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

UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, WASHINGTON, D.C. AND BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION, RAY BROOK, NEW YORK Respondent	
and	Case No. 1-CA-40368 [22 FLRA No. 95]
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3882 Charging Party	

William C. Owen, Esquire
For the Respondent

Martin R. Cohen, Esquire
For the Charging Party

Gay H. Snyder, Esquire
Applicant Pro se

Richard Zaiger, Esquire
For the General Counsel

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

I. Statement of the Case

This decision concerns a Motion for Attorneys' Fees and Costs filed by Gay H. Snyder in connection with a previously decided unfair labor practice case. The matter was assigned to the undersigned for disposition pursuant to 5 C.F.R. § 2423.20 inasmuch as Administrative Law Judge Louis Scalzo, who heard the unfair labor practice case, retired and is no longer available to the Authority.

All counsel, including counsel for the General Counsel, were provided an opportunity to respond to the Motion and to specifically address certain issues. 1/ No party requested an evidentiary hearing, and such hearing appears unnecessary based on the various submissions. Upon consideration of the entire record, I make the following findings and conclusions.

II. Background 2/

In the underlying unfair labor practice proceeding, it was alleged that the Respondent violated section 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) when it failed to comply with the provisions of section 7122(b) of the Statute by refusing to implement an arbitration award clarifying an earlier award dealing with an employee's termination from employment.

A grievance over the termination of Richard Frontera, an employee at the Respondent's Ray Brook, New York facility (FCI, Ray Brook), was filed pursuant to the parties' negotiated grievance procedure and the matter was submitted to arbitration. On December 16, 1983, Arbitrator Dale S. Beach found that there was not just and sufficient cause for the adverse action taken. He issued an award that reduced the penalty to a 60 calendar day suspension and ordered that "[w]ithin 10 calendar days of receipt of this Award Mr. Frontera shall be reinstated to his regular job without the loss of any employee benefits." The award also provided for backpay to June 10, 1982, the date of discharge, less pay for the 60-day suspension, and less any possible unemployment compensation or wages received from other employment during the period of discharge. Upon receipt of the December 16th award, the Respondent determined that an appeal should not be

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1/ The Charging Party's subsequent reply brief and submissions of July 26, 1987 and August 7, 1987 are accepted. Respondent's motion to strike is denied. Counsel for the General Counsel replied, "As a neutral party representing the public interest, Counsel for the General Counsel declines to take a position regarding the propriety of attorney fees in this proceeding."

2/ The background of the underlying grievance and unfair labor practice proceeding is taken from the Authority's decision at 22 FLRA No. 95.

filed. It also decided that Frontera would be returned to work in a location other than FCI, Ray Brook. The Respondent did not request the Office of Personnel Management (OPM) to take the necessary steps to perfect an appeal to the United States Court of Appeals for the Federal Circuit in accordance with the provisions of section 7121(f) of the Statute and 5 U.S.C. § 7703(d).

The Respondent decided not to return Frontera to FCI, Ray Brook. Rather, the Respondent reassigned him to the United States Penitentiary, Lewisburg, Pennsylvania (USP, Lewisburg). This was done despite vigorous objection by the Charging Party (the Union) that this would not satisfy the arbitrator's award. The Union contacted Arbitrator Beach on February 7, 1984, and sought an interpretation of his order that the Respondent "reinstate Frontera to his regular job without the loss of any employee benefits." The Respondent did not receive proper notice of the request for clarification.

On March 1, 1984, without providing the Respondent an opportunity to be heard, Arbitrator Beach issued a clarification of Award, holding that Frontera should be reinstated to his regular job as Cook-Foreman at FCI, Ray Brook, without the loss of any employee benefits. In his Clarification, Arbitrator Beach explained that "[t]he use of the term 'regular job' in my award means regular job at the Federal Correctional Institution at Ray Brook, New York. Normally when arbitrators say 'regular job' they mean the same job at the same location held by the grievant before his discharge."

