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

DEPARTMENT OF THE AIR FORCE HEADQUARTERS 832D COMBAT SUPPORT GROUP, DPCE LUKE AIR FORCE BASE, ARIZONA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1547 Charging Party	Case No. 8-CA-50167

Major Phillip G. Tidmore, Esq.
For the Respondent

Stanley Lubin, Esq.
For the Charging Party

John R. Pannozzo, Jr.
For the General Counsel, FLRA

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION AND ORDER
GRANTING APPLICATION FOR PAYMENT OF ATTORNEYS FEES AND COSTS

This proceeding arises under the Back Pay Act, 5 U.S.C. § 5596, as implemented in § 550.801 et seq. of the Rules and Regulations of the Office of Personnel Management. It began with the filing of an Application for Fees and Costs by Mr. Stanley Lubin, Esq., attorney for the Charging Party, with the Authority. That Application was referred to me on February 3, 1987. Respondent filed Comments on the Application on February 24. On March 2, I issued an Order, placing time limits on any effort by Respondent or General Counsel to make 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." 1/ I also requested that all parties brief the question whether that part of the Application based upon services rendered before the Arbitrator "was properly before the undersigned or ought to be placed before the Arbitrator."

The General Counsel took no position on either matter. Respondent asserted that Applicant was not entitled to a fee for services before the Arbitrator because of the passage of time since that proceeding ended, or for services in the unfair labor practice proceeding because he did not attend the hearing and filed a brief which duplicated the General Counsel's effort. Applicant argued against the need for remand, but was willing to proceed on that basis.

Findings and Conclusions

On December 31, 1986, the Authority issued its decision on the merits of this proceeding (24 FLRA No. 99, 24 FLRA 1021), finding that Respondent violated Section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute, by failing fully to comply with an Arbitrator's award.

At issue before the Arbitrator was whether Respondent had violated a contractual obligation to negotiate concerning reassignments when it transferred two employees from the swing to the day shift. He found such a violation and ordered a return to the status quo ante without explicitly mentioning backpay, although the men had lost a small night shift diffential, and the union had indicated, in response to a question from the Arbitrator, that it wished that matter to be addressed. Respondent returned the men to the swing shift, but contended the Award did not in such circumstances, require backpay. Approximately five months after the Award

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1/ See United States Department of Housing and Urban Development, 24 FLRA 885. That inquiry was prompted by the issue of a charging party's attorney's entitlement to fees where he is not lead counsel, but rather a public prosecutor is. See, for example, In re Frazier, 672 F.2d. 150, 170 where the Court said that, "in examining the value of employee participation in corrective action proceedings (those brought by the Special Counsel) . . . the Board (MSPB) may take into account the presence and role of the Special Counsel."

was entered the Arbitrator, at the Union's request, advised the parties by letter that his "status quo remedy was clearly intended to require the Air Force to make these employees whole for all lost wages. . . ."

Respondent filed timely exceptions to the "clarification" of the Award. The Authority dismissed the exceptions, as untimely in reference to the date of the original Award, which it found had not been modified, but rather restated in the letter.

During this time, and thereafter, the Charging Party filed three unfair labor practice charges, in addition to the one which gave rise to this proceeding. All such work was essential to this case, for the Charging Party's persistence in seeking redress was a relevant consideration in the Authority's ultimate determination that the charge herein was not time-barred under Section 7118(c)(4)(A).

Respondent's continued refusal to pay the shift differential led to this proceeding and to an order that it pay backpay as required by the Arbitrator's final award. Thus the Back Pay Act, 5 U.S.C. § 5596 (1982) applies, as it provides:

> (b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, 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--
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> (A) is entitled, on correction of the personnel action to receive . . .
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> (ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title 1 of the Foreign

> Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title[.]

