbursement of some, but not all, of her attorney's fees and costs. After the trial, Petitioner terminated the services of her prior counsel of record (Janice F. Willis, Esq.) and retained the services of new counsel (Nora V. Kelly, Esq.). Ms. Kelly has filed the Fee Request on behalf of Petitioner for all fees incurred during the appellate stage of the litigation, but only for that portion of Ms. Willis' fees that related to work prior to the actual evidentiary hearing. Petitioner has not requested payment of fees for Ms. Willis' work during or after the trial. Ms. Willis then moved to intervene.[3] That Motion was granted, albeit with the proviso that she could not seek payment of fees beyond those already requested by Petitioner. *See* Decision on Motion to Intervene at 6 (Nov. 17, 2003). Ms. Willis disregarded the instructions and submitted a brief that supported Petitioner's original request for fees, as well as an independent request for payment of fees for her work during and after the trial.

In her Fee Request, Petitioner seeks an award of $128,867.17 for fees and costs incurred during the pretrial and appeal phases of this proceeding.[4] She argues that she is entitled to this amount because she was a "prevailing" party at trial and on appeal. That some of her claims were rejected should not, she asserts, change this conclusion:

> In the context of the civil rights statutes, 42 U.S.C. §1988, the Supreme Court has held that the prevailing party standard requires only that a party succeed on any issue in the litigation which achieves some of the benefit that he or she sought in bringing the action sufficient to change the legal relationship between the parties. [Fee Request at 2.]

Petitioner argues that this same standard applies to fee requests under 5 U.S.C. §7701(g)(1), citing *Ray v. Department of Health & Human Servs.*, 64 MSPR 100 (1994).

Petitioner next contends that, once an entitlement to attorney's fees has been established, she should be reimbursed for those fees at the hourly rate set by the so-called "*Laffey* Matrix," which is a spreadsheet of fees developed by the district court 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). The Civil Division of the United States Attorney's Office has continued to update the Matrix for succeeding years, indicating the hourly rates

[3] Both the Agency and Petitioner opposed the Motion to Intervene.

[4] Ms. Willis' arguments in support of her request for additional fees are addressed in greater detail below. Both the Agency and Petitioner have opposed her request for the payment of additional fees.

appropriate to attorneys with varying levels of experience. The U.S. Attorney's Office uses the Matrix as a guide in cases in which a prevailing party is entitled to recover reasonable attorney's fees pursuant to a fee-shifting statute. Petitioner states that "[a]ccording to the Matrix, the uniform rate for fee awards in the District of Columbia is $335.00 for attorneys with the experience of Petitioner's attorneys." Fee Request at 3. This hourly rate is based on the Matrix's suggested rate in 2003-2004 for attorneys with 11-19 years of experience. By multiplying this rate times the total hours set forth in her counsels' bills, she arrives at a total fee request of $125,658.50; the costs requested total an additional $3,208.67.

The Agency opposes the Fee Request on a variety of grounds, including that the hourly rate is "excessive and unreasonable," the number of hours expended was "excessive and unreasonable," the hours should be limited to the one factual issue on which Petitioner prevailed, and the amount of fees requested is excessive in light of the limited results obtained by Petitioner. The Agency additionally challenges the accuracy of Petitioner's calculations and also objects to the request for reimbursement of expenses because they are "taxable costs" and thus noncompensable under the governing statute.

GAO argues that the PAB standard for awarding fees under 5 U.S.C. §7701(g)(1) should follow *Allen v. U.S. Postal Serv.*, 2 MSPR 420 (1980):

> First, the party requesting the fees must be the "prevailing party." Second, the award of fees must be "warranted in the interests of justice." Third, the fee[s] must be reasonable. [Respondent's Opposition to Petitioner's Request (Resp. Opp.) at 4.]

The Agency concedes that Petitioner prevailed to the extent that she was granted relief on one of her claims. GAO additionally concedes that fees are ordinarily warranted in the interest of justice whenever the employing agency commits a prohibited personnel practice. Because I found that Stephen Backhus engaged in a prohibited personnel practice when he violated GAO Order 2430.1, the Agency does not dispute that an award of fees would satisfy the "interest of justice" standard. The Agency's opposition to the Fee Request is therefore premised on the contention that the amount of fees requested is not reasonable because the hourly rate and the number of hours allegedly expended at the trial level are both excessive. [5]

In determining a "reasonable" fee amount, the Agency urges that the *Laffey* Matrix be rejected. It contends that the Matrix arose out of litigation under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e, *et seq*.), and the Equal Pay Act of 1963 (29 U.S.C. §206) and is used by the U.S. Attorney's Office for the District of Columbia only in the settlement of cases. The Agency contends that the Matrix is not a proper basis for awarding fees under 5 U.S.C. §7701(g)(1). Instead, it urges me to follow the analysis of the Merit Systems Protection Board (MSPB) in *Kling v. Department of Justice*, 2 MSPR 464 (1980), which concluded that a reasonable fee award is presumed to be the product of a reasonable hourly rate multiplied by the number of hours reasonably expended. This "lodestar" amount may be adjusted up or down

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[5] The Agency does not contest the reasonableness of the hours expended at the appellate stage of this proceeding.

depending on a variety of factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

GAO notes that the hourly rates actually billed by Petitioner's trial counsel (Ms. Willis) and appellate counsel (Ms. Kelly) were $150 and $190, respectively. It proposes that any fees awarded should be based on these rates alone.[6] It further notes that, because of the very limited success obtained by Petitioner in this litigation, the amount of fees derived from the lodestar should be reduced by 80%. By this calculation, the Agency suggests that Petitioner should be awarded no more than $14,116.50 in fees for both attorneys. Additionally, the Agency argues that the expenses claimed by Petitioner are recognized by statute as "taxable costs" and, therefore, must be denied in their entirety.

I. STANDARDS FOR DETERMINING THE REASONABLENESS OF AN ATTORNEY'S FEE REQUEST

Neither Petitioner nor the Agency has accurately stated the prevailing standards for deciding requests for reimbursement of attorney's fees. The PAB is authorized to award attorney's fees to a prevailing petitioner "consistent with the standards set forth at 5 U.S.C. §7701(g)." 4 C.F.R. §28.89. In applying these standards, the PAB is guided, but not bound, by decisions of the MSPB interpreting that same statute. The PAB is, however, bound by the decisions of the Supreme Court and the Court of Appeals for the Federal Circuit. Neither party has undertaken an analysis of the most recent Supreme Court and Federal Circuit decisions addressing fee-shifting statutes in general and Section 7701(g)(1) in particular. As a result, their suggestions as to how the instant Fee Request should be analyzed are outdated and misguided.

Section 7701(g) has two parts. Subsection 7701(g)(2) provides that, if an employee or applicant is a prevailing party on a claim of discrimination, then the standards for obtaining attorney's fees are dictated by the Civil Rights Act of 1964. This statute states that a court "in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee…." 42 U.S.C. §2000e-5(k). Subsection 7701(g)(1) applies to all other cases under the Civil Service Reform Act in which an employee or applicant prevails; like Title VII, this statute also permits an award of reasonable attorney's fees to a prevailing employee or applicant, but only if the party can show that doing so is "warranted in the interest of justice."

In the instant case, Petitioner did not claim discrimination. Accordingly, 5 U.S.C. §7701(g)(1) is the relevant provision for determining the propriety of awarding attorney's fees. It requires Petitioner to prove that:

1. Petitioner was the "prevailing party;"
2. an award of fees is "warranted in the interest of justice;" and
3. the fees requested are "reasonable."

5 U.S.C. §7701(g)(1); *Ramey v. GAO*, PAB Docket No. 01-703-17-81 (Mar. 9, 1982);[7] *Allen v.*

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[6] The Agency accepts Ms. Willis' rate of $75 per hour for travel time.

[7] The decisions of the PAB are available online at www.pab.gao.gov.

U.S. Postal Serv., 2 MSPR 420 (1980). Petitioner's success in the litigation is not alone sufficient to justify an award of fees. *Id.* at 428. All three of the above criteria must be met.[8]

Twenty years ago the Supreme Court cautioned that a "request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). In that same case, Justice Brennan prophetically described appellate litigation over fee disputes to be a "Frankenstein's monster [that] meanders its well-intentioned way through the legal landscape leaving waste and confusion…." *Id.* at 455 (concurring in part and dissenting in part). The large volume of judicial and administrative decisions on fee requests during the past 20 years suggests that the Court's cautionary advice has gone largely unheeded. The standards for determining when and how to award fees and the amount of such fees have evolved over two decades in something other than a linear fashion; decisions by the courts and administrative agencies have been neither clear nor consistent. As one exasperated commentator has noted, the MSPB's rulings on the subject of what constitutes a reasonable hourly fee rate "multiply and bewilder." P. Broida, <u>A Guide to MSPB Law & Practice</u> (2003) at 2943. Even the Supreme Court has had difficulty promulgating consistent guidelines. *Compare Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1987) *with City of Burlington v. Dague*, 505 U.S. 557 (1992).

