

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOAN E. GERLACH)	
)	
v.)	DOCKET NO. DC07528010020ADD
)	
FEDERAL TRADE COMMISSION)	

OPINION AND ORDER

The Board here reviews the propriety of an award of attorney fees