The Respondent did not request OPM to take the necessary steps to perfect an appeal of the clarified award to the Federal Circuit. Instead, the Respondent refused compliance and filed exceptions to the clarified award with the Authority.

On June 29, 1984, the Authority in American Federation of Government Employees, Local 3882 and Federal Prison System, Ray Brook, New York, 15 FLRA 204 (1984), dismissed the Respondent's exceptions, noting that it had no jurisdiction to review the case, as the arbitration award involved a section 7121(f) matter, and referred the Respondent to its right to seek judicial review pursuant to 5 U.S.C. § 7703. The Respondent's motion for reconsideration was denied by the Authority on December 11, 1984, on the same grounds.

The assignment of Frontera to USP, Lewisburg, represented an economic and personal burden for him. He did begin working at Lewisburg in early 1984, but resigned on March 2, 1985, due to such hardship.

Administrative Law Judge Louis Scalzo, contrary to the Respondent's contentions, concluded that the Authority had jurisdiction to order compliance with section 7121(f) arbitration awards. The Judge found that the sentence in section 7122 mandating that agencies "shall take the actions required by an arbitrator's final award" refers to arbitration awards reviewed by the Authority, and to adverse action arbitration awards reviewable by the United States Court of Appeals for the Federal Circuit.

The Judge further found that the charge was timely filed, finding that the record, at a minimum, establishes that OPM received notice of the clarified award through the Respondent, and that OPM thereafter took no action to intervene in the arbitration proceeding for the purpose of requesting reconsideration as a step toward appeal to the Federal Circuit. Since more than 30 days passed after OPM's receipt of notice, OPM's right to proceed further was extinquished. Therefore, the clarified award became final and binding. He concluded that the charge in this case was filed well within six months of the date on which the clarified award became final and binding, and within the six-month period prescribed by section 7118(a)(4) of the Statute.

The Judge concluded that because the record clearly showed that the Respondent did not comply with the March 1, 1984 clarified award after it became final and binding, the Respondent violated section 7116(a)(1) and (8) of the Statute. The Judge found it unnecessary to pass upon whether such conduct was also violative of section 7116(a)(5) of the Statute. The Judge's recommended order provided that the Respondent comply with the clarified award and make Frontera whole, consistent with applicable law and regulation, for any loss of pay he may have suffered by reason of his separation (resignation) from Federal service brought about by the Respondent's unlawful conduct, and pay to him a sum equal to the amount he would have earned or received from the date of his separation to the effective date of the offer of reinstatement, less any amount earned through other employment during this period of time. The Judge also ordered the Respondent to make Frontera whole, consistent with law and regulation, for any monetary losses

incurred as a result of the Respondent's assignment of Frontera to USP, Lewisburg, for which he has not otherwise been reimbursed.

The Respondent and the General Counsel filed certain exceptions to Judge Scalzo's recommended decision. Upon review of the exceptions, the Authority adopted the Judge's findings, conclusions, and recommended order. The Authority concluded that Respondent's refusal to reinstate Frontera to his regular job at FCI, Ray Brook, New York, without the loss of any employee benefits, as required by Arbitrator Beach's award, which had become final and binding, constituted a failure to comply with the Arbitrator's award and a violation of section 7116(a)(1) and (8) of the Statute. The Authority found that the Judge's recommended remedy was appropriate in the circumstances, noting in part:

> The Arbitrator's award obligated the Respondent to reinstate employee Frontera to his former position at FCI, Ray Brook, New York. The Respondent ordered him to report to USP, Lewisburg, Pennsylvania. The record shows that Frontera and the Charging Party on his behalf went to great lengths in an attempt to persuade the Respondent that the reassignment would be a hardship. While the Respondent gave the reason that in cases such as Frontera's it was Bureau policy to reassign the employee, it also insisted that in its opinion the reassignment was not precluded by the Arbitrator's award. The Arbitrator's clarification clearly showed that the reassignment was inconsistent with the award.
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> The Judge's finding that the Respondent's failure to comply with the award caused Frontera's resignation is supported by the record. Accordingly, we find that, but for the Respondent's refusal to comply with the Arbitrator's award, Frontera would not have resigned from Federal service. We shall adopt the Judge's recommended Order. See Department of the Treasury, United States Customs Service, New York Region, New York, New York, 21 FLRA No. 119 (1986).

