UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

UNITED STATES DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE, AUSTIN COMPLIANCE CENTER, AUSTIN, TEXAS Respondent and NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 247 Charging Party	Case No. 6-CA-90506 [44 FLRA 1306 (1992)]

Susan L. Nieser, Esquire
On brief: Roger Rhodes, Esquire
Gary A. Anderson, Esquire
For the Respondent

Christopher J. Ivits, Esquire
For the General Counsel

Michael J. Wolf, Esquire
On brief: Dennis Schneider, 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

Statement of the Case

The Authority issued its decision herein on May 27, 1992. By letter dated June 29, 1992, Dennis Schneider, Esquire, National Counsel, on behalf of himself and Michael Wolf, Esquire, Assistant Counsel, filed with the Authority an application for award of "reasonable attorney fees at the market rate in the amount of THIRTY-ONE THOUSAND FIVE HUNDRED EIGHTY-SIX DOLLARS AND NO CENTS ($31,586.00) pursuant to 5 USC 5996, and 5 USC 7710(g). In the alternative, NTEU hereby applies for an award using the cost-plus formula in the amount of ELEVEN THOUSAND FOUR HUNDRED NINETY-FOUR DOLLARS AND FIFTY CENTS ($11,494.50)." (Union's Application For Award Of

Attorney Fees). In addition, Charging Party submitted with its Application a Brief in Support thereof. By Order dated July 20, 1992, the Authority referred the Charging Party's application for attorney fees to the Office of Administrative Law Judges and the application was duly referred to the undersigned. By Order dated July 28, 1992, the time to answer was extended, on motion of Respondent, for good cause shown, to August 17, 1992.[1/] Respondent timely mailed its Answer which was received on August 20, 1992. As a part of its Answer, Respondent requested an evidentiary hearing. On August 20, 1992, Charging Party mailed an Opposition to Respondent's motion for an evidentiary hearing and, also, a Motion for extension of time to file a reply, i.e., "until a reasonable period after the Judge rules on Respondent's Motion . . ." for a further hearing, which were received on August 26, 1992. By Orders dated September 2 and 4, 1992, Respondent's request for a further evidentiary hearing was denied; Charging Party was granted an extension of time to file a reply to September 15, 1992; and Respondent was granted leave to file any further written statement of position regarding backpay calculations, overtime or moonlighting earnings on, or before, September 15, 1992. On September 3, 1992, Charging Party mailed a second request for extension of time to reply to Respondent's Answer to October 2, 1992, which was denied.

On September 15, 1992, Charging Party timely mailed its Reply to Respondent's Answer, which was received on September 18, 1992. Also on September 15, 1992, Respondent timely mailed a written statement which, however, took the form of an "Amended Answer", which was likewise received on September 18, 1992. On September 21, 1992, Charging Party mailed a Request to reply to the amended answer, received on September 24, 1992. By Order dated September 25, 1992, Charging Party was granted leave to file a reply to Respondent's Amended Answer on, or before, October 9, 1992. On October 6, 1992, Respondent mailed a Motion For Clarification and Request for Leave to File Rebuttal to Union

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1/ On July 1, 1992, General Counsel filed the following Response to Charging Party's Application:

> ". . . General Counsel does not oppose this motion to the extent that it is consistent with Authority precedent and requests fees in accordance with the formula set by the Authority for such fees. Health Care Financing Administration, 35 FLRA 274 (1990), Department of the Air Force, Headquarters, 832 Combat Support Group DPCE, Luke Air Force Base, Arizona, 32 FLRA 1084 (1988)."

Replies, received on October 9, 1992, which was denied by Order dated October 13, 1992. On October 8, 1992, Charging Party mailed a Motion, received on October 13, 1992, that Respondent's Amended Answer not be considered and Charging Party's Reply to the Amended Answer. Charging Party's motion that Respondent's Amended Answer not be considered was denied by Order dated October 14, 1992. Finally, on my own motion, in light of the Authority's decisions 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 (1992); and U.S. Customs Service, 46 FLRA No. 98 (1992), by Order dated January 25, 1993, Applicant was granted leave to file herein on, or before February 15, 1993, evidence showing the market rate fees for Austin, Texas, and Respondent and General Counsel were given leave to respond on, or before, March 8, 1993.

