

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

YONG H. SCHALLER,
Appellant,

DOCKET NUMBER
PH-0752-10-0173-A-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: February 8, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Wynter P. Allen, Esquire, and Kristin D. Alden, Esquire, Washington,
D.C., for the appellant.

Edward G. Allan, Fort Meade, Maryland, 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, and the agency has filed a cross petition for review in this case asking us to reconsider the addendum initial decision issued by the administrative judge that granted in part and denied in part

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

the appellant's motion for attorney fees. 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](#)).² After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

Appellant's Petition for Review

On review, the appellant argues that the administrative judge erred in determining the hourly rate to be applied in calculating the attorney fee award, and she reasserts the arguments she raised below regarding the adjusted *Laffey* matrix.³ Specifically, the appellant argues that the administrative judge erroneously failed to accept evidence demonstrating the prevailing market rate and erred by limiting the fee award to the hourly rates set forth in the fee agreement. The appellant also contends that the administrative judge erred by

² 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.

³ The adjusted *Laffey* matrix is a schedule of hourly rates which the appellant asserts are the prevailing market rates for federal litigation in the Washington, D.C. area.

rejecting evidence of her attorney's fees in other cases, evidence of the noneconomic goals of the law firm representing her, and evidence of her inability to pay market rates.

The Board assesses the reasonableness of the attorney fee request by using two objective variables, the attorney's customary billing rate and the number of hours reasonably devoted to the case. *Hart v. Department of Transportation*, [115 M.S.P.R. 10](#) ¶ 14 (2010). 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. *Id.*; *Stewart v. Department of the Army*, [102 M.S.P.R. 656](#), ¶ 17 (2000), *overruled in part on other grounds by Shelton v. Environmental Protection Agency*, [115 M.S.P.R. 177](#), ¶ 10 (2010).

Although the appellant submitted a copy of the fee agreement, she argues that the fees she agreed to pay should not apply because the rates do not reflect market rate. The appellant contends that instead she should be awarded the higher hourly rates provided in the adjusted *Laffey* matrix. However, the Board has consistently held that, where it is agreed that a specific fee will be paid to attorneys for legal services rendered on behalf of an appellant in a Board case, the Board presumes that the amount agreed upon represents the maximum reasonable fee that may be awarded. *Martinez v. U.S. Postal Service*, [89 M.S.P.R. 152](#), ¶ 18 (2001); *Gensburg v. Department of Veterans Affairs*, [85 M.S.P.R. 198](#), ¶ 13 (2000); *O'Donnell v. Department of the Interior*, [2 M.S.P.R. 445](#), 455 (1980), *overruled in part on other grounds by Koch v. Department of Commerce*, [19 M.S.P.R. 219](#) (1984). Further, our reviewing court stated in *Willis v. U.S. Postal Service*, [245 F.3d 1333](#), 1340 (2001), that “[a] representation contract specifying hourly rates is evidence that the contract rates are consistent with local market rates, because the client freely agreed to pay the rates by entering into the contract.” This presumption, however, is rebuttable by convincing evidence that the agreed-upon rate was not based on marketplace considerations and that the attorney's rate for similar work was customarily

higher, or by a showing that she had agreed to such a rate only because of the employee's reduced ability to pay and that her customary fee for similar work was significantly higher. *Gensburg*, [85 M.S.P.R. 198](#), ¶ 13. In this instance, the administrative judge correctly found that neither exception applies. As the administrative judge found, all clients of the law firm representing the appellant, Alden Law Group, PLLC, are charged the same or similar rates. Initial Decision (ID) at 11; Initial Appeal File (IAF), Tab 6 at 28; Petition for Review (PFR) File, Tab 1 at 12-13.

The appellant also asserts that the administrative judge erred in relying upon *Brown v. Department of Health & Human Services*, [50 M.S.P.R. 523](#) (1991), in which the Board declined to award prevailing community rates to an attorney who charged rates that were less than the prevailing community rates. She contends that *Brown* is no longer good precedent and that the Board should instead rely on *Raney v. Federal Bureau of Prisons*, [222 F.3d 927](#), 935 (Fed. Cir. 2000). The appellant's reliance upon *Raney* is misplaced.

