

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

2008 MSPB 199

Docket No. NY-0752-04-0163-A-1

**Kevin F. Coradeschi,
Appellant,**

v.

**Department of Homeland Security,
Agency.**

August 14, 2008

Thomas G. Roth, Esquire, West Orange, New Jersey, for the appellant.

Bryan A. Bonner, Esquire, Arlington, Virginia, for the agency.

Diane M. McDevitt, Esquire, Arlington, Virginia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The agency petitions for review of an addendum initial decision that awarded attorney fees and expenses in the amount of \$99,322.48. For the reasons set forth below, we GRANT the agency's petition and AFFIRM the addendum initial decision AS MODIFIED by this Opinion and Order.

BACKGROUND

¶2 On June 23, 2002, the appellant received an excepted service appointment to the position of Civil Aviation Security Specialist (Federal Air Marshal), after having served 4 years as an Immigration Agent with the Immigration & Naturalization Service. *Coradeschi v. Department of Homeland Security*, MSPB Docket No. NY-0752-04-0163-I-1, Initial Appeal File (IAF), Tab 8, Subtab 1; *see*

IAF, Tab 7 at 2; Tab 8, Subtab 3. On February 10, 2004, the agency terminated the appellant “because [his] conduct fail[ed] to fully demonstrate [his] fitness for continued employment.” IAF, Tab 3 at 7; *see* IAF, Tab 8, Subtab 2. The appellant appealed his termination to the Board, and after recognizing that a question existed as to Board jurisdiction, the administrative judge ordered the appellant to file evidence and argument establishing that he met the statutory definition of “employee” under 5 U.S.C. § 7511(a)(1)(C)(ii). IAF, Tab 4. After considering the parties’ responses to the jurisdictional order, *see* IAF, Tabs 7-8, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant’s Immigration Agent position and Federal Air Marshal position, both in the excepted service,¹ were not sufficiently similar to satisfy the requirements of section 7511(a)(1)(c)(ii). *Coradeschi v. Department of Homeland Security*, MSPB Docket No. NY-0752-04-0163-I-1 (Initial Decision, June 28, 2004).

¶3 The appellant petitioned for review of the administrative judge’s initial decision, but the Board denied the appellant’s petition by final order. *Coradeschi v. Department of Homeland Security*, MSPB Docket No. NY-0752-04-0163-I-1 (Final Order, Nov. 23, 2004). The appellant subsequently appealed the final Board decision to the U.S. Court of Appeals for the Federal Circuit, which vacated the Board’s decision and remanded the case for further adjudication. *Coradeschi v. Department of Homeland Security*, 439 F.3d 1329 (Fed. Cir. 2006). On remand, the administrative judge reversed the agency’s decision to terminate the appellant. *Coradeschi v. Department of Homeland Security*, MSPB Docket No. NY-0752-04-0163-M-1 (Bench Decision, Nov. 9, 2006). The agency’s petition for review of the administrative judge’s remand decision was denied by the Board in a May 25, 2007 final order.

¹ Although an Immigration Agent position is normally in the competitive service, the appellant herein was appointed to that position under excepted procedures pursuant to the Veterans’ Readjustment Act (VRA). *See* IAF, Tab 8, Subtab 3; 5 C.F.R. § 307.103 (the VRA authorizes “excepted appointment[s]” to positions “otherwise in the competitive service” for veterans who meet specified criteria).

¶4 The appellant subsequently filed a motion for attorney fees and expenses, through which he sought a total of \$97,369.98. *Coradeschi v. Department of Homeland Security*, MSPB Docket No. NY-0752-04-0163-A-1, Attorney Fee File (AFF), Tab 1.² The agency contested the appellant’s motion, arguing that the appellant had not shown that an award of attorney fees and expenses was warranted in the interest of justice, or in the alternative, that the fee award should be reduced by \$31,213.75 based on the appellant’s failure to submit documentation with a sufficient level of detail and specificity to determine if the number of hours claimed in the motion was reasonable. AFF, Tabs 3, 5. The administrative judge issued an addendum initial decision in which he found that the appellant established the requisite criteria for the award of attorney fees and expenses, and awarded \$95,716.25 in attorney fees and \$3,606.23 in expenses. *Coradeschi v. Department of Homeland Security*, MSPB Docket No. NY-0752-04-0163-A-1 (Initial Decision, Dec. 19, 2007). In reviewing the appellant’s fee motion, the administrative judge reduced the award to account for legal services claimed by the appellant that occurred prior to the date on which the appellant’s attorney began representing him. *Id.* at 11.

¶5 On petition for review, the agency argues that the administrative judge committed legal error when he: (1) “Awarded attorney fees and expenses incurred for work performed before the Federal Circuit, absent jurisdiction”; (2) “Awarded attorney fees and expenses incurred for work performed in conjunction with the Appellant’s Petition for Review filed on July 26, 2004, denied by the Board on December 13, 2004”; (3) “Failed to consider the degree of success achieved by Appellant’s counsel for work performed on remand”; and (4) “Failed to consider the reduced hourly rate Appellant’s counsel gives federal law enforcement clients as a public service.” *Coradeschi v. Department of Homeland Security*, MSPB Docket No. NY-0752-04-0163-A-1, Petition for

² The total amount of claimed fees and expenses was later increased to \$100,004.98 to account for the time spent preparing a reply to the agency’s response in opposition to the appellant’s motion for attorney fees. AFF, Tab 4 at 7-8.

