UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 183

Docket Nos. AT-0752-07-0660-A-1

Russell Hart, et al.,[1]

Appellant,

v.

Department of Transportation,

Agency.

September 7, 2010

Sean Lafferty, Esquire, Burlington, Massachusetts, for the appellant.

Parisa Naraghi-Arani, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellants have filed a petition for review from the addendum initial decision that granted in part and denied in part their request for attorney fees incurred in their successful appeals of the agency's constructive suspension actions and awarded them $154,212.50. For the reasons set forth below, we GRANT the appellants' petition, AFFIRM the addendum initial decision as modified, and award the appellants $214,800 in attorney fees.

[1] The individual names and docket number of the 22 appellants whose appeals are consolidated and covered by this Opinion and Order are set forth at Attachment A.

BACKGROUND

¶2 The appellants, Air Traffic Controllers with the Federal Aviation Administration (FAA), were temporarily medically restricted from performing their duties for more than 14 days. *Hart v. Department of Transportation*, 109 M.S.P.R. 280, ¶ 2 (2008).[2] They requested administrative duties under the applicable collective bargaining agreement, but the agency did not provide such duties; as a result, the appellants took sick or annual leave. *Id.* The agency did not provide advance notice or an opportunity to respond before the appellants took leave. *Id.* In appeals to several Board regional and field offices, the appellants claimed that the agency constructively suspended them. *Id.*, ¶ 3. The administrative judges assigned to those appeals reversed the actions, finding that the agency had failed to follow statutorily-required or constitutionally-required procedures for taking such actions. *Id.* The administrative judges did not, however, order restoration of the appellants' leave. *Id.*

¶3 Seventeen of the appellants filed petitions for review of the initial decisions in their respective cases, arguing that they were entitled to "back pay," a contention the Board interpreted as a claim for restoration of the leave the appellants were forced to take. *Id.*, ¶ 4. The agency filed cross-petitions for review, claiming that it was not required to follow 5 U.S.C. § 7513(b) in taking the actions at issue. *Id.*

¶4 In *Hart*, deemed the lead case, the Board denied the appellant's petition for review, finding that the Back Pay Act does not apply to the FAA and that the applicable collective bargaining agreement provided no authority for the Board to order restoration of the appellant's leave. *Id.*, ¶ 5. The Board granted the agency's cross-petition for review, agreeing with the administrative judge that the appellant's placement on leave was involuntary and therefore an appealable

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[2] Because the facts of *Hart* are generally representative of all the cases at issue here, we shall cite *Hart* in this background discussion.

action. *Id.*, ¶¶ 6-7. The Board found, however, that the FAA was not required to follow the procedures set forth in 5 U.S.C. chapter 75, *id.*, ¶¶ 8-10, but that the appeal must nevertheless be remanded to give the appellant an opportunity to show that the agency failed to follow its internal procedures before suspending him, *id.*, ¶ 11. The Board individually decided 16 other cases, which have now been consolidated with the *Hart* case, in the same manner. On remand, the administrative judges again reversed the agency actions, and those remand initial decisions became final when the Board denied the agency's petitions for review by final order. *See* Addendum Appeal File (AAF), Tab 1 at 1.

¶5 A timely-filed consolidated motion for attorney fees followed in which the appellants' attorney moved to have his fee requests for the *Hart* appeal and the 16 similarly decided cases, as well as four other similar appeals against the FAA involving the same legal issue and decided by administrative judges in the Board's Central Regional Office,[3] adjudicated in one proceeding. AAF, Tab 1. The agency did not object, and the administrative judge consolidated the cases. *Id.*, Tabs 3, 5.

¶6 Additionally, while this consolidated attorney fee motion was pending before the administrative judge, the appellants' attorney submitted a separate motion for fees on behalf of another similarly situated appellant, Troy Clogston, and asked that it be included in the consolidation. AAF, Tabs 8, 19. The administrative judge granted that request and thus, as noted previously, 22 appellants are included in this consolidation. AAF, Tab 20, Addendum Initial Decision (AID) at 1 n.1.

¶7 In support of his fee motion, the appellants' attorney argued that an attorney-client relationship existed, that fees were incurred, and that the appellants were the prevailing parties. *Id.*, Tab 1 at 8-9. He further argued that fees were warranted in the interest of justice under several theories, including

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[3] These cases involved appellants Foley, Leech, Schneider, and Sinkhorn.

that the agency committed gross procedural error and that it knew or should have known that it would not prevail on the merits. *Id.* at 9-13. He sought fees at the rate of $300 per hour, *id.* at 13-15, and claimed the following time:

> 54.75 hours[4] ($16,425.00) for time spent on the initial processing of the appeals, *id.* at 15-16;
>
> 324.75 hours ($97,425.00) for time spent on the 17 individual appeals that subsequently were the subject of the Board's remands, *id.* at 16-43;
>
> 46 hours ($13,800.00) for time spent reviewing the 17 initial decisions, and preparing petitions for review and responses to the agency's cross-petitions for review, *id.* at 43-44;
>
> 81.25 hours ($24,375.00) for time spent reviewing and considering the implications of the Board's opinion remanding the 17 appeals, *id.* at 45;
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> 50 hours ($15,000.00) for time spent reviewing the 17 remand initial decisions and addressing the agency's petitions for review of those decisions, *id.* at 45-46;
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> 70.50 hours ($21,150.00) for time spent on the four Central Regional Office appeals, *id.* at 46-52; and
>
> 26.75 hours ($8,025.00) for time spent preparing the fees motion, *id.* at 52.

