

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

69 M.S.P.R. 299

Docket Number DC-0752-92-0316-A-1

GARNETT F. TAYLOR, Appellant,

v.

DEPARTMENT OF JUSTICE, Agency.

Date: January 22, 1996

Peter B. Broida, Esquire, Arlington, Virginia, for the appellant.

Alina F. Kofsky, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

Member Amador issues a dissenting opinion.

OPINION AND ORDER

The appellant has filed a petition for review, and the agency has filed a cross petition for review, of the addendum initial decision that awarded the appellant \$20,293.14 in attorney fees and costs. For the reasons set forth below, we GRANT the petition for review, DENY the cross petition for review, AFFIRM the addendum initial decision AS MODIFIED herein, and award the appellant \$34,060.14 in attorney fees and costs.

BACKGROUND

The agency removed the appellant from his GM-13 Security Programs Specialist position for failing to file income tax returns for three consecutive years. The appellant filed an appeal in which he admitted the misconduct, but argued that the penalty was too severe. The administrative judge affirmed the removal. Upon the appellant's petition for review, the Board found that the deciding official, in determining the penalty, did not consider some relevant factors, and gave too little weight to others; the Board found removal to be an unreasonable penalty in light of all of the circumstances, and mitigated the penalty to a 90-day suspension. *Taylor v. Department of Justice*, 60 M.S.P.R. 686 (1994).

The appellant filed a timely motion for attorney fees in which he requested \$34,425.13 in attorney fees and costs. Attorney Fees File (AFF), Tab 1. He later submitted a revised request of \$35,022.14. AFF, Tab 8. The agency opposed the motion, arguing that an award of attorney fees would not be in the interest of justice, and alternatively, that the claimed fees were not reasonable. AFF, Tab 6. The administrative judge held in an addendum initial decision as follows: (i) The appellant incurred attorney fees; (ii) the appellant is a "prevailing party"; (iii) an award of attorney fees is in the interest of justice because the agency knew or should have known that its choice of penalty would not be upheld; (iv) the hourly rate claimed by Mr. Gaffney, the appellant's primary attorney, is reasonable; (v) the hourly rate claimed by Mr. Chuzi, who represented the appellant in proceedings on the appellant's petition for review on the merits, would be reduced by \$15; (vi) the fees claimed for the services of a tax attorney are not recoverable; (vii) the fees claimed for photocopying and delivering a document are not recoverable; (viii) the 127.9 hours of attorney time for work during the initial appeal phase would be reduced to 48 hours to reflect unproductive time spent on unsuccessful arguments, and the 15.3 hours of law clerk time claimed for the same period would be disallowed, for the same reason; and (ix) the attorney time spent preparing a written reply before the deciding official, and the time spent preparing a reply to the agency's opposition to the motion for attorney fees, was excessive, and would be reduced. AFF, Tab 9.

The appellant, in his timely petition for review, contests all of the administrative judge's reductions in his claimed attorney fees, with one exception. Petition for Review File II (PRF II), Tab 1. The agency argues in its timely cross petition for review that the administrative judge erred in finding that an award of attorney fees is in the interest of justice. PRF II, Tab 3.

ANALYSIS

The agency does not dispute, and we have no reason to revisit, the administrative judge's findings that the appellant is a "prevailing party," that he incurred attorney fees in connection with the appeal, that the hourly rate claimed by Mr. Gaffney is reasonable, and that \$114.14 of costs incurred are recoverable. See 5 U.S.C. § 7701(g)(1). The appellant does not contest, and we have no reason to revisit, the administrative judge's decision to reduce Mr. Chuzi's hourly rate.

The agency's cross petition for review is denied.

After full consideration, we DENY the agency's cross petition for review, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The administrative judge's determination that an award of attorney fees is warranted in the interest of justice is fully supported in fact and law, and the agency has not identified any error on this issue.

The administrative judge abused his discretion in reducing the 127.9 hours of attorney time claimed for the initial appeal stage to 48 hours, and in disallowing the 15.3 hours of law clerk time for such period.