5 U.S.C. 5596(c) further provides that the "Office of Personnel Management shall prescribe regulations to carry out this section". Those regulations are set forth at 5 CFR 550.801 through 550.807. Section 550.803 defines "appropriate authority" to include an "arbitrator in a binding arbitration case." It further defines "(u)njustified or unwarranted personnel action" as "an act of commission or . . . omission . . . that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law . . . or mandatory personnel policy established . . . through a collective bargaining agreement." (Emphasis mine)

Section 550.806(a) provides for the payment of reasonable attorney fees to "an employee or an employee's personal representative."2/ It directs that the request for fees "may be presented only to the appropriate authority that corrected or directed the correction of the unjustified or unwarranted personnel action. However, if the finding that provides the basis for a request for payment of reasonable attorney fees is made on appeal from a decision by an appropriate authority . . . the employee or (his) personal representative shall present the request to the appropriate authority from which the appeal was taken." (Emphasis mine)

Section 550.806(c) and (d) of OPM's implementing Rules and Regulations provides:

> (c) Except as provided in paragraph (e) of this section, when an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise

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2/ Nowhere is the status of a union as the collective bargaining representative providing legal services mentioned. However, the Authority has found unions are entitled to fee awards when the fee was "incurred on behalf of the employee." HHS, Health Care Financing Administration, Region IV, 21 FLRA No. 106.

due an employee, the payment of reasonable attorney fees shall be deemed to be warranted only if -

> (1) Such payment is in the interest of justice, as determined by the appropriate authority in accordance with standards established by the Merit Systems Protection Board under section 7701(g) title 5, United States Code; and
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> (2) There is a specific finding by the appropriate authority setting forth the reasons such payment is in the interest of justice.

(d) When an appropriate authority determines that such payment is warranted, it shall require payment of attorney fees in an amount determined to be reasonable by the appropriate authority. When an appropriate authority determines that such payment is not warranted, no such payment shall be required.

Finally § 550.806(g) provides that "a determination whether payment of a fee is in the interest of justice, and concerning the amount of any such payment "shall be subject to review or appeal only if provided for by statute or by regulation" (Emphasis mine). It is to be noted that the Authority has no regulation respecting attorney fees in cases subject to the Back Pay Act, and further, that Respondent contends that there has not been a proper use of the Authority's rulemaking procedures to set forth the procedures to be used in cases involving application of the Back Pay Act.

Thus, the threshhold question in determining entitlement to backpay and to the attendant attorney fees, is whether an appropriate authority has found that an employee has been affected by an unwarranted or unjustified personnel action which resulted in the withdrawal or reduction of pay, allowances or differentials and that an award of backpay was an appropriate remedy. This second requirement is normally subjected to the "but for" test, i.e. to a finding that the loss would not have occurred in the absence of a violation - a very vexing question where a failure to negotiate so-called procedures, or impact and implementation matters, cannot easily be shown to have caused a loss.3/ Here, both

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3/ See FAA, Washington, D.C., 27 FLRA 230 (1987).

the Arbitrator, acting pursuant to the grievance procedures of a collective bargaining agreement, and the Authority, acting pursuant to the unfair labor practice procedures of the Statute in enforcing his award, constitute such appropriate authority and have met those threshhold requirements. Although the Arbitrator did not address the "but for" test, as would ordinarily be required, inquiry into that matter has been foreclosed by the Authority's holding that Respondent's exceptions to the award, which did raise the point, were untimely filed. The threshhold requirements are therefore satisfied.

The next question raised by these regulations is whether there has been compliance with § 550.806(a)'s requirement that a request for fees "may be presented only to the appropriate authority that corrected or directed the correction of the unjustified . . . personnel action." I have found that both the Arbitrator and the Authority were appropriate authorities instrumental in correcting an unjustified personnel action. Respondent has not explicitly argued that the fee application had to be filed with the Arbitrator under this rule for such work as was done in that forum. Rather it has argued that I should not remand to the Arbitrator and should not award a fee for such work because no fee can properly be awarded for such work. Nonentitlement is argued to exist on the ground that the Arbitrator's award became final over three years ago, and hence laches precludes any recovery at this late date. Looking to those cases in which arbitrators' fee awards have been set aside, Respondent also argues that no fee award can be properly entered here for services rendered in the arbitration proceeding because the Arbitrator did not render a fully articulated, reasoned decision on the incurrence of the fees, their reasonableness and their warrant in the interest of justice, as well as the issue of prevailing party.

