PANAMA CANAL COMMISSION REPUBLIC OF PANAMA Respondent	
and DISTRICT 1, MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO REPUBLIC OF PANAMA Charging Party	Case No. DA-CA-40377

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **JANUARY 22, 1996**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

GARVIN LEE OLIVER
Administrative Law Judge

Dated: December 22, 1995
Washington, DC

MEMORANDUM DATE: December 22, 1995

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: PANAMA CANAL COMMISSION
REPUBLIC OF PANAMA

Respondent

and Case No. DA-CA-40377

DISTRICT 1, MARINE ENGINEERS'
BENEFICIAL ASSOCIATION, AFL-CIO
REPUBLIC OF PANAMA

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the Charging Party's application for attorney fees and expenses, the Respondent's reply, and the record in this case which was transferred to this Office on November 20, 1995.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

PANAMA CANAL COMMISSION REPUBLIC OF PANAMA Respondent	
and DISTRICT 1, MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO REPUBLIC OF PANAMA Charging Party	Case No. DA-CA-40377

Jay Sieleman
Counsel for the Respondent

Richard J. Hirn
Counsel for the Charging Party

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION AND ORDER
ON APPLICATION FOR AN AWARD OF ATTORNEY FEES

I. Statement of the Case

This decision concerns an application by the Charging Party for an award of attorney fees under the Back Pay Act, 5 U.S.C. § 5596, and 5 C.F.R. § 550.807 in connection with a previously decided unfair labor practice case.

All counsel, including counsel for the General Counsel, were provided an opportunity to respond to the application. The Respondent filed a reply. Upon consideration of the entire record, I make the following findings and conclusions.

II. An Award of Attorney Fees is Authorized by the Back Pay Act.

The Back Pay Act, 5 U.S.C. § 5596(b)(1) provides in part that an employee who is found to have been "affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee" is entitled to receive "all or any part of the pay, allowances, or differentials . . . which the employee normally would have earned or received during the period if the personnel action had not occurred" and "reasonable attorney fees related to the personnel action . . . awarded in accordance with standards established under section 7701(g) of this title. . . ."
5 U.S.C. § 5596(b)(1)(A)(i) and (ii).

The application for attorney fees meets these threshold requirements. The effect of the final Order in the underlying case was to determine that Mr. Goldsworthy had been affected by an unjustified or unwarranted personnel action which resulted in the withdrawal of pay. The final Order corrected this action with a remedy which included an award of backpay.

III. Application of Standards for Attorney Fee Awards Under the Back Pay Act

The prerequisites for an award of attorney fees under 5 U.S.C. § 7701(g)(1), which apply to all cases except those involving allegations of discrimination, are as follows: (1) the employee must be the prevailing party; (2) the award of fees must be warranted in the interest of justice; (3) the amount of the fees must be reasonable; and (4) the fees must have been incurred by the employee. U.S. Department of Defense, Defense Mapping Agency, Hydrographic/Topographic Center, Washington, D.C. and American Federation of Government Employees, Local 3407, 47 FLRA 1187, 1191-92 (1993); 5 U.S.C. § 5596(b)(1)(A)(i) and (ii).

There is no dispute that the employee prevailed and incurred attorney fees within the meaning of section 7701(g)(1). See Department of the Air Force Headquarters, 832D Combat Support Group DPCE, Luke Air Force Base, Arizona, 32 FLRA 1084, 1094-95 (1988) (Union incurred fees on behalf of employees and employees obtained backpay award;

fact that employees did not directly file the successful unfair labor practice charge does not preclude an award of attorney fees).

Interest of Justice

An award of fees is warranted in the interest of justice in cases: (1) involving prohibited personnel practices; (2) where agency actions are clearly without merit or wholly unfounded, or where the employee is substantially innocent of charges brought by the agency; (3) when agency actions are taken in bad faith to harass or exert improper pressure on an employee; (4) when gross procedural error by an agency prolonged the proceeding or severely prejudiced the employee; (5) where the agency knew or should have known it would not prevail on the merits when it brought the proceeding; or (6) where there is either a service rendered to the Federal work force or there is a benefit to the public derived from maintaining the action. An award of fees is warranted in the interest of justice if any one of these criteria is met. United States Department of the Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas, 48 FLRA 1281, 1292 (1994).