The administrative judge reduced the 127.9 hours of attorney time claimed for work during the initial appeal stage to 48 hours, and disallowed the 15.3 hours of law clerk

time for the same period. He found generally that the hours claimed were "excessive." AFF, Tab 9 at 5. He further found that the appeal presented "relatively simple" issues, and that "approximately two-thirds" of the hours were attributable to "researching and raising an affirmative defense and attempting to challenge [the] appellant's past record." *Id.* at 6. He reduced the 127.9 hours of claimed attorney time by 79.9 hours (roughly two-thirds), noting that the Board did not find the appellant's affirmative defense and his challenge to his past record to be persuasive, that the sole issue was the appropriateness of the penalty, that "most of the material facts and issues had already been fully developed at the preappeal stage," and that the appeal was adjudicated without a hearing. *Id.* at 6-7. He concluded that only one-third of the 127.9 hours were spent on "productive legal issues." *Id.* at 7. Apparently, his decision to disallow the 15.3 hours of law clerk time was based on the same reason.

If a party "fail[s] 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." *Morey v. Department of the Navy*, 55 M.S.P.R. 604, 607 (1992) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983)). If, "however, ... a 'lawsuit consists of related claims, a [party] who has won substantial relief should not have his attorney's fee reduced simply because' he did not prevail on all of his contentions." *Id.* (quoting *Hensley*, 461 U.S. at 440). Thus, attorney time spent formulating an unsuccessful argument advanced as an alternative ground for setting aside an adverse action, such as an unsuccessful affirmative defense, is compensable. See *Flood v. Federal Energy Regulatory Commission*, 30 M.S.P.R. 546, 547 n.2 (1986) (relying on *Hensley v. Eckerhart*, *supra*); *Hanson v. Department of Transportation*, 28 M.S.P.R. 176, 180-81 (1985) (relying on *Hensley v. Eckerhart*, *supra*). By contrast, if an appellant makes multiple, distinct requests for relief in a single Board appeal, each of which could form the basis of a separate appeal, the Board will reduce claimed attorney fees, to reflect the degree of success obtained, if the appellant prevails on only some of the requests for relief. See *Smit v. Department of the Treasury*, 61 M.S.P.R. 612, 617, 619 (1994); *Rothschild v. Department of Housing & Urban Development*, 54 M.S.P.R. 238, 242-43 (1992). In addition, if the Board decides not to award fees for hours of attorney service that are adequately documented, it must identify those hours and give a clear explanation for their elimination. *Crumbaker v. Merit Systems Protection Board*, 781 F.2d 191, 195 (Fed. Cir. 1986), *modified on other* *gds.*, 827 F.2d 761 (Fed. Cir. 1987).

The appellant did not make multiple, distinct requests for relief, only some of which were successful. Rather, he advanced several arguments in support of his sole contention that the penalty of removal was too severe for the misconduct to which he admitted. Not all of the arguments were found to be persuasive, but the appellant succeeded in having his removal set aside, and a 90-day suspension substituted in its place. Under the principles set forth above, then, the time spent on the arguments that were not found to be persuasive should not be disallowed on the ground of lack of success; indeed, the appellant succeeded on the only request for relief that he made. See *Freeman v. Department of Veterans Affairs*, MSPB Docket No. DE-0752-93-0170-A-1, slip op. at 10-11 (Jan. 3, 1995) (attorney time spent on affirmative defenses and other arguments for setting aside a removal was compensable, even though the contentions were not found to be persuasive, where the appellant succeeded in having

his removal mitigated to a 90-day suspension; the rejected contentions were alternative grounds for a desired outcome, namely, having the adverse action set aside).

We also disagree with the administrative judge's conclusion that the issues in the case were simple. While the fundamental legal issue of mitigation of a penalty is neither novel, see *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), nor complex in and of itself, this case involved an extensive and detailed factual record. Furthermore, the final Board decision on the merits discusses in depth the appellant's interpretation of the charge in light of tax law, as well as the numerous mitigating factors that the appellant brought to the attention of the deciding official, the administrative judge, and, ultimately, the full Board. See 60 M.S.P.R. at 686. In this connection, we note (as does the appellant) that the agency's response to the appellant's petition for review on the merits is over 45 pages long, and contains citations to 42 cases and 151 footnotes. See PRF I, Tab 3. While prolixity in pleadings is not always relevant in assessing the complexity of a case, we believe that, here, the length of, and degree of detail in, the agency's response to the appellant's petition for review on the merits, illustrate well the overall complexity of the appeal.