The total amount of fees the appellants' attorney sought in this initial motion was $196,200 (654 hours at $300 per hour). *Id.* at 53. In its response to the fee motion and the administrative judge's acknowledgment order, the agency recognized the appellants' entitlement to an award of reasonable attorney fees and challenged only the amount of fees sought. AAF, Tab 5 at 2-6. The agency did not, however, challenge the appellants' attorney's requested rate of $300.00 per hour. *Id.*

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[4] Because of a mathematical error, in his initial request for fees, the appellants' attorney requested an additional hour under this category. AAF, Tab 1 at 16. He subsequently acknowledged this error. AAF, Tab 6 at 7 n.3.

¶8 The appellants' attorney subsequently submitted a supplement to his fee motion, claiming an additional 9.25 hours ($2,775.00) for time spent responding to the agency's initial response to the fee motion and in mediation of the consolidated attorney fees case through October 24, 2009, and 14.50 hours ($4,350.00) for time spent on the *Clogston* appeal which, as noted, he had requested be added to the consolidation.[5] AAF, Tab 8 at 2, 4-18. The supplement brought the total amount of fees sought at this stage of the proceedings to $203,325.00 (677.75 hours at $300.00 per hour).

¶9 Thereafter, the appellants' attorney requested additional fees of $450.00 for 1.5 hours spent in mediation on November 24, 2009,[6] and $4,200.00 for 14 hours spent in mediation efforts on January 14 and 15, 2010, a motion for an expedited ruling, and a supplemental response to the agency's opposition to the fee request. *Id*. Tab 10 at 2-3. In his "final submission," the appellants' attorney sought additional fees in the amount of $3,675.00 for 12.25 hours spent in mediation on January 21-26, 28-29, and February 1-2, 2010. *Id.*, Tab 12 at 2. Thus, at this point in the litigation below, the appellants' attorney had sought $211,650.00 in fees (705.50 hours at $300.00 per hour).

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[5] When the administrative judge did not acknowledge the appellants' attorney's request to add the *Clogston* fees motion to the consolidation, the attorney modified the amount of his request to exclude the time he had previously sought in connection with that matter. AAF, Tab 15. The administrative judge did, in fact, consider the fees requested in the *Clogston* appeal in this consolidation. AID at 1 n.1. Therefore, the time expended on the *Clogston* matter is included in our discussion.

[6] The appellants' attorney failed to clearly set forth the number of hours spent in mediation on November 24, 2009, but the number of hours can be extrapolated from a statement in a January 20, 2010 submission that 5.50 hours were spent on mediation matters on October 19, 21, and 24, 2009, and November 24, 2009, and a statement in a November 4, 2009 submission that 4 hours were spent on mediation matters on October 19, 21, and 24, 2009. AAF, Tab 8 at 2, Tab 10 at 2. The additional 1.50 hours included in the January 20, 2010 submission are presumably the time worked on mediation issues on November 24, 2009.

¶10 Although he had done so earlier, in a March 29, 2010 order, the administrative judge again acknowledged the fee motion, setting forth the appellants' burden of proof and ordering the agency to respond. AAF, Tab 16. The agency filed a response challenging the appellants' claimed status as prevailing parties and the amount of fees sought as unreasonable. *Id.*, Tab 17. The appellants' attorney responded to the agency's submission, claiming an additional 6 hours of time ($1,800.00) for doing so. *Id.*, Tab 18.

¶11 In the addendum initial decision, the administrative judge first found it undisputed that an attorney-client relationship existed pursuant to which the appellants' attorney rendered legal services on the appellants' behalf and that the appellants were the prevailing parties. AID at 1-3. He next found that fees were warranted in the interest of justice because the agency knew or should have known that it would not prevail in constructively suspending the appellants, and because the agency committed gross procedural error in taking these actions without affording the appellants due process. *Id.* at 3. In considering the reasonableness of the fees sought, the administrative judge found the claimed rate of $300.00 per hour reasonable. *Id.* at 3-4. The administrative judge awarded the appellants' attorney $147,712.50 (492.375 hours at $300.00 per hour) for time spent on all matters up to and including submission of the fees motion, *id.* at 4-11, and he awarded the appellants' attorney $6,500.00 for time spent on all subsequent supplemental filings. *Id.* at 10-11. Thus, the administrative judge awarded $154,212.50 in total fees. *Id.* at 11.

¶12 In the petition for review, the appellants' attorney challenges all of the hours disallowed by the administrative judge. Petition for Review (PFR) File, Tab 1. He also seeks an additional $8,550.00 (28.5 hours at $300.00 per hour) for time spent preparing the petition for review, bringing the final total to $222,000.00. *Id.* at 49, 50 n.15. The agency has responded in opposition to the appellants' attorney's petition. PFR File, Tab 4.

ANALYSIS

¶13 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. *McKenna v. Department of the Navy*, 104 M.S.P.R. 22, ¶ 5 (2006). As noted, the administrative judge found that the appellants were the prevailing parties, that they incurred fees pursuant to an attorney-client relationship, and that an award was warranted in the interest of justice. AID at 2-3. The agency has not challenged these findings by filing a petition for review or a cross-petition for review, and we discern no reason to disturb the administrative judge's findings with regard to these issues. *Foley v. U.S. Postal Service*, 59 M.S.P.R. 413, 416 n.2 (1993) (stating that the Board "discern[ed] no reason to disturb the administrative judge's findings" regarding attorney fees where the agency did not challenge the findings on review).