Background[2/]

The complaint alleged, I found, and the Authority affirmed, that Respondent violated §§ 7116(a)(1), (5) and (8) of the Statute by failing and refusing to timely implement the terms of an arbitrator's award. The complaint further alleged, I found, and the Authority affirmed, that Respondent violated §§ 7116(a)(1) and (8) of the Statute by failing and refusing to fully implement the arbitrator's award by denying backpay for a two week period. The Authority further held, contrary to my decision, that: (a) Respondent failed to comply timely with the arbitration award by unreasonably delaying the processing of the backpay claim and thereby violated §§ 7116(a)(1), (5) and (8) of the Statute; and (b) Respondent improperly deducted overtime and "moonlighting" earnings from the backpay award.

The issues, as initially found and as modified and found by the Authority, were all raised, litigated, and briefed by General Counsel (see, 44 FLRA at 1307, 1309,-10).

ATTORNEY FEES UNDER THE BACK PAY ACT, 5 U.S.C. § 5596(b)(i)(A)(ii)

As the Authority has stated, ". . . an award of attorney fees must be in conjunction with an award of backpay to the grievant on correction of the personnel action, that the award of attorney fees must be reasonable and related to the

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2/ The facts were fully set forth in my initial decision, which may be found at 44 FLRA 1332, et seq., and will be referenced only as needed.

personnel action, and that the award of attorney fees must be in accordance with the standards established under 5 U.S.C. § 7701(g)." International Brotherhood of Electrical Workers, 14 FLRA 680, 683-684 (1984); see to like effect: Naval Air Development Center, Department of the Navy, 21 FLRA 131, 135, 151 (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) (hereinafter referred to as "HUD"); Federal Aviation Administration, National Aviation Facilities Experimental Center, 32 FLRA 750, 752 (1988); United States Department of the Navy, Norfolk Naval Shipyard, 34 FLRA 725, 728 (1990); U.S. Department of Treasury, Customs Service, Washington, D.C. and Customs Service Region IV, Miami, Florida, 4-CA-90748, ALJ Dec. Rep. No. 95, March 28, 1991. Thus, the Back Pay Act provides, in pertinent part, that:

> "(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 . . . 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 for the period for which the personnel action was in effect --
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> . . .
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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 I 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(b)(1)(A)(ii)) (Emphasis supplied).

Section 7701(g) provides:

> "(g)(1) . . . the Board [Merit Systems Protection Board], or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of

> reasonable attorney fees incurred by an employee[3/] . . . if the employee . . . is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit." (5 U.S.C. § 7701(g)(1)(Emphasis supplied).

Section 5596(c) of the Back Pay Act provides that, "(c) The Office of Personnel Management shall prescribe regulations to carry out this section. . . ." (5 U.S.C. § 5596(c)), and

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3/ The Merit Systems Protection Board, indulging in a bit of legerdemain, has established that, ". . . fees incurred by an employee . . .", doesn't really mean that, but, rather,

> ". . . attorney fees are 'incurred' within the ambit of § 7701(g)(1) where an attorney-client relationship exists [there, solely between the union and the attorney, ". . . appellant . . . 'incurred' no fees whatsoever, since his counsel was retained by the union, not by appellant, and . . . appellant has no contractual obligation to pay his counsel (2 M.S.P.R. at 452)] and counsel has rendered legal services on behalf of the appellant [employee] in an appeal before the Board." O'Donnell v. Department of Interior, 2 M.S.P.R. 445, 454 (1980); Allen v. U.S. Postal Service, 2 M.S.P.R. 420, 427 n.9 (1980).

Adopted and followed by the Authority, HUD, supra, 24 FLRA at 887; 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, 25-27 (1988) (hereinafter "Ray Brook"). If this were a case of first impression, I would find, fully in agreement with the dissenting opinion of Judge Sentelle, in American Federation of Government Employees, AFL-CIO, Local 3882 v. FLRA, 944 F.2d 922, 938, et seq. (D.C. Cir. 1991), that only attorney fees "incurred by an employee or applicant for employment could be recovered under § 7701(g)(1)." Not only is this plainly what the statute provides, but the legislative history shows that Congress was concerned only about expenses incurred by employees or applicants for federal employment, not reimbursement of unions. But, of course, the issue has been firmly decided to the contrary.

§ 550.807(c) of the Regulations of the Office of Personnel Management provides, in pertinent part, that,

> "(c) . . . the payment of reasonable attorney fees shall be deemed to be warranted only if --
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> (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) of title 5, United States Code; . . ." (5 C.F.R. § 550.807(c)(1) (Emphasis supplied).

As the Authority noted in HUD, supra, 24 FLRA at 887-890, there are four requirements of 5 U.S.C. § 7701(g): First, that an attorney-client relationship existed and that the attorney rendered legal services on behalf of the employee, O'Donnell v. Department of Interior, supra. Here there is no dispute that an attorney-client relationship existed between Mr. Tyler and Mr. Wolf and that Mr. Wolf rendered legal services on behalf of an employee, Mr. Tyler.

