UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: September 8, 1999

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: OGDEN AIR LOGISTICS CENTER
HILL AIR FORCE BASE, UTAH

Respondent

and Case No. DE-CA-80545

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1592, AFL-CIO

Charging Party

Pursuant to section 2430.12(b) of the Rules and Regulations, 5 C.F.R. § 2430.12(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 Respondent's application for attorney fees, and the record in this case which was transferred to this Office on July 22, 1999.

Enclosures

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

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WASHINGTON, D.C. 20424-0001

OGDEN AIR LOGISTICS CENTER HILL AIR FORCE BASE, UTAH Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1592, AFL-CIO Charging Party	Case No. DE-CA-80545

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. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 12, 1999**, and addressed to:

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

ELI NASH,
JR. Administrative Law Judge

Dated: September 8, 1999
Washington, DC

OALJ 99-38

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OGDEN AIR LOGISTICS CENTER HILL AIR FORCE BASE, UTAH Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1592, AFL-CIO Charging Party	Case No. DE-CA-80545

Jon W. Jepperson, Esq.
For the Respondent

Daniel Minahan, Esq.
For the Charging Party

Matthew L. Jarvinen, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION ON MOTION FOR PAYMENT OF ATTORNEY FEES

Statement of the Case

The Charging Party (Union) has filed a motion with the Authority, pursuant to the Back Pay Act, 5 U.S.C. § 5596, for attorney fees incurred as a result of representing a unit employee, Robert Sarlo, in connection with the above-captioned unfair labor practice proceeding. By Order dated July 19, 1999, the Authority referred the matter to the undersigned for the preparation of a recommended decision (absent resolution by the parties) addressing whether the Union is entitled to attorney fees and, if so, in what amount, after the Respondent and the General Counsel have been afforded the opportunity to file responses (by August

19, 1999) to the Union's motion. The Respondent filed a timely response; the General Counsel has not responded. Inasmuch as no party has requested further proceedings to submit additional evidence on the issues referred by the Authority, I address them immediately below.

Background

On May 3, 1999, I issued a decision and recommended order on the underlying complaint in this case, finding that the Respondent violated section 7116(a)(1),(2) and (4) of the Federal Service Labor-Management Relations Statute (the Statute), as alleged, by terminating Sarlo's employment during his one-year trial period because Sarlo had engaged in many protected representational and unfair labor practice activities, and rejecting Respondent's attempt to establish by a preponderance of the evidence that Sarlo would have been terminated even in the absence of his protected activity. As a remedy, I recommended that Sarlo be offered reinstatement to his former position as a Wage Grade (WG) 8 Aircraft Worker Helper; reimbursed for any loss of pay he may have suffered by reason of his separation from employment on April 2, 1998, due to his exercise of rights protected by the Statute; and restored all rights and privileges he may have lost by such unlawful action. I further ordered the Respondent to cease and desist from engaging in like or related conduct in the future and to post appropriate notices to employees herein. However, I did not grant the Union's request that Sarlo be reinstated immediately and retained during the pendency of further administrative and judicial proceedings in this case, a remedy in the nature of "interim relief" which is available in proceedings before the Merit Systems Protection Board (MSPB). On June 18, 1999, in the absence of exceptions, the Authority issued an Order adopting my findings, conclusions and recommendations without precedential significance pursuant to its Rules and Regulations (5 C.F.R. § 2423.41 (a)).

Contentions of the Parties

A. Union

Daniel Minahan, a private practice attorney representing labor organizations and individual employees from his law office in Denver, Colorado, has requested reimbursement for attorney fees and related expenses to date in connection with this proceeding in the amount of $9,772.29. In support of his request, Mr. Minahan submitted an affidavit and several other attachments consisting of his fee arrangement with the Union and Mr. Sarlo; a breakdown of

the services he (and others in his office) provided and the time it took to accomplish them; statements from attorneys in Utah concerning their customary hourly rate for performing similar services in the geographical area where this proceeding occurred; and receipts for air fare, hotel and meals, and car rental expenses.

Mr. Minahan asserts that Robert Sarlo was the prevailing party in this proceeding and that it would be in the interest of justice under the applicable legal standard to reimburse him for attorney fees and related expenses. Specifically, Mr. Minahan indicates that he customarily charges $200 per hour for providing the type of representational services involved in this proceeding, but that he is requesting only $150 per hour herein because that is the going rate in Utah where his services were performed. He further asserts that the 60.9 hours spent in representing Mr. Sarlo during the pre-trial preparation, at the hearing, in filing a post-hearing brief, and in preparing the instant request for attorney fees, were reasonable, and that the services provided did not duplicate the General Counsel's efforts in prosecuting the unfair labor practice complaint against the Respondent.