¶14 The Board assesses the reasonableness of an attorney fee request by using two objective variables, the attorney's customary billing rate and the number of hours reasonably devoted to the case. *Krape v. Department of Defense*, 97 M.S.P.R. 430, ¶ 6 (2004). To establish the appropriate hourly rate, an attorney fee petition must contain a copy of the fee agreement, if any, as well as evidence of the attorney's customary billing rate for similar work. *Stewart v. Department of the Army*, 102 M.S.P.R. 656, ¶ 17 (2006). The administrative judge found, based upon his review of the supporting documentation in this case, that the claimed rate of $300.00 per hour was reasonable. AID at 4. The agency did not challenge the rate below and has not challenged the administrative judge's finding as to its reasonableness by filing a petition for review or cross-petition for review. We therefore discern no basis to disturb the administrative judge's finding with regard to this issue. *See Foley*, 59 M.S.P.R. at 416 n.2. The sole matter in contention, then, is the reasonableness of the hours claimed.

¶15 The appellants' attorney divided his claimed hours into various categories based on the reason for the work. The administrative judge addressed each category in his addendum initial decision, as has the appellants' attorney in the petition for review. Therefore, we shall do the same.

Time Charges for Initial Processing of Appeals

¶16 Under this category, the appellants' attorney claimed 54.75 hours. AAF, Tab 1 at 15-16; Tab 6 at 7 n.3. The administrative judge disallowed 6 hours on the basis that the appellants' attorney failed to substantiate what the entries "Misc. issues" on May 8, 2007, and "Various issues as to appeals" on May 9, 2007, represented. AID at 8. The appellants' attorney challenges the administrative judge's striking of these hours, arguing on review that the time was spent communicating with the agency regarding how best to deal with the 17 appeals he was in the process of filing in four of the Board's offices.[7] *See* PFR File, Tab 1 at 32. The agency did not below, nor does it now, specifically challenge the reasonableness of these claimed 6 hours. Given the logistical issues involved in preparing to litigate a large number of appeals before a number of different administrative judges in different Board offices, we disagree with the administrative judge's striking of these 6 hours as unsubstantiated and, finding that they are reasonable, we allow them. Thus, we allow all 54.75 hours sought by the appellants' attorney under the category of work described as the initial processing of appeals.

Time Charges for Individual Appeals

¶17 Under this category, the appellants' attorney set out with specificity the number of hours devoted to each of the initial 17 appeals, AAF, Tab 1 at 16-43, the four Central Regional Office appeals, *id.* at 46-52, and the *Clogston* appeal,

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[7] The attorney also stated that he discussed with the agency the application of the Board's then recently-issued decision in *Bennett v. Department of Transportation*, 105 M.S.P.R. 634 (2007), to the various appeals. PFR File, Tab 1 at 32.

id., Tab 19 at 14-15. Below we discuss two general areas of work where there is a dispute about the administrative judge's reduction in the number of hours claimed, preliminary work and timeliness and jurisdiction, and four specific appeals where the administrative judge made further reductions in the number of hours claimed, apart from the general areas.

Preliminary Work

¶18 The appellants' attorney claimed 111 hours for "all preliminary work, reviewing documents from the Union, client, research, drafting and filing appeals." AAF, Tab 1 at 17-42. He allocated the hours among the 21 individual appeals (Because the *Clogston* fee request was filed later, it was not included), claiming 5.5 hours for each of 17 appeals and 4.25 hours for each of the remaining four appeals.[8] The agency challenged these hours as excessive. AAF, Tab 5 at 4-5. The administrative judge agreed, based on what he described as the appellants' counsel's level of expertise in Federal-sector employment law, the fact that all the appeals concerned the exact same issues, and the "relatively low level of difficulty" presented by the appeals. AID at 4. He found 3 hours reasonable in this category for the first appeal and 1.5 hours for the remaining 20 appeals for a total of 33 hours.[9] *Id.* at 4-5.

¶19 The appellants' attorney strongly challenges this substantial reduction of hours. He argues that, if the administrative judge had concerns over these entries, he should have alerted the appellants' attorney and afforded him an opportunity to provide a more complete explanation of any perceived deficiencies. PFR File, Tab 1 at 9. We agree.

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[8] We calculate the total number of hours claimed for this task to be 110.5 (5.5 x 17 + 4.25 x 4).

[9] The administrative judge stated this total as 34.5 hours, but presumably meant to award 33 hours for this category (1.5 x 20 + 3). As mentioned, the *Clogston* fees request was not included in this category; thus there were only a total of 21 individual appeals at issue for this particular request. *See* AAF, Tab 19 at 14-15.

¶20 In *Wilson v. Department of Health & Human Services*, 834 F.2d 1011, 1012 (1987), the United States Court of Appeals for the Federal Circuit held that, where an administrative judge has concerns about deficiencies in a motion for attorney fees, the judge should afford the party an opportunity to address the matter before rejecting the claims. *See Martinez v. U.S. Postal Service*, 89 M.S.P.R. 152, ¶ 16 (2001). Further, we note that, early on in these proceedings, the appellants' attorney specifically asked the administrative judge to notify him of any "shortcomings" in his fee petition so that he could expeditiously address them. AAF, Tab 10 at 4. The administrative judge failed to offer such an opportunity and that was error. Because the appellants' attorney has provided a full explanation for these charges in his petition for review, PFR File, Tab 1 at 11-16, we are able to make a determination regarding the reasonableness of the disputed fees without remanding the matter to the administrative judge. *Ruble v. Office of Personnel Management*, 96 M.S.P.R. 44, ¶ 8 (2004) (finding that remand of an attorney fees matter was unnecessary where the supplemental information provided on petition for review was sufficient for the Board to determine that certain costs were not recoverable).

¶21 The appellants' attorney has explained that filing the numerous individual appeals included in this consolidation required extensive preparation over a significant amount of time because he needed to file the appeals in several Board offices, the appellants were employed at a number of different facilities and there was a need to ascertain the availability of work that pertained to each individual, there were collective bargaining agreement issues, complicated by the fact that changes in the agreement occurred during the time of filing, and it was necessary to confirm each appellant's request for administrative duties, the dates of his enforced leave, and his individual medical disqualification, all of which had to be presented in affidavit form. PFR File, Tab 1 at 12-13. Upon consideration of the appellants' attorney's explanation, we agree that the time expended in this effort was reasonable and that the administrative judge's reasons for reducing by two-

thirds the hours requested were unrealistic and unpersuasive. We award 110.5 hours as reasonable for this preliminary work.