Second, that the employee is a prevailing party. As in Ray Brook, supra, the Union, National Treasury Employees Union, Chapter 247 (hereinafter "Union"), filed the charge; but the Union acted at all times on behalf of Mr. Tyler and prevailed; Mr. Tyler was the sole person who suffered harm by Respondent's failure and refusal to timely comply with the arbitrator's final award, by failing to pay Mr. Tyler for the period from September 24, 1989, to October 8, 1989, and by improperly deducting certain earnings from the backpay award; and, as the Authority held in Ray Brook, supra,

> ". . . we believe that the term 'prevailing party' as used in § 7701(g)(1) refers explicitly to MSPB proceedings. Under the Back Pay Act, an employee who has suffered an unjustified personnel action may or may not be a direct 'party' to the range of proceedings which can give rise to an award of attorney fees." (32 FLRA at 25-26).
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> . . .
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> "To read the Back Pay Act to require an employee to file unfair labor practice charges in addition to, or as opposed to, the Union filing such charges as the representative of that employee would emphasize form over substance and render the Back Pay Act's provision inapplicable in a large number of cases. We do not believe that such an interpretation is necessary or appropriate . . . the

reference in 5 U.S.C. § 5596(b)(1)(A)(ii) of the Back Pay Act to 'standards established under section 7701(g)' refers to the standards for determining that an award is in the interest of justice, including any case in which the agency's action was clearly without merit.

"Accordingly, we conclude that the fact that the Union was a 'party' to the case . . . but . . . [the employee] had not filed a charge and was therefore not a 'party' . . . does not preclude an award of attorney fees. We further conclude that the Union, acting at all times on behalf of . . . [the employee], incurred fees within the meaning of the Act. See O'Donnell, 2 MSPB at 608-10." (32 FLRA at 25-26).

Third, that an award of attorney fees is warranted in the interest of justice. This is an essential consideration in this proceeding and is discussed in detail hereinafter.

Fourth, that the amount of any award be reasonable. Respondent, while asserting that no fee is warranted, further asserts that the fee claimed is unreasonable. This is also discussed hereinafter.

A. INTEREST OF JUSTICE

As Applicant notes (Application, p. 11-12), the Merit Systems Protection Board (MSPB), in Allen v. United Postal Service, 2 MSPB 582, 593, 2 M.S.P.R. 420, 434-435 (1980), set forth five, non-exclusive, guidelines for determining whether an award of attorney fees is warranted in the interest of justice; and the Authority has made clear that these guidelines, approved by the United States Court of Appeals for the Federal Circuit [Sterner v. Department of the Army, 711 F.2d 1563, 1570 (Fed. Cir. 1938); Sims v. Department of the Navy, 711 F.2d 1578, 1581 (Fed. Cir. 1983); Yorkshire v. Merit Systems Protection Board, 746 F.2d 1454, 1456 (Fed. Cir. 1984)], are the starting point in determining when an award of fees is warranted in the interest of justice. Naval Air Development Center, Department of the Navy, 21 FLRA 131, 137, 159 (1986)[4/]; HUD, supra, 24 FLRA at 888-890. It is unnecessary to dwell at any length on this requirement since it is plain that Respondent's failure and refusal timely to comply with the arbitrator's award after it had become final

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4/ For a full summary of the legislative history of the 1978 addition of the attorney fees amendment to the Back Pay Act, see, id. at 152-159.

was without merit and wholly unjustified, and Respondent knew, or should have known, that, because it had failed and refused to timely reinstate the grievant and otherwise timely to comply with the final award, it would not prevail on the merits in the unfair labor practice proceeding. Ray Brook, supra, 32 FLRA at 23. Respondent, above all others, should know that it could not ignore its duty to comply with a final arbitration award with impunity any more than a taxpayer can not ignore the duty to file a tax return with impunity.