Of course, the Arbitrator could not address these issues, as he was not presented with an application, perhaps because the litigation to enforce his award was ongoing. Thus, indirectly the issue is raised whether Applicant was required to file his fee request with the Arbitrator at some earlier stage in these interwoven proceedings. No authority is cited, nor do I know of any, indicating that a fee request had to be filed directly with the Arbitrator before this litigation designed to enforce his Award had run its course. One would think it is best that each forum set the fee for work done before it, which it can best judge. But 5 CFR 550.806 provides that, where the basis for a fee request is made on appeal from a decision by an appropriate authority,

the request shall be presented to the appropriate authority from which the appeal was taken. Here, over one-half of the fee requested is based on work at the arbitration stage, a matter about which the undersigned is largely ignorant. Furthermore, Applicant never appeared before the undersigned, and most of his work in the unfair labor practice proceeding occurred either before the General Counsel's office, or before the Authority in resisting Respondent's exceptions to my recommended decision.

No prospect for assessing the fee application is neat and tidy, and I find little guidance as to the proper course. Ordinarily I would be inclined to say that Applicant should have filed an initial application with the Arbitrator, after his award became final with the Authority's dismissal of the exceptions to it. Here, however, the matter is complicated by the absence of any Agency rules respecting fee requests pursuant to the Back Pay Act, and the fact that Respondent's continued refusal to comply with the Arbitrator's award required enforcement proceedings through the unfair labor practice procedures. In a sense it is all one ball of wax - a continuing effort in various forums to correct an unwarranted personnel practice. It is not uncommon for one forum to set fees for work done in a "lower" forum or at the administrative level, as for example, in filing and pursuing a charge lodged with the General Counsel. Finally, considerations of "judicial economy" would suggest that it is best that one person, at this late date, grapple with all the interrelated effort from grievance and charge to final disposition by the Authority. I accordingly will take that route, and will neither dismiss as untimely so much of the applications as concerns work before the Arbitrator, nor remand same for his consideration.

The Authority, in U.S. Department of Housing and Urban Development, 24 FLRA 885, has set forth in detail the other considerations which apply to and award of attorney's fees under the Back Pay Act "in accordance with standards established under" 5 U.S.C. 7701(g). They are that such fees have in fact been incurred, that the employee prevailed in the proceeding, that the award is in the interest of justice and that the amount of the award is reasonable.

There is here no issue regarding incurrence of the fees. Nor is there any question regarding the standing of the employees and the Union as prevailing parties. The employees have recovered the pay differentials lost as a result of the unfair labor practice, and the Union has vindicated its institutional right not to be ignored when

employment conditions are to be changed. The fact that the General Counsel had the primary role in the successful prosecution of the unfair labor practice proceeding, in his capacity as the public's prosecutor in vindicating rights established by law, does not, teaches HUD, detract from the status of employees and union as prevailing parties. It is, however, a factor to be considered in assessing the reasonableness of the fee awarded.

The requirement that the award be found warranted in the interest of justice is less easily applied. As noted, the Back Pay Act requires that reasonable attorney fees shall be awarded in accordance with standards established under 5 U.S.C. § 7701(g). It, in turn, provides that the Merit Systems Protection Board or its designee "may require payment . . . of fees incurred by an employee . . . if the employee . . . is the prevailing party and the Board . . . (or its designee) . . . determines that payment . . . is warranted in the interest of justice, including any case . . . in which the agency's action was clearly without merit." These standards were fleshed out in Allen v. U.S. Postal Service, 2 MSPB 582, 593 (1980) and have been clarified or refined by the United States Circuit Court of Appeals for the Federal Circuit. As originally promulgated by MSPB in Allen, they imposed a considerable burden on applicants. Thus they required that the agency's action be "clearly without merit", "wholly unfounded", based on "bad faith", intended to "harrass" or "exert improper pressure", flawed by "gross procedural error", and that the agency "knew or should have known that it would not prevail on the merits" or that the employee was "substantially innocent" of the changes brought by the agency. In HUD, the Authority applied these principles, as modified by the Federal Circuit, to find the interest of justice requirement is met if any of these elements was present, and that it is not defeated simply because a case is factually close. Noting that the suspension there involved was disciplinary action taken against a union president, and that it violated the Statute, the Authority concluded that the Union president was "substantially innocent" and the imposition of discipline was "wholly unfounded" and "clearly without merit."