In *Raney*, the appellant was ordered reinstated by an arbitrator. His attorneys, who were salaried attorneys of the union, had requested attorney fees and stated that any fees received would be deposited into a separate union legal representation fund. *Raney*, 222 F.3d at 929. Based on ethical concerns identified in earlier court decisions, the arbitrator declined to award market-rate attorney fees and instead issued an award based on the cost of providing legal services. Thus, the question arose as to whether litigants who employ union staff counsel are barred from recovering market rate fees when such fees are deposited into a separate fund controlled exclusively by lawyers and the fund is used solely to support litigation on behalf of employees. The court held that, when a legal fund is separated from other union funds and is controlled exclusively by attorneys for the sole benefit of employee litigation, the Back Pay Act, [5 U.S.C. § 5596\(b\)](#), permits the award of attorney fees at market-fee rates for work by union staff counsel. *Raney*, 222 F.3d at 931-37.

Here, the appellant is represented by a private law firm rather than union staff counsel, there are no legal fund concerns, and there is a signed fee agreement between the appellant and the law firm setting forth the rates. Thus, *Raney* is not controlling, and the holding in that case does not affect the Board's analysis in *Brown*. Accordingly, the administrative judge correctly declined to grant the appellant's request to approve hourly rates based on the significantly higher rates in the adjusted *Laffey* matrix.

Finally, because the appellant is not the prevailing party with respect to the petition for review, she is therefore not entitled to an additional award of fees for services rendered in connection with the petition for review. See *Blackman v. U.S. Postal Service*, [67 M.S.P.R. 382](#), 387 (1995); *Koerner v. Office of Personnel Management*, [55 M.S.P.R. 150](#), 152-54 (1992).

Agency's Cross-Petition for Review

On cross-petition for review, the agency contends that the administrative judge should have reduced the number of hours for which the appellant was entitled to an award of fees. Specifically, the agency contends that the attorney fees claimed for essentially routine clerical duties are excessive, i.e., indexing the report of investigation pertaining to the appellant's equal employment opportunity (EEO) case. PFR File, Tab 3 at 10. The agency also disputes 216.91 hours of fees awarded and contends that the overall amount of hours claimed "is excessive given the fact that the appellant's counsel is clearly recognized as an expert authority in the area of federal employment litigation, as noted in counsel affidavits." PFR File, Tab 3 at 10, 12. The agency argues that the appellant's counsel recommended courses of action to the appellant that would increase the costs of litigation for the appellant and the agency, i.e., opposing the hearing being conducted by video teleconference. *Id.* at 11. The agency also argues that the hours claimed for the preparation of the prehearing statement, closing

statement, fee statements, and unsuccessful sanctions motions are excessive given the competence of counsel and the nature of the actions. *Id.* at 12.

The administrative judge carefully scrutinized the hours claimed and subsequently disallowed 3.8 hours for work on the appellant's EEO complaint. *Id.* at 13. The administrative judge further reduced the award by 10 hours for those hours that the appellant had agreed to reduce her claim by but did not do so. *Id.* at 14. Even though the agency disagrees on review with the administrative judge's findings and determinations concerning its challenges to a large number of hours for which the appellant was awarded attorney fees, the administrative judge thoroughly addressed the agency's arguments, and we find no basis upon which to disturb his findings and conclusions. Thus, we discern no basis for reducing the hours further. *See Burch v. Department of Homeland Security*, [109 M.S.P.R. 426](#), ¶ 19 (2008); *Gensburg*, [85 M.S.P.R. 198](#), ¶ 12; *Sprenger v. Department of the Interior*, [34 M.S.P.R. 664](#), 669 (1987) (the administrative judge who heard the appeal on the merits is in the best position to determine its complexity at the amount of reasonable attorney fees incurred at the attorney fee stage).

**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 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).

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. 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.