Respondent asserts that it reasonably believed it would prevail by focusing solely on the calculation of the backpay award. This it may not do. Even if there were no disagreement whatever on the calculation of the backpay award, Respondent's unwarranted failure or refusal to reinstate Mr. Tyler for seven weeks after the award had become final violated §§ 16(a)(1), (5) and (8) of the Statute, as I found and the Authority affirmed, Respondent could not reasonably have believed that it would prevail on the unfair labor practice charge. Respondent further asserts that the unethical conduct of Mr. Wolf, ". . . by appearing as counsel for NTEU and then testifying as a fact and expert witness" prohibits the award of attorney fees (Respondent's Amended Answer to Union's Application For Award of Attorney Fees, pp. 9-15; Answer to Union's Application For Award of Attorney Fees, pp. 6-11). Although it is a poor practice, and one to be avoided, as I previously held herein, nothing in our Rules prohibits an attorney for a party also testifying as a witness in the same case (cf. Gusman v. Unisys Corporation, __ F.2d __, No. 41, Daily Labor Reporter D-1 (March 4, 1993), Nos. 92-2415 and 92-3134, U.S. Court of Appeals For the Seventh Circuit, decided February 25, 1993) and, as I further held herein, Mr. Wolf was not disqualified, although his credibility was seriously impaired and he was not to be credited when there was conflicting testimony or evidence (44 FLRA at 1333 n.4); nor is this the forum to determine whether, by such conduct, Mr. Wolf has violated the Texas Code of Professional Responsibility (id., at 1333, n.4). Accordingly, as Mr. Wolf lawfully, under the Rules and Regulations of the Authority, performed services as an attorney he is eligible for attorney fees pursuant to 5 U.S.C. § 5596(b)(1)(A)(ii); however, the fee should exclude time spent in preparing to testify as a witness and for time spent as a witness inasmuch as he was not then acting as an attorney in the litigation of this case, i.e., non-employee witnesses are entitled to compensation solely pursuant to § 32(c) of the Statute.

B. REASONABLENESS OF REQUESTED FEE

Applicant has submitted an accounting of the time expended with a statement describing each charged time entry. Mr. Wolf claims a total of 172.5 hours. In addition, Mr. Dennis Schneider has submitted an accounting of the time he spent in consulting with Mr. Wolf, review of briefs and preparation of Attorney's fees brief. Mr. Schneider claims 11.9 hours.

1. The Hourly Rate

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 (December 18, 1992) (hereinafter, "Bureau of Prisons"), the Authority held, in part, 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 at 1007) (Emphasis supplied).

The Authority further held, in pertinent part, that,

> ". . . We note the Supreme Court's direction in Blum [Blum v. Stenson, 465 U.S. 886 (1984)] that 'the burden is on the fees applicant to produce satisfactory evidence--in addition to the attorney's own affidavits--that the prevailing requested rates are in line with those in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.' Blum, 465 U.S. at 895-96 n.11 . . . In cases arising subsequent to this decision, a party requesting an award of attorney fees must satisfy the requirements for market rate fees. A party's failure to do so may result in denial of fees." (46 FLRA at 1009).

In U.S. Customs Service, 46 FLRA No. 98, 46 FLRA 1080 (December 31, 1992), the Authority reaffirmed its decision in Bureau of Prisons, supra, inter alia, that,

> ". . . in future case [sic] '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.'" (46 FLRA at 1095).

In U.S. Customs Service, supra, the union was, and it also is herein, the National Treasury Employees Union; here, as in U.S. Customs Service, supra, NTEU maintains a segregated "Legal Service Program Account" for the receipt of attorney fees awards for the exclusive use for funding administrative and judicial proceedings. (Application, p. 20), and in U.S. Customs Service, supra, the Authority noted that, "In the present case (i.e. Customs), the Union asserts, without contradiction, that at all times pertinent to this case it maintained a separate account for legal services, entitled NTEU Legal Services Program, which is used solely to pay the litigation expenses of the Union's attorneys.[5/] Consistent with our decision in Bureau of Prisons, we find that an award of attorney fees to the Union on a market-rate basis is appropriate." (46 FLRA at 1095).

5/ See, Curran v. Department of the Treasury, 805 F.2d 1406, 1409 (9th Cir. 1986) (Ninth Circuit had jurisdiction because matter was pending in that Circuit on October 1, 1982, the cutoff date for the transfer of MSPB appeals to the Federal Circuit); American Federation of Government Employees, AFL-CIO, Local 3882 v. FLRA, 944 F.2d 922, 934-937 (D.C. Cir. 1991).