The PAB has addressed attorney's fee issues on several occasions, but it has not done so recently. *See Saunders v. GAO*, PAB No. 104-AF-17-88 (May 18, 1989) (*en banc*). The 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.

A. <u>Who Is a Prevailing Party</u>?

A plaintiff litigating under federal law is deemed to prevail for purposes of a fee-shifting statute when, pursuant to a court's judgment or court-approved settlement, the party obtains

> actual relief on the merits of his claim [that] materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Farrar v. Hobby, 506 U.S. 103, 111-12 (1992) (although plaintiff obtained only nominal damages, he was still a prevailing party); *see also Buckhannon Board & Care Home v. West Virginia*, 532 U.S. 598, 604-05 (2001). A plaintiff's status as a prevailing party is not undermined by the failure to obtain all of the relief requested or even the failure to prevail on the "central issue" in the litigation. *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 789-90 (1989); *see Farrar v. Hobby*, 506 U.S. at 114 (holding that "the prevailing party inquiry does not turn on the magnitude of the relief obtained").

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[8] In some cases, disputes have arisen as to whether fees were actually incurred. The MSPB has noted that a petitioner must actually incur attorney's fees in order to prevail in a request for recovery of such fees. *See, e.g.*, *Social Sec. Admin. v. Price*, 94 MSPR 337, 341 (2003). Because there is no dispute in this case that Petitioner incurred fees during the trial and appellate phases of this litigation, it is unnecessary to address that issue here.

The fact that a party obtained only limited success does not become irrelevant, however. While such a party may still claim fees under a fee-shifting statute, a court or administrative agency may consider the party's relative success as a factor in deciding whether to reduce the amount of a fee award in the interest of justice or to deny fees altogether:

> Although the "technical" nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under §1988. Once civil rights litigation materially alters the legal relationship between the parties, "the degree of the plaintiff's overall success goes to the reasonableness" of a fee award…. Indeed, "the most critical factor" in determining the reasonableness of a fee award "is the degree of success obtained."
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> In some circumstances, even a plaintiff who formally "prevails" under §1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party.

Farrar, 506 U.S. at 114-15 (citations omitted).

The term "prevailing party" has the same meaning and is defined by the same standards under 5 U.S.C. §7701(g)(1) as under 42 U.S.C. §1988, the statute addressed in *Farrar* and *Garland*.[9] *See Sacco v. Department of Justice*, 317 F.3d 1384, 1387 (Fed. Cir. 2003); *Sterner v. Department of the Army*, 711 F.2d 1563, 1566 (Fed. Cir. 1983). As discussed below, this means that the relative success of an employee in litigation before the PAB must be considered when determining whether the amount of fees requested is reasonable or "in the interest of justice."

In the instant case, Petitioner's failure to obtain most of the relief that she requested does not alter the fact that, under the definition in *Farrar* and *Buckhannon*, she prevailed. By 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. Citing *Buckhannon*, the Agency has accordingly conceded that Petitioner can lay claim to the status of a prevailing party.

B. <u>When Are Attorney's Fees Warranted in the Interest of Justice</u>?

The MSPB, with the approval of the Federal Circuit, has proposed that any one of the following five criteria should be 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.

[9] 42 U.S.C. §1988 is the Civil Rights Attorney's Fees Awards Act of 1976. That statute essentially extended the attorney's fee standards from 42 U.S.C. §2000e-5(k), Section 706(k) of Title VII, to other types of federal civil rights litigation.

4. The agency committed a "gross procedural error."
5. The agency knew or should have known that it would not prevail.

Allen v. Postal Serv., 2 MSPR at 434-35; *see Sterner,* 711 F.2d at 1569-70. While not necessarily exclusive tests under Section 7701(g)(1), these criteria have proved workable over the years and have been adopted by the PAB. *Ramey v. GAO,* PAB No. 01-703-17-81 at 1 (Mar. 9, 1982).

The instant case poses little difficulty at the outset in meeting the interest of justice standard, since the PAB has concluded that the Agency engaged in a prohibited personnel practice under 5 U.S.C. §2301(b)(12). The Agency again concedes that this conclusion is sufficient to satisfy Petitioner's burden under this part of the statute.

What is less clear and what is not conceded by the Agency is whether the interest of justice standard requires a reduction in fees to reflect Petitioner's limited success on her claims. As previously explained, the Supreme Court has held that, even under the federal civil rights statutes, which do not explicitly include a requirement that fee awards be in the interest of justice, a prevailing plaintiff is not automatically entitled to fees. Similarly, under 5 U.S.C. §7701(g)(1), limited success by an employee may be considered as a basis for reducing the amount of fees awarded to a prevailing party. *See, e.g., Sterner,* 711 F.2d at 1567-68; *Garcia v. U.S. Postal Serv.*, 83 MSPR 458, 462 (1999); *Smit v. Department of Treasury*, 61 MSPR 612, 619 (1994).

In assessing a party's degree of success, money is not the only measure of victory. In addition to damage awards, the courts and administrative agencies may consider the significance of the legal principle vindicated and whether a public purpose was served in pursuing the litigation. *See Farrar v. Hobby*, 506 U.S. at 121-22 (O'Connor, J., concurring). In federal sector employment cases, an upgrade in an employee's performance appraisal may be sufficient relief to satisfy the interest of justice standard. *See Smit*, 61 MSPR at 618. At the same time, if a change in a performance appraisal was only a small part of the relief requested, it may be appropriate to lower the amount of attorney's fees awarded. As the Supreme Court has concluded:

> [T]he district courts should exercise their equitable discretion in such cases [of partial relief] to arrive at a reasonable fee award, either by attempting to identify specific hours that should be eliminated or by simply reducing the award to account for the limited success of the plaintiff.

Texas State Teachers Ass'n v. Garland, 489 U.S. at 789-90.

This same discretion should be exercised in cases before the PAB, including the instant case. As explained below, Petitioner's limited success in this case, coupled with other factors, warrants a reduction in her Fee Request, although not as steep a reduction as the Agency proposes.

C. How Should "Reasonable" Fees Be Quantified?

A presumptively reasonable fee under 5 U.S.C. §7701(g)(1) is a reasonable hourly rate multiplied by the number of hours reasonably expended on the case. *Ramey v. GAO*, PAB No. 40-209-107-83 at 6 (Mar. 2, 1988); *Chen v. GAO*, PAB No. 17-201-17-82 at 1 (Jul. 27, 1983); *see also Foley v. U.S. Postal Serv.*, 59 MSPR 413, 423 (1993). This definition of the so-called "lodestar" amount is one of the few aspects of attorney's fee standards that have remained unchanged over the past several decades. Defining a reasonable hourly rate and deciding upon a standard for calculating reasonable hours have, however, proved to be moving targets to both the courts and the MSPB. A review of that precedent is useful.

1. Reasonable Hourly Rate

Petitioner requests that the hourly rates set forth in the *Laffey* Matrix be applied. As a result, she contends *Laffey* would entitle both trial counsel and appellate counsel to receive $335 per hour. The Agency contends that the maximum appropriate rate for these attorneys is the hourly rate they actually charged Petitioner: $150 for Ms. Willis and $190 for Ms. Kelly. The Agency dismisses the *Laffey* Matrix as a construct derived from a civil rights case, with no applicability to 5 U.S.C. §7701(g)(1). Neither party has accurately characterized the *Laffey* Matrix. Nor have the parties adequately addressed the current state of the law before the Federal Circuit and the MSPB.

a. Determining a Reasonable Hourly Rate—Federal Circuit and MSPB Precedent

The Federal Circuit has held that "reasonable" attorney's fees under the Back Pay Act (5 U.S.C. §5596(b)) and the Civil Service Reform Act (5 U.S.C. §7701(g)(1)) should be measured against prevailing market rates or "prevailing community rates." *See Willis v. U.S. Postal Serv.*, 245 F.3d 1333, 1337 (Fed. Cir. 2001); *Raney v. Federal Bureau of Prisons*, 222 F.3d 927, 933 (Fed. Cir. 2000); *see also* 5 C.F.R. §1201.203(a)(3) (requiring fee petitioner to present evidence of the "prevailing community rate for similar services"). This standard is consistent with Supreme Court precedent interpreting other fee-shifting statutes. *Blum v. Stenson*, 465 U.S. 886, 893-96 (1984). Moreover, the market rate applies not only to attorneys in private practice, but also to attorneys who work for unions or other non-profit organizations that do not ordinarily charge fees to clients. *Id.; Raney*, 222 F.3d at 933-38.

