

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HARRY L. BOESE,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DOCKET NUMBER
SF075282A0286-1

DATE: APR 21 1987

George M. McClarrinon, Esquire, Sacramento, California,
for the appellant.

Bruce P. Waggoner, McClellan Air Force Base, for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

The agency has petitioned for review of an addendum initial decision in which an administrative judge of the Board's San Francisco Regional Office awarded attorney fees to appellant. For the reasons discussed below, the petition for review is GRANTED and the case is REMANDED.

BACKGROUND

Appellant was removed from his position of Assistant Commissary Store Manager based on charges of falsifying official government documents, embezzling \$6,000.00 of government funds, and assaulting a non-government employee on

the agency premises. Appellant was tried and acquitted on the federal criminal charges. The Board's administrative judge, after a hearing, found that the criminal charges of falsification and embezzlement were not sustained; however, he upheld appellant's removal based on the remaining assault charge. On review, the Board mitigated the penalty from removal to a ninety-day suspension. Appellant then filed an enforcement action and sought attorney fees as a result of the Board's mitigation ruling. Subsequent Board decisions denied appellant's enforcement request and his request for attorney fees.

Appellant appealed to the U.S. Court of Appeals for the Federal Circuit, which affirmed the Board's compliance decision, but concluded that appellant had shown that he was substantially innocent of the charges. *Boese v. Department of the Air Force*, 784 F.2d 388 (Fed. Cir. 1986). The court remanded the case to the Board for a determination of reasonable attorney fees. In doing so, it stated that (1) if it was practicable to segregate fees related to the assault charge, those fees should be eliminated from the fees allowed, and (2) if it was not practicable to segregate those fees, or if those fees were de minimis, the Board could either allow fees for the whole case or allow "that amount of fees that [was] reasonable in relation to the results obtained." The court did not address the question of the Board's authority to award counsel fees for his representation of appellant during the criminal proceedings.

In an addendum decision on remand, the administrative judge found appellant's counsel's hourly rate of \$90.00 to \$125.00¹ to be reasonable. He also found that, although the fees related to the assault charge were segregable, they also were de minimis, and included those fees in the award. The administrative judge also found that the appellant was entitled to recover fees for the hours expended on representation of appellant on the criminal charges. The administrative judge awarded fees to counsel for his criminal representation of appellant based on what he termed the "Nadolney-Blumenson" test. That test required a showing that work done in a criminal proceeding significantly contributed to success before the Board and eliminated the need for work in the Board proceeding.² The administrative judge awarded attorney fees in the amount of \$22,453.11, including those relating to the criminal charges.

¹ The rates varied according to the kind of services performed by appellant's counsel, and also according to the time period during which the services were performed. Time sheets submitted by appellant's counsel explained and supported the variances. Appeal File, Tab 10.

² In *Nadolney v. Environmental Protection Agency*, 30 M.S.P.R. 561 (1986), fees were awarded for two factually related proceedings before the Board; the same agency took both actions, a denial of a within-grade increase, and a removal. In *Blumenson v. Department of Health and Human Services*, 30 M.S.P.R. 644 (1986), fees were awarded for a grievance proceeding involving appellant's unacceptable performance rating, while the Board hearing involved a demotion for unacceptable performance.

ISSUES

1. Whether the administrative judge erred in awarding fees for services performed in connection with the assault charge.

2. Whether the administrative judge erred in awarding fees for services performed in connection with the criminal proceedings against appellant.

3. Whether appellant is entitled to an award of additional attorney fees for time expended in responding to the petition for review.

ANALYSIS

1. The administrative judge did not err in awarding fees for services performed in connection with the assault charge.

In its petition for review, the agency alleges that the administrative judge erred in finding that fees related to the assault charge were de minimis and that such fees therefore should not be excluded from the award. We find no error on the part of the administrative judge in this regard. Although this charge was the subject of testimony by the witnesses named in the petition for review, that testimony does not represent a major area of dispute, when the record as a whole is considered. In fact, a review of the transcript of the hearing testimony reveals that only approximately nine pages of more than six hundred pages of the transcript of the hearing testimony were devoted to direct and cross examination

on the assault charge.³ Similarly, as noted by the administrative judge, the testimony and documents that related to the assault issue primarily concerned mitigation,⁴ the issue upon which appellant prevailed. We find, therefore, that the administrative judge committed no error in deciding to include in the award fees related to services rendered in connection with the assault charge.

2. The administrative judge erred in awarding fees for services performed in connection with the criminal proceedings against appellant.