Initially, the Authority, after Blum, supra, and Curran, supra, held that,

> ". . . where such fees are to be paid to a union, the fees are computed based on actual costs rather than on the prevailing market rate. . . . Further, a special fund created by a union into which all fees awarded to union-employed attorneys would be paid and expended solely for legal work does not entitle the union to market rate fees for the services of its staff." Department of Health and Human Services, Health Care Financing Administration, Region IV, Atlanta, Georgia, 21 FLRA 910, 915 (1986); Naval Air Development Center, 21 FLRA 131, 140 (1986); National Treasury Employees Union v. Department of the Treasury, 656 F.2d 848 (D.C. Cir. 1981); Goodrich v. Department of the Navy, 733 F.2d 1578 (Fed. Cir. 1984), cert. denied, 105 S. Ct. 958 (1985); Wells v. Schweiber, 12 MSPB 329 (1982); PPG Industries, Inc. v. Celanese Polymer Specialties, 840 F.2d 1565, 1570 (Fed. Cir. 1988); Harper v. Better Business Services, Inc., 961 F.2d 1561, 1564 (11th Cir. 1992).

42 U.S.C. § 1988 (1966 ed., Supp. V) had provided that in federal civil rights actions, ". . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (Emphasis supplied). The Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)(ii), similarly provides for "reasonable attorney fees". In Blum v. Stenson, 465 U.S. 886 (1984), the Supreme Court held that under § 1988 reasonable attorney's fee was,

> ". . . to be calculated accordingly to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel[11/]" (id. at 895).

> "11/ . . . To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence . . . that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to - for convenience - as the prevailing market rate."

In Bureau of Prisons, supra, as set forth above, the Authority stated that, ". . . a party requesting an award of attorney fees must satisfy the requirements for market rate fees" which, as stated in Blum, supra, are the prevailing rates in the community; and in U.S. Customs Service, supra, the Authority reaffirmed its Bureau of Prisons, supra, conclusions. The Authority has no regulations concerning awards of attorney fees under the Back Pay Act; however, it does for Awards of Attorney Fees and Other Expenses under the Equal Access to Justice Act (5 U.S.C. § 504) and 5 C.F.R. § 2430.4(b)(2) provides as follows:

> "(2) The prevailing rate for similar services in the community in which the attorney . . . ordinarily performs services[6/];"

6/ A compelling argument could be made that emphasis be placed on where the principal services are performed, not on the place where the attorney "ordinarily performs services". For example, a N.Y. City attorney tries a case in Austin, Texas; assuming that all work is done in Austin, he should receive the prevailing Austin rate - not the prevailing N.Y. rate. On the other hand if the case were tried in N.Y. City

(continued...)

Here, both Mr. Wolf and Mr. Schneider are located in Austin, Texas; the case arose in Austin, Texas; and the work by Messrs. Wolf and Schneider was performed in Austin, Texas. Accordingly, the market rates for attorney fees in this case are the prevailing rates in Austin, Texas. Specifically, the asserted market rate of Washington, D.C. is rejected as an appropriate market rate for the award of attorney fees in this case.

Pursuant to my Order concerning Market Rate Fee, dated January 25, 1993, Charging Party-Applicant - has submitted the affidavit of B. Craig Deats, an attorney and shareholder in the firm of Jenkins and Deats, P.C., Austin, Texas, and a specialist in labor and employment law, purporting to show the prevailing rates for Austin, Texas, of $150.00 per hour for shareholders (presumably, essentially partners); $125.00 per hour for associates; and $42.00 per hour for law clerks and paralegals. General Counsel did not dispute the prevailing rates asserted by Charging Party-Applicant for Austin, Texas. Respondent, by Response timely mailed on March 8, 1993, and received on March 17, 1993[7/], challenges the market rates, asserting, inter alia, that, ". . . the evidence provided by NTEU is inadequate to support a market rate." (Respondent's Response To Market Rate Evidence, p. 1). However, Respondent made no showing whatever as to what the prevailing rates in Austin, Texas, are.

Charging Party-Applicant certainly has not made a broad survey of fees as the applicant did in Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, Case No. 3-CA-80274, OALJ 93-23 (April 8, 1993); nevertheless, it has submitted the affidavit of Mr. Deats who has stated that his, and his firm's, customary billing rates are: $150.00 per hour for shareholders; $125.00 per hour for associates; etc. and, further, that, in his opinion, these rates are at or below the prevailing community rates for similar work. I am

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6/ (...continued)
by an Austin attorney, he should receive the prevailing N.Y. rate - not the prevailing Austin rate. It is immaterial here since both the place where the services were performed and place, i.e., community, in which the attorneys ordinarily perform services were the same.

7/ During the move of the offices of the Authority, receipt of mail by our office was disrupted for a number of days so that, although mail arrived in the Authority's mail room much earlier, it was not distributed and/or date stamped as received until March 17, 1993.

well aware that Mr. Deats has appeared in matters before the Authority, indeed, that he has appeared before me. Charging Party-Applicant could have done more but, in the absence of any evidence or testimony challenging or disputing the showing of prevailing rates in Austin, established by the affidavit of Mr. Deats, it has met its burden of producing satisfactory evidence of prevailing rates in Austin, Texas. Accordingly, I accept, for the purpose of this proceeding, that the rates set forth in Mr. Deat's affidavit are the prevailing rates for employment-related matters in Austin, Texas.