In determining the relevant market, the MSPB had previously concluded that the "community" should be the site of the hearing in a case. In 2000, the MSPB altered its approach to this issue and adopted a regulation providing that the relevant community is the one "in which the attorney ordinarily practices." 5 C.F.R. §1201.203(a)(3); *see* 65 Fed. Reg. 24381 (Apr. 26, 2000). This change in the defining "community" or "market" was a sound one.[10] It makes sense that an attorney's and client's expectations of a reasonable rate would be guided by the place where the attorney normally competes for clients and where the law firm's overhead expenses (e.g., rent, employee salaries) are incurred. For example, a law firm in New York City, with its high rents

[10] The PAB does not have a comparable regulation and has not issued any decisions defining the relevant market or community. I propose that the PAB follow the MSPB's regulation on this issue as a matter of policy.

and salaries, should not be penalized in its fee requirements merely because it has tried a case in a city with a much lower cost of living. To lower a fee request on this basis would unfairly restrict an employee's ability to select and retain competent counsel. Conversely, an attorney who normally practices in a comparatively less expensive market should not obtain a windfall in fees merely by litigating a case in a high-cost city such as New York or Washington, D.C.

The MSPB has further held that the fee actually charged to a client in an MSPB matter, as evidenced by a fee agreement or actual billing records, will be the presumptively appropriate market rate for that attorney. *See Lizut v. Department of the Army*, 42 MSPR 3, 7 (1989). However, the MSPB has also made clear that a party seeking fees under Section 7701(g)(1) may recover more than the rate actually charged if he/she can show that the "attorney had agreed to a lower than market rate and that the attorney had been awarded higher attorney fees in the past when representing other appellants before the Board." *Flood v. FERC*, 30 MSPR 546, 547 n.2 (1986). If the attorney can show that he/she normally charges higher rates and that the lower rate charged in a particular case was not based on "marketplace considerations" (e.g., the client was unable to pay the attorney's regular rate), then the MSPB will award the market rate rather than the actual rate charged. *See, e.g., Shirley v. OPM*, 36 MSPR 179, 183 (1988).

Proof of prevailing market rates can be established by a variety of evidentiary avenues. Foremost are the attorney's own fee agreement and billing records. The attorney may also submit affidavits attesting to the "going rate" for attorneys who represent clients in similar cases in the relevant community or may cite fee awards by the courts or the MSPB in similar cases in the same community. *See Willis v. Postal Serv.*, 245 F.3d at 1341.

b. Determining a Reasonable Hourly Rate—the D.C. Circuit Precedent

The *Laffey* case did indeed involve Title VII and the Equal Pay Act, as GAO has pointed out. To simplify the award of fees in civil rights cases, the U.S. Attorney's Office for the District of Columbia devised a Matrix that correlated an attorney's experience level with a commensurate hourly rate. While various factors could affect the application of the Matrix, the U.S. Attorney's Office has used it for settlement purposes. However, the Agency is incorrect in suggesting that the Matrix is limited to civil rights or EEO actions; it similarly misstates the applicability of *Laffey* when it characterizes the Matrix as being used only in settlements.

The PAB has already cited the District Court in *Laffey* with approval. *See Ramey v. GAO*, PAB No. 40-209-107-83 at 4 (Mar. 2, 1988), *aff'd en banc,* Oct. 17, 1988. Although the PAB has not yet addressed whether the hourly rates in the *Laffey* Matrix are presumptively reasonable, nothing in Board precedent would suggest that the District Court's analysis is inapposite.

Moreover, the District of Columbia Circuit has affirmed fee awards based on the Matrix. *See, e.g.*, *Covington v. District of Columbia*, 57 F.3d 1101 (D.C. Cir. 1995). In other words, the *Laffey* Matrix is not merely a guideline used by the U.S. Attorney's Office in settling cases. It has been embraced by the courts as a usable measure of reasonable hourly rates in appropriate cases.

Nor is the approval of the *Laffey* Matrix limited to civil rights or EEO litigation. Its use has been extended to other fee-shifting statutes. *See, e.g.*, *Trustees of Hotel & Rest. Emp. Local 25 v. JPR, Inc.,* 136 F.3d 794 (D.C. Cir. 1998) (applying market rate analysis to prevailing party in ERISA litigation); *Trustees of Hotel & Rest. Emp. Local 25 v. Madison Hotel*, 43 F. Supp. 2d 8 (D.D.C. 1999) (applying *Laffey* Matrix to ERISA litigation). This precedent in the D.C. Circuit undermines GAO's effort to circumscribe the applicability of the *Laffey* Matrix.

The utility of applying the Matrix in the instant case, however, is put into question by the absence of any precedent in either the Federal Circuit or the MSPB adopting or approving the *Laffey* approach. At the same time, neither the Federal Circuit nor the MSPB has rejected *Laffey*. The PAB therefore writes on a relatively clean slate when it addresses the propriety of applying the *Laffey* approach to ascertaining reasonable hourly rates for attorneys. A close analysis of *Laffey* and its progeny is therefore appropriate to determine whether the Matrix should be adopted in the fashion suggested by Petitioner.

Petitioner has cited the *Laffey* Matrix reflexively, without any regard for the principles supporting its adoption. She merely cites the Matrix as if it were a foregone conclusion that it is binding law before the PAB or in the Federal Circuit. It is not. She also ignores the subsequent precedent in the D.C. Circuit that has defined and refined those principles. That precedent is instructive.

Consistent with Supreme Court and circuit court precedent, the District Court in *Laffey* concluded that a reasonable fee under fee-shifting statutes implicitly authorizes the payment of prevailing "market" rates for work in similar cases. 572 F.Supp. at 374. The Circuit Court affirmed this part of the lower court's *Laffey* decision. 746 F.2d at 30; *see also Blum v. Stenson*, 465 U.S. at 895; *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988) (*en banc*) (*SOCM*). The District Court in *Laffey* noted that "the relevant legal market in this action is <u>complex</u> employment discrimination litigation and that this market is subject to the same hourly rates that prevail in other <u>complex</u> federal litigation." 572 F. Supp. at 374 (emphasis added). The court recognized that an attorney's actual billing rate is the normal starting point for determining a reasonable rate, but that, in appropriate circumstances, the court may award a higher hourly rate, so that the fee award matches prevailing market rates for similar litigation.

In *SOCM*, the court reaffirmed use of the *Laffey* Matrix, but concluded that it should not be limited to large law firms or non-profit organizations: the "prevailing market rate method heretofore used in awarding fees to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals." 857 F.2d at 1524. The court recognized that while some attorneys represent clients for reasons of public interest, rather than for economic gain, they should nevertheless be paid at the market rate if they prevail. In other words, if a law firm could obtain higher rates for its work, but chooses to take on a particular client for public spirited reasons, that firm should not be penalized when it seeks an award of fees. *Id.*

In *Covington v. District of Columbia*, the D.C. Circuit further clarified the conditions under which *Laffey* should be applied. That case (actually several consolidated cases) involved claims that prison inmates were denied constitutional rights during incarceration. The court approved the application of the *Laffey* Matrix, but only as one of several factors to be considered in deciding upon an appropriate market rate. It held that fee applicants must present the following evidence to show the reasonableness of an attorney's hourly rate:

1. the attorney's billing practices;
2. the attorney's skill, experience, and reputation; and
3. the prevailing market rates in the relevant community.

57 F.3d at 1107. Satisfying this three-pronged test is subject to the same kinds of proof that the Federal Circuit and MSPB have demanded, as discussed above.

As to the first prong, the court continued the rule that a law firm's usual hourly rates remain the presumptive standard for determining that firm's market rates under a fee-shifting statute. The court observed that a fee-shifting statute is not an excuse to provide a windfall to attorneys "who charge below-market rates because they cannot command anything more." 57 F.3d at 1108. However, a firm may establish an entitlement to a higher rate if the actual rate charged to a particular client does not fairly reflect the value of its services. If a law firm is claiming in a particular case that the actual fees charged were below the firm's normal hourly charges, then the firm must "offer some evidence that they charge reduced rates for public-spirited or non-economic reasons." *Id.* at 1107; *accord, Local 25 v. JPR,* 136 F.3d at 807.

Even if a firm proves that its rates in a particular case do not reflect its normal billing rates and that the rates were reduced for non-economic reasons, it still is not automatically entitled to the rates in the *Laffey* Matrix. The second prong of a party's burden requires evidence "to demonstrate their attorneys' experience, skill, reputation, and the complexity of the case they handled." *Covington,* 57 F.3d at 1108. The court emphasized that the relevant market for cases under 42 U.S.C. §1988 was "complex federal litigation." *Id.* at 1111; *see also Blum v. Stenson*, 465 U.S. at 893 ("'[i]t is intended that the amount of fees awarded under [§1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases'") (quoting S.Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976)).

Finally, if a firm satisfies the first two prongs of its evidentiary burden, it may present data regarding prevailing market rates that include, but are not necessarily limited to, the updated *Laffey* Matrix. Such additional data may include attorney's fee awards in other similar cases involving attorneys at a similar skill level; it may also include affidavits from attorneys in other law firms that handle similarly complex cases. *Covington,* 57 F.3d at 1108-09.

