

NORMAN BARTON

v.

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE

Docket No.
SF531D09013

OPINION AND ORDER

Appellant, a GS-14, Step 5, Equal Employment Opportunity Officer in the San Francisco Regional Office of the Department of Health, Education and Welfare, now the Department of Health and Human Services, was denied a within-grade salary step increase due April 22, 1979. The denial of the within-grade increase was based upon appellant's supervisor's determination that appellant was not performing at an acceptable level of competence ("negative ALOC determination"). The negative ALOC determination was affirmed on reconsideration by the agency. Appellant filed an appeal with the Board's San Francisco Field Office which, by decision dated May 16, 1980, reversed the negative ALOC determination as affirmed by the reconsideration decision. The presiding official, after a hearing, concluded that the agency had failed to support its negative ALOC determination by substantial evidence.

Appellant then moved for an award of attorney fees under 5 U.S.C. § 7701(g)(1) and 5 C.F.R. § 1201.37(a). By addendum decision dated October 27, 1980, the presiding official granted in part and denied in part appellant's request for attorney fees. The portion granted was for services rendered by Attorney Lawrence E. Moll in the amount of \$2,551.20 in connection with the appeal before the Board's Field Office. The presiding official found that payment of attorney fees in that amount for services rendered to the appellant, the prevailing party, was warranted in the interest of justice and was reasonable.

The presiding official, however, disallowed the remainder of appellant's claim for attorney fees which included a claim for attorney fees and expenses incurred in connection with appellant's challenge, before the agency, of the negative ALOC determination.

Appellant has filed a timely petition for review of the presiding official's addendum decision. Appellant contends that the presiding official erred in not also awarding attorney fees and expenses which were incurred for representation by his attorney during the proceedings before the agency.

The agency has not filed a petition for review of the addendum decision awarding a portion of the fees. Nor has the agency opposed the petition for review challenging the denial of an award of additional fees in the amount of \$1,425.57. The requirements of 5 U.S.C. § 7701(g)(1) and 5 C.F.R. § 1201.37(a), however, must be met regardless of any position taken by the agency. *McBride v. Department of Agriculture*, 4 MSPB

17 (1980). In that context, the Board will consider the question of whether the presiding official erred, as contended by the appellant, in not granting the additional fees requested.

A review of the record before the Board discloses that the presiding official was in error in not granting the additional \$1,425.57 attorney fees award being pursued in appellant's petition for review.

The law firm of Specter and Stevens billed appellant for attorney services performed and expenses incurred by Attorney Russell Lombard in representing appellant during the proceedings before the agency challenging the negative ALOC determination. These fees were disallowed by the presiding official and are the subject of appellant's petition for review.¹

The Board has previously held that it has the authority to award attorney fees for services rendered to the appellant prior to issuance of the agency's final action under appropriate circumstances. The only prerequisites to such an award are that the Board have jurisdiction over the appeal, 5 U.S.C. § 7701, and that the services were rendered in connection with the appealable agency action. *See, e.g., McBride, supra; Kling v. Department of Justice*, 2 MSPB 620 (1980).

Both prerequisites are satisfied in this case. The Board also finds, as did the presiding official for the reasons stated in his addendum decision, that the award of reasonable attorney fees to appellant is warranted in the interest of justice in this case.

As to the reasonableness of the amount requested for representation before the agency, the \$1,425.57 includes: (1) fees for 22 hours at \$75.00 per hour, which was reduced by the law firm by 50% to \$825.00; (2) expenses of \$98.57 for photocopying, telephone tolls and expenses for Attorney Lombard in Washington, D. C.; and (3) air fare of \$502.00 for Mr. Lombard's trip to Washington, D. C., to make appellant's oral presentation before the agency.

Those fees and expenses are both reasonable and recoverable. Reasonable expenses include photocopying, telephone tolls, travel and any other reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client in the course of providing legal services. *See O'Donnell v. Department of the Interior*, 2 MSPB 604, 612 (1980).

Accordingly, the petition for review of the addendum decision is GRANTED, and the addendum decision is AFFIRMED, as MODIFIED by this Opinion and Order. Appellant is, therefore, awarded attorney fees of \$1,425.57 for the services rendered by the law firm of Specter and Stevens before the agency and \$2,551.20 for the services

¹The presiding official's decision to deny these fees was based on his erroneous finding that they were incurred in connection with a matter other than the negative ALOC determination, which had not been the subject of an appeal to the Board. Addendum Decision at 3.

rendered by Lawrence E. Moll, Esquire, before the Board's San Francisco Field Office. The agency is hereby ORDERED to remit payment of these amounts to the attorneys specified and to furnish the Board's San Francisco Field Office with a certified statement that such payments have been made within ten days of receipt of this decision.

This is the final order of the Merit Systems Protection Board in this appeal.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR.

WASHINGTON, D.C., *June 15, 1981*