

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

LIBRARY OF CONGRESS WASHINGTON, DC Respondent	 Case No. WA-CA-90069
and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2477 Charging Party	

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 **APRIL 17, 2000**, 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: March 17, 2000
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM
2000

DATE: March 17,

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: LIBRARY OF CONGRESS, WASHINGTON, DC

Respondent

CA-90069 and Case No. WA-

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, LOCAL 2477

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(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 is the record in this case which was transferred to this office on March 1, 2000.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 00-22
WASHINGTON, D.C.

LIBRARY OF CONGRESS WASHINGTON, DC Respondent and	Case No. WA-CA-90069
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2477 Charging Party	

Barbara Kraft, Esquire
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.

By Order dated March 1, 2000 the Authority provided the Respondent and the General Counsel 30 days after service of the application (on or about February 4, 2000), in which to file responses to the application and also the opportunity to file motions for extensions of time. No responses were received.

Upon consideration of the entire record, I make the following findings and conclusions.

II. 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 seeks \$23,003.00 in fees for both the arbitration and the unfair labor practice proceedings. The Union's request for attorney fees and expenses in the arbitration proceeding must be presented to the arbitrator. A motion for attorney fees related to an unjustified or unwarranted personnel action must be determined by an "appropriate authority," as defined in 5 C.F.R. § 550.807(a). The arbitrator found that the Respondent violated the collective bargaining agreement by failing to appoint the grievant to the position and ordered that he receive back pay and benefits. When an arbitrator has resolved a grievance over an unjustified or unwarranted personnel action, the arbitrator, not the Authority, is the "appropriate authority" for resolving the request for an award of attorney fees. *U.S. Department of the Army, Red River Army Depot, Texarkana, Texas and National Association of Government Employees, Local R14-52*, 54 FLRA 759 (1998); *Department of the Air Force, Headquarters, 832D Combat Support Group DPCE, Luke Air Force Base, Arizona*, 32 FLRA 1084, 1093 (1988) (*Luke AFB*).

The application for attorney fees for the unfair labor practice proceeding meets the threshold requirements of the Act. While the Respondent had awarded some back pay following the arbitrator's decision, it had failed to appoint the grievant, Mr. Hassan, to the position of Technical Information Specialist and pay him full back pay and benefits. The unfair labor practice proceeding determined that the Respondent had therefore failed to comply fully with a final and binding arbitration award within the meaning of section 7122(b) of the Statute and thereby violated section 7116(a)(1) and (8) of the Statute. The effect of the final Order was to determine that Mr. Hassan had been affected by an unjustified or unwarranted personnel action which resulted in the withdrawal of pay. The Act defines a "personnel action" to include "the omission or failure to take an action or confer a benefit." See 5 U.S.C. § 5596(b)(3). The final Order corrected this action with a remedy which included an award of back pay. See *Luke AFB*, 32 FLRA at 1084, 1094-95 (attorney fees for unfair labor practice proceeding which obtained full compliance with arbitration award warranted under the Back Pay Act).

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, DC 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). *Luke AFB*, 32 FLRA at 1095-96 (Union incurred fees on behalf of employees and employees obtained back pay award; the fact that employees did not directly file the successful unfair labor practice charge does not preclude an award of attorney fees).

1. 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 workforce 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 Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas*, 48 FLRA 1281, 1292 (1994) (*IRS, Austin*).

The Charging Party claims that an award of attorney fees is in the interest of justice in this case because the Respondent did not award complete back pay or appoint the grievant to the position at issue until ordered to do so by the Authority. I agree that an award of attorney fees is in the interest of justice as the Respondent's action was clearly without merit. As stated (and further explained) in that decision: "[I]t takes sustained willful myopia not to perceive that the Arbitrator clearly intended the Respondent to correct its contractual failure to appoint Mr. Hassan to the vacant position for which he had been selected."

2. Reasonableness of the Fee

Fee requests must be closely examined to ensure that the number of hours expended were reasonable. They must also be carefully scrutinized to determine whether, and to what extent, participation by outside counsel contributed to the General Counsel's efforts in prosecuting the case. *IRS, Austin*, 48 FLRA at 1294.

I find that the time spent by Counsel after October 23, 1998 on, or in preparation for, the unfair labor practice proceeding can be considered in determining the reasonableness of the fee. October 23, 1998, was the date the arbitrator advised counsel that he no longer had jurisdiction over the matter. This period amounts to 14.8 hours spent by Barbara Kraft, 9.9 hours by Joe Stater, and 2.7 hours by Sarah Starrett. Based on the declaration and billing records submitted, and in the absence of a specific showing to the contrary by the Respondent, I conclude that the above hours 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. See *IRS, Austin*, 48 FLRA at 1295 (the Authority will not second-guess a party's decision to seek legal representation for an unfair labor practice proceeding, nor will it 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).

The Charging Party seeks attorney fees at market rates according to a submitted copy of the *Laffey Matrix* used by the U.S. Attorney's Office. Based on the declaration of Barbara Kraft, and in the absence of any demonstration that the hourly rates set forth in the *Laffey Matrix* submitted by the Union do not reflect hourly rates that are consistent with those in the community for similar services of lawyers of comparable skills, experience, and reputation, I find that the requested hourly fees are so consistent and are reasonable. See *U.S. Department of the Treasury, Internal Revenue Service, Washington, DC and National Treasury Employees Union*, 48 FLRA 931, 935-38 (1993) (arbitrator's award based on prevailing market rate set forth in the *Laffey Matrix* was not deficient). This amounts to 1.9 hours at \$335 an hour and 12.9 hours at \$340 an hour for Barbara Kraft (total \$5022.50), 8.8 hours at \$240 an hour and 1.1 hours at \$295 an hour for Joe Slater (total \$2436.50), and 2.7 hours at \$245 an hour for Sarah Starrett (total \$661.50), and a grand total of \$8120.50. The lower hourly rates for some of the hours of Kraft and Slater represent the period prior to an increase in the *Laffey Matrix* rate on June 1, 1999.

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 \$8120.50 for the legal services of Attorneys Barbara Kraft, Joe Slater, and Sarah Starrett of the law firm of Beins, Axelrod & Kraft on behalf of the American Federation of State, County and Municipal Employees, Local 2477. The Authority orders the Library of Congress to pay such sum, \$8120.50, to Beins, Axelrod & Kraft, 1717 Massachusetts Avenue, NW., Suite 704, Washington, DC 20036.

Issued, Washington, DC, March 17, 2000.

GARVIN LEE OLIVER
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION ON ATTORNEY FEES**, issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. WA-CA-90069, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

Barbara Kraft, Esquire
Beins, Axelrod & Kraft, PC
1717 Mass. Avenue, NW, Suite 704
Washington, DC 20036

P168-060-159

Jesse James, Representative
Library of Congress, OGC
101 Independence Avenue, S.E.
Washington, DC 20540

P168-060-160

Thomas Bianco, Esquire
Beth Landes, Esquire
Federal Labor Relations Authority
800 "K" Street, NW., Suite 910
Washington, DC 20001

P168-060-161

CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: MARCH 17, 2000
WASHINGTON, DC