In most respects, the *Covington* approach to ascertaining prevailing market rates is no different from the analysis adopted by the Federal Circuit and the MSPB. The one significant departure comes at the end of the analysis. If an attorney representing a client in a complex case charged less than his/her normal rate and if the reduction was for non-economic reasons, then the courts in the D.C. Circuit may look to the updated *Laffey* Matrix to determine an appropriate market rate. The Matrix provides a simplified methodology for ascertaining market rates, thereby avoiding the ever-burgeoning litigation over this issue. However, even in the D.C. Circuit, the Matrix is not viewed in isolation and must be accompanied by other appropriate evidence.

c. <u>Determining a Reasonable Hourly Rate—a Proposed PAB Analysis</u>

The PAB's decisions are appealable to the Federal Circuit, and it is the law in that Circuit that must be obeyed. The D.C. Circuit's approach in *Laffey* is instructive, but not binding. On the other hand, because the Federal Circuit has not rejected *Laffey*, the propriety of using the Matrix must be decided on its own merits. I conclude that the PAB should use the *Laffey* Matrix in appropriate cases where it is needed to reach an equitable determination of a reasonable market rate. If customary billing practices are not available, for example when a non-profit organization represents an employee, the *Laffey* Matrix can provide evidence of a reasonable market rate. However, there are certain limitations on its use. In particular, it is applicable only to "complex" cases handled by attorneys who practice in Washington, D.C.; the Matrix does not purport to measure rates in any other locale or for routine litigation. The Matrix was originally based on the rates that anti-trust (or similar) litigators would charge and is most appropriately applied to cases of comparable complexity (e.g., civil rights class actions, ERISA litigation).

With these conditions in mind, an appropriate analysis in PAB litigation should proceed as follows:

1. The prevailing employee should submit any fee agreement and billing records in the case. The attorney's actual billing rate in the case will be presumed to be reflective of the market rate to which the attorney is entitled. The Board should award fees at that rate, unless the following factors are satisfied.[11]

2. If the prevailing employee claims that the actual rate charged was less than the attorney's normal rate and that the lower rate was not based on marketplace considerations, the attorney must establish that he/she charged a lower hourly rate for such reasons as public-spiritedness or the inability of the client to pay the normal rates.

3. If the prevailing employee is requesting a rate higher than the one actually charged, then the attorney must offer evidence of the market rate appropriate to that attorney's skill and experience level. This evidence would include the attorney's normal billing rates, the billing rates of other attorneys in similar cases (e.g., through affidavits) and fee awards by the MSPB or other agencies in similar cases. The prevailing employee's attorney must also submit evidence of his/her experience and skill level and must show how that experience and skill compares to that of other attorneys in the community who litigate the same kinds of cases. This type of evidence of market rates, experience levels, etc. would also be submitted if the attorney represented the employee on a *pro bono* basis or if the employee was represented by a union, public interest organization, or some other non-profit organization that does not ordinarily bill individual parties in litigation.

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[11] It should be emphasized that the market-based approach to valuing fees is not an opportunity for wish fulfillment. For example, if an attorney normally charges $175 per hour, but has entered into what amounts to a bogus fee agreement providing for $300 per hour, with no expectation of having the client actually pay that amount, that agreement would not be probative evidence of the attorney's true market value.

4. If the prevailing employee proves that the case was "complex" and that the attorney charged less than prevailing market rates, the employee may offer the *Laffey* Matrix as proof of market rates for similarly complex cases. In considering the *Laffey* Matrix, the Board should treat it as one factor to be considered in deciding an appropriate hourly rate for attorneys who practice in the Washington, D.C. metropolitan area.

2. Quantifying the Number of Hours Reasonably Expended

A prevailing party seeking fee reimbursement must submit the attorney's bills showing the hours expended in the case, with an itemization of work performed. Two factors may cause the PAB to lower the number of hours. First, "[i]t does not follow that the amount of time actually expended is the amount of time reasonably expended." *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980). The PAB must review the hours claimed and determine whether any hours charged were "excessive, redundant, or otherwise unnecessary." *Hensley v. Eckerhart*, 461 U.S. at 434. Second, the Board may reduce the number of hours to be reimbursed if it determines that an employee obtained relief that was far less than that requested. *Id.* at 436 (reduction in fees is appropriate for this reason, "even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith"); *Ramey v. GAO*, PAB No. 40-209-107-83 at 7 (Mar. 2, 1988); *Garcia*, 83 MSPR at 462.

The MSPB decision in *Smit v. Department of Treasury* is instructive with respect to this second basis for reducing the number of attorney hours. In that case, the employee did not prevail in his claim that the agency had engaged in reprisals against him for whistleblowing and that his suspension for five days was illegal; the employee nevertheless prevailed in his claim that his performance appraisal had been improperly lowered. The MSPB concluded that the employee's limited success justified a reduction in the fees that would be reimbursed:

> A fee can be reduced either by identifying the hours associated with the unsuccessful related claims or by "simply reducing the award to account for the limited success." We cannot identify precisely the hours associated with the related unsuccessful claims, at least in part because the appellant's documentation is not specific enough. Further, if the reduction must be made on a general basis rather than by specific hours, the administrative judge is better able to make such a determination because she is more intimately familiar with the adjudication of this appeal. Therefore, we remand this attorney fees request to the administrative judge for a further determination of the hours spent on the successful claim, after providing the parties an opportunity to supplement the record. If, on remand, the administrative judge is unable to identify a precise number of hours to disallow for the unsuccessful claims, she should reduce the award by an otherwise appropriate amount. [61 MSPR at 619-20 (citations omitted).]

If the number of hours is to be reduced, the reductions may not be arbitrary or unreasoned; the basis for any reduction must be clearly articulated. *Crumbaker v. MSPB*, 781 F.2d 191, 195

(Fed. Cir. 1986); *Rose v. Department of the Navy*, 47 MSPR 5, 14 (1991); *Fagan v. Department of the Navy*, 29 MSPR 64, 65 (1985). However, as indicated in *Smit*, the Board may delete hours specifically attributable to losing claims or it may make a general reduction in the number of hours to account for the employee's relatively limited success. *Cf. Hensley v. Eckerhart*, 461 U.S. at 438 n.13 (district court properly reduced compensable hours by 30% because of attorney's inexperience and failure to keep contemporaneous time records).

II. ATTORNEY'S FEE REQUEST FOR MS. KELLY'S TIME

Ms. Kelly entered this case after the trial. She replaced Petitioner's previous counsel and participated only in the appellate phase and the attorney's fee phase of the litigation. She has submitted a fee agreement with Petitioner, dated March 18, 2002, which states that "[m]y hourly fee is $190.00." Fee Request Ex. A. Both Ms. Kelly and Petitioner signed the fee agreement. Nothing in that agreement states that the rate of $190 per hour is less than Ms. Kelly's normal charge for this type of litigation; nor is there such a statement in the affidavit that Ms. Kelly filed in conjunction with the Fee Request. The Fee Request asserts that Ms. Kelly expended 47.85 hours in her representation of Petitioner. Rather than requesting payment at the rate of $190 per hour, Petitioner seeks payment at $335 per hour, based on the *Laffey* Matrix.

GAO does not contest the number of hours claimed on behalf of Ms. Kelly. Nor does it contest her right to be paid at a rate of $190 per hour. The Agency does contest, however, Petitioner's right to be reimbursed for Ms. Kelly's time at the *Laffey* rate. On this point, I agree with the Agency.

Ms. Kelly has failed to satisfy any of the evidentiary criteria necessary for application of the *Laffey* Matrix. First, she made no showing that the billing rate of $190 per hour in this case was less than her normal rate for these kinds of cases. Second, she offered no evidence that she routinely practices law in Washington, D.C. (as opposed to Denver, Colorado, which is her address of record). Finally, she did not establish that her work in this appeal constituted "complex" litigation. This case did not involve a discrimination claim and was not litigated as a class action. In fact, the appeal in this case was "run of the mill," with no great complexity and no issues beyond those normally confronted in federal employee personnel cases.

For all of these reasons, I agree with the Agency and conclude that Ms. Kelly's "market rate" is $190 per hour and not the $335 per hour derived from the *Laffey* Matrix. Accordingly, Petitioner is entitled to be paid for Ms. Kelly's 46.85 hours of work represented in the Fee Request at the rate of $190 per hour, for a total of $8,901.50. An additional hour of paralegal work will be paid at $75 per hour, bringing the award for this phase of the case to $8,976.50.[12]

Petitioner also submitted a Supplemental Request for Attorney's Fees and Costs (Supp. Request) covering the time expended in the context of her request for fees, including the request itself, her reply to GAO's responsive pleading, response to former counsel's Motion to Intervene, and the

[12] Petitioner includes one hour of paralegal time apparently charged at the attorney rate. *See* Fee Request Ex. B at 2. The Agency does not challenge this entry. However, in the absence of evidence as to the paralegal billing rate here applicable, this hour is reduced to the $75 hourly rate allowed for attorney travel time.

Supplemental Request. She requested further compensation for 15.89 hours of work, at the *Laffey* Matrix rate of $335 per hour. Respondent objects to the Supplemental Request as based on an "excessive and unreasonable billable rate," and premised on work that was "tangential to the reasonable pursuit of legal fees," *i.e.,* related to the Motion to Intervene. Respondent's Opposition to Petitioner's Supplemental Request (Supp. Opp.) at 1.

