

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

JOHN YERESSIAN,  
Appellant,

DOCKET NUMBER  
SF-0752-09-0049-A-2

v.

DEPARTMENT OF THE ARMY,  
Agency.

DATE: January 29, 2013

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Robert Atkins, Esquire, Edmonds, Washington, for the appellant.

William H. Brawner, Esquire, Los Angeles, California, for the appellant.

Larry F. Estrada, Esquire, Los Angeles, California, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mark A. Robbins, Member

**FINAL ORDER**

The appellant has filed a petition for review in this case asking us to reconsider the addendum initial decision issued by the administrative judge, which, among other things, found that: (1) the appellant was the prevailing party;

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

(2) attorney fees were warranted in the interest of justice; (3) the appellant incurred fees during the course of attorney-client relationships with Robert Atkins, Esq., and William Brawner, Esq.; and (4) fees should be awarded to Mr. Atkins and Mr. Brawner.<sup>2</sup> Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)<sup>3</sup>). For the reasons discussed below, we GRANT the appellant's petition for review and AFFIRM the initial decision AS MODIFIED. Except as expressly modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

On petition for review, the appellant makes the following assertions: (1) that the administrative judge did not explain the legal requirements of a fee petition or the appellant's burden; (2) that Mr. Brawner should have been awarded fees at the prevailing market rate of \$335.00 per hour and the agency did not challenge the \$335.00 hourly rate; (3) that the administrative judge improperly reduced Mr. Brawner's hours; and (4) that the administrative judge

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<sup>2</sup> The administrative judge did not award all of the claimed fees. For instance, the administrative judge denied the following requests: for Mr. Brawner to be paid at a \$335.00 hourly rate; for fees for consultation and other fees and costs; and for Mr. Atkins to be paid for his work in mediation. The administrative judge also reduced Mr. Brawner's claimed hours by 53.2 hours.

<sup>3</sup> Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

erred by not awarding fees for consultations and mediation.<sup>4</sup> We have considered each of these arguments and, for the most part, we do not find them persuasive. For instance, we find that the appellant was given ample notice of his burden in a fee petition. *See, e.g., Yernessian v. Department of the Army*, MSPB Docket No. SF-0752-09-0049-A-1 (A-1 File), Tab 2 (Acknowledgment Order); *Yernessian v. Department of the Army*, MSPB Docket No. SF-0752-09-0049-A-2 (A-2 File), Tabs 40 (Order Closing Record); 45 (Order on Appellant's Motion); *see also* A-2 File, Tab 64 (Order Requiring Additional Information Regarding Attorney Fees).

We find that the administrative judge properly determined that Mr. Brawner's customary rate was \$250.00 based on the fee agreement. Where a specific fee is agreed upon, the Board presumes that that amount represents the maximum reasonable fee which may be awarded. *Gensburg v. Department of Veterans Affairs*, [85 M.S.P.R. 198](#), ¶ 13 (2000). Although that presumption may be rebutted by convincing evidence, *see id.*, the appellant has presented no persuasive evidence to rebut that presumption with respect to Mr. Brawner.<sup>5</sup>

Even if the administrative judge erred by not providing the appellant with notice and an opportunity to address his concerns regarding the 53.2 hours that he disallowed in the addendum initial decision, *see, e.g., Wilson v. Department of Health & Human Services*, [834 F.2d 1011](#), 1012 (Fed. Cir. 1987), we need not reverse the addendum initial decision or remand the appeal. Importantly, the agency raised many of these concerns in its Supplemental Response to the appellant's motion for attorney fees for Mr. Brawner, and we have also considered the appellant's arguments on review. Thus, we find that the appellant

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<sup>4</sup> It is unclear if the appellant is claiming on review that the administrative judge was biased against him; to the extent that he was making such an assertion, he has not overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, [1 M.S.P.R. 382](#), 386 (1980).

<sup>5</sup> We note that the agency did challenge the claimed \$335.00 market rate for Mr. Brawner. *See* A-2 File, Tab 66 at 8.

has had ample notice and an opportunity to address these deficiencies. *See Diehl v. U.S. Postal Service*, [88 M.S.P.R. 104](#), ¶ 9 (2001); *see also Ruble v. Office of Personnel Management*, [96 M.S.P.R. 44](#), ¶ 8 (2004). For these reasons, we affirm the administrative judge's findings on these issues.

We now turn to the issue of the administrative judge's decision to disallow an award of fees for Mr. Atkins's work on the appellant's behalf during mediation.<sup>6</sup> In the addendum initial decision, the administrative judge rejected the appellant's request for fees for work done during attempts to settle this appeal, and the appellant's other appeals, through the Board's Mediation Appeals Program (MAP), explaining that the fee case pertains to fees incurred during the initial appeal culminating in the Board's July 2, 2009 Opinion and Order and in the preparation of the attorney fee petition, and that the settlement efforts through MAP, which occurred after the Opinion and Order was issued, were ultimately unsuccessful. *See* A-2 File, Tab 67 at 8 n.2.

The Board has an obligation to ensure that reasonable fees are awarded, *see* [5 U.S.C. § 7701\(g\)\(1\)](#), and we disagree with the administrative judge's decision in this regard. Importantly, the Board encourages parties to pursue mediation or other alternative dispute resolution methods, and it has awarded fees for such work. *See, e.g., Hart v. Department of Transportation*, [115 M.S.P.R. 10](#), ¶ 46 (2010); *Carson v. Department of Energy*, [86 M.S.P.R. 192](#), ¶ 20 (2000). Because the instant fee petition was pending at the time of the mediation, the fee petition was part of the settlement discussions, Mr. Atkins had entered his appearance on the appellant's behalf in this matter prior to the start of mediation, and he properly documented his work to settle these matters, we vacate the addendum initial decision in this regard, and we award Mr. Atkins fees for the claimed 10.59 hours of work.

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<sup>6</sup> We affirm the administrative judge's decision to deny the request for fees for "consultation" and other claimed expenses not specifically discussed herein.

We also credit Mr. Atkins's Declaration, made under penalty of perjury, which explained the increase in the market value for his services in 2011, *see* A-2 File, Tab 3, and we therefore award him \$435.00 per hour for the hours documented in 2010 and \$470.00 per hour for the hours documented in 2011. This award does not entitle the appellant to seek attorney fees for the same work performed by Mr. Atkins, should he prevail in his other matters that were also part of the global mediation efforts during this time frame.<sup>7</sup>

**NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS**

The addendum initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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 the date of this order. *See* [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). 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).

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<sup>7</sup> The appellant and the agency each requested that the Board issue sanctions against the other party. We deny the appellant's numerous requests for sanctions against the agency. Although we are extremely concerned about the multiple serious allegations made against the appellant, in light of our disposition, we deny the agency's requests for sanctions against him without prejudice.

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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://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:

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William D. Spencer  
Clerk of the Board

Washington, D.C.