Timeliness and jurisdiction

¶22 The appellants' attorney's billing records reflect 40.75 hours worked on timeliness and jurisdictional submissions.[10] The agency disputed these hours as "extreme and unnecessary" on the basis that the jurisdictional issues were "similar" throughout the numerous appeals. AAF, Tab 5 at 5. The administrative judge agreed, finding the requested hours "excessive," given the appellants' counsel's level of expertise in what the attorney described as a "straightforward" area of law.[11] AID at 6-7. The administrative judge awarded .75 hours for each of the 21 appeals (excluding *Clogston*), an amount of time he deemed "more reasonable," for a total of 15.75 hours. *Id.* at 7.

¶23 The appellants' attorney challenges this reduction on the basis that he was required to respond to numerous motions to dismiss and show-cause orders on issues of jurisdiction and timeliness, and to include with his responses a variety of exhibits. PFR File, Tab 1 at 20-21; *see, e.g., id.*, at Exhibit L. The appellants' attorney also suggests that it is disingenuous not to grant him the full number of hours he worked on the jurisdictional and timeliness issues presented by each of the 21 appeals when the agency continued to litigate them separately, despite his

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[10] There is some confusion in the record regarding the number of hours claimed by the appellants' attorney for work on the timeliness and jurisdictional issues. For example, in its response to the fees motion, the agency stated that the appellants' attorney sought 42.5 hours for work on these issues, AAF, Tab 5 at 5, and in his addendum initial decision the administrative judge also stated that the appellants' attorney sought 42.5 hours under this item. AID at 6-7. A careful review shows that the appellants' attorney's billing records include 40.75 hours worked on these issues. AAF, Tab 1 at 16-43, 47-52.

[11] The appellants' attorney actually stated that "[his] position in this matter is straight forward." AAF, Tab 1 at 4. We interpret this to mean that, in his view, the law on constructive suspensions was, or at least became, well settled during the time the agency continued to vigorously argue that the Board lacked jurisdiction over these appeals. *Id.* at 4-8.

efforts to have them consolidated. PFR File, Tab 1 at 25, n.6. We agree. We reject as unsupported the administrative judge's finding that .75 hours per appeal is a "more reasonable" amount of time than the approximately 2 hours per appeal sought by the appellants' attorney. *See Mudrich v. Department of Agriculture*, 92 M.S.P.R. 413, ¶ 13 (2002), *recons. denied*, 93 M.S.P.R. 313 (an administrative judge must provide sufficient justification for reducing a fee request, and those reasons cannot be conclusory). We award 40.75 hours for the appellants' attorney's work on jurisdiction and timeliness.

Beaulieu v. Department of Transportation, AT-0752-07-0603-A-1

¶24 The appellants' attorney claimed 9.75 hours on November 13-14, 2008, for "Hours spent on November 14, 2008 submissions to AJ Cummings. This model was used in Judge Cummings other appeals and in the other appeals the time charged was time spent modifying it." AAF, Tab 1 at 24-25. The administrative judge allowed 6 hours for this task, finding it "more reasonable." AID at 9 n.4. The appellants' attorney challenges this reduction as improper. PFR File, Tab 1 at 34-35. We agree. The November 14, 2008 submission indicates that it was filed in response to the administrative judge's order to Mr. Beaulieu to identify the duties that were available for him to perform during the period he was medically disqualified and to expand upon the "seniority" argument. PFR File, Tab 1, Exhibit Q. The 12-page response, which included attachments, was both substantive and fully responsive. *Id.* We therefore find that the requested 9.75 hours for this task was reasonable.

Watts v. Department of Transportation, AT-0752-07-0606-A-1

¶25 The appellants' attorney claimed 2 hours on November 14, 2008, for "Hours spent on November 14, 2008 submissions to AJ Cummings attributable [to] this appeal." AAF, Tab 1 at 26. The administrative judge allowed only .5 hours for this task on the basis that the appellants' counsel did not enumerate why 2 additional hours were needed to duplicate the same document he submitted in the *Beaulieu* matter, described immediately above, for which he was already

compensated. AID at 9 n.5. The appellants' attorney challenges this reduction as improper, arguing that it was necessary for him to modify the *Beaulieu* submission in *Watts*. PFR File, Tab 1 at 35-36. Based on our review, we find that the two pleadings are largely identical, save for minor distinctions. *Compare*, PFR File, Tab 1, Exhibit Q, *with* Exhibit R. We find, therefore, that the appellants' attorney has not demonstrated support for his claim for 2 additional hours for preparing the submission in question. We agree with the administrative judge's reduction and award .5 hours for this task.

Esau v. Department of Transportation, NY-0752-07-0196-A-1

¶26 The appellants' attorney claimed 5.75 hours for work on September 21, 2008, for "Various issues including Responding to AJ as to discussions during the conference, determine what is necessary on appeal." AAF, Tab 1 at 43. The administrative judge disallowed half of these hours because the appellants' counsel did not sufficiently explain the specific work he performed during this period of time. AID at 9 n.6. The appellants' attorney contends on review that, in reducing these hours, the administrative judge did so sua sponte, without affording him the opportunity to provide further explanation. PFR File, Tab 1 at 39. We agree and find that the administrative judge erred because, as discussed previously, the Board and Federal Circuit have held that, where an administrative judge has concerns about deficiencies in a fee motion, he should afford the party an opportunity to address the matter before rejecting it. *Wilson*, 834 F.2d at 1012; *Martinez*, 89 M.S.P.R. 152, ¶ 16. Because the appellants' attorney has provided a complete explanation for this charge in his petition for review, PFR File, Tab 1 at 39, we are able to remedy the administrative judge's error by making a determination as to the reasonableness of the hours claimed without remanding the matter to the administrative judge. *See Ruble*, 96 M.S.P.R. 44, ¶ 8.