Petitioner's hours expended on the Fee Request, Supplemental Request, Motion to Intervene and related responses were reasonable. In particular, as to the response to Ms. Willis' Motion to Intervene, Petitioner provided useful detail as to why certain hours were excluded from the original Fee Request. GAO itself relies on Ms. Kelly's response to the Motion in its own brief. Resp. Opp. at 13. Given the nature of the Fee Request, a response to the Motion to Intervene was necessary and proper. Contrary to the Agency's assertion, this was not a tangential filing. But, as discussed above, the appropriate rate for counsel is that represented in the fee agreement with Petitioner—$190 per hour. Therefore, the total fee awarded for this phase of the litigation is $3,019.10. Coupled with her award for the appeal phase of the case, fees awarded for Ms. Kelly's work amount to $11,920.60 plus $75.00 for one hour of paralegal time. This brings the total fee award to $11,995.60.

III. ATTORNEY'S FEE REQUEST FOR MS. WILLIS' TIME

The instant Fee Request was filed on behalf of Petitioner by Ms. Kelly. As noted above, the Fee Request seeks the recovery of fees for time spent by prior counsel (Ms. Willis) through the pretrial phase of the litigation, but does not include the time spent by Ms. Willis in the trial or in the preparation of a post-trial brief. Because Petitioner did not request reimbursement of fees for all of Ms. Willis' time, Ms. Willis moved to intervene in this phase of the case. Petitioner opposed the Motion to Intervene, in part because she claimed that Ms. Willis' invoices for the evidentiary hearing and post-hearing litigation were excessively high and unreliable:

> Ms. Davis has not requested payment for the $63,325.00 which Ms. Willis claims that Ms. Davis still owes to her. In fact, Ms. Davis expressly did not include the billing statement upon which Ms. Willis relies for this figure…. Ms. Davis did not include it for three reasons: 1) the amount of hours and fees claimed by Ms. Willis is preposterously high; on one entry, she claims she spent 40 hours in one day working on a post-trial brief; 2) Ms. Willis claimed she appeared at hearing on days on which a hearing was not even held; and 3) Ms. Willis had already billed Ms. Davis for $15,000.00 for her appearance at the trial on this matter, on an earlier invoice….
>
> Ms. Davis simply believed that her credibility would be compromised by including Ms. Willis' inflated invoice for $63,325.00 in her request for fees. [Pet. Response to Motion to Intervene at 2-3.]

Although both Petitioner and the Agency opposed the Motion to Intervene, I granted Ms. Willis'

Motion pursuant to the PAB's regulation governing intervention (4 C.F.R. §28.27). However, I also noted that Section 28.89 of the Board's regulations "identifies only a prevailing petitioner as someone authorized to seek an award of fees and costs." Order of Nov. 17, 2003 at 2-3. Under this provision, Ms. Willis, who could not be characterized as a prevailing petitioner, had no right to file an independent request for attorney's fees. She therefore was permitted to intervene, but with a significant caveat:

> Ms. Willis is cautioned, however, that her role as an intervenor is limited. She may not advance a request for payment of fees beyond the hours encompassed within Petitioner's motion. If she has a dispute with Petitioner over the payment of additional fees, that dispute must be resolved in a different forum. Ms. Willis is limited to making arguments with respect to the issues raised in Petitioner's motion and with respect to the opposition filed by the Agency. If Ms. Willis wishes to submit a position with respect to these issues, she may do so by filing a brief within 10 days from the date of this Order. [*Id.* at 6.]

Notwithstanding the instructions, Ms. Willis filed a brief arguing for the payment of fees for the work that was not included in Petitioner's Fee Request. In light of the clear disregard of the instructions in the November 17 Order, no consideration will be given to any aspect of Ms. Willis' brief that seeks payment for time not included in Petitioner's Fee Request; her brief will be considered only to the extent that it sheds light on the issues raised by Petitioner's brief. The only attorney's fees at issue in this Decision are the ones discussed and enumerated in Petitioner's Fee Request.

GAO does not contest the propriety of reimbursing Petitioner for Ms. Willis' legal work at the rate of $150 per hour, which was the hourly rate contained in all of Ms. Willis' invoices to Petitioner (except for her travel time).[13] It does contest, however, the request for reimbursement at the rate of $335 per hour, pursuant to the *Laffey* Matrix. It additionally argues that many of Ms. Willis' bills contain excessive and unreasonable hours. Finally, the Agency proposes that the total fees requested for Ms. Willis' work (after taking into account the allegedly excessive hours) should be reduced by 80% because Petitioner "prevailed only on one-fifth of her legal claims" and because Ms. Willis' work was "substandard." Resp. Opp. at 7, 14.

A. The Appropriate Hourly Rate for Ms. Willis' Work

As with Ms. Kelly, Ms. Willis assumes that she is entitled to be paid at the Matrix rate of $335 per hour, without giving any consideration to the principles underlying that rate and the more recent D.C. Circuit decisions interpreting *Laffey*. Unlike Ms. Kelly, Ms. Willis does practice in

[13] The Agency points out that Ms. Willis' own bills charged a reduced hourly rate for travel time (a total of 20 hours); that rate was $75 per hour. The Agency is amenable to paying that rate for travel time. Petitioner has not responded to GAO's argument regarding this issue. Because I agree with the Agency that Ms. Willis' travel time should be reimbursed at the same rate which she charged for those services, Petitioner's reimbursement for Ms. Willis' travel time is $1,500.

the Washington, D.C. metropolitan area. The *Laffey* Matrix is therefore potentially relevant to Ms. Willis' work. However, neither she nor Petitioner has made the sort of showing required to obtain the higher fees authorized by the Matrix:

1. Ms. Willis did not enter into a written fee agreement with Petitioner. The only evidence of her hourly rate is found in the invoices and payments showing that she was charging and being paid at the hourly rate of $150.

2. During the several years that Ms. Willis represented Petitioner, there is no evidence that the rate of $150 per hour was reduced to reflect Petitioner's inability to pay or for public-spirited reasons.[14]

3. Ms. Willis offered no evidence of her billing rates in other similar cases during her private practice of law.[15]

4. Ms. Willis did not offer evidence of the rates charged by other attorneys who regularly practice before the PAB or MSPB.

It must be reiterated that this case was not "complex," which is the basis for the *Laffey* Matrix fees. The issues raised by Ms. Willis, both the winning and losing arguments, are routinely litigated before the PAB and MSPB. Those issues, no matter how important to Petitioner, were relatively common to any experienced practitioner of federal employment law. In 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.

Because the Agency has not opposed payment of $150 per hour for Ms. Willis' work, there is no need to address whether that rate is appropriate. I conclude that the market rate for Ms. Willis was $150 per hour for all hours reasonably expended. The particulars of those hours are addressed below.

B. <u>The Hours Reasonably Expended by Ms. Willis</u>

The Agency concedes that "judges are 'not required to evaluate every billable hour in a voluminous record'." Resp. Opp. at 13. The Agency, however, "posits that the sheer volume of billable hours improperly claimed by Ms. Willis in this case calls into question many of the fees related to Ms. Willis' representation." *Id.* I agree with the Agency that it is not my

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[14] In her Request for Attorney Fees (filed Nov. 26, 2003), Ms. Willis stated that she "billed [Petitioner] at the discounted rate of $150.00 per hour because Petitioner could not afford to pay the prevailing rate due to the anticipated protracted nature of the litigation." Request at 3-4. This representation, however, is not sufficient because it is not supported by any documentary evidence (e.g., fee agreement or correspondence) or, most significantly, by Petitioner herself. This belated representation appears to have been devised solely to suggest compliance with *Laffey, Covington,* etc.

[15] Ms. Willis had been employed for many years as a government attorney. She had entered private practice only shortly before the filing of this case.

responsibility to roam at will over attorney invoices and select any excesses that catch my fancy. Rather, I will limit myself to those billing particulars that the Agency has challenged.

GAO has objected to various billing entries with a narrative that explains precisely why and how those entries should be non-recoverable. In addition, the Agency has reviewed all of the invoices and made hand-written coded objections next to various fee entries. The coded objections are E (excessive), U (unnecessary), V (vague), and D (duplicative). Many of these objections are not accompanied by argument or narrative; only the code is provided. To this extent, coded objections that are not explained or that are not obvious on their face will not be considered. For example, some of the objections based on vagueness are self-explanatory and can be addressed. As to other coded objections, however, the absence of explanatory argument makes it impossible to address the merits. For example, if the Agency stated that a particular job took an excessive number of hours, it should have explained the basis for the belief (e.g., by pointing out the length of a particular pleading) and how many hours would be appropriate; for the most part, GAO did not undertake such an analysis. To the extent the Agency has not done so, this Decision will not address the objection nor will this Decision supply argument that the Agency has declined to provide.[16]

1. <u>Duplicate Charges on June 23, July 9, July 18, July 19, July 25 and July 26, 2000</u>. The Agency noted that identical work entries for these dates are contained in both Invoice #91 and Invoice #98, resulting in that work being counted twice. Petitioner has not offered any explanation to refute this contention. These duplicate entries are therefore eliminated, resulting in a reduction of 10.5 hours in Ms. Willis' total invoice.

