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

U.S. CUSTOMS SERVICE Respondent	
and	Case No. 39 FLRA No. 64 (9-CA-90211)
NATIONAL TREASURY EMPLOYEES UNION Charging Party	

Martha T. Wong, Esq.
For the Respondent

Andrew R. Krakoff, Esq.
Lorrie A. Gray, Esq.
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION AND ORDER
GRANTING MOTION FOR PAYMENT OF ATTORNEYS FEES

Statement of the Case

This proceeding arises under the Back Pay Act, 5 U.S.C. 5596 and 5 C.F.R. 550.801 et seq., of the Rules and Regulations of the Office of Personnel Management. It was instituted by the filing of a Motion for Attorney's Fees by Andrew R. Krakoff, Esq. and Lorrie A. Gray, Esq., attorneys for the Charging Party, on March 25, 1991. The said Motion was transferred thereafter to the Chief Administrative Law Judge for further disposition. It was duly assigned to the undersigned for disposition.

Under date of May 8, 1991 Respondent submitted its Objection to Charging Party's[1/] Motion for Attorney's Fees

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1/ Referred to, at times, as either Charging Party or the Union.

along with a brief in support thereof. At the same time Respondent requested, in the alternative, either (a) an informal conference, (b) an evidentiary hearing; (c) additional submission re the reasonableness of the fees requested; (d) documentation verifying the time spent relating to prosecuting the unfair labor practice. On May 24, 1991 the undersigned denied the paid request except that he ordered the Union's attorneys to submit separate affidavits showing the annual salary of each one, before taxes, and the number of hours worked for which that annual salary was paid to the affiant. Pursuant to said Order, Andrew R. Krakoff and Lorrie A. Gray, attorneys for the Union, filed affidavits with the undersigned on June 12, 1991.

Background

On February 22, 1991 the Authority issued its decision on the merits in this case (39 FLRA No. 64) wherein it found that Respondent violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute by its failure to comply with an arbitrator's award, as clarified on October 16, 1988.

The Arbitrator issued his award on May 2, 1988. He found that Respondent's removal of the grievant was not for such cause as would promote the efficiency of the service. The grievant had been, prior to his removal, a GS-9 Step 5 canine enforcement officer. The Arbitrator, agreeing that some discipline was necessary, directed that the grievant be suspended on July 17, 1987 for 30 days but be demoted to a GS-7 grade on August 17, 1987 and restored to his position as canine enforcement officer.

Respondent reinstated the grievant on July 11, 1988 to Step 1 of a GS-7. The Charging Party filed a request for clarification since the award did not specify the step in the GS-7 grade to which the grievant should be demoted. In the Arbitrator's clarification of his award he directed that the grievant be demoted to the GS-7 grade at Step 10, and to receive all backpay and overtime, as well as accrued sick and annual leave credits. No appeal was filed on behalf of Respondent to the clarified award.

Respondent did not restore the grievant to the Step 10 level of the GS-7 grade as directed by the Arbitrator. In resisting the claim that it engaged in an unfair labor practice, Respondent argued to the Authority that the award had become final before the clarification, and that no

clarification was necessary. The Authority disagreed and found that the award, as clarified, became final on October 16, 1988. Accordingly, Respondent's noncompliance therewith violated the Statute.

Conclusions

The Back Pay Act, 5 U.S.C. 5596 (1982), provides for the award of attorney fees against the Government where an appropriate authority has found that (1) an employee has been affected by an unwarranted or unjustified personnel action which results in the withdrawal or reduction in pay, allowances, or differential; and (2) this action be remedied by an award of backpay.

This Act also requires that fee requests be judged under the standards provided in 5 U.S.C. 7701(g) for awarding attorney fees. See 5 U.S.C. 5596(b)(1)(A)(ii). The requirements in this regard are: (1) that attorney fees have been incurred; (2) the employee is the prevailing party in the action; (3) an award of attorney fees is warranted in the interest of justice; and (4) the fees are reasonable.

In its Objection to the Motion for Attorney's Fees, Respondent contends that a threshold determination was not made by the Authority, to wit: that the grievant was affected by an unwarranted or unjustified personnel action which resulted in the withdrawal or reduction of the grievant's pay. It argues that the Authority's ruling that the clarification by the Arbitrator was final and binding was not a determination as to the substance of the clarification.