2. Hours allowable

In Ray Brook, supra, the Authority stated,

"We do not construe the decision in HUD, San Antonio as having created a presumption in favor of attorney fee awards. . . . The Authority stated:

> "'Since these aspects of participation are entitlements under the Authority's Rules and Regulations [the right to appear at any hearing with counsel, to examine and cross-examine witnesses, to introduce evidence, subject to a decision by the Judge that such participation should be limited, the right to present oral argument and to file a brief], we will not second-guess a party's decision to seek legal representation . . . Nor will we conclude, absent 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. Although such fee requests must be carefully scrutinized, the mere presence of an administrative prosecutor does not per se preclude an award for contributions to the proceedings made by outside counsel. . . . 24 FLRA at 891 (citations omitted).'

"In our view, this statement is intended to emphasize two principles: (1) a rule of law making attorney fee awards inappropriate per se when the General Counsel prosecutes an unfair labor practice case is unwarranted . . .; and (2) fee requests must be carefully scrutinized to determine whether and to what extent participation by outside counsel contributed to the General Counsel's efforts in prosecuting the case or merely duplicated those efforts. . . ." (32 FLRA at 27-28) (Emphasis supplied).

The Authority, in Department of the Air Force Headquarters, 832d Combat Support Group DPCE, Luke Air Force Base, Arizona) (hereinafter, "Luke AFB"), 32 FLRA 1084 (1988), has noted that, "The Supreme Court described how a reasonable attorney fee award should be determined in Hensley v. Eckerhart, 461 U.S. 424 (1983) (Hensley)" (id. at 1099); that, while Hensley involved a fee request in a civil rights case under 42 U.S.C. § 1988, the Court stated that, "the standards set forth are generally applicable in all cases where Congress has authorized an award of fees to a 'prevailing party.'" Hensley, 461 U.S. at 433, n.7; and the Authority held, "Thus, we find that the standards in Hensley are applicable to requests for attorney fees under the Back Pay Act" (Luke AFB, supra, at 1100). The Authority also noted that, "In Hensley . . . The Court stated that the hours expended are not necessarily those 'reasonably expended.' . . . that applicants should make a good faith effort to exclude hours that are 'excessive, redundant, or otherwise unnecessary.' . . . If such billing judgment is not exercised, the Court instructed the courts to exclude hours not reasonably expended." (id. at 1101), and the Authority reiterated its holding in Ray Brook, supra, "which set forth the principle that requests for attorney fees must be carefully scrutinized to determine whether and to what extent participation by outside counsel contributed to the General Counsel's efforts in prosecuting the case or merely duplicated those efforts." (id. at 1101).

While, as the Authority has held, "An award of attorney fees should not, however, be reduced simply because a party failed to prevail on every contention raised", Naval Air Development Center, Department of The Navy, 21 FLRA 131, 140 (1986), the Supreme Court has made it clear that when an applicant has failed to prevail on a claim unrelated to the successful claim, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee, thus, the Court stated,

> "We hold that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. . . ." Hensley v. Eckerhart, 461 U.S. 424, 440 (1983).

Of course, as noted above, the Authority has held that, ". . . the standards in Hensley are applicable to requests for attorney fees under the Back Pay Act." Luke AFB, supra,

at 1100; see also, Boese v. Department of the Air Force, 784 F.2d 388, 391 (Fed. Cir. 1986).

Respondent challenges the application for attorney fees on various grounds including the assertion that Applicant, specifically, did not prevail on two of its claims, namely: its claim that the Complaint be amended; and its claim for compensation for adverse tax consequences due to the timing of the payment of backpay. Thus, Respondent states,