2. <u>Unnecesary Charge on November 29, 2000</u>. GAO objects to the charge for three hours on November 29, 2000 for drafting Petitioner's Third Set of Interrogatories and Request for Production of Documents, because it merely "'reformulated the previous inquiries from the Second Set of Interrogatories'." Resp. Opp. at 15 (quoting Order of Aug. 20, 2001). As pointed out in the Order of August 20, 2001, the reformulation of the Second Set of Interrogatories was necessitated by their substantial defects (e.g., vague, overbroad and improperly directed to individual employees). The time spent by Ms. Willis in correcting her own defective pleading should not be chargeable to the Agency. Accordingly, the three hours spent in the drafting of the Third Set of Interrogatories are disallowed.

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[16] The Agency opines that it does not have the burden of showing that "claimed expenditures were unreasonable. Rather, it is [P]etitioner's burden to demonstrate the reasonableness of all of the fees upon which her fee request is based. *Hensley [v. Eckerhart]*, 461 U.S. at 433." Resp. Opp. at 18. *Hensley* does not, in fact, make this statement. The Supreme Court stated at page 433 that "[t]he party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly." Once a fee petitioner has submitted documentation (such as the invoices in this case), the burden shifts to the opponent to explain why certain billings are unreasonable. The Agency cannot simply object that a particular bill entry is unreasonable and then fall silent as to why it is unreasonable. *See Crumbaker v. MSPB*, 781 F.2d 191, 195 (Fed. Cir. 1986) ("Nor is there any indication that the government offered any evidence or reasoned analysis in support of its contention that the number of hours claimed was excessive…."); *see also Allen v. Postal Serv.*, 2 MSPR at 436.

3. Unnecessary Charge on December 6, 2000. The Agency has argued as follows with respect to this charge:

> Ms. Willis claimed three hours, on December 6, 2000, for "Preparation of Petitioner's Motion to Reconsider the Time for Response and For Protective Order." Petitioner's motion consisted of a challenge to the AJ's decision, on December 5, 2000, to grant respondent's Motion to Compel Discovery and to Enlarge the Discovery Period for Depositions. Petitioner had never filed a response or objections to respondent's motion, and the AJ promptly rejected her motion on the grounds that she previously had such an opportunity to respond to respondent's motion but failed to timely do so. Ms. Willis' failure to follow timeliness requirements justifies excluding the claimed hours from the fee award…. Thus, the three hours should be disallowed as unnecessary. [Resp. Opp. at 16.]

GAO is correct that this time was necessitated by Ms. Willis' own failure to observe the Board's deadlines and that the Motion to Reconsider was both without merit and ill-advised. The alleged expenditure of three hours by Petitioner's counsel far exceeds the time that should have been taken to write this four-paged, double-spaced memorandum. Accordingly, these three hours are deducted from Ms. Willis' total time.

4. Unnecessary Charge on June 15, 2001. The Agency argued as follows with respect to this charge:

> Another example of an unnecessary expenditure of time by Ms. Willis involves Ms. Willis' claim of having spent eight hours, on June 15, 2001, for drafting Petitioner's Motion for Sanctions and Subpoenas. This motion, with little citation to any legal authority, complained of [R]espondent's purported bad faith in failing to answer eight of petitioner's interrogatories. The AJ, in an Order dated August 20, 2001, concluded that: (1) most of petitioner's objections lacked merit; (2) petitioner was re-litigating matters already decided by the judge; and (3) petitioner was attempting to perpetuate discovery long past its closing date. Consequently, the AJ denied petitioner's motion for sanctions. Because this pleading was unnecessary and lacking in merit, petitioner's claim for eight hours should be disallowed. [Resp. Opp. at 16-17.]

Ms. Willis had an unusual propensity in this case to re-argue issues that had already been decided. Her Motion of June 15, 2001 was just one example. On several points, her June 15 Motion merely reasserted Petitioner's right to discovery of materials that had already been ruled not discoverable. The Motion also asserted a right to discover new materials well after the deadline for discovery had passed. To this extent, the Motion was unnecessary and constituted abusive litigation. However, as the Agency noted, the Motion was not denied in its entirety.

Rather, a small part of the relief sought (*i.e.,* supplementation of one interrogatory answer) was granted. The total Motion was 13 pages long, mostly devoted to arguments that should never have been made and that had previously been rejected. While the limited success in the Motion argues against a complete rejection of this time entry, the compensable time is being reduced from eight hours to two hours. As a result, an additional six hours are being deducted from Ms. Willis' total invoice. This brings the total of the four deductions to 22.5 hours.

Apart from the foregoing arguments, the remainder of the Agency's opposition to particular bills falls in the category of coded objections without explanation. Some of those objections are wholly inadequate. For example, the Agency objected to the charge of six hours for "Deposition (Harker & Guthrie)" as being vague; the Agency may believe this entry is vague, but it certainly has not made it clear to me why this billing entry is inadequate. Similarly, the Agency protests that the 2.5 hours charged for "Client Meeting (Davis, Vargas & Furutani)" was unnecessary; it hardly seems unnecessary that the attorney should meet with her client and two witnesses in the midst of preparing for and taking depositions. Absent explication by GAO, I must reject these and similar objections.

The following, therefore, are the additional work entries by Ms. Willis that I find inadequate to justify an award of fees; to the extent that a coded objection is not addressed below, it means that I did not find the Agency's mere objection, standing alone, sufficient to justify elimination of that entry. In each of the following instances, the Agency objected to the entry as vague and I find that the entry, on its face, lacks the specificity necessary to justify the fee request. Because the lack of specificity was obvious on its face, Petitioner should have filed a responsive pleading to explain the entry. In each instance, Petitioner failed to do so.

Date	Work	Hours
08/07/00	Review Documents	1.00
08/21/00	Telephone Conference	0.50
08/26/00	Review Documents	4.00
01/21/01	Review Documents	6.50
02/06/01	Review Faxes from Client	3.50
03/20/01	Review Client Memo with Forwarded Documents	2.00
07/10/01	Review Documents	0.25
07/23/01	Review Documents Received from Client	0.50
10/01/01	Review Documents	0.50
10/04/01	Review Documents	0.25

Because the foregoing charges are not accompanied by sufficiently detailed explanations and because Petitioner declined to provide such detail in her Response to the Agency's objections, I am unable to determine whether the time expended was reasonable. Accordingly, these 19.0 hours are deducted from the total requested by Petitioner.

Petitioner requested reimbursement for 335.25 hours of Ms. Willis' time. Based on the foregoing analysis of the bills, 41.5 hours of work time from the invoices (22.5 hours plus 19.0 hours) are deducted. In addition, the 20 hours of travel time are being deducted, since that time is being paid at the rate of $75 per hour. This leaves a total number of work hours reasonably expended in this case at 273.75; the latter hours are payable at the rate of $150 per hour.

C. Reductions in the Total Fee Award

GAO has requested that the total fee award for Ms. Willis' time be reduced by 80% to reflect the fact that she "only prevailed on 20 percent (one out of five) of the claims identified by the AJ." Resp. Opp. at 24. The Agency proposed that Petitioner be reimbursed only $5,025 for Ms. Willis' time in this case.

The Supreme Court has made clear that it is appropriate to either reduce or eliminate fee awards where a plaintiff/petitioner has achieved only limited success in the litigation. *See generally Hensley v. Eckerhart*, 461 U.S. at 453-54. The courts have also made clear, however, that success on the merits cannot be measured by some rough algebraic formula that measures success solely by the number of claims that are granted. *Id.* Frequently, different claims present different legal theories based on the same sets of facts; claims may become intertwined, without a clear delineation between one claim and another. In this case the Agency argues that the one claim on which Petitioner prevailed was legally and factually unlike the four other claims in the Petitions for Review. It moreover points to the fact that she had asked for far more extensive relief than she was actually awarded:

> The result of her efforts was an upgrade in two dimensions of petitioner's 1999 performance appraisal, and a back pay award in the amount of $6,538.77…. Petitioner did not receive the other relief she sought, including reassignment, disciplinary action against the named responsible parties, and damages of $412,798.79. Respondent argues that this result does not remotely support the 335.25 hours claimed by Ms. Willis. [Resp. Opp. at 24-25.]

Although the Agency argues that it is "not recommending a pure mathematical formula to determine a fee award in this case," that is precisely what it has done. Resp. Opp. at 24. While it is necessary to reduce the amount of fees because of Petitioner's limited relief, the Agency overstates the case and the amount of reduction that is appropriate.

