

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

.
AMERICAN FEDERATION OF .
GOVERNMENT EMPLOYEES, .
LOCAL 2391, AFL-CIO .
Respondent .
and .
ROBERT W. WANGEMAN, .
An Individual .
Charging Party .
.

Case No. 9-CO-70014

Joseph F. Henderson
For Respondent

Susan E. Jelen, Esq.
For General Counsel of FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This proceeding is based upon application for attorney's fees filed under the Equal Access to Justice Act, 5 U.S.C. 504, hereinafter referred to as EAJA, and the Rules and Relations of the Federal Labor Relations Authority (FLRA) 5 CFR Part 2430.

The undersigned issued a Decision in American Federation of Government Employees, Local 2391, AFL-CIO, 9-CO-70014, on September 21, 1988, dismissing the unfair labor practice complaint therein. No exceptions were filed. Accordingly, by Order dated November 3, 1988 the FLRA adopted the findings, conclusions and recommendations set forth in the Decision, and dismissed the Complaint.

On November 25, 1988 American Federation of Government Employees, Local 2391, AFL-CIO, hereinafter called AFGE Local 2391, filed Application for An Award of Attorney's Fees and Expenses, pursuant to EAJA. The General Counsel of the FLRA filed a Motion to Dismiss Respondent's Application for An Award of Attorney's Fees. The General Counsel of the FLRA, in its Motion, does not contest that AFGE Local 2391 is "eligible" for an award of attorney's fees but contends the application should be deemed because it does not establish the reasonableness of the fees sought and does not meet the requirements of Section 2430.4 of the Rules and Regulations of the FLRA. AFGE Local 2391 filed a Response to the Motion of the General Counsel of the FLRA.

Findings and Conclusions

In the original Decision in this matter, I conclude that AFGE Local 2391 did not violate Section 7116(b)(1) of the Statute when President Cunningham refused to rent an apartment to Robert W. Wangeman, the charging party, because Wangeman was not a member of AFGE Local 2391. The apartment in question was owned by Cunningham and other family members and not by AFGE Local 2391. I concluded however that there would have been no violation by AFGE Local 2391, even if it had owned the apartment.

The EAJA provides for the award of attorney's fees and other expenses. Section 2430.1 of the FLRA's Rules and Regulations provides "an eligible party may receive an award when it prevails over the General Counsel unless the General Counsel's position was substantially justified or special circumstances make an award unjust. . . ."

AFGE Local 2391 prevailed in the underlying case herein. Further in light of findings and disposition in underlying case I conclude that the position of the General Counsel of the FLRA was not "substantially justified;" it was unreasonable and unjustified. It is undisputed, and I so find that AFGE Local 2391 is a labor organization that represents bargaining unit employees of Department of Labor, including employees in Department of Labor's Region IX, in San Francisco, that AFGE Local 2391 has no employees and that AFGE Local 2391's net worth is under \$10,000. The General Counsel of the FLRA does not dispute the foregoing facts, which are set forth AFGE Local 2391's Application.

Accordingly, I conclude that AFGE Local 2391 is eligible for an award of attorney's fees in this matter.1/

The only issue in dispute is the reasonableness of the fees sought. In its application AFGE Local 2391 asks for expenses in the amount of 1,021.84 and attorney's fees for 38.8 hours at 75.00 per hour for an amount of \$2910.00.

General Counsel of the FLRA contends that the amount requested by AFGE Local 2391 does not comply with Section 2430.4(b), which provides:

(b) In determining the reasonableness of the fees sought for an attorney, agent or expert witness, the following matters may be considered:

(1) If the attorney, agent or witness is in practice, his or her customary fee for similar services, or if an employee of the applicant, the fully allocated cost of the services.

General Counsel of the FLRA urges that the request for attorney's fees should be denied because AFGE Local 2391 requested to be reimbursed for attorney's fees at the prevailing market rate, not to exceed \$75 per hour, 2/ as provided in 5 U.S.C. 504(b)(1)(A) of EAJA. Because counsel for AFGE Local 2391 is a staff counsel for American Federation of Government Employees, General Counsel of the FLRA urges any request for attorney's fees is limited by section 2430.4(b) of the FLRA's Rules and Regulations to the "fully allocated cost of the services," not the prevailing market rate as computed by AFGE Local 2391.

AFGE Local 2391 in its response to the General Counsel of the FLRA's Motion to Dismiss the Application reiterates its claim to fees based on the market rate but also states that based on the method urged by the General Counsel of the FLRA it is entitled to \$3928.19. This is based upon the expenses of \$1,021.84 and 1987 hours paid at the basis of \$37.42 per hour and 1988 hours paid at 40.53 per hour

1/ There are no special circumstances presented herein that would make an award unjust.

2/ Thus AFGE Local 2391 requested to be paid \$3931.84 which is composed of \$1021.84 in expenses and 38.8 hours times \$75 which equals \$2910.00.

and then the fee amount doubled to cover overhead for a fee total 2906.35. 3/

I conclude in the subject case that AFGE Local 2391 is entitled to attorney's fees based on actual cost rather than the prevailing market rate plus 100% of the attorney's compensation to cover overhead. See Department of Health and Human Services, Health Care Financing Administration, Region IV, Atlanta, Georgia, 21 FLRA 910 (1986). 4/

In light of all of the foregoing, I conclude that pursuant to EAJA and the FLRA's Rules and Regulations, AFGE Local 2391 is entitled to an award of attorney's fees and expenses in the amount of \$3928.19 representing a recovery of \$1,021.84 in Expenses and \$2,906.35 for attorney's fees and overhead, based upon the actual amount paid by AFGE to its staff counsel. Accordingly, I hereby recommend that the Authority issue the following award:

AWARD

Pursuant to the Equal Access to Justice Act, 5 U.S.C. 504 and Part 2430 of the Authority's Rules and Regulations, 5 C.F.R. 2430 et seq., expenses, overhead costs and reasonable attorney's fees are hereby awarded in the total amount of \$3928.19, including the 38.8 hours the Union attorney devoted to the case.

Issued: May 8, 1989, Washington, D.C.



SAMUEL A. CHAITOVITZ
Administrative Law Judge

3/ This amount was apparently computed as follows:

1987 hours worked - 22.8 x (\$37.42x2) =	1706.35
1987 hours worked - 16 x \$75 =	<u>1200.00</u>
	2906.35

The \$75 hour rate rather than doubling the \$40.53 per hour was apparently used because section 2430.4(a) of the FLRA's rules and regulations provides that no award for attorney's fees may exceed \$75.00 per hour.

4/ In the subject case there has been no contention or demonstration by AFGE Local 2391 that the attorney is not required to reimburse the union for more than the actual costs incurred. See Department of Defense Dependent Schools, Pacific Region, 32 FLRA 109 (1988).