Respondent petitioned the United States Court of Appeals for the Second Circuit for review of the Authority's decision and Order. The Authority cross-petitioned for enforcement. On April 22, 1987, the Court denied the petition for review and enforced the Authority's order, stating, in part: 3/

> Petitioners contend that the FLRA has no jurisdiction to enforce agency compliance with a final adverse action arbitration award. It is well settled that, absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language. United States v. Apfelbaum, 445 U.S. 115, 121 (1980). Our thorough review of the legislative history of the Civil Service Reform Act reveals no Congressional intent contrary to the plain meaning of 5 U.S.C. § 7122(b). The language of 5 U.S.C. § 7122(b) requires an agency to comply with "an arbitrator's final award." This phrase clearly includes adverse action arbitration awards. Accordingly, an unfair labor practice complaint alleging agency noncompliance with a final adverse action arbitration award falls within the FLRA's unfair labor practice jurisdiction. See 5 U.S.C. § 7116(a)(1) and (8).
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> Our scope of review of an FLRA unfair labor practice proceeding based on non-compliance with an arbitration award is limited to a determination of whether there was substantial evidence to support the FLRA's finding of non-compliance. United States Department of Justice v. FLRA, 792 F.2d 25, 29 (2d Cir. 1986). Since petitioners concede non-compliance, the FLRA's finding of non-compliance is clearly supported. We therefore enforce the order of the FLRA.

3/ United States Department of Justice, Bureau of Prisons, Federal Correctional Institute (Ray Brook), Petitioners, v. Federal Labor Relations Authority, Respondent, American Federation of Government Employees, AFL-CIO, Local 3882, Case No. 86-4133, 87-4013 (2nd Cir., April 22, 1987). (Unreported order).

III. Timeliness of the Application

Following the Authority's decision on July 30, 1986, Gay H. Snyder served her Motion for Attorneys' Fees and Costs by letter dated August 19, 1986 addressed to the Regional Director in Boston. The motion was received by the Regional Office on August 21, 1986. Ms. Snyder noted in her letter that copies were being sent to "the other parties and to the FLRA Office of Administrative Law Judges in Washington, D.C." The Office of Administrative Law Judges (OALJ) received copies of the Motion on August 22, 1986. The Regional Director subsequently forwarded a copy of the Motion to the Authority's Office of Case Management (OCM), which was received by OCM on September 2, 1986. By memorandum dated September 11, 1986, the Director of OCM transferred the Motion to the Chief Administrative Law Judge pursuant to § 2430.7 of the Authority's Rules and Regulations.

Snyder's motion cited the Back Pay Act, 5 U.S.C. § 5596, as the basis for the Authority's power to grant attorneys' fees and costs. In a footnote she also relied upon the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1), but stated that lengthy argument was not presented "since it appears that 5 C.F.R. § 2430.1 et seq. is inapplicable since a labor union was not named as a respondent in this case." She "reserved the right" to supplement her argument under the EAJA if the Authority concludes that the Back Pay Act is inapplicable or does not merit an award. 4/

Respondent contends that the application for fees should be dismissed because it was improperly filed with the Regional Director, or was received by the Authority's central office from the Regional Director in excess of 30 days from the Authority's decision.

4/ Authority regulations provide that awards of attorney fees under the EAJA are available only to a respondent, other than the United States, who prevails against the General Counsel in an unfair labor practice proceeding. The Union as Charging Party in this case clearly was not the respondent and is not entitled to an award of attorney fees under that Act. See United States Department of the Treasury, Internal Revenue Service and Internal Revenue Service, Austin District, 23 FLRA No. 100 (1986), petition for review filed, No. 86-1712 (D.C. Cir. Dec. 22, 1986).