It must be kept in mind that Petitioner is not seeking any fees for the time that Ms. Willis spent in the trial or on the post-trial brief. To the extent that parts of the trial were devoted to witnesses who were arguably irrelevant to the one successful claim, there is no basis for excluding that time, since it was not claimed in the first place. The issue of the time expended in unsuccessful claims must focus solely on the discovery/pretrial phase of this litigation. In this regard, the Agency seems to have forgotten the purpose of discovery and also seems to have forgotten its own objections and non-responses to discovery requests, which served to slow down and prolong discovery. *See, e.g.,* Opinion & Order, May 25, 2001 (rejecting *inter alia* GAO's assertion of work product); Status Conf. Report & Order, Nov. 6, 2000 (denying GAO's objections to discovery).

One of the main objectives of discovery is to permit the parties to learn each other's factual and legal contentions so that the issues at trial can be more focused. The scope of discoverable information is relevance, not admissibility. This permits the parties some latitude in seeking information, even if that information might not be admissible at trial. That the whistleblowing and retaliation claims in the Petitions for Review did not succeed at trial does not mean that discovery as to those issues was *ab initio* improper or worthless. In fact, much of the information relating to those claims was relevant at the time of discovery and was properly pursued by Petitioner in discovery. If Petitioner had sought reimbursement for the time spent at trial in pursuit of those claims, that time might well have been discounted or eliminated; but, again, those hours are not the subject of this Decision because Petitioner has not made a request for their reimbursement. The only question is whether it was appropriate to pursue the discovery and other pretrial litigation that related to these claims.

In my review of the pretrial litigation and Ms. Willis' bills, 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, as evidenced by the large portion of Petitioner's pretrial brief devoted to these three claims. This time and effort was unavailing and its futility should have been apparent to Ms. Willis well before trial.

Having made this observation, I nevertheless do not agree with the Agency that this unnecessary effort over unsuccessful claims should result in an 80% reduction in fees. While the legal theories of the three rejected claims were distinct from the legal theory underpinning the successful claim, all four claims still had facts and witnesses in common; some of the facts relevant to the three unsuccessful claims were also relevant to the successful one. Mr. Backhus, for example, was a key actor in all of the events alleged in the Petitions. Time spent by counsel in pursuing the full history of his work involvement with Petitioner was not wasted effort. To the extent that there were common factual threads in all of the claims, of which Mr. Backhus was but one example, it is not appropriate to delete all time spent on the losing claims. *See, e.g., Lizut v. Department of the Army,* 42 MSPR at 10-11.

In addition, much of the pretrial phase of the litigation revolved around discovery disputes in which the Agency itself took unmeritorious positions on factual matters that were relevant. In other words, Ms. Willis' and Petitioner's pursuit of unsuccessful claims was not the sole cause of this litigation extending longer than necessary; some of the cost of the litigation by Petitioner is attributable to the Agency's own approach to discovery.

In addition to GAO's argument for reduction of fees based on Petitioner's limited success, it has also proposed a reduction based on how she conducted herself at the hearing. "Ms. Willis' representation of petitioner during the hearing was substandard. . . . Ms. Willis also presented petitioner's case in an inefficient and unorganized manner." Resp. Opp. at 14.

While it is correct that Ms. Willis was admonished for repetitive and irrelevant questioning at trial, the Agency again loses sight of the fact that Petitioner has not claimed fees for the trial itself. Only the pretrial phase of the litigation is at issue in this fee petition. For this reason, a claim of "substandard" presentation at trial does not justify reducing the fee award. The Agency must instead show that Ms. Willis' representation at the pretrial phase was "substandard" and resulted in duplicative or unnecessary filings or caused the litigation to be prolonged.

Ms. Willis' difficulties at trial were, in fact, emblematic of problems throughout this litigation. She repeatedly filed pretrial papers that were repetitive or poorly drafted, resulting in added work for both the Board and the Agency; the time spent in this work was either totally or largely unnecessary. In addition to the filings to which the Agency raised specific objections (discussed above), the following are some examples of actions by Ms. Willis indicating the unnecessary expenditure of time:

1. Petitioner's Third Set of Interrogatories, which was supposed to be a re-formulation of the Second Set of Interrogatories, included a new request that did not comply with the Order of November 6, 2000. That failure to follow the earlier Order led to further litigation, resulting in yet another Order, dated August 20, 2001, in which the inadequacies of Petitioner's discovery requests were pointed out.

2. On May 25, 2001, Petitioner's request to take the deposition of the Comptroller General on the subject of a study undertaken by an outside consultant (PricewaterhouseCoopers) was rejected. The Agency had offered to provide Petitioner a copy of the slide presentation made to the Comptroller General by the consultant, but Ms. Willis had refused to review this material. Ms. Willis persisted in raising this issue through later discovery motions, including requests for sanctions against the Agency. These motions consumed significant time and resulted in yet another Order (dated August 20, 2001) summarizing the history of this particular discovery dispute and rejecting Petitioner's position.

3. On October 17, 2001, shortly before trial, Ms. Willis filed a ten-page Motion for an Adverse Inference Ruling as a Sanction for Respondent's Withholding the Written Portion of PwC's[17] Briefing to the Comptroller General. This filing was based on the complaint that Petitioner had not been given a copy of the briefing provided to the Comptroller General by PricewaterhouseCoopers. This Motion was addressed at the outset of the trial, as reflected in the following statement from the bench:

> Ms. Willis, you were offered the slide printout sometime in early 2001. In the March hearing that we had, at which I was present, you were offered it again by the Agency. In that hearing you declined to take the slide presentation because you wanted the deposition of the Comptroller General, and you made it very clear that was the only acceptable discovery to you. I have already written that in one order, that you declined acceptance of this document.
>
> You complained later, months later, again on this subject, and the Agency then said it would produce these documents if you signed

[17] "PwC" is PricewaterhouseCoopers.

> the confidentiality agreement. Based on that representation from the Agency, I issued an order, I believe it was August 20th of this year, directing the Agency to produce it to you, since you had now changed your mind and you were willing to accept this document.
>
> As I understand it from your own pleading, you didn't sign the confidentiality agreement until roughly October 10th, or thereabouts. So from August 20th until early October, you easily could have had this document if you had signed the confidentiality agreement. The confidentiality agreement was finally signed and given to the Agency, as I said, in early October, and you received the slide presentation, as I understand it, October 12th. The delay is not the Agency's fault. The delay is solely your fault. I am going to deny the request for an adverse inference. [Tr. 15-16.]

4. On June 15, 2001, Ms. Willis filed a Motion for Sanctions, accusing the Agency of not responding to several discovery requests. In the Order of August 20, 2001, it was noted that several of the requests for information that Petitioner relied on were, in fact, new requests that were not raised until after the close of discovery:

> Petitioner seems to forget that discovery was closed a very long time ago and that motions to compel or for sanctions are not vehicles for re-opening discovery. The fact that the Agency's production has prodded Petitioner to think of additional questions does not mean that she is permitted to impose new discovery obligations at this late date. This case has been set for trial and no further discovery will be permitted. [Order of Aug. 20, 2001 at 12.]

Many of the foregoing filings by Petitioner were completely unnecessary and, in some instances, clearly improper (e.g., the use of a sanctions motion to expand the scope of discovery after the deadline for all discovery requests). The problem with trying to exclude these filings in their entirety is that GAO was not entirely blameless in the prolongation of the litigation. The Agency frequently opposed or did not respond to discovery requests. A review of the discovery orders in this case reveals several discovery issues raised by Ms. Willis that were indeed meritorious and that required the issuance of corrective rulings adverse to the Agency. As a result, many of Ms. Willis' filings are a mixture of meritorious and non-meritorious points. Even though some of her motions were filled with frivolous assertions, it would be unfair and unreasonable to exclude all of the time that she spent in such work, since there frequently was some justification for these filings as a result of the Agency's own conduct.

The Supreme Court has authorized trial courts reviewing attorney's fee reimbursement requests in cases where only partial relief has been awarded to exercise their discretion "to arrive at a reasonable fee award, <u>either</u> by attempting to identify specific hours that should be eliminated <u>or</u> by simply reducing the award to account for the limited success of the plaintiff." *Texas State Teachers Ass'n v. Garland*, 489 U.S. at 789-90 (emphasis added). In those situations in which the reduction of a fee request is appropriate in the interest of justice, but where it is difficult to identify specific hours that should be eliminated, the courts are permitted simply to reduce the total compensable hours by a fixed percentage. *See Hensley v. Eckerhart*, 461 U.S. at 438 n.13 (district court properly reduced compensable hours by 30% because of attorney's inexperience and failure to keep contemporaneous time records); *Lanasa v. City of New Orleans*, 619 F. Supp. 39 (E.D. La. 1985) (25% reduction in fee request because of limited success and inefficient legal work). In *Barrett v. Kalinowski*, 458 F. Supp. 689 (M.D. Pa. 1978), the court reduced the fees awarded by a percentage factor based on limited success and the generally excessive time spent by inexperienced attorneys. The court's comments in this respect are apposite:

> [T]here was not sufficient testimony presented at the hearing to permit the Court to make a determination as to how excessive the number of hours was and, in fact, it would be difficult to obtain evidence of record which would permit that kind of a determination to be made…. It is the view of the Court that an adjustment in the overall fee can be made based upon the Court's impression of excessiveness even though it is not possible to determine how many hours spent by each attorney would have been sufficient to reach the result in this case. This is so because the Court is permitted to compare the fee to the benefit produced and adjust downward if the fee is excessive without disallowing a specific number of excessive hours. [*Id.* at 706.]