B. Respondent

In response to the Union's application for attorney fees, the Respondent contends that Paul Hirokawa, a paralegal, was responsible for 3.4 hours of the work performed for Mr. Sarlo in this case, and therefore should not be compensated at the $150 hourly rate applicable to attorneys. Respondent further asserts that the appropriate hourly rate for paralegal work in this case should be $55 (applicable in Utah) rather than $75 (applicable in Denver), thereby reducing the amount claimed by $255.

Respondent also challenges as unreasonable the Union's claim for 60 hours of compensation, because some of the claims relate to "efforts" which did not contribute to the General Counsel's success in prosecuting the case and others described as "preparation" should be considered either administrative or clerical rather than legal in nature.

Conclusions

As previously stated, the Union requested attorney fees pursuant to the Back Pay Act, which 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 what would normally have been earned or received during the applicable period if the personnel action had not occurred and "reasonable attorney fees . . . awarded in accordance with standards established under section 7701(g) of this title[.]" 5 U.S.C. § 5596(b)(1)(A)(i) and (ii).

Respondent does not dispute that Mr. Sarlo was affected by an unwarranted personnel action when his employment was terminated for having engaged in protected union activities. There is also no dispute that the final order in this case requires the Respondent to pay Mr. Sarlo backpay consistent with the requirements of the Back Pay Act. Entitlement to reasonable attorney fees pursuant to the standards established under 5 U.S.C. § 7701(g)(1) requires: (1) the employee to be the prevailing party; (2) the award of fees to be warranted in the interest of justice; (3) the amount of the fees to be reasonable; and (4) the fees to be 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). The standards established under section 7701(g) further require a fully articulated, reasoned decision setting forth the specific findings supporting a determination on each pertinent statutory requirement. See U.S. Customs Service, 46 FLRA 1080, 1091 (1992).

1. Prevailing party

The employee, Robert Sarlo, clearly was the prevailing party in this unfair labor practice proceeding, and Respondent does not contend otherwise. Thus, my finding that Mr. Sarlo's employment was terminated because of his protected union activities, my rejection of Respondent's attempt to establish that the employee would have been terminated in any event, and my recommended order that Mr. Sarlo be reinstated to his former position with backpay and restoration of all his other benefits, were not challenged before the Authority and have become final in the absence of exceptions. My rejection of the Union's request for "interim relief" requiring Mr. Sarlo's immediate reinstatement pending subsequent administrative and judicial appeals by the Respondent--a remedy which became moot when the latter chose not to file exceptions to my decision with the Authority--in no way diminishes Mr. Sarlo's status as the prevailing party in this case.

2. 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 that 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. Overseas Education Association and U.S. Department of Defense, Office of Dependents Schools, 45 FLRA 214, 216 (1992)(citing U.S. Department of the Army, Red River Army Depot, Texarkana, Texas and National Association of Government Employees, Local R14-52, 39 FLRA 1215, 1222-23 (1991)(Army Depot)). An award of fees is warranted in the interest of justice if any one of these criteria is met. Army Depot, 39 FLRA at 1222.

I find, and Respondent does not dispute, that attorney fees are warranted in the interest of justice in this case. In my judgment, the Respondent knew or should have known that it would not prevail on the merits herein. Thus, there was overwhelming evidence that Mr. Sarlo's representational and unfair labor practice activities were a motivating factor in management's decision to terminate him. His activities were extensive, as reflected in his use of approximately 200 hours of approved official time over a six-month period. Moreover, most of his protected activities involved direct and repeated challenges to his supervisors' actions. The latter attempted to limit his use of official time for such purposes by threats to place him in AWOL status and to terminate his employment. When the Respondent made good on those threats, it sought to justify the termination on the basis that Mr. Sarlo was unsuited to the job. However, it never counseled Mr. Sarlo concerning any work-related deficiencies and rated his job performance as satisfactory. On this record, the Respondent could not have had any reasonable expectation of victory in defending against the General Counsel's allegation that Mr. Sarlo had been terminated unlawfully for exercising his protected rights to engage in representational and unfair labor practice activity.

3. Reasonableness of the fees requested

I conclude that, with the minor adjustment discussed below, the attorney fees and related expenses requested by Mr. Minahan are reasonable and should be awarded. First, I find Respondent's characterization of Mr. Minahan's participation as "beyond reasonableness" and "questionable" in terms of contributing to the General Counsel's success to be misplaced. Specifically, I note that Mr. Minahan participated throughout the 11 hours of hearing in this case; examined and cross-examined witnesses to supplement and clarify the record evidence; raised a point concerning the sequestration of witnesses; and offered certain stipulations of fact to expedite the proceedings. Additionally, Mr. Minahan submitted a 13-page post-hearing brief which did not duplicate the General Counsel's efforts in any respect. While Mr. Minahan was unsuccessful in requesting a form of "interim relief" for Mr. Sarlo, such failure does not diminish the Union's entitlement to attorney fees. As the Authority has stated, quoting the Supreme Court's decision in Hensley v. Eckerhart, 461 U.S. 424, 435 (1983), a "fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." See United States Department of Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas, 48 FLRA 1281, 1296-97 (1994)(IRS, Austin).