Respondent's position is rejected. The Authority's Rules and Regulations to date do not address the procedures for applying for attorney fees pursuant to the Back Pay Act, although 5 C.F.R. § 2423.31 does give the Regional Director certain responsibilities for resolving backpay controversies after the entry of an Authority order directing payment of backpay. 5/ Therefore, it was not entirely unreasonable for Snyder to file her motion with the Regional Director. 6/ She served the motion on all parties and the Office of Administrative Law Judges. No party was prejudiced. Also, contrary to Respondent's assertion, the motion was received directly by the OALJ, and by the Authority from the Regional Director, within 30 days of the Authority's decision, as measured by Authority regulations. This is the time period set by the Authority for filing applications for attorney fees pursuant to the Equal Access to Justice Act. See 5 C.F.R. §§ 2429.21-22, 2430.7.

IV. Requirements of the Back Pay Act

The Back Pay Act authorizes awards of attorney fees against the Government where an appropriate authority has found: (1) that an employee has been affected by an unwarranted or unjustified personnel action which results in the withdrawal or reduction in pay, allowances, or differentials; and (2) that this action be remedied by an award of backpay. 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 (HUD), 24 FLRA No. 84, 24 FLRA 885 (1984).

5/ The Office of Personnel Management (OPM) has issued regulations to carry out the Back Pay Act. See 5 C.F.R. Chapter 1, Subpart H (1985). § 550.806(a) does not prescribe a time frame for the filing of applications for attorney fees, but does provide, "Such a request may be presented only to the appropriate authority that corrected or directed the correction of the unjustified or unwarranted personnel action." In the absence of implementing Authority regulations "the appropriate authority" would be the Authority itself since Administrative Law Judges issue only recommended decisions pursuant to Authority Regulations.

6/ Snyder's specific reliance on § 2422.10 of the Authority's Rules as authority for filing motions with the Regional Director is misplaced. Part 2422 of the Rules pertain to representation proceedings.

A. Unwarranted or Unjustified Personnel Action and Backpay Award

The motion for attorney fees meets these threshold requirements. The effect of the Authority's final order was to determine that Frontera had been affected by an unjustified or unwarranted personnel action which resulted in the withdrawal of pay. Section 5596(b)(3) provides that "personnel action" includes the omission or failure to take an action or confer a benefit. The Authority's Order corrected this action with a remedy which included an award of backpay.

B. The Requirements of 5 U.S.C. § 7701(g)

Where a motion meets the unwarranted personnel action and backpay requirements, section 5596(b)(1)(A)(ii) of the Back Pay Act provides that fee requests must be judged under the standards for awarding attorney fees provided in 5 U.S.C. § 7701(g). HUD, supra.

1. Incurrence of Attorney Fees. The record shows that attorney fees was incurred by the Union on the employee's behalf. Frontera was represented by his duly certified bargaining representative, the Charging Party, and by the Union's counsel. 5 C.F.R. § 550.806 of the OPM Regulations governing Back Pay provide, "An employee or an employee's personal representative may request payment of reasonable attorney fees . . . ." The Authority and the MSPB have granted attorney fees in analogous circumstances. See Naval Air Development Center, Department of the Navy, 21 FLRA 131 (1986); Department of Health and Human Services, Health Care Financing Administration, Region IV, Atlanta, Georgia, 21 FLRA 910 (1986); O'Donnell v. Department of Interior, 2 MSPB 604 (1980).

2. Prevailing Party. The General Counsel and the Charging Party were the prevailing parties. Frontera also prevailed in that he obtained a significant part of the relief sought, namely reinstatement to his regular job, backpay, and expenses incurred as a result of his improper reassignment. HUD, supra, 24 FLRA at 888.

