



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for August 11, 2017

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Elissa Rumsey

Respondent: Department of Justice

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2016-2661](#)

Issuance Date: August 10, 2017

Individual right of action (IRA) appeals

Attorney Fees

Reasonableness of Fees

The petitioner was the prevailing party in an IRA appeal and was represented by three different attorneys during the course of litigation before the Board. The petitioner filed a petition for attorney fees. The Board granted fees for two of the attorneys, but denied fees for the third attorney, Beth Slavet, on the grounds that the petitioner failed to show that the fees were reasonable. Specifically, the Board found that the documentation of Ms. Slavet's work on the case was insufficient to show how she had spent the time for which she billed.

Holding: The court reversed the Board's determination to disallow all attorney fees claimed for Ms. Slavet's work, and remanded for the Board to determine the appropriate amount of fees.

1. The applicant for fees bears the burden of proving that they are reasonable, including documenting the hours appropriately expended. Nevertheless, under 5 U.S.C. § 1221(g), corrective action in an IRA appeal "shall" include attorney fees. Therefore, even where documentation is inadequate, the Board should use its experience and knowledge to determine what a reasonable fee would be.
2. Although the petitioner conceded that "there may be some truth to [the agency's] claim that Ms. Slavet's time charges should not be fully compensable," this did not constitute a concession that none of her time charges were compensable.
3. There was an insufficient basis for the Board to disallow Ms. Slavet's hours altogether, although an examination of the documentation in support and the agency's challenges thereto may reveal that some specific hours should be disallowed. It may also be appropriate for the Board to apply a global reduction in light of the appellant's limited success, as it did to the fee awards for the work of the other two attorneys.
4. Ms. Slavet is a current federal employee, and conflict of interest laws prohibit federal employees from taking payment for representing individuals in proceedings against the United States. 18 U.S.C. §§ 203(a), 205(a). Nevertheless, these laws do not prevent an award of attorney fees in this case because fees under 5 U.S.C. § 1221(g), are payable to the employee - not to the employee's attorney.

NONPRECEDENTIAL:

Jones v. Department of Health & Human Services, No. [2016-1908](#) (Aug. 10, 2017) (DE-4324-16-0240-I-1) (affirming, as supported by substantial evidence, the Board's final decision denying the petitioner's request for corrective action challenging his nonelection for appointment under VEOA and USERRA).

Brown v. Department of Defense, No. [2017-1687](#) (Aug. 10, 2017) (MSPB No. SF-0752-15-0761-I-1) (affirming the Board's decision to uphold the petitioner's removal for misconduct; the petitioner did not prove his affirmative defenses of due process violation or harmful procedural error).

Griesbach v. Department of Veterans Affairs, No. [2017-1510](#) (Aug. 9, 2016) (MSPB No. AT-1221-16-0076-W-1) (affirming the Board's decision that denied the petitioner's request for corrective action in this IRA appeal; substantial evidence supported the Board's finding that the petitioner's disclosures were not protected).

Henley v. Merit Systems Protection Board, No. [2016-2176](#) (Aug 4., 2016) (MSPB No. AT-0752-15-0087-I-1) (petition for panel rehearing granted to correct the legal standard set forth in the court's July 19, 2017 decision; the court affirmed the Board's decision that dismissed the petitioner's constructive removal appeal for lack of jurisdiction; the petitioner failed to make a nonfrivolous allegation that his resignation was involuntary; the petitioner waived his discrimination claims so the case could proceed before the Federal Circuit and would not have to be transferred to district court as a mixed case pursuant to *Perry v. Merit System Protection Board*, 137 S. Ct. 1975 (2017).

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