These standards were developed by an agency that does not adjudicate unfair labor practices. They seem clearly to address the considerations which apply where an employee's job has been affected by action taken based on performance or conduct, i.e., they are tailored to the factors which are relevant to the maintenance of a civil service system based on merit. As such, they throw little, if any, helpful light

on losses in pay which result from organizational changes which are made without the negotiations the Statute requires. Nor is the provision for payment of fees designed to be punitive, i.e., to coerce compliance with the law; rather it is intended to reduce employees' costs in defending against unsubstantiated agency actions. Here, in fact, the employees bore no legal costs, except as some portion of their dues, if they were members, was a form of pre-paid legal insurance covering those matters in which the Union decides to employ counsel. In short, the MSPB standards developed under law to govern the award of fees in the interest of justice do not seem designed to deal with bargaining-related backpay issues. For example, no charges were levelled at those employees of which they could be deemed "substantially innocent". Nor was action taken against them which can be said to be "clearly without merit" or "wholly unfounded". To beat a dead horse, these factors sound in personalized assessments of individuals based upon conduct and/or performance. Those due back pay here lost income because management changed their shift without discussing the matter with the Union. Were this a matter handled as an unfair labor practice from the beginning, their right to backpay would presently depend upon the outcome of negotiations ordered by the Authority to remedy the original failure to negotiate so-called impact and implementation.4/

So much for an effort to understand how the standards for assessing whether the interest of justice is served by awarding a fee. The HUD case, again, indicates that such considerations as "wholly unfounded", "clearly without merit", "substantially innocent", "bad faith", and that the agency "should have known that it would not prevail" are satisfied by a finding, without further inquiry, that the agency has violated the law. It would, at least, be the rare case where one would look behind the finding. It would be difficult to find a better case than HUD, given the conduct involved, the closeness of the legal issue, the loss of the grievance by the union, and the moderate discipline imposed, in which to find reason for a determination that the interest of justice standard had not been met.

I take it, then, that it is enough here that Respondent accomplished its change in a manner violative of the contract

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4/ See U.S. Department of Transportation, Federal Aviation Agency, 27 FLRA 230, and Federal Aviation Administration, 27 FLRA 304.

and that the Arbitrator and Authority found backpay an appropriate part of the remedy, to support the conclusion that an award of fees is in the interest of justice.