The administrative judge stated that almost 60 hours of attorney time were spent taking a single deposition, preparing a 5-page brief, and preparing a 13-page declaration. AFF, Tab 9 at 7. It appears that the administrative judge was referring to the entries on the appellant's counsel's statement for May 1992. See AFF, Tab 1, Ex. 1, Att. E at 10-13. The appellant's counsel was actually engaged in many other appeal-related activities in May 1992, however, *id.*, and we do not find any of the 58.7 hours claimed for that month to be excessive. Indeed, we do not find that any of the 79.9 hours of attorney time disallowed by the administrative judge for work during the initial appeal stage were excessive or unreasonable. Based on our review of the appellant's counsel's statement, we do not discern any duplication or padding. We also note that the appellant's primary attorney, Mr. Gaffney, claimed compensation for less than 95% of the hours he spent on the appeal. He made his own "5% billing judgment reduction," applied to the total number of hours spent, and his statement also contains entries for activities that appear to have been related to the appeal, but for which he did not seek recovery. See AFF, Tab 1, Ex. 1, Att. E at 12-13, 15, 17.

We also find no basis for disallowing the 15.3 hours of law clerk time. Thus, we restore these hours as well. See *Mitchell v. U.S. Postal Service*, 6 M.S.P.R. 22, 23 (1981) (services performed by a law clerk who works under the supervision of a licensed attorney are generally compensable under 5 U.S.C. § 7701(g)(1)). We note that, although some portion of the 15.3 hours was devoted to photocopying cases, Mr. Gaffney also applied a "5% billing judgment [reduction]" to the law clerk's time. See AFF, Tab 1, Ex. 1, Att. F. Because we believe that any time spent photocopying beyond the 5% already cut from the law clerk time was likely de minimis, we will not reduce the 15.3 hours.

The administrative judge abused his discretion in disallowing 2.1 hours for the appellant's tax attorney's services.

The appellant argues that the administrative judge abused his discretion in disallowing \$2475 in fees for the services of a tax attorney who advised the appellant

after the agency proposed his removal and before it made a final decision. Before the administrative judge issued the addendum initial decision, however, the appellant amended his request for fees for a tax attorney to just \$420 (2.1 hours at \$200 per hour). See AFF, Tab 8 at 5, 19. Thus, the appellant abandoned his original claim for \$2475 in fees for the tax attorney's services, and our review of this issue is limited to the 2.1 claimed hours.

The 2.1 hours were attributable to drafting a letter to the deciding official, discussing the letter with the appellant and the appellant's primary attorney, and revising the letter. See AFF, Tab 1, Ex. 2, Att. A at 2. The letter, inter alia, explained that the tax attorney had assisted the appellant in preparing and filing his tax returns for the years at issue and that the appellant was due a refund; the letter also expressed the attorney's prediction (which ultimately proved to be correct), based on the attorney's professional experience, that the Internal Revenue Service would not take any action against the appellant. See IAF, Tab 8, Ex. A-2. Contrary to the administrative judge's finding, AFF, Tab 9 at 5, we do not believe that the 2.1 hours were unnecessary or unreasonable. While the appellant could have sent a one-sentence letter to the deciding official explaining that he had filed his tax returns and was due a refund, as the administrative judge suggested, *id.*, this does not mean that the drafting of a more involved letter setting forth a possible reason for mitigating the removal, and the attendant time spent on the consultation between counsel and client, was unreasonable. We also find the tax attorney's rate of \$200 per hour to be reasonable, in light of the evidence he submitted in support of his claimed rate. See AFF, Tab 1, Ex. 2. The agency does not argue that the tax attorney's hourly rate is unreasonable.

The administrative judge abused his discretion in disallowing 5 hours of attorney time attributable to the preparation of a second submission to the deciding official in response to the notice of proposed removal.

The appellant's counsel claimed a total of 31.2 hours for the preparation of two written submissions and making an oral presentation to the deciding official, in response to the notice of proposed removal. The administrative judge disallowed 5 of the claimed hours, which were attributable to the preparation of the second written submission, because two written submissions were not necessary, and because the appellant was "legally entitled" to only one written response. AFF, Tab 9 at 5.