3. Interest of Justice. The result obtained in the underlying unfair labor practice proceeding shows that an award of attorney fees is warranted in the interest of justice. HUD, supra, 24 FLRA at 888-890. The Agency's refusal to comply with the March 1, 1984 clarified award was

"clearly without merit," "wholly unjustified," and the agency "knew or should have known that it would not prevail on the merits." The arbitrator's clarification clearly showed that Frontera had to be placed at his former job at Ray Brook, New York and that his reassignment to Lewisburg, Pennsylvania was inconsistent with the award. As the United States Court of Appeals held, the Agency's assertion that the Authority did not have jurisdiction to enforce agency compliance with a final adverse action award was contrary to the plain language of 5 U.S.C. § 7122(b), which requires an agency to comply with "an arbitrator's final award." The Administrative Law Judge and the Authority also found the Agency's argument as to the untimely filing of the charge to be without merit as the clarified award became final and binding at the expiration of 30 days after OPM's receipt of notice of the award. The Administrative Law Judge noted that Respondent's counsel attempted to obscure his communication with OPM "to avoid a final and binding effect by creating a record tending to indicate the absence of communication between the Respondent and OPM, and the absence of notice on the part of OPM." Likewise, Respondent should have known that it could not litigate issues as to the merits of the award in the unfair labor practice proceeding. As the Administrative Law Judge pointed out in his decision, "The Authority has repeatedly held in a series of analogous cases, that any contention that an arbitrator's award is deficient because it is contrary to law, rule or regulation must be made by invoking the procedures established by Congress."

4. Reasonableness of the Amount of the Award. Gay Snyder, for part of her period of representation, and Martin R. Cohen, at all relevant times, were employed by the American Federation of Government Employees, AFL-CIO (AFGE). Gay Snyder and Martin Cohen have requested a market rate fee for all work including that performed when employed by the Union based on Curran v. Department of the Treasury, 805 F.2d 1406 (9th Cir., 1986). The Authority to date has held that where such fees are to be paid to a union, including a special union fund expended solely for legal work, the fees are computed based on actual costs rather than on the prevailing market rate for the legal services rendered. See Department of Health and Human Services, Health Care Financing Administration, Region IV, Atlanta, Georgia and National Treasury Employees Union, 21 FLRA No. 106, 21 FLRA 910 (1986). The Merit Systems Protection Board has held that a union attorney's hourly salary rate must be based on the total number of annual work hours for which the attorney was

paid rather than on the hours of actual service. Contrary to the position urged by Snyder and Cohen, there can be no deduction for holidays, sick leave, and annual leave. Powell v. Department of the Treasury, 85 FMSR 5074 (1985); Overton v. Department of the Treasury, 85 FMSR 5083 (1985).

Snyder and Cohen have submitted an itemized list of the time spent and work performed on the case. Except for an unexplained 16.5 hours charged for travel back and forth between New York City and Lake Placid, New York, which is reduced to 12 hours as being reasonable for the distance traveled (approximately 500 miles total), there is no evidence to show that counsels' hours were duplicative of the General Counsel's, failed to make a substantial contribution to the General Counsel's efforts in prosecuting the case, or were not effectively utilized in advancing the employee's interests. HUD, supra, 24 FLRA at 891-892.

The itemized list and Snyder's affidavit show that she drafted and filed the initial charge and amendments. She was in contact with the Regional Office to urge that a complaint be issued and a temporary restraining order obtained. She then assisted the Region in obtaining witnesses and documentary evidence and in formulating trial strategy. Although counsel for the General Counsel conducted the questioning of witnesses, she appeared at the hearing on behalf of the Charging Party and worked with counsel for the General Counsel. She responded to an important question from the Judge as to the correct appellate procedure in such cases. She made an oral argument at the end of the hearing and filed a post-hearing brief. She avers that her post-hearing brief included a crucial argument, accepted by the Judge, dealing with whether or not the Charging Party complied with the six-month statute of limitations in filing the charge. After Judge Scalzo's opinion was rendered, Snyder monitored the pleadings of the Respondent and the General Counsel, conferred with Counsel for the General Counsel, Charging Party and Frontera as appropriate, and prepared the motion for attorney fees.