This contention is rejected. The effect of the Authority's decision herein was to determine that the grievant was affected by the unjustified or unwarranted action by Respondent. After a full discussion of the facts and the issues, the Authority set forth the clarification of the Arbitrator's award which directed Respondent to reinstate the grievant to GS-7 at Step 10 level. This award, which the Authority found final and binding, also directed Respondent to pay the grievant for all backpay and overtime he would have earned as a GS-7, Step 10 level employee. In concluding that Respondent violated section 7116(a)(1) & (8) of the Statute by not complying with the clarified award, it is quite evident that the Authority determined that the grievant was affected by the action resulting in his loss of pay. No other reasonable inference is warranted. See United States Department of Housing and Urban Development, et. al., 24 FLRA 885.

In respect to the four standards set forth in 5 U.S.C. 7701(g) for awarding attorney fees, Respondent does not take issue with the (a) incurrence of attorney fees by the Union on behalf of the grievant, (b) fact that the grievant was the prevailing party.

The record clearly establishes that such fees were incurred by the Union and it is so concluded. Moreover, both General Counsel and the Union prevailed since they obtained a decision by the Authority that Respondent violated the Statute by failing to comply with the Arbitrator's award. Further, the record reflects that the grievant/employee obtained relief by being reinstated and awarded backpay with overtime, as well as accrued leave, for the GS-7 grade, Step 10 during the period designated in the award. Thus, I also find that the individual involved herein was the prevailing party.

Respondent does contend that an award of attorney fees herein is not appropriate as not being in the "interest of justice" as required by 5 U.S.C. 7701(g).

The Merit Systems Protection Board (MSPB) developed a set of five categories of cases fitting within the framework of the standard: "interest of justice". See Allen v. U.S. Postal Service, 2 M.S.P.B. 582 (1980). Three of these, which are more particularly relevant or at issue herein, are as follows:

> (a) Where the agency's action was "clearly without merit", or was "wholly unfounded", or the employee is "substantially innocent" of the charges brought by the agency.
>
> (b) Where the agency initiated the action against the employee in bad faith.2/
>
> (c) Where the agency "knew or should have known that it would not prevail on the merits" when it brought the proceeding.

The application of this standard was clarified to some extent in Yorkshire v. Merit Systems Protection Board, 746 F.2d 1454 (1984). The Court referred specifically to

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2/ This category also includes an attempt to "harass" the employee, as well as to "exert improper pressure on the employee to act in certain ways."

the category concerned with whether the personnel action by an agency was clearly without merit, or was wholly unfounded, or whether the employee was substantially innocent. A decision in this regard, concluded the Court, should be based on the result of the appeal - not on the evidence and information available to the agency prior to the hearing. The purpose of awarding attorney fees is not punitive but intended to minimize the burden an unsubstantiated accusation places upon employees. The Court added that in respect to the "substantially innocent" standard in awarding fees, the question of an agency's fault need never arise. Further, it concluded that an award of attorney fees is warranted in the interest of justice if on appeal any of these elements is present, and the determination should be separate from the agency's motivation when it initiated the action.

The Authority abided by the Federal Circuit's approach in United States Department of Housing and Urban Development, et al., 24 FLRA 885. The suspension of an employee for acting on behalf of a union was found to be violative of sections 7116(a)(1) and (2). Since it was found that the employee was substantially innocent, and the discipline was "wholly unfounded" and "clearly without merit", the "interest" of justice requirement was satisfied.

In a case more analogous to the instant one, the Authority dealt with a failure by an agency to comply with an arbitrator's award. See Department of the Air Force Headquarters, 832d Combat Support Group, DPCE, Luke Air Force Base, Arizona, 32 FLRA 1084. The agency therein argued that the Arbitrator never found the agency's action (transferring two employees from the swing shift to the day shift) was based on bad faith or clearly without merit. It also asserted that the agency did not know, nor should it have known, there was no likelihood of prevailing on the merits in an unfair labor practice proceeding. The agency also insisted it maintained a good faith belief in its right to reassign employees pursuant to the collective bargaining agreement.

The Authority, noting that no exceptions were filed to the award, concluded that the award became final 30 days after its issuance, and this failure to comply was a violation of the Statute. Under those circumstances, the failure to comply with the award, and pay backpay to employees who were denied a shift differential, was an action "clearly without merit" under the Back Pay Act. An award of attorney fees for the unfair labor practice proceeding was deemed warranted in the interest of justice.