¶27 The appellants' attorney states that, after a September 21, 2008 conference call, he filed a submission pertaining to election of remedies, as the parties explored how to adjudicate these appeals without a hearing. PFR File, Tab 1 at

39. Our examination of the September 21, 2008 pleading supports the attorney's assertion and, we find, supports his claim for 5.75 hours for this task. *Id.*, Exhibit Y.

Kittrell v. Department of Transportation, AT-0752-07-0659-A-1

¶28 The appellants' attorney claimed 1 hour on August 21, 2007, for "Figuring out what's what" and 1 hour on December 5, 2007, for "Reviewed ID, etc." AAF, Tab 1 at 33. The administrative judge disallowed the first hour for "blatantly obvious" vagueness and reduced the second claimed hour to .25 hours, which he found to be "more reasonable" in light of the appellants' counsel's expertise and the relative simplicity of the issues. AID at 7. The appellants' attorney challenges the administrative judge's striking of the first hour as "petty," PFR File, Tab 1 at 26, and his reduction of the second claimed hour as improper, *id.* at 27. The appellants' attorney also observes that the administrative judge struck the second hour sua sponte without affording him an opportunity to address the matter. *Id.* As stated previously, that was error, *Wilson*, 834 F.2d at 1012; *Martinez*, 89 M.S.P.R. 152, ¶ 16, but because an explanation for the time is included in the petition for review, remand is not necessary, *see Ruble*, 96 M.S.P.R. 44, ¶ 8.

¶29 On review, the appellants' attorney admits that he used a "less than sophisticated expression" to describe the work he performed during the first claimed hour, and suggests that an attorney can surely "ponder" an issue for an hour. PFR File, Tab 1 at 26. While no doubt true, we must agree with the administrative judge's striking of the first hour, particularly given the specificity with which the appellants' attorney has otherwise described the tasks he performed in connection with these appeals in his motion for fees and petition for review. As for the second hour, the appellants' attorney has explained on review that, after reviewing the initial decision on the merits, he compared it to the file to ensure that the dates were correct and made notes for preparing petitions for review. PFR File, Tab 1 at 27. This type of activity is appropriate and we do not

agree with the administrative judge's reduction of the second hour, which we find reasonable.

Other hours and summary

¶30 After the above-described adjustments were made by the administrative judge, he awarded 217.875 hours for work on the 17 initial appeals. AID at 8-9. In addition, he awarded 52 hours for work on the four Central Regional Office Appeals, and 14.50 hours for work on the *Clogston* appeal, for a total of 284.375 hours on the individual appeals. *Id*. at 9. These hours are not contested on review and we discern no reason to disturb the administrative judge's findings. *See Foley*, 59 M.S.P.R. at 416 n.2. As previously indicated, we find that 7.375 additional hours are warranted for these specific appeals as follows: 3.75 hours for *Beaulieu*, 2.875 hours for *Esau*, and .75 hours for *Kittrell*, for a total of 291.75 hours. Also, as we previously found, the appellant's counsel is entitled to an additional 76 hours for preliminary work (34.5 hours already awarded by the administrative judge + 76 additional hours awarded here = 110.5 hours total for preliminary work, as previously found) and an additional 25 hours attributed to timeliness and jurisdiction work (15.75 already awarded by the administrative judge + 25 additional hours awarded here = 40.75 hours total for timeliness and jurisdiction, as previously found). Thus, we find that the appellants' attorney is entitled to 392.75 hours for work under the category described as individual appeals.

<u>Time Charges for Petition for Review Process Upon First Initial Decision</u>

¶31 Under this category, the appellants' attorney claimed, as part of 108.75 total hours worked during the petition for review process, four entries, totaling 26.25 hours, for work performed from November 21 to November 25, 2007, on "Opposition to agency PFRs." AAF, Tab 1 at 44 & n.*. Under this same category, he also listed, as a portion of the 108.75 total hours, 18.75 hours spent "Drafting PFR" and 6.25 hours spent on "Supplemental to the appellant's PFR." *Id*. The attorney acknowledges that the petitions for review he filed, in which he

argued that the appellants were entitled to back pay, were ultimately not successful and that an attorney may not be reimbursed for hours expended in pursuit of an unsuccessful claim. *Id.* He also acknowledges that he originally opposed 20 petitions for review filed by the agency, but was successful in only 17 oppositions. *Id.* He states that he has accounted for this degree of success by assuming that half of the 108.75 hours, 54.375 hours, were attributed to his successfully opposing the agency's petitions for review, and that, because he was only successful in opposing the agency's petitions for review in 17 of 20 appeals, he is entitled to approximately 46 hours for this category (54.375 hours divided by 20 appeals multiplied by 17 successful oppositions). *Id.*

¶32 In the addendum initial decision, the administrative judge found that the appellants' counsel failed to enumerate with specificity the actual work he performed during the 26.25 hours mentioned above and, noting that the sole pleading the appellants' counsel filed was a one-and-a-half page document that was "not comprehensive," the administrative judge awarded 12.75 hours for "Opposition to agency PFRs," disallowing 13.5 hours. AID at 5. The administrative judge also disallowed all activity devoted solely to pursuit of the appellants' petitions for review for back pay as they were not successful on that issue. *Id.* Therefore, he disallowed the 18.75 hours devoted to "Drafting PFR," and the 6.25 hours devoted to "Supplemental to the appellants' PFR," noted above. *Id.* at 5-6. Of the remaining 70.25 hours under this category, the administrative judge disallowed half to account for time the appellants' counsel performed work in pursuit of back pay via the appellants' petitions for review. *Id.* And, of the remaining 35.125 hours, the administrative judge disallowed 4 hours for the "Motion to Consolidate All Appeals Before the Board" because it related to the back pay issue. *Id.* Thus, the administrative judge awarded 31.25 hours for this category. *Id.*