Attorney fees incurred in responding to a proposed adverse action are generally recoverable, if the proposal results in an action that the appellant successfully appeals to the Board and the appellant is otherwise entitled to recover attorney fees. See *Brown v. U.S. Coast Guard*, 28 M.S.P.R. 539, 544-53 (1985). This rule encourages employees and counsel to develop cases before the agency, with the aim of having a complete, useful record in a Board appeal; in addition, the rule promotes settlement of actions at the agency level. *Id.* at 550. The question, then, is not whether the appellant was legally entitled to make a second submission to the deciding official, but whether it was reasonable for him to do. The second submission is a detailed discussion of the factors the appellant wished to have the deciding official consider in determining the appropriate penalty. It contains significant information that had not previously been submitted to the deciding official, including a discussion of Board case law on appropriate penalties for tax-related offenses, and how such cases relate to the

appellant's offenses. See IAF, Tab 3, Subtab 2, Ex. D. We find that it was reasonable for the appellant's counsel to spend 5 hours in preparing this submission, and we restore those hours.

The appellant's remaining contentions do not provide a basis for modifying the addendum initial decision.

Contrary to the appellant's argument on review, the administrative judge did not abuse his discretion in disallowing 1.2 hours of law clerk time claimed for photocopying and delivering documents to the deciding official, on the ground that these tasks were more like clerical services than legal services. *Cf. Koerner v. Office of Personnel Management*, 55 M.S.P.R. 150, 153-54 (1992) (fees for services of a paralegal that appeared to be clerical in nature were not recoverable under 5 U.S.C. § 7701(g)(1)).

The appellant also has not shown that the administrative judge abused his discretion in reducing, by 5 hours, the 24.6 hours of attorney time claimed for preparing a reply to the agency's opposition to the motion for attorney fees. The administrative judge found that the time claimed was excessive, in light of his assessment of the complexity of that pleading, among other things. See AFF, Tab 9 at 8-9; Tab 8. The appellant has not provided a basis for setting aside the administrative judge's finding.

CONCLUSION

We augment the \$20,293.14 in attorney fees and costs awarded by the administrative judge by \$13,767. The additional \$13,767 represents: A total of 84.9 hours of attorney time at \$150 per hour, or \$12,735; 2.1 hours of attorney time at \$200 per hour, or \$420; and 15.3 hours of law clerk time at \$40 per hour, or \$612.

ORDER

We ORDER the agency to pay the attorney of record \$34,060.14 in fees and costs. The agency must complete this action within 20 days of the date of this decision. See *generally* 5 U.S.C. § 1204(a)(2).

We also ORDER the agency to inform the appellant and the attorney of all actions taken to comply with the Board's order and the date on which it believes it has fully complied. See 5 C.F.R. § 1201.181(b). We ORDER the appellant and the attorney to provide all necessary information that the agency requests in furtherance of compliance. The appellant and the attorney should, if not notified, inquire as to the agency's progress. *Id.*

Within 30 days of the agency's notification of compliance, the attorney may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the attorney believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance. See 5 C.F.R. § 1201.182(a).

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place,
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.

Dissenting Opinion of Antonio C. Amador, Member

The administrative judge found attorney fees warranted in the interest of justice on the basis that the agency knew or should have known that its choice of penalty would not be sustained. The majority, without analysis, finds the administrative judge's determination fully supported in fact and law. I do not.

In *Lambert v. Department of the Air Force*, 34 M.S.P.R. 501, 507 (1987), the Board found fees generally warranted where the charges are sustained yet the Board mitigates the penalty, unless the decision to mitigate was based on evidence that was not presented before the agency. A proper analysis under *Lambert*, however, does not apply a per se rule and may result in a conclusion that attorney fees are not warranted in the interest of justice despite the Board's having mitigated the agency's penalty. See, e.g., *Caryl v. Department of Treasury*, 57 M.S.P.R. 76, 79 (1993); *Garcia v. Department of Labor*, 45 M.S.P.R. 28, 31, *aff'd*, 923 F.2d 871 (Fed. Cir. 1990)(Table).

I note that, in his initial decision, the administrative judge upheld the penalty. On review, I dissented from the majority opinion mitigating the removal penalty to a 90-day suspension. Under these circumstances, where the administrative judge originally affirmed the removal penalty, and the Board did not issue a unanimous decision that the agency's penalty exceeded the bounds of reasonableness, to conclude that the agency knew or should have known that its penalty decision would not be upheld is to attribute to agency officials a degree of prescience not normally found in mere mortals. I, therefore, do not conclude that an award of attorney fees is warranted in the interest of justice.

For the above reasons, I dissent.