In maintaining that the award of fees is not in the interest of justice, Respondent herein contends the Arbitrator had no jurisdiction to render a clarification of his award on October 16, 1988 and hence it was of no effect. Since it complied with the award of May 2, 1988 it was never obligated to abide by the clarified award. Respondent adverts to the fact that it continued to maintain that position as part of its defense; that the agency has not acted in defiance of any mandate; and there is no evidence to substantiate a claim of bad faith on its part in view of the willingness to cooperate with the General Counsel and the Charging Party.

In part, at least, the Respondent made these arguments before the Authority in the unfair labor practice proceeding, 34 FLRA 749. As to the validity and effect of the October 16, clarification of the May 2 award, the Authority concluded those issues were not litigable in the unfair labor practice proceeding, but are matters going to the substance of the award which could have been raised within the appeals procedure. The Arbitrator clearly had jurisdiction to arbitrate, and thus it was concluded that the failure to comply with the Arbitrator's award was violative of sections 7116(a)(1) & (8).

The foregoing decisions by the Federal Circuit Court and the Authority persuades me that the contentions advanced by Respondent herein are without merit. The continued refusal to comply with the arbitration award, as clarified on October 16, 1988, was an action clearly without merit under 5 U.S.C. 7701(g)(1). Hence, an award of attorney fees and costs for the unfair labor practice proceedings is warranted in the interest of justice. See, Luke case, supra.

Turning now to the fourth standard required for an award of attorney fees, which is the reasonableness of the award, Respondent makes two principal contentions. With respect to the calculation which governs the award, it maintains that the cost-plus formula, rather than the market rate of services, should be controlling. Further, Respondent argues that the Union should have submitted a detailed and particularized statement of the work performed by the attorneys, showing how their time was utilized and establish it was not excessive nor duplicative of the General Counsel's work.

The Union takes the position that the market rate for attorney fees should govern herein, and that the request for the fees of Andrew R. Krakoff, Esq. and Lorrie A. Gray, Esq. should be based upon the prevailing rate for their services.

It insists, moreover, that the Authority should follow the Ninth Circuit, within whose jurisdiction this case arose, and apply the market rate in granting the award of attorney fees. The Ninth Circuit concluded that, under the Back Pay Act, the NTEU was entitled to market-rate fees since they would be deposited into its Legal Services Program Fund. Curran v. Department of the Treasury, 805 F.2d 1406 (9th Cir. 1986). In the cited case the Merit Systems Protection Board limited the fees to a cost-plus formula - salary and overhead to be reimbursable. The Circuit Court reversed on the ground that since the fees were put into a separate account to be used for litigation purposes, there was no need to be concerned about laymen practicing law or sharing legal fees. Hence, it awarded fees based on the market rate.

While the Union recognizes that the Authority has held that the cost-plus formula should control rather than the market rate for attorney fees, it urges the Authority to reverse its position and conform to the Ninth Circuit and the D.C. Circuit. See also Jordan v. Department of Justice, 694 F.2d 514 (D.C. Circuit, 1982).

Case law as established by the Authority makes it clear that, despite the argument presented by the Union, the market-rate fee for attorney services will not be adopted by the Authority. The fact that a special fund is created by the union, into which all fees awarded to union-employed attorneys would be paid, does not warrant a different result. The Authority held in Department of Health and Human Services, Health Care Financing Administration, Region IV, Atlanta, Georgia, 21 FLRA 910, that the creation of such a fund does not entitle the union to market-rate fee. It was made clear in 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, 29, that the Authority would not follow the Circuit Courts but would continue to base attorney fees on a cost-plus basis. In said case the Authority concluded as follows:

> We agree with the position of the MSPB and the Federal Circuit. We decline to follow Curran and to overturn our existing interpretation of this matter. We will continue to base fee awards to union-employed attorneys on a cost-plus formula as set forth in Health Care Financing Administration, 21 FLRA 910 (1986). (Emphasis supplied)

Accordingly, I reject the Union's request that the attorney fees for Krakoff and Gray, be based on the market rate, but shall apply the cost-plus basis in calculating any award.

Respondent's contention that the Union has not demonstrated that the services were not duplicative nor necessary is rejected. The Authority has stated that, while fee requests must be carefully scrutinized, the mere presence of an administrative prosecutor does not per se preclude an award for contribution by outside counsel. Absent a specific showing, the Authority will not conclude such services were duplicative or did not make a substantial contribution. HUD, San Antonio, 24 FLRA 885 (1985).