The applicant claims that an award of attorney fees is in the interest of justice in this case because the suspension of Mr. Goldsworthy for contacting an Agency contractor regarding a safety concern was clearly without merit, was wholly unfounded, and Mr. Goldsworthy was substantially innocent of the charges.

The underlying unfair labor practice complaint alleged that Respondent violated section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (2), by issuing a five-day suspension to an employee, Mr. Daniel Goldsworthy, an official of the Charging Party (Union). The complaint alleged that the suspension was issued because Mr. Goldsworthy, in his capacity as a Union official, contacted Mr. John Tyson, a representative of an insurance broker under contract by Respondent to provide services in connection with placing catastrophic insurance coverage.

Respondent challenged Mr. Goldsworthy's status as an “employee” within the meaning of 5 U.S.C. § 7103(a)(2) and alleged that the basis for the suspension involved the content of his contact with the contractor's representative in addition to the contact itself. Respondent claimed that
Mr. Goldsworthy's statements to the contractor were made with knowledge of their falsity or in reckless disregard of whether they were true or false and statements which were disloyal to his employer.

I conclude that fees are warranted in the interests of justice in this case as the result in the underlying unfair labor practice proceeding shows that Mr. Goldsworthy was ultimately found to be substantially innocent of the charges brought by the agency. See United States Department of Housing and Urban Development, Region VI, and United States Department of Housing and Urban Development, Region VI, San Antonio Area Office, 24 FLRA 885, 888-89 (1986) (A decision on whether an agency's personnel action was "clearly without merit" or was "wholly unfounded," or whether the employee was "substantially innocent" is to be based on the result of the underlying unfair labor practice proceeding, not on the agency's motivation, evidence, and information when it initiated the action.)

The underlying decision found that Mr. Goldsworthy, a supervisor and Union official, had the right, under the Statute and the related applicable laws, to present the views of the labor organization to third parties on matters affect-ing unit employees' conditions of employment and made an appropriate contact with a risk management professional, who was employed by Respondent's contractor to identify and reduce the Respondent's catastrophic insurance risk exposure. It was determined that the manning of the unmonitored towboats, which was the Union's legitimate labor relations concern and the subject of collective bargaining at the time, had a reasonable nexus to the contractor's responsibility to improve the fire protection capability of the Canal for the Respondent. Respondent's position that Mr. Goldsworthy made statements to the contractor which were false or made in reckless disregard of whether they were true or false, and statements which were disloyal to his employer, was rejected following a thorough examination of each of the alleged statements. It was determined that the statements were well within the bounds of protected activity as outlined in cases by the Authority, the National Labor Relations Board, and the Supreme Court.

Reasonableness of the fee

Respondent argues that the fee should be reduced because Counsel did not prevail on claims asserted in his response to the Agency's proposed suspension (Whistleblower Protection Act and First Amendment) or on all claims asserted in the unfair labor practice proceeding.

Where the plaintiff has failed to prevail on a claim that is "distinct in all respects" from the successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Hensley v. Eckerhart, 461 U.S. 424, 440 (1983). However, "[w]here a lawsuit consists of related claims, a plaintiff

who has won substantial relief should not have [the] attorney's fee reduced simply because the district court did not adopt each contention raised." Id. The Court stated that when a plaintiff's claims for relief involve a common core of facts, or are based on related legal theories, the "lawsuit cannot be viewed as a series of discrete claims." Id. at 435. See American Federation of Government Employees, Local 2241 and U.S. Department of Veterans Affairs Medical Center, Denver, Colorado, 49 FLRA 1403 (1994) (Arbitration award found deficient and remanded insofar as it denied attorney fees for work performed on the grievant's claim of racial discrimi-nation and only allowed fee for work connected with claimed violation of collective bargaining agreement where claims arose solely from the agency's suspension in issue.)

In this case, it is clear that the employee's alternative claims arose solely from a common core of facts involving his representational activity and the Agency's decision to impose the suspension. Accordingly, the claims are not distinct in all respects and will not be reduced on this basis.

Counsel documents a total of 13.44 hours defending Mr. Goldsworthy before the Agency when the suspension was first proposed. In the absence of a specific showing to the contrary by the Respondent, I conclude from the explanation of the dates, time, and nature of the work performed that the hours claimed by Counsel for the Union were reasonably expended in this regard.