See also Lizut v. Department of the Army, 42 MSPR at 8-9 (15% across-the-board fee reduction to account for limited success).

The Federal Circuit has cautioned that reductions in fees may not be arbitrary and the basis for a reduction must be clearly articulated. *Crumbaker v. MSPB*, 781 F.2d at 195. However, this mandate should not be interpreted to bar the use of a percentage reduction, as opposed to targeted reductions of specific pleadings. Indeed, in many cases where there has been only limited success by a plaintiff/petitioner, it will be virtually impossible to parse the pleadings in a way that permits the elimination of specific work product. Especially in the early (and time-consuming) phases of discovery, a party's attorney should be permitted to discover all things relevant. While pursuit of unmeritorious claims beyond a certain point can and should result in the elimination of certain work product from the fee calculation, such a clean cut is not always possible.

For example, the deposition of Mr. Backhus was clearly relevant and justified. Undoubtedly, some of that deposition focused on the whistleblowing and retaliation issues that were ultimately unsuccessful. Be that as it may, some of that time in the deposition was probably still productive in developing the overall case, especially since Mr. Backhus interacted with Petitioner directly and indirectly over an extended period of time. Any effort to deduct a percentage of the time in his deposition (and other similar depositions) to account for unsuccessful claims would be less than an educated guess. Similarly, with the various discovery motions filed by Ms. Willis, it is impossible to discern with any precision how much time she spent on the meritorious issues and how much time was devoted to non-meritorious contentions. I cannot pretend to know how much time should have been spent on these motions, to the extent they had merit, as opposed to how much time was actually spent.

The instant case is therefore one in which an overall percentage reduction is most appropriate. *Cf. Lizut v. Department of the Army,* 42 MSPR at 8-9. Such an approach involves an educated guess, but such a reduction is fully informed by my having presided over the entire case and having had the opportunity to observe at first hand the skill level of counsel. I have also taken into account that three of the claims were found to be without merit, as well as the fact that all four claims were interrelated. Moreover, I have taken into account the fact that the Agency's own opposition to discovery was at least a contributing factor in prolonging the litigation.

Finally, 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. Based on Ms. Willis' Request for Attorney Fees, it appears that she claims to have spent a total of 586.5 hours[18] on the entire case. Petitioner has submitted a claim for only 335.25 of those. In other words, Petitioner voluntarily reduced her fee request for Ms. Willis' time by more than 40%. Taking all these factors into account, 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. Accordingly, the total hours to be compensated for Ms. Willis' work time is 219, at an hourly rate of $150. Additionally, her travel time (20 hours) is to be compensated at $75 per hour.

Based on the foregoing, Petitioner is entitled to be reimbursed for the following fees:

Ms. Willis	
219 hours (litigation time) x $150.00	$ 32,850.00
20 hours (travel time) x $75.00	$ 1,500.00
SUBTOTAL	$ 34,350.00
Ms. Kelly	
62.74 hours x $190.00	$ 11,920.60
1 hour (paralegal time) x $75	$ 75.00
SUBTOTAL	$ 11,995.60
TOTAL FEES TO BE REIMBURSED	$ 46,345.60

[18] This figure was computed by adding the individual entries on Ms. Willis' billing sheets attached to her Request less the 10.5 hours of duplicate charges. The total was then adjusted to correct for two errors in the invoices: 5 hours overage (addition error on invoice #127) and .25 hour under charge (error on invoice #126). Since Petitioner's Fee Request for 335.25 hours for Ms. Willis included travel in regular hours, the 20 hours of travel are included in this total for comparison.

IV. COSTS

Petitioner's Request for Attorney's Fees and Costs states as follows:

> 10. The amount of Petitioner's attorney fees and costs for the appeal is itemized as follows:
>
> | | | |
> |---|---|---|
> | a. Costs for exemplification and copies (28 U.S.C. §1920(4)) | | $ 728.36 |
> | 2. Attorney's fees (47.85 hours @ $335.00 /hour | | $ 16,029.75 |
> | | TOTAL | $ 16,758.11 |
>
> 11. The amount of Petitioner's attorney fees and costs for the hearing is itemized as follows:
>
> | | | |
> |---|---|---|
> | a. Costs for exemplification and copies (28 U.S.C. §1920(4)) | | $ 107.41 |
> | 2. Fees for obtaining depo. transcripts (28 U.S.C. §1920(2)) | | $ 2,372.90 |
> | c. Attorney's fees (335.25 hours @ $335.00 /hour | | $109,628.75 |
> | | TOTAL | $112,109.06 |

Respondent argues that none of the requested costs are recoverable by Petitioner. Resp. Opp. at 26. Petitioner's Reply addressed only Respondent's argument as to fees, and did not address the objection as to costs.

Petitioner's Supplemental Request, filed on April 30, 2004, requests costs for "exemplification and copies (28 U.S.C. §1920(4))" for the attorney's fees phase of the litigation totaling $132.95. Respondent's Opposition reiterates the argument that the claim for "[c]osts for exemplification and copies (28 U.S.C. §1920(4)) must be rejected because it is for noncompensable 'taxable costs'" under that provision. Supp. Opp. at 8-9.

The Board's regulations specifically state that "[r]ulings on attorney's fees and costs shall be consistent with the standards set forth at 5 U.S.C. 7701(g)." 4 C.F.R. 28.89. Respondent contends that "[t]he rule precluding the payment of taxable costs is specific to requests for attorney's fees under 5 U.S.C. §7701(g)**,** and is inflexible because it is premised upon the United States' decision not to waive sovereign immunity with respect to costs associated with administrative actions." Opp. at 25-26 (citing *Bennett v. Department of the Navy*, 699 F.2d 1140, 1144 (Fed. Cir. 1983)). As discussed above, Subsection 7701(g)(1) allows for attorney's fees in cases where an agency has engaged in prohibited personnel practices. Subsection (2) of 7701(g), not applicable here, allows for payment of attorney's fees in accordance with the Civil Rights Act of 1964.

In *Bennett v. Department of the Navy,* the Federal Circuit held that the term "attorney's fees" in 5 U.S.C. §7701(g)(1) is not synonymous with "all expenses." 699 F.2d at 1143. The Court further distinguished between "taxable costs," as defined by 28 U.S.C. §1920,[19] and costs that

[19] Taxable costs are set forth in 28 U.S.C. §1920:

are reasonable and necessary out-of-pocket expenses of providing a lawyer's services and are considered "attorney's fees." *Id.* at 1145. The Federal Circuit held that "the concept of attorney fees does not comprise those expenses that are commonly known as 'taxable costs'." Examples of permissible expenses encompassed by the term "attorney's fees" are telephone calls, postage and counsel travel. *Id.* at 1145. Costs that are considered "taxable costs" and, thus, not covered as "attorney's fees" include deposition costs[20] and photocopying costs. *Id.* at 1145-46; *see also Koch v. Department of Commerce*, 19 MSPR 219, 221-22 (1984).

Since Petitioner's case only involved prohibited personnel practices, Petitioner's fees and costs are governed by 5 U.S.C. §7701(g)(1).[21] This means that she is not entitled to the costs itemized in her Fee Request and Supplement, since these items specifically are "taxable costs" under 28 U.S.C. §1920 and thus, noncompensable under 5 U.S.C. §7701(g)(1).[22]

CONCLUSION

Pursuant to the foregoing, GAO is directed to issue a check payable to Petitioner in the amount of $46,345.60, as reimbursement for the attorneys' fees she has been charged by her counsel in this proceeding.

SO ORDERED.

A judge or clerk of any court of the United States may tax as costs the following:
(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

[20] The Court held that deposition costs were included by implication in the phrase "stenographic transcript" under 28 U.S.C. §1920. *Bennett,* 699 F.2d at 1145 n.4.

[21] If Petitioner had prevailed on her whistleblower claim, she could have been entitled to additional costs as authorized by 5 U.S.C. §1221(g).

[22] Petitioner's Fee Request is perplexing as to costs, since it itemizes only matters that are taxable costs and thus non-compensable, while she delineates in attached bills or attached receipts (in exhibits), but fails to delineate in her Petition, a request for reimbursement for items that might have been allowed, such as postage and express mail costs. Fee Request Exs. B, C; Supp. Request Ex. B; s*ee Coltrane v. Department of the Army*, 32 MSPR 6, 10 (1986); *Social Sec. Admin. v. Balaban*, 39 MSPR 622, 625-26 (1989); *Garcia v. Postal Serv.*, 75 MSPR at 202. Thus, the Agency correctly argues that Petitioner is not entitled to the requested costs.

Ms. Willis' Motion to Intervene similarly includes items that might have been reimbursable (travel, lodging, mailing), but since they were not encompassed in Petitioner's Fee Request, they are beyond the parameters of the award in this case.