¶33 The appellants' attorney challenges the reduction of the 26.25 hours spent on the opposition to the agency's petitions for review on the grounds that, in

addition to the one-and-a-half page document he filed in one appeal, and to which the administrative judge referred, he also filed 16 separate 15-20 page pleadings in opposition to the individual petitions for review that the agency filed. PFR File, Tab 1 at 17-18; *see, e.g,* Exhibits J, K. Based upon our review, we agree with the appellants' attorney and find that these pleadings are substantive and entailed significant work. While considerable portions of the arguments are the same, the pleadings do address the specifics of each appeal. *Id.* Thus, subject to a further reduction, addressed below, we allow these hours.

¶34 As acknowledged by the appellants' attorney, he may not be awarded fees for time expended on unsuccessful claims. *See Del Prete v. U.S. Postal Service*, 104 M.S.P.R. 429, ¶ 15 (2007). Here, that would include time spent on the appellants' petitions for review on the issue of back pay. We therefore find that the administrative judge properly disallowed the 18.75 hours devoted to "Drafting PFR," the 6.25 hours devoted to "Supplemental to appellant's PFR," and the four hours devoted to "Motion to consolidate all appeals before the Board," as these entries clearly reflect hours spent on unsuccessful claims.

¶35 Two additional entries under this category suggest that some of the time was expended on the appellants' unsuccessful petitions for review. Those entries are 7.75 hours spent "Reviewing all decisions for purposes of PFR and Opposition to agency PFR" and 33.50 hours spent on "Begin[ning] drafting and assembling file for PFR and opposition to PFR and continue all extension requests." AAF, Tab 1 at 43. Because these hours relate to both the appellants' petitions for review and the oppositions to the agency's cross-petitions for review, subject to a further reduction addressed below, we find that it is reasonable to allow half of each of these two entries, or 20.625 hours. As to the remaining entries under this category totaling 12.25 hours, it is not possible to identify whether the time expended was on the appellants' petitions for review or the oppositions to the agency's petitions for review, *see id.*, and therefore we allow half of the time, or 6.125 hours.

¶36 Thus, we initially allow a total of 53 hours under this category. But, because the appellants' attorney was only successful in opposing 17 of the 20 agency petitions for review, a further adjustment of hours is necessary to reflect his degree of success. Of the 53 hours we have allowed, we award 45 hours (17/20 or 85% of 53) for this category.

Time Charges Upon Remand From Full Board

¶37 Under this category, the appellants' attorney claimed 81.25 hours. AAF, Tab 1 at 45. The administrative judge allowed these hours, finding them reasonable. AID at 7. The agency has not challenged this finding by filing a petition for review or a cross-petition for review, and we discern no reason to disturb the administrative judge's findings as to these hours. *See Foley*, 59 M.S.P.R. at 416 n.2

Time Charges Upon Issuance of Second Initial Decisions

¶38 Under this category, the appellants' attorney claimed a total of 50 hours, including 5.75 hours for work on a "Motion to consolidate for purposes of PFRs and related issues." AAF, Tab 1 at 45-46. Finding the amount excessive and not sufficiently substantiated, the administrative judge awarded only 1.5 hours for work on the motion to consolidate. AID at 7. The appellants' attorney challenges this reduction on petition for review on the basis that the administrative judge struck the hours sua sponte, without first affording the appellants an opportunity to provide a more thorough explanation. PFR File, Tab 1 at 28. As discussed previously, the Board and Federal Circuit have held that, where an administrative judge has concerns about deficiencies in a fee motion, he should afford the party an opportunity to address the matter before rejecting it. *Wilson*, 834 F.2d at 1012; *Martinez*, 89 M.S.P.R. 152, ¶ 16. In failing to do so here, the administrative judge erred.

¶39 Because the appellants' attorney has provided a complete explanation for this charge in his petition for review, PFR File, Tab 1 at 28, we are able to make

a determination as to the reasonableness of the hours claimed for this task without remanding the matter to the administrative judge. *See Ruble*, 96 M.S.P.R. 44, ¶ 8. The motion in question was a joint motion to consolidate the 17 appeals "to expedite case processing for all concerned," and was signed by both the appellants' attorney and the agency representative. PFR File, Tab 1, Exhibit M at 2. Notably, the agency did not specifically challenge this expenditure of time, either below, AAF, Tabs 5, 17, or in its response to the appellants' petition for review. PFR File, Tab 4. Because the motion was a joint motion, the agency's failure to challenge the hours spent on it is particularly significant. Under these circumstances, we find that 5.75 hours for work on this motion is reasonable.

¶40 Under this same category, the appellants' attorney also claimed 21.25 hours (11.5 hours on January 25-26, 2009, and 9.75 hours on February 23, 2009) for "Opposition to agency PFRs." AAF, Tab 1 at 46. The administrative judge found such a description to be "scant and insufficient," and found instead that 4 hours for each of the two entries was reasonable. AID at 7-8. The appellants' attorney again contends that the administrative judge reduced these hours sua sponte, without affording the appellants an opportunity to provide further explanation. PFR File, Tab 1 at 29-31. We again find that the administrative judge erred in this regard. *See Wilson*, 834 F.2d at 1012; *Martinez*, 89 M.S.P.R. 152, ¶ 16. However, we are again able to make a determination as to the reasonableness of the hours claimed based on the explanation in the petition for review. PFR File, Tab 1 at 29-31; *Ruble*, 96 M.S.P.R. 44, ¶ 8.