Whether Outside Counsel Contributed to General Counsel's Case

The Authority stated in United States Department of Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas, 48 FLRA 1281, 1295 (1994):

> The Authority's Rules and Regulations provide that a party to an unfair labor practice case has, among other things, the right to appear at any hearing with counsel and the right to file a post-hearing brief to the Judge. See 5 C.F.R. §§ 2423.16 and 2423.25. Because "these aspects of participation are entitlement under the Authority's Rules and Regulations, [the Authority] will not second-guess a party's decision to seek legal representation" for an unfair labor practice proceeding. HUD, 24 FLRA at 891. "Nor will [the Authority] conclude, absent a specific showing, that participation by outside counsel was either duplicative of, or failed to make a substantial

contribution to, the General Counsel's efforts in prosecuting the case." Id. (citations omitted).

Counsel documents a total of 19.2 hours spent in pre-hearing, telephone conferences with the Authority attorney and Mr. Goldsworthy and in researching and preparing the Union's brief. Counsel, who is located in Washington, D.C., did not appear at the hearing in Panama. The Union's brief presented the arguments in different ways from the General Counsel,
and my conclusion that Mr. Goldsworthy was entitled to the protections of the Statute was specifically attributed, in part, to the Union's reasoning. In the absence of a specific showing to the contrary by the Respondent, I conclude that
the hours claimed by Counsel for the Union were reasonably expended on the case and did not primarily duplicate, or fail to contribute to, the General Counsel's efforts in prosecuting

the case. Counsel's documentation of an additional 7.75 hours spent in connection with the fee application is also found to be reasonable.

Respondent requests that Counsel's claimed standard, nondiscounted hourly billing rate ($225) be reduced to more accurately reflect the billing rates of sole practitioners or attorneys in small firms. Counsel is a sole practitioner in Washington, D.C., but claims that his standard billing rate
is commensurate with that of some partners in Washington, D.C. law firms. He has provided a survey of partner, associate, and legal assistant billing rates and has set forth his education, published articles, experience over some 15 years, and noteworthy litigation before the Authority, district courts, courts of appeal, and U.S. Supreme Court. In addi-tion, Counsel notes that he serves as General Counsel of one labor organization and represents four others on a regular basis. Aside from pointing to the size of the applicant's firm, Respondent has failed to provide any information that demonstrates that the applicant's hourly rates are not consis-tent with those in the community for similar lawyers of com-parable skill, experience, and reputation. Based on the record presented by the applicant, I find the requested fee of $225 per hour for the documented 40.39 hours ($9087.75) to be reasonable.

Expenses

Counsel for the Union requests expenses in the amount

of $533.49, as follows: $300.66 for the transcript of the hearing, $27.30 for photoduplication, $10.53 for postage, and $195.00 for a copy of the billing survey.

Respondent objects to these costs. The hearing transcript is not a recoverable cost, United States Department of Housing and Urban Development, Region VI, and United States Department of Housing and Urban Development, Region VI, San Antonio Area Office, 24 FLRA 885, 892 (1986), nor is the cost of photo duplication, Department of the Air Force Headquarters, 832D Combat Support Group DPCE, Luke Air Force Base, Arizona, 32 FLRA 1084, 1113-14 (1988) (Luke AFB). However, the cost of postage, see Luke AFB, and the cost of the survey are reasonable and necessary out-of-pocket expenses which may be included in an award of attorney fees.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to the Back Pay Act, 5 U.S.C. § 5596 and the Civil Service Reform Act of 1978, 5 U.S.C. § 7701(g), the Authority grants an award in the amount of $205.53 in expenses and $9087.75 for the legal services of Attorney Richard J. Hirn on behalf of the District 1, Marine Engineers' Beneficial Association, AFL-CIO, Republic of Panama. The Authority orders the Panama Canal Commission, Republic of Panama to pay such sum, $9293.28, to Richard J. Hirn, Esquire, 2300 N Street, NW, Suite 600, Washington, D.C. 20037.

Issued, December 22, 1995, Washington, DC,

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GARVIN LEE OLIVER
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. BN-CA-40377, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Jay Sieleman, Agency Representative
Industrial Relations
Panama Canal Commission
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Richard J. Hirn, Esquire
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Joseph T. Merli

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Dated: December 22, 1995
Washington, DC