The agency asserts that the administrative judge erred in awarding fees for counsel's representation of appellant in the criminal proceedings for the following reasons: (1) The standard established in the cases on which he relied, *Nadolney* and *Blumenson*, is limited to situations where both actions were taken by the employing agency; (2) the Board's decision in *Lizut v. Department of the Army*, 27 M.S.P.R. 611 (1985), on which the administrative judge also relied in awarding fees, is distinguishable from the present case because the court proceedings in *Lizut* were directly related to the Board proceeding in that case; and (3) the Board's decision in *King v. United States Postal Service*, 20 M.S.P.R. 467 (1984), declining to award attorney fees for services performed in

³ Testimony concerning this charge was obtained from the appellant (Transcript (Tr.), Volume (Vol.) II, at 173-75); Mr. Kronich, the person assaulted (Tr., Vol. I, at 11-12); and Mr. Barry Mammen, a witness to the assault (Tr., Vol. II, at 104-09).

⁴ See Tr., Vol. I, at 10-24; Vol. II, at 7.

connection with a state unemployment compensation hearing, is controlling.

Absent a clear waiver of sovereign immunity, attorney fees are not awardable to a litigant who prevails against the United States. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 267-68 (1975); *Williams v. Office of Personnel Management*, 718 F.2d 1553, 1557 (Fed. Cir. 1983). It is well settled that a statutory authorization for attorney fees must be express and specific; it cannot be extended beyond the statute's literal terms and it cannot be implied. *Saldana v. Merit Systems Protection Board*, 766 F.2d 514, 516 (Fed. Cir. 1985).

In enacting the Civil Service Reform Act of 1978, Congress amended §7701 to specifically provide in (g)(1) for the payment of attorney fees. The statute clearly waives sovereign immunity by authorizing the Board to require an agency to pay reasonable fees incurred by a prevailing appellant. The question posed by this case is whether services performed by counsel in a criminal proceeding are sufficiently related to the appeal before the Board to be included within the waiver. In construing a statute waiving the sovereign immunity of the United States, great care must be taken not to expand liability beyond that which was explicitly consented to by Congress. *Fidelity Construction Co. v. United States*, 700 F.2d 1379, 1387 (Fed. Cir. 1983).

The appellant in this case has requested a fee award under the authority of 5 U.S.C. § 7701(g)(1). Our analysis of the language of 5 U.S.C. § 7701(g) leads us to conclude that

the clarity of waiver required to meet the strict construction standard for sovereign immunity waiver does not here exist. We find, therefore, that the Board lacks jurisdiction to award attorney fees for services rendered by counsel in criminal proceedings.

In support of this legal conclusion, we note that the criminal proceedings did not grow from the Board or agency proceedings. Awarding fees for them would result in a windfall to counsel; he would receive an award for fees he would have had no entitlement to, absent the removal action. Although the Board has awarded fees for work done before other bodies,⁵ these situations have all involved related administrative proceedings, and are distinguishable from the case before us on that ground alone. Further, in all of these other cases in which the Board has awarded fees for attempts at resolution of the personnel action, the agency brought the charges or created the situation that appellant was entitled to challenge. In the case of criminal proceedings, the action is initiated by the U.S. attorney's office or other authority over which the agency has no control.

⁵ For example, we have considered whether to award attorney fees for work done before the agency prior to filing a Board appeal, *Brown v. U.S. Coast Guard*, 28 M.S.P.R. 539 (1985), for work done before the Board's Special Counsel in pursuit of a successful resolution of a matter before the Board, *Wells v. Schweiker*, 14 M.S.P.R. 175, 177-79 (1982), for work done on an EEO complaint that preceded a Board appeal, *Young v. Department of the Air Force*, 29 M.S.P.R. 589 (1986), and for work expended on an EEOC petition, *Bartel v. Federal Aviation Administration*, 30 M.S.P.R. 451 (1986).

3. The appellant is entitled to an award of additional attorney fees for time expended in responding to the agency's petition for review.

Counsel for the appellant requests a supplemental attorney fee award for an additional eleven hours of work at an hourly rate of \$125.00 for reviewing briefs, cases, and for dictating a reply to the agency's petition for review.


The Board has held that counsel for a prevailing appellant may be compensated for services provided with respect to an agency's petition for review of an addendum initial decision that awarded attorney fees to counsel. *Weaver v. Department of the Army*, 27 M.S.P.R. 371, 373 (1985); *Simms v. Government of the District of Columbia*, 20 M.S.P.R. 486, 487 (1984). Although appellant's counsel has not provided the Board with an affidavit in support of the fee request or a statement itemizing the dates, number of hours, professional activity involved, or the fees charged for each service, see *Kling v. Department of Justice*, 2 M.S.P.R. 464, 472-73 (1980), we find that \$125.00 per hour is a reasonable rate and that eleven hours is not an unreasonable amount of time to expend on this phase of the case. The appellant's request for an award of \$1375.00 (11 x \$125.00) in additional fees for work done in responding to the agency's petition for review of the addendum initial decision is hereby GRANTED.

ORDER

Because we find that it is not possible to determine from counsel's submissions what hours and costs are related to counsel's trial preparation as opposed to preparation of

appellant's case before the Board, we find that a reasonable attorney fee cannot be ascertained. Accordingly, this case is REMANDED to the San Francisco Regional Office for further proceedings and a new determination consistent with this opinion.

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.