> ". . . the efforts of Mr. Wolf resulted in claims that did not prevail before the ALJ or the full Authority. For example, the arguments made at the hearing by General Counsel and NTEU were not identical. NTEU argued that the Agency had the obligation to comply with the award as of April 14, 1989, and requested that the unfair labor practice complaint be amended to include this date. General Counsel refused to amend the complaint and relied on the date of July 31, 1989.
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> NTEU argued this point vigorously at the unfair labor practice hearing and devoted 5 pages of its post-hearing brief to this argument. After Judge DeVaney (sic) affirmed his prior ruling on this issue, NTEU took exception to that ruling. NTEU devoted almost 12 pages of its 33-page Brief in Support of Exceptions to this argument. The full Authority also rejected this argument and affirmed that General Counsel may refuse to amend the complaint. 44 FLRA at 1307-08. The record thus shows on this issue that NTEU's efforts, while different from those of General Counsel, did not result in NTEU prevailing on the issue.
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> Similarly, NTEU also strongly argued at the hearing and in its post-hearing brief that Tyler should be compensated for adverse tax consequences due to the timing of the backpay award. Wolf's testimony on the tax issue was extensive (Tr. 67, 89-102) and he also introduced 5 exhibits which were hypothetical tax returns. NTEU spent 4 pages of its post-hearing brief discussing this issue. Judge DeVaney (sic) soundly rejected this claim and noted that General Counsel did not support the adverse tax consequences theory. 44 FLRA at 1356-58. NTEU did not take exception to the ruling on this claim. The adverse tax consequence argument is another example of how NTEU's case was different from that presented by General Counsel but the record again shows that NTEU did not prevail on the claims it separately

advanced." (Respondent's Answer, pp. 16-17; Respondent's Amended Answer, pp. 22-23).

These two claims were distinct from the claims which were successful; and Applicant did not prevail on these two claims. Accordingly, the hours spent on these unsuccessful claims should be excluded in considering the amount of a reasonable fee. Mr. Wolf's itemized record of services performed does not identify separately the hours devoted to these two claims; however, Applicant's post-hearing Brief was 43 pages in length plus 11 pages of backpay worksheets, which included, "Tax Consequences of Failure To Timely Fulfill Back Pay Obligation", or a total of 54 pages. Respondent notes that 9 pages of Applicant's Brief were devoted to these two claims, or about 1/6th. As Mr. Wolf shows a total of 36.5 hours devoted to the Brief (3/28 - 4/2/91) a deduction of six hours is a reasonable estimate of the time devoted to these two unsuccessful claims. The time may have been substantially greater since no allocation was made for time spent for oral argument on these claims or preparation for hearing; Mr. Wolf testified that he used a Turbo Tax software program to make calculations of tax consequences; etc. In like manner, Respondent notes that 12 pages of Applicant's 33-page Brief in Support of Exceptions, or nearly 1/3, was devoted to the amendment of the Complaint claim which the Authority also rejected. As Mr. Wolf showed 22.7 hours devoted to the "exceptions brief", a deduction of 7 hours is a reasonable estimate of the time devoted to this unsuccessful claim.

Other activity for which an attorney might very properly bill a client, i.e., for activity customary to an attorney-client relationship, nevertheless makes no contribution whatever to prosecution of a case and, pursuant to the Authority's criterion must be disallowed:

1989	
3/21 - 3/24	(1.6 hrs.)
6/29	(.2)
8/29	(.2)
9/13	(.3)
9/22	(.2)
9/22	(1.0)
12/15	(.2)
1990	
1/29	(.1)
3/21	(.1)
	(.4)

8/8	(.1)
8/13	(.2)
11/21	(.1)

1991

1/4	(.1)
1/17	(.2)
1/22	(.4)
2/13	(.2)
8/26	(1.8)

1992

6/1	(.6)
	8.0 hours

The above activities were not related to the prosecution of the case. I am well aware that an attorney must consult with his client(s) in preparing for trial but; "update Tyler", telephone conversations with Union representative and/or Tyler, study of decision and contact Tyler and Union, etc., did not contribute to General Counsel's efforts in prosecuting the case.

As noted above, Mr. Wolf's time in preparing to testify as a witness and conferring with another NTEU attorney, Mejia-Dietche, did not represent time as an attorney in trying this case and/or did not contribute to the prosecution of the case. Accordingly, the four hours charged for 1/28/91 will be disallowed. The .2 hours charged on 2/13/91 and .2 hours on 3/8/91 for "FOIA request . . ." bears no known relevancy to the conduct of the prosecution of this case and is disallowed.