There remains the question of the reasonableness of the fee requested. Respondent concedes that the highest hourly rate charged ($85.00) has been held to be reasonable. However, it asserts that Applicant is, at best, limited to the fee charged his client, and may not seek a higher fee based on his claimed expertise, the poverty of the client, or his claimed customary charges, which are much higher. Respondent also resists any fee for the unfair labor practice proceeding as such, indicating that Applicant did not attend the hearing and that his brief is clearly duplicative of the General Counsel's and thus made no substantial contribution to that effort to persuade. It relies on Donovan v. CSEA Local Union 1000, 784 F.2d. 98, CCA 2, 1986) for the proposition that union counsel's fee should be limited to work which was preliminary to, and not duplicative of, the Secretary of Labor's representation in an action brought by the Secretary challenging union election procedures under Title IV of the Labor-Management Reporter's and Disclosure Act. There a requested fee of $100.00 per hour was reduced to $75.00, on the ground that the latter was the prevailing rate in the area "for assisting as opposed to lead counsel", and half of the hours were disallowed on the ground that they duplicated the Secretary's representation. Counsel was awarded fees for his initial role in bringing the violation to the Secretary's attention (i.e. in amassing evidence of the probable cause required for the Secretary to bring his action with 60 days of the member's complaint) and in establishing that the union was subject to the LMRDA. However, counsel received less than 20% of what he requested. Fees were granted predominantly for counsel's work done preliminary to, and not duplicative of, the Secretary's representation. The judge allowed fees for only a small fraction of counsel's time spent once the Secretary had taken over. The Court said that "such limitation encourages proper attention to the initiation of complaints without conflicting with the policy of limited intervention". The Court also denied fees for work on the appeal, finding counsel's efforts duplicated the work of the Secretary. It found work done by counsel in argument of the appeal not to "be sufficiently distinct from the Secretary's representation or beneficial to the union membership to warrant compensation", noting that "(o)nce a record has been made in distinct court, the Secretary's need for additional assistance is minimal."

This guidance, as it meshes, with the Authority's guidance in HUD, 24 FLRA 885, is anything but easy to apply to the circumstances here. First, it is to be observed that these considerations do not apply to the arbitration proceeding, including the appeal to the Authority. That part of this entire controversy accounts for well over half of the fee sought, exclusive of that allocated to preparation of the fee request. A total of $2134.00 is requested for the unfair labor practice phase of the proceeding. Putting aside fees claimed for much of the preliminary work and various charges filed which contributed to the victory here, as well as fees for the stipulation entered into, as to which there is no contention that applicant failed to make a contribution, there is left $582.50 based on the brief filed with me, and $427.00 based on the exceptions filed with FLRA.

I agree with Respondent that Applicant's brief to me is largely duplicative of the General Counsel's and did not significantly contribute to the result reached. Further, as noted by the Authority, Applicant's Opposition to Respondent's exceptions, constituted "argument generally in support of the Judge's rationale . . . (and) . . . or alternative dates to support the finding that the charge in this case was timely filed." In this latter respect such argument was entirely unsuccessful. In the circumstances, I read the teaching of Donovan, supra, and the Authority, as requiring me to reduce the fee requested for the briefing undertaken on behalf of the Charging Party. I take that teaching of necessity to impose on counsel for a charging party some duty to contact Counsel for General Counsel and familiarize himself with the arguments and fact-presentation the latter intends to make, so as to avoid needless repetition where that can adequately be judged, or assume the risk that he will not be fully compensated. The former appears to be no mean task, and it is complicated in terms of the Judge's duty to assess the value of counsel's effort, where the General Counsel chooses to be silent about such matters. The assumptions seem to be that private counsel plays a secondary or assisting role for which a reduced fee is appropriate, and that work which essentially duplicates the public prosecutor's effort is itself of little value.

Here it is to be noted that, while Applicant's briefs did not plow new or different ground, the hours invested were modest. In the circumstances it would seem appropriate to cut the $1009.50 claimed on the basis of such work in half, or to $504.75.

Finally there is the issue of Applicant's entitlement to a multiplier, based on expertise, difficulty of case, low hourly rate applied and result reached. Here Applicant seeks a 50% multipliers. The threshhold question is whether Applicant is entitled to fees higher than those incurred by his client, i.e. from $65.00 to $85.00 per hour over the course of these protracted proceedings, where the prevailing rate of a Phoenix labor relations specialist ranged from $100.00 to $150.00. The low rate charged the local union was a reflection of its inability to pay and, it is argued, ought not constitute a ceiling, lest access to capable counsel be cut off for the less than well-heeled.