With respect to the itemized hours spent by both counsel for the Union, I am satisfied that the affiant's have sufficiently detailed the dates, time spent, and the nature of the work performed in regard to the unfair labor practice case involving the parties herein. The time spent in relation to each task by both attorneys appears to be reasonable, and there is no evidence or factual information present in the record to dispute the particularized time spent by each one. Neither is there any data which calls for a conclusion that their services were either duplicative or failed to contribute substantially to the General Counsel's efforts in prosecuting the case.

However, in applying the cost-plus formula to the award of fees herein, I do not accept the calculations as set forth by the affiants. Attorney Krakoff has calculated his claim as follows: His annual salary during 1989 was $71,766.00. This amount is based on a paid work week of 37 and 1/2 hours times 52 weeks per year, amounting to 1950 paid work hours annually. From this figure of 1950 hours Krakoff subtracted 75 hours of holiday time (10 holidays times 7 and 1/2 hours each; subtracted 156 hours annual leave per year; subtracted 104 hours sick leave per year - leaving a balance of 1615 total hours of work time. He calculated his hourly rate for 1989 to be $44.43 by dividing "$71,766.00 by 1615 hours. His claim for work spent on the case in 1981 is for 7 and 1/2 hours, and this would result in a request for $333.21.

However, there is no justification for deducting the holiday time (75 hours), the annual leave (156 hours), and the sick leave (104 hours) from the paid work hours per year. The Authority has held in the Bureau of Prisons case, supra, that there can be no deduction for holidays, sick

leave and annual leave, citing Powell v. Department of the Treasury, 85 FMSR 5074 (1985).

Thus, the paid work hours for Attorney Krakoff for 1989 are 1950 rather than 1615. Using 1950 hours as the divisor, his hourly rate for 1989 based on his annual salary of $71,766.00 was $36.80. The claim by him for 7 and 1/2 hours spent in 1989 on this case is calculated to be $276.00 ($36.80 x 7 and 1/2 hours). Krakoff also claims attorney fees for 3 hours spent on the case in 1991. His salary for that year was $77,118.00 . Using the 1950 hours as the divisor, his hourly rate for 1991, based on his annual salary of $77,118.00, was $39.55. His claim for 3 hours spent in 1991 on this case is calculated to be $118.65. The total allowed for the time spent by this attorney in 1989 and 1991 is therefore $394.65. It has also been determined that an equal amount is allowable for overhead.3/ Accordingly, I find that the proper attorney fee to be awarded for Krakoff's services should be $789.30.

Affiant Lorrie A. Gray submitted a claim for 71 and 1/2 hours spent working on this case in 1989 and 26 and 1/2 hours in 1990. Her annual salary for 1989 was as follows: January 1 - June 1 in the amount of $38,039.00; June 2 - December 31 in the amount of $41,121.00. Gray's submission reflects she worked 2.3 hours on this case between January 1 and June 2. Using the same divisor of 1950 hours (her annual paid work hours), and based on her annual salary for this period of $38,039.00, her hourly rate for that period was $19.50. Her claim for 2.3 hours on this case for the period January 1 - June 2, 1989 is calculated to be $44.85.

With respect to the 69.2 hours worked by Gray between June 2 - December 31, 1989, using the same divisor of 1950 hours (her annual paid work hours), and based on her annual salary for this period of $41,121, the hourly rate for that period was $21.08. Her claim for 69.2 hours in this case for the period June 2 - December 31, 1989 is calculated to be $1,458.74.

The balance of Gray's claim is for 26.5 hours of legal services rendered in 1990. Using the same divisor of 1950 annual paid work hours, and based on her annual salary of $42,601.00, the hourly rate in 1990 amounted to $21.85. Her

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3/ Bureau of Prisons case, supra.

claim for 26.5 hours of legal work in 1990 is thus calculated to be $579.03.

The total allowed for time spent by Gray in 1989 and 1990 is therefore $2,082.62. An equal amount is granted to overhead. Accordingly, I find that the proper attorney fee to be awarded for Gray's services in this case should be $4,165.24.

By virtue of the above calculations, I conclude that the proper award of attorney fees for services rendered by the Union's attorneys in this unfair labor practice case amounts to $4,954.54.

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 $4,954.54, and orders that the U.S. Customs Service pay such sum to the National Treasury Employees Union Legal Services Program Fund.

Issued, August 15, 1991, Washington, DC

William Naimark

WILLIAM NAIMARK
Administrative Law Judge