

OFFICE OF ADMINISTRATIVE LAW JUDGES WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL SECURITY
ADMINISTRATION

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party

Case No. 3-CA-80274

[41 FLRA 755
(1991) enf d 976 F.2d
1409 (D.C. Cir. 1992)]

Timothy M. White, Esquire For the Respondent

Bruce D. Rosenstein, Esquire For the General Counsel

Mark D. Roth, Esquire Judith D. Galat, Esquire For the Charging Party

Before: WILLIAM B. DEVANEY Administrative Law Judge

DECISION AND ORDER

ON MOTION FOR PAYMENT OF ATTORNEY FEES

UNDER THE BACK PAY ACT

DECISION

The Authority issued its decision herein on July 19, 1991, in which it ordered compliance with the arbitrator's award, notwithstanding that the arbitrator had no jurisdiction, for the reason that the award had become final upon the Federal Circuit's denial of OPM's petition for review. On August 15, 1991, the Authority granted the Charging Party, American Federation of Government Employees, AFL-CIO, an extension of time to September 19, 1991, to file its application for attorney fees pursuant to the Back Pay Act, 5 U.S.C. § 5576. The Charging Party's application for attorney fees, dated and postmarked September 19, 1991, was timely filed with the Authority.

Pursuant to section 2430.7(a) of the Authority's Regulations, 5 C.F.R. § 2430.7(a), by Order dated September 27, 1991, the application was referred to the undersigned. Respondent by timely motion, dated October 23, 1991, and received on October 24, 1991, moved that action on the application be postponed pending disposition of the appeal filed herein. By Order dated November 4, 1991, pursuant to section 2430.7(b) of the Authority's Regulations, 5 C.F.R. § 2430.7(b), proceedings for the award of fees were stayed, ". . . pending final disposition of the petition for review by the United States Court of Appeals. Upon final disposition of court review a new time schedule will be fixed for the submission of any answer or comments to the application. . . ."

On October 13, 1992, the United States Court of Appeals for the District of Columbia Circuit granted the Authority's application for enforcement of its order (FLRA may enforce compliance with arbitration award regardless of whether arbitrator had contractual jurisdiction in original proceeding), 976 F.2d 1409 (D.C. Cir. 1992); and by Order dated December 15, 1992, an Order issued fixing time for responses, specifically, as

applicable, the Order provided,

"ORDERED: 1. That within 30 days after service of this Order, Respondent may file an answer to Charging Party's application . . . (2) That the General Counsel may file comments on the Charging Party's application within 30 days after it is served. . . ."

The Order of December 15, 1992, was duly served on December 15, 1992, by certified mail, on, inter alia,

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(Mr. White having been the only person who entered his appearance for Respondent on the Attorney Fees Application)

Bruce D. Rosenstein, Esquire
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Respondent, although duly served by mail on December 15, 1992, filed no answer to the application for attorney's fees within 30 days after service of the December 15, 1992, Order; and General Counsel filed no comments on the application within 30 days after service of the December 15, 1992, Order.

Charging Party requests an attorney's fee for the services of Anne M. Wagner, a 1985 graduate of the National Law Center, George Washington University, to be paid to the AFGE Legal Representation Fund. Ms. Wagner's affidavit claims a total of 51.1 hours for services from December 1987, to June 11, 1991, and

sets forth in detail, by date, the actions involved. Charging Party seeks a market rate but, "In the event that the FLRA does not award a market rate fee award, AFGE requests that the fee be awarded based on a cost-plus formula." ("Memorandum In Support of Motion For Attorney's Fees," p.12) (hereinafter "Memorandum"). The Authority, in United States Department of Justice, Bureau of Prisons, Washington, D.C. and Bureau of Prisons, Federal Correctional Institution, Ray Brook, New York, 46 FLRA No. 89, 46 FLRA 1002 (1992); and U.S. Customs Service, 46 FLRA No. 98, 46 FLRA 1080 (1992), has held that,

". . . in this and future cases, where attorney fees are awarded under the Back Pay Act to successful employees represented by union attorneys, we will use market rate fees to calculate the payment of those attorney fees. To the extent that previous decisions applied a cost-plus formula for determining such attorney fees, those decisions will no longer be followed." (46 FLRA 1007) (See, also, 46 FLRA 1095).

Accordingly, the fee requested herein will be considered on the basis of market rates.

Charging Party's claimed market rate of \$130.00 is fully supported by "Laffey" matrix [Laffey v. Northwest Airlines, Inc., 572 F.Supp. 354, 371 (D.D.C. 1983); Save Our Cumberland Mountains v. Hodel, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc)] attached to the affidavit of Joseph A. Yablonski which shows that the prevailing rate for attorneys in private firms in Washington, D.C. with experience equivalent to Ms. Wagner's years of service for the years 1987-1989, ranged from 105.00 to 135.00; is fully consistent with the sworn declaration of Mr. Gary E. Klein, a managing director of Smith, Klein and Partners, a Washington, D.C. legal search consulting firm, and various surveys and publications attached to his declaration. Since there is no objection to the fee sought, and I find it fully supported by the affidavits and declarations, I find that the fee requested is reasonable. As there is no assertion that the work of Ms. Wagner was merely duplicative of that of General Counsel, and Charging Party vigorously asserts that it was not, Memorandum, pp. 15-17, it is unnecessary to express an opinion since, in the absence of any such allegation, there is adequate basis to dispel any appearance that Charging Party's efforts "merely duplicated" the efforts of General Counsel. United States Department of Justice, Bureau of Prisons, Washington, D.C. and Bureau of Prisons, Federal Correctional Institution, Ray Brook, New York, 32 FLRA 20, 28 (1988). By like token, in the absence of any contention that an award of attorney fees is not warranted in the interest of justice, I express no opinion as to whether an award is warranted in the interest of justice, Naval Air Development Center, Department of the Navy, 21 FLRA 131, 137, 159 (1986); 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, 886-887 (1986), as the Authority's prior action in enforcing the award created a presumption that enforcement of the award, despite the arbitrator's lack of jurisdiction, was in the public interest and that presumption governs in the absence of a showing to the contrary.

Accordingly, it is recommended that the Authority adopt 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 of attorney fees for services performed by Ms. Anne M. Wagner and orders the U.S. Department of Health and Human Services, Social Security Administration to pay \$6,643.00 to the American Federation of Government Employees Legal Representation Fund.

WILLIAM B. DEVANEY
Law Judge

Administrative

Date: April 8, 1993

Washington, DC