Respondent asserts that certain items on Mr. Minahan's list of services should not be compensated because they are "efforts" and "preparations" which were not shown to have contributed to the General Counsel's success. However, absent a specific showing by the Respondent that such efforts did not so contribute, the Authority will not second-guess outside counsel's participation. See IRS, Austin, 48 FLRA at 1295, and cases cited. Similarly, I reject Respondent's general assertion that some of the itemized services provided were clerical or administrative in nature and should not be compensated at attorney rates. I find that all of the items challenged by the Respondent in this category were legal services absent a specific showing by the Respondent to the contrary.

With one exception, the Respondent does not dispute the number of hours billed by Mr. Minahan (60.9) or the rate of $150 per hour. In any event, I specifically find that both figures are reasonable. Indeed, I find that Mr. Minahan was more than fair in reducing his customary hourly billing rate by $50 simply because the services were provided in a case which was litigated in Utah where, local practitioners attested, the going rate for such services was lower than in Denver.

Having conceded that local rates in Utah are applicable in computing the amount of attorney fees to which the Union is entitled, Mr. Minahan should have treated the rate for paralegal services in a similar manner. As the Respondent notes, however, the itemized list of services submitted by Mr. Minahan identifies 3.4 hours of work as having been performed by Paul Hirokawa (whose full hourly rate is designated as $75) and, in addition, Mr. Minahan seeks compensation for that work at the rate of $150 per hour. At the very least, the work performed by Mr. Hirokawa should not be compensated at twice his normal hourly rate. In fact, I conclude that it should not be compensated at his hourly rate, either. Since Mr. Minahan has reduced the hourly rate for attorney services by 25%, he should do the same with respect to the rate for paralegal services. That proportional reduction results in an hourly rate of $56 for paralegal work (Respondent's submission suggests a paralegal hourly rate of $55 in Utah). The fee for Mr. Hirokawa's services therefore totals $190.40 (3.4 hours x $56 per hour). Since Mr. Minahan's bill for Mr. Hirokawa's services totaled $510 (3.4 hours x $150 per hour), the difference of $319.60 should be subtracted from the $9,772.29 claimed, leaving a total of $9,452.69.

4. The fees were incurred by the employee

Respondent does not dispute that the attorney fees at issue were incurred by Mr. Sarlo. See U.S. Department of Health And Human Services, Social Security Administration and American Federation of Government Employees, Local 1923, 48 FLRA 1040, 1047 (1993). Under Mr. Minahan's contingency fee arrangement with the Union and Mr. Sarlo (attachment B to the Union's application for attorney fees), only certain out-of-pocket expenses would be payable by the clients if Mr. Sarlo did not prevail; if he prevailed, Mr. Minahan agreed to "seek to recover our hourly billings, at a reasonable rate, only from the Agency . . . ." A contingency fee arrangement as described above has been recognized as valid and enforceable by the MSPB and the courts. See Francois v. Office of Personnel Management, 64 MSPR 191, 196 and n.2 (1994); Phillips v. General Services Administration, 924 F.2d 1577, 1583 (Fed. Cir. 1991). See also Broida, A Guide to Merit Systems Protection Board Law and Practice, 15th ed., at 2910 (1998): "The . . . type of fee agreement, involving the lawyer's agreement to work only for whatever recovery he can obtain through a Board order directing payment of fees, is not a problem. If the lawyer chooses to accept a case on that basis, if his client wins, and if a fee award is justified under the 'interest of

justice' standard, the lawyer will be paid by the agency-employer."

Summary

In summary, I conclude that the Union is entitled to attorney fees under the Back Pay Act. Fees are awarded as follows: 56.5 hours of attorney time (at the rate of $150 per hour) preparing for and participating at the instant unfair labor practice hearing, as well as filing a post-hearing brief to the undersigned; 3.4 hours of paralegal time (at the rate of $56 per hour) assisting in this case; and 1.0 hours of attorney time (at the rate of $150 per hour) preparing the application for attorney fees. In addition, reimbursement is granted as requested for the travel and related expenses totaling $637.29 incurred and documented by Mr. Minahan in the course of representing Mr. Sarlo herein.

Order

The application for attorney fees and related expenses is granted in the total amount of $9,452.69, and the Respondent is ordered to remit that amount to the law firm of Minahan & Shapiro, P.C., Lakewood, Colorado.

Issued, Washington, D.C., September 8, 1999

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ELI NASH, JR.
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION ON MOTION FOR PAYMENT OF ATTORNEY FEES** issued by ELI NASH, JR., Adminis-trative Law Judge, in Case No. DE-CA-80545, were sent to the following parties in the manner indicated:

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Dated: September 8, 1999
Washington, DC