¶41 Based on our review, we find that these pleadings are substantive and entailed significant work. PFR File, Tab 1, Exhibits N, O. While the agency's petitions for review were largely similar, the oppositions necessarily addressed distinctions raised by requirements of the agency's personnel management system and provisions of the collective bargaining agreement which, as noted, changed during adjudication of these appeals, *id.*, Exhibit N at 9-10, Exhibit O at 6, and also pointed out various factual differences in certain of the appeals, *id.*, Exhibit

O at 8. We find that the 21.25 hours claimed for preparation of these two pleadings is reasonable and we allow them. Thus, we award the appellants' attorney all 50 hours he requested under this category.

Time Charges for Preparing the Instant Motion and Review Files

¶42 Attorney fees may be recovered for time an attorney spent preparing a motion for fees. *Wightman v. Department of Veterans Affairs*, 111 M.S.P.R. 109, ¶ 13 (2009). Under this category, the appellants' attorney claimed 26.75 hours for work performed from June 22-25, 2009, but provided no explanation as to how he spent those hours. AAF, Tab 1 at 52. The administrative judge awarded only half the requested time, or 13.375 hours, based on the lack of explanation. AID at 8. The appellants' attorney challenges the reduction as without merit since the fee petition was lengthy and addressed 21 appeals. PFR File, Tab 1 at 31-32. He also argues that, if the administrative judge had concerns over this entry, he should have alerted the appellants' attorney and afforded him an opportunity to provide a more complete explanation of any perceived deficiencies. *Id.* We again find that the administrative judge erred in this regard. *See Wilson*, 834 F.2d at 1012; *Martinez*, 89 M.S.P.R. 152, ¶ 16. Because the fee petition itself is obviously part of the record, AAF, Tab 1, we are able to review it and make a determination regarding the reasonableness of fees claimed for this task without remanding the matter to the administrative judge for his consideration. *Ruble*, 96 M.S.P.R. 44, ¶ 8.

¶43 The 53-page fee petition painstakingly reviewed the background of these appeals, including how they developed in the Board's different regional and field offices, how they were decided below, the petition for review process which resulted in remand, the resulting remand initial decisions, and the second petition for review process and its resolution by issuance of the Board's final order, which rendered final those remand initial decisions. AAF, Tab 1 at 1-8. The fee motion then set out the requirements for entitlement to an award of attorney fees under Board law, and explained how and why the appellants are so entitled. *Id.* at 8-13.

Next, the fee motion provided a statement in support of the appellants' attorney's entitlement to the $300 per hour rate he seeks. *Id.* at 13-15. Finally, the motion described in detail the hours the appellants' attorney spent on matters at the various stages of processing – those that pertained to all the appeals and those that pertained to each of the individual appeals. *Id.* at 15-52. Based on our review, and considering the inherent difficulties in providing a comprehensive pleading covering 22 different appeals, we find that the appellants' attorney has supported his claim for 26.75 hours in connection with this task.

Post-Attorney Fees Motions

¶44 After he filed his initial fee motion, the appellants' attorney filed subsequent pleadings and claimed 43.25 hours for time spent on those submissions. AAF, Tabs 8, 10, 12, 18. In each instance, the administrative judge awarded approximately half of the hours requested, finding that the appellants' attorney failed to substantiate his claim. AID at 10.

¶45 In several of these subsequently-filed pleadings, the appellants' attorney claimed a total of 19.75 hours for time he spent participating in the Board's Mediation Appeals Program, wherein the parties, assisted by a Board mediator, endeavored, without success, to settle this fee motion. AAF, Tabs 8, 10, and 12. In each instance, with one exception,[12] the appellants' attorney set out the precise number of hours worked on the mediation and the dates on which the work was performed. *Id.* In awarding only half the hours claimed, the administrative judge questioned of what the hours spent on "mediation matters" consisted. AID at 10-

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[12] In his January 20, 2010 motion for an expedited ruling on the fee petition, the appellants' attorney indicated that he spent 1.5 hours in mediation on November 24, 2009, and 14 hours in mediation on January 14 and 19, 2009, and in preparing the motion. AAF, Tab 10 at 2-3. In his petition for review, the appellants' attorney indicates that, of an additional "14.25" hours requested in his January 20, 2010 motion, 2 hours were spent in mediation. PFR File, Tab 1 at 42. However, it is clear from the January 20, 2010 motion that the appellants' attorney requested only 14 total hours for mediation and preparing the motion. AAF, Tab 10 at 3, 21.

11. The appellants' attorney strongly challenges this reduction on the basis that the description was adequate, mediations are supposed to be confidential, and the administrative judge was kept informed on the progress of the mediation. PFR File, Tab 1 at 43-44. The appellants' attorney further explained on review that, during these hours, the parties were exchanging proposals, considering proposals, and reviewing and drafting proposals. *Id*.

¶46 The Board has long encouraged the use of alternate dispute resolution to resolve matters submitted to it for adjudication. *Carson v. Department of Energy*, 86 M.S.P.R. 192, ¶ 20 (2000). And, the Board has awarded fees for time spent preparing an offer of settlement of an attorney fees matter. *See, e.g.*, *Diehl v. U.S. Postal Service*, 88 M.S.P.R. 104, ¶ 18 (2001). It is significant that the agency, whose representative also participated in mediation, has not questioned the hours claimed in that effort, either below or in its response to the petition for review. AAF, Tab 17; PFR File, Tab 4. Under the circumstances, we find that 19.75 hours, claimed by the appellants' attorney for time attributed to mediation, is reasonable.