Mr. Wolf shows 39.5 hours (**1990**: 3/22; 3/26; 3/27; 3/29; 3/30; 5/18; 5/23; 5/24; 11/21; 11/28, **1991**: 1/23) which are specifically designated "backpay". There may be additional hours relating to backpay computations not specifically designated "backpay". Respondent would disallow any fee based upon this activity because, inter alia, the "calculations were so thoroughly discredited" (Respondent's Answer, p. 17; Amended Answer p. 24); "The hours . . . Mr. Wolf spent on these calculations also were not effectively used to advance the employee's interests" (id. at 19 and 25); and "NTEU's efforts to calculate the backpay owed resulted in confusion . . . These efforts are not worthy of a reward." (id. at 20 and 26). Alternatively, "Those hours . . . need to be severely reduced." (Respondent's Amended Answer, p. 27). Clearly, the computations were unreliable and confusing. Because they created serious questions as to actual hours of employment, the hours claimed for the computations were

excessive. At the same time, it was important to establish both that overtime had been earned and the hours of Mr. Tyler's employment. Accordingly, because the time utilized was excessive, the hours claimed for these calculations will be reduced by 20 hours, leaving 19.5 hours which, under the circumstances seems a reasonable amount of time to examine, collate and compute, for the purposes of litigation, backpay liability.

Mr. Wolf claimed a total of 172.5 hours. Deducting, for reasons fully set forth above, 45.4 hours leaves 127.1 hours for Mr. Wolf. In addition, Mr. Dennis Schneider claims 11.9 hours. I find the time claimed in 1990 and 1991, 3.9 hours, did not contribute to General Counsel's efforts in prosecuting the case; however, the 8 hours claimed in 1992 for "Attorney's fees brief" are, fully allowable to the extent that any attorney's fee is granted. Luke AFB, supra, 32 FLRA at 1106-1108. This time, i.e., 127.1 hours for Mr. Wolf and 8 hours for Mr. Schneider, prompts the central question in this case, namely, is Respondent liable for any attorney fee where: (a) As noted previously, the issues, as initially found and as modified by the Authority, were all raised, litigated and briefed by General Counsel; (b) Charging Party did not prevail on any of the separate issues it raised, litigated and briefed. There is no doubt, in my opinion, that the result would have been precisely the same had NTEU not taken part in the litigation of this matter. That is, in response to the Authority's admonition in Ray Brook, supra, that,

> "(2) fee requests . . . be carefully scrutinized to determine whether and to what extent participation by outside counsel contributed to the General Counsel's efforts in prosecuting the case or merely duplicated those efforts. . . ." (32 FLRA at 28),

it could be concluded, as Respondent well argues, that outside counsel made no contribution to the General Counsel's efforts in prosecuting the case and that its efforts, at best, merely duplicated the efforts of General Counsel. Is outside counsel to be compensated only when General Counsel fails in his, or her, duty to properly prosecute a case and/or when outside counsel prevails on a separate count or theory not espoused by General Counsel? Perhaps, but I do not believe the proscription is total. That is, although Charging Party's efforts in prosecuting this case either totally duplicated the efforts of the General Counsel or related to claims or assertions, not joined in by General Counsel, on which it did not prevail, for which, pursuant to Ray Brook, supra, it is entitled to no attorney fees, there were, nevertheless, services which were not duplicative for which it is entitled to recover attorney fees, as follows:

(a) Mr. Wolf's time spent in preparing the charges; telephone conversations with Counsel for General Counsel, Mr. Merli; witness preparation, other than himself; etc., as follows: 1989 5/30, .4; 6/9, .3; 6/14, .3; 6/29, .1; 7/7, .2 and .3; 7/12, .2; 8/7, .2; 8/28, .7 and .1; 8/29, .1 and .1; 9/8, .3; 9/21, .7; 10/27, .6; 12/11, .3; 12/14, .1; 12/15, .1 and .3; 12/18, .1; 1990 1/11, .3 and .3; 1/26, .3; 3/19, .2; 3/21, .2; 4/9, .1; 4/16, .1; 5/30, .1; 6/12, .2; 6/22, .2; 8/8, .1; 8/24, .2; 11/27, .2; 1991 1/2, .1; 1/7, .2; 1/10, .7; 1/16, 4.1; 1/18, 1.4; 1/24, 3.2; 1/25, .1, which total 17.8 hours.

(b) Time allowed for back pay computations, 19.5 hours which I find did contribute to General Counsel's prosecution of this case.

(c) Time to prepare Application For Attorney Fees.

Wolf - 2.8 hours; Schneider 8 hours.

Total time set forth in (a), (b) and (c), above, 48.1 hours multiplied by the represented prevailing rate for Austin, Texas, of $150.00[8/], results in reasonable attorney fees of $7,215.00.

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 Messrs. Michael J. Wolf and Dennis Schneider, and Orders the United States Department of Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas, to pay $7,215.00 to the National Treasury Employees Union's Legal Service Program Account.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: April 23, 1993
Washington, DC

8/ Since there is a single represented prevailing rate, which Respondent does not challenge, the hours allowed for Messrs. Wolf and Schneider are treated as a unit.