In M. P. O'Donnell v. Department of Interior (2 MSPB 604, 2 MSPR 445) the Merit Systems Protection Board rejected a request for a fee in excess of the amount billed to appellant's union, which was well below the prevailing rate. The Board noted that the low fee was in part motivated by the hope of future business, and that "a fee award under the Reform Act must not provide a windfall to counsel at the expense of the public fisc." It then concluded that it "will presume that the amount agreed upon represents the maximum reasonable fee that may be awarded," i.e. absent clear evidence to the contrary, it will be presumed that a "bill rendered . . . accurately reflects . . . (counsel's) . . . fair judgement of the maximum fee that is commercially reasonable under the circumstances."

The meaning of "clear evidence to the contrary" is less than clear to me, as it would be applied in this context. A lawyer may be called upon to represent an impecunious individual victimized by government, and do so successfully in a case of extraordinary complexity and difficulty, and hence worthy of the very highest fee. On the other hand he may represent unions and regularly receive half or less than half the hourly rate, for comparable work, received by his counterparts on the management side. At some point it may be fairly said that the lesser rate goes with the territory, i.e. that union counsel cannot routinely accept the lesser amount except when government picks up the bill.

This effort at analysis is further complicated by the presence of the Equal Access to Justice Act. There Congress meant to ease the burden upon small businesses, labor organizations and other entities where they are subjected to unwarranted prosecution (or other litigation forced upon them) and must retain attorneys to vindicate themselves. It fixed a $75.00 hourly rate with the provision that agencies, by regulation, may increase the rate where justified by an

increase in the cost of living "or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved" (5 U.S.C. 504(b)(1)). Does the absence of such a limit in the Back Pay Act indicate that Congress did not mind a wide disparity, or does the presence of the limit in EAJA, on the contrary, indicate that Congress deemed $75.00 a reasonable rate when that law was passed, or even that it did not intend full compensation?5/ The contemporaneous award by an agency of $75.00 per hour when it has provoked unwarranted litigation, while awarding a "prevailing rate" of $125.00 or more from the treasury of another agency adjudged guilty of unlawfully withholding pay, surely raises questions as to what Congress intended, and even questions about an agency's willingness to dip as generously into its own coffers as those of other agencies. And there is the final complication deriving from the nature of the work. Those presently limited to $75.00 are fully in charge of litigation unreasonably forced upon them by the government. Those who may command a prevailing rate of perhaps twice that much, at least in actions brought by a public prosecutor, would normally play a secondary role.

Here, the multiplier sought by Applicant would yield a rate of $127.50 per hour for the most recent work he did, or 70% more than is permitted in EAJA matters. While this begs the question whether the $75.00 maximum is today reasonable (or ever was in some areas), it detracts from the prospect of establishing by clear evidence that the amount billed was unreasonably low, so as to warrant a departure from the general rule that the amount billed is presumed to be reasonable. In all the circumstances, I conclude that Applicant's fees must be limited to the fee actually charged to the client.

Applicant's affidavits show total legal and paralegal billings of $7558.50. My count of the paralegal billing indicates at error of one hour at $50.00, thus reducing that amount to $7808.50. The reduction of $504.75 in the briefing fees would bring that amount down to $7303.75. Applicant also seeks reimbursement of costs in the amount of $284.56 for long distance telephone calls, postage, document delivery and document reproduction. Such costs are recoverable, except for the $185.60 allocated to reproduction of docu-

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5/ In HUD, supra, at page 892, the Authority allowed a customary $90.00 hourly rate, noting that it did "not greatly exceed the rated permitted under" the EAJA.

ments. In FAA, Washington Flight Service Station, 27 FLRA 901, 905, the Authority disallowed photocopying costs, following a Federal Circuit Court holding that such costs are not recoverable under 5 U.S.C. § 7701(g)(1).6/

Accordingly, I recommend that the Federal Labor Relations Authority enter 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 $7402.71, and orders the Department of the Air Force Headquarters, 832D Combat Support Group, DPCE, Luke Air Force Base, Arizona, to pay that amount to attorney Stanley Lubin.

JOHN H. FENTON
Chief Administrative Law Judge

Dated: November 17, 1987
Washington, D.C.

6/ Bennett v. Department of the Navy, 699 F.2d. 1140, 1145.