Review File (PFR File), Tab 1 at 4. The appellant has responded in opposition to the agency's petition. PFR File, Tab 3.

ANALYSIS

¶6 To establish entitlement to an award of attorney fees, an appellant must show that: (1) he was the prevailing party; (2) he incurred attorney fees pursuant to an existing attorney-client relationship; (3) an award of fees is warranted in the interest of justice; and (4) the amount of fees claimed is reasonable. 5 U.S.C. § 7701(g)(1); *Social Security Administration v. Price*, 94 M.S.P.R. 337, ¶ 8 (2003), *aff'd*, 398 F.3d 1322 (Fed. Cir. 2005). On petition for review, the agency does not contest the administrative judge's findings that the appellant was the prevailing party, that he incurred attorney fees pursuant to an existing attorney-client relationship, and that an award of fees is warranted in the interest of justice. Moreover, we discern no basis for disturbing the administrative judge's findings on these issues. Nevertheless, the agency has raised questions as to the reasonableness of the fee amount that require further examination.

¶7 Each of the agency's arguments on petition for review are raised for the first time on review. Because the agency has not shown that its arguments are based on new and material evidence not previously available despite its due diligence, the Board will not consider them. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). However, because the agency has contested the Board's jurisdiction to award fees and expenses for work performed before the Federal Circuit, and because the issue of jurisdiction is always before the Board and may be raised by any party or *sua sponte* by the Board at any time during Board proceedings, we have considered the agency's argument on that issue. *See Matthews v. Social Security Administration*, 104 M.S.P.R. 130, ¶ 7 (2006).

¶8 It is well-settled that the Board lacks the authority to award attorney fees incurred in connection with an appeal of a Board decision to the Federal Circuit. *See, e.g., Phillips v. General Services Administration*, 924 F.2d 1577, 1580 (Fed. Cir. 1991) (finding that the Board lacks jurisdiction to award attorney fees for

work performed before the Federal Circuit and vacating the Board's decision to the extent that it awarded fees for such work); *Manley v. Department of the Air Force*, 78 M.S.P.R. 673, 674 (1998) (same). Here, the appellant has submitted evidence and argument claiming that he incurred attorney fees of \$24,256.25,³ and expenses of \$2,190.42, during his appeal to the Federal Circuit of the Board's November 23, 2004 final order. AFF, Tab 1 at 21, 23; Ex. I at 7, 23-27, 29-31, 37-38; Ex. K. Because the administrative judge clearly erred by awarding attorney fees and expenses related to the appellant's Federal Circuit appeal, that portion of the fee award must be deleted from the total award in this case. Further, because photocopying expenses are not recoverable in cases like the one presently before us, we reduce the award by \$573.40, the amount of photocopying costs incurred in connection with the appellant's Board appeal. *See Bennett v. Department of the Navy*, 699 F.2d 1140, 1143-46 (Fed. Cir. 1983); *Willis v. U.S. Postal Service*, 89 M.S.P.R. 85, ¶ 5 (2001).

¶9 Accordingly, we AFFIRM the administrative judge's addendum initial decision AS MODIFIED herein, awarding attorney fees of \$71,460 and expenses in the amount of \$842.41.

ORDER

¶10 We ORDER the agency to pay the attorney of record \$72,302.41 in fees and expenses. The agency must complete this action no later than 20 days after the date of this decision. *See generally* Title 5 of the United States Code, section 1204(a)(2) (5 U.S.C. § 1204(a)(2)).

¶11 We also ORDER the agency to tell the appellant and the attorney promptly in writing when it believes it has fully carried out the Board's Order and to

³ The record reflects that the appellant's attorney, Thomas G. Roth, claimed 60.25 hours of work during this period, which at an hourly rate of \$340, totals \$20,485. The record further reflects that Roth's associate, Robin A. Newman, claimed 21.55 hours of work during this period, which at an hourly rate of \$175, totals \$3,771.25. Although the billing statements reflect a smaller hourly rate (\$200) for Roth, the rate that was set forth in the retainer agreement and accepted by the administrative judge as reasonable was \$340.

describe the actions it took to carry out the Board's Order. We ORDER the appellant and the attorney to provide all necessary information that the agency requests to help carry out the Board's Order. The appellant and the attorney, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶12 No later than 30 days after the agency tells the appellant or the attorney that it has fully carried out the Board's Order, the appellant or the attorney may file a petition for enforcement with the office that issued the initial decision on this appeal, if the appellant or the attorney believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant or the attorney believes the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. *See* 5 C.F.R. § 1201.182(a).

¶13 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.