¶47 The appellants' attorney also claimed 5.25 hours for time spent preparing his August 3, 2009 preliminary response to the agency's initial response to the fee motion. AAF, Tab 8; *see* AAF, Tab 6. The appellants' attorney challenges the administrative judge's reduction of these hours by half. AID at 10-11; PFR File, Tab 1 at 42. We have reviewed the seven-page document and find that it addresses with specificity each area in which the agency challenged the fee motion and that 5.25 hours is reasonable for that task. *See* AAF, Tab 6.

¶48 The appellants' attorney claimed 12 hours for time spent preparing the appellants' motion for an expedited ruling/supplement to his response to the agency's opposition to the fee motion. AAF, Tab 10; *see* PFR File, Tab 1 at 42 (deducting 2 hours for mediation from the claimed 14 hours). The administrative judge reduced these hours and appellants' attorney challenges that reduction in the petition for review. AID at 10-11; PFR File, Tab 1 at 42. The motion

includes a one-and-a-half page supporting argument regarding the request for an expedited ruling. AAF, Tab 10 at 3-4. The supplement to the appellants' attorney's response to the agency's opposition to his fee motion is largely, if not wholly, duplicative of his preliminary response to the agency's initial response to his fee motion, *compare* AAF, Tab 6 with Tab 10, and did not address any further pleadings filed by the agency in the interim as none was filed. Under the circumstances, we reduce the requested hours for this effort to 6 hours, which we deem reasonable.

¶49 Lastly, the appellants' attorney claimed 6 hours for time spent responding to the agency's final response to his fee motion. AAF, Tab 18 at 4. As noted above, the administrative judge reduced the hours claimed by half, and on petition for review the appellants' attorney challenges the administrative judge's reduction. AID at 10 -11; PFR File, Tab 1 at 43. We have reviewed the 20-page document in which, in order that the Board would have a "single source submission," the appellants' attorney included, as exhibits, ten previously-filed pleadings. AAF, Tab 18, Exhibits A-J. We concur with the appellants' attorney's acknowledgment that the response itself includes arguments previously made, but we find that it also includes new arguments, *see, e.g.*, *id.* at 5-7, and expands upon others, *see, e.g.*, *id.* at 8-12. We therefore find that the claimed 6 hours for this task is reasonable. In sum, we award the appellants' attorney 37 of the 43.25 hours sought for his work under this category.

<u>Petition for Review of the Addendum Initial Decision</u>

¶50 Under this category, the appellants' attorney claims 28.5 hours spent preparing the petition for review of the addendum initial decision from May 24-27, 2010. PFR File, Tab 1 at 49-50. We have reviewed the 50-page submission and evaluated the level of complexity of the issues presented and the amount of time necessary to review the record. We have also considered the fact that, while we have not disturbed some of the reductions that the administrative judge found were warranted in his initial decision, we did find that the record failed to support

a substantial number of the administrative judge's findings that the appellants' attorney's submissions did not support the hours he claimed. Accordingly, we find that the appellants' attorney reasonably expended 28.5 hours for this task.

Summary

¶51 In sum, we award to the appellants' attorney the following number of hours:

Initial processing		54.75
Total for individual appeals		392.75
17 initial appeals	217.875	
4 Central Office appeals	52.00	
Clogston appeal	14.50	
Preliminary work adjustment	76.00	
Timeliness/jurisdiction adjustment	25.00	
Adjustment for *Beaulieu*, *Esau* and *Kittrell*	7.375	
PFR process upon 1st initial decisions		45.00
Remand from full Board		81.25
Upon issuance of 2nd initial decisions		50.00
Fee motion		26.75
Post-attorney fees motions		37.00
Petition for review		28.50
Total		716.00

Thus, we award 716.00 hours at $300.00 per hour for a total award of $214,800.00.

ORDER

¶52 We ORDER the agency to pay the attorney of record $214,800.00 in fees. 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)).

¶53 We also ORDER the agency to tell the appellants and the attorney promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. We ORDER the appellants and the attorney to provide all necessary information that the agency requests to help carry out the Board's Order. The appellants and the attorney, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶54 No later than 30 days after the agency tells the appellants and the attorney that it has fully carried out the Board's Order, the appellants or the attorney may file a petition for enforcement with the office that issued the initial decision on this appeal, if the appellants or the attorney believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellants 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).

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

NOTICE TO THE APPELLANTS 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.

Attachment A

Russell Hart	AT-0752-07-0660-A-1
Bruce Beaulieu	AT-0752-07-0603-A-1
Daniel Watts	AT-0752-07-0606-A-1
Kevin Kee	AT-0752-07-0604-A-1
Calvin Phillips	AT-0752-07-0605-A-1
Kurt Ceniglio	AT-0752-07-0602-A-1
Malcolm Kittrell	AT-0752-07-0659-A-1
John Gianetto	AT-0752-07-0661-A-1
Frederick Riley	AT-0752-07-0592-A-1
Victor Wainwright	AT-0752-07-0662-A-1
James Bridgeman	AT-0752-07-0608-A-1
William Pullich	AT-0752-07-0697-A-1
Troy Clogston	AT-0752-08-0006-A-1
Randy Zak	DC-0752-07-0631-A-1
Michael Shanholtzer	DC-0752-07-0630-A-1
David Yarnell	DC-0752-07-0609-A-1
Ronald Stanton	DC-0752-07-0525-A-1
Ruben Foley	CH-0752-07-0414-A-1
Gary Leech	CH-0752-07-0415-A-1
John Schneider	CH-0752-07-0438-A-1
Scott Sinkhorn	CH-0752-07-0454-A-1
Michael Esau	NY-0752-07-0196-A-1