Snyder billed for 4.4 hours from August 23, 1984 to December 20, 1984. Her annual salary for 1984 was $31,506 based on 1820 hours. Accordingly, her hourly salary was $17.09. That hourly rate multiplied by 4.4 hours ($75.19), plus an equal sum ($75.19) as overhead, amounts to $150.38.

Snyder billed for 52.5 hours from January 17, 1985 to July 2, 1985. Her annual salary for 1985 was $32,451 based on 1820 hours. Accordingly, her hourly salary was $17.83. That hourly rate multiplied by 48 hours as being reasonable in view of the travel time deducted above ($855.84), plus an equal sum ($855.84) as overhead, amounts to $1711.68.

Martin R. Cohen billed for 2.5 hours on June 16, 1987 for preparation of a supplemental brief in support of the motion for fees. The billing for these hours is considered appropriate and granted, considering that Mr. Cohen has filed several other documents in the proceeding relating to the application. See Federal Aviation Administration, Washington Flight Service Station and National Association of Air Traffic Specialists, 27 FLRA No. 99, 27 FLRA 901, 905 (1987). Cohen's annual salary for 1987 was $37,760. based on 1820 hours. Accordingly, his hourly salary was $20.74. That hourly rate multiplied by 2.5 hours (51.85), plus an equal sum ($51.85) as overhead, amounts to $103.70.

Snyder has requested $125. in costs prior to July 5, 1985 for transportation, hotel expenses, photocopying, telephone calls and postage. Fees relating to travel of counsel, telephone tolls, and postage are permitted under 5 U.S.C. § 7701(g)(1), and photocopying costs are not. FAA, supra, 27 FLRA at 905. Accordingly, counsel is granted $116.66 for travel, long distance calls, and postage.

The above fees are to be paid to the AFGE Legal Representation Fund.

Snyder continued as the Charging Party's private counsel after her position at AFGE was terminated by a reduction in force on July 5, 1985. She had an agreement with the Charging Party whereby she was paid $250 for work performed, including costs, at the Office of Administrative Law Judge level until Respondent filed exceptions with the Authority. However, she avers that she continued to act as the Charging Party's representative until August 18, 1986. She has billed for 33.3 hours during this period at the rate of $90 per hour or $2997.

The Merit Systems Protection Board has held that fee arrangements establish a rebuttable presumption as to the maximum reasonable rate for attorney fees. See Davis v. Department of the Navy, MSPB Docket PH075286AO626, 87 FMSR 5523 (1987). Snyder avers that it was understood that her

work would be worth in excess of $250, but Local 3882 had severe financial limitations. It employed no one and had assets of only a few thousand dollars. Frontera could not pay for her services due to his long period of unemployment. In view of the number of hours devoted to the case, the financial conditions of the Charging Party and Frontera, and the remedial purposes of the Act to assure payment of the cost of vindicating employee rights, I find that Snyder has overcome the presumption that attorney fees here are reasonably limited to $250.

The fee request of Snyder for $2997. is reasonable based upon the attorney's customary hourly rate of $90. and the number of hours the attorney devoted to the case. See HUD, supra, 24 FLRA at 892.

For the period after July 5, 1985 Snyder claims $81.13 in costs. These costs include the transcript, photocopying, long distance calls, and postage. The Authority has held that the cost of the trial transcript is not a recoverable cost. HUD, supra, 24 FLRA at 892. As set forth above, fees relating to long distance calls and postage are permitted, but photocopying costs are not. Accordingly, counsel's request is reduced by $31.13 for transcript and by $16.66 for photocopying. Costs in the amount of $33.34 are approved.

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 $5112.76, and orders that the U.S. Department of Justice, Bureau of Prisons (Washington, D.C.) and Bureau of Prisons, Federal Correctional Institution, Ray Brook, New York pay $2082.42 to the AFGE Legal Representation Fund and $3030.34 to Attorney Gay H. Snyder.

GARVIN LEE OLIVER
Administrative Law Judge

Dated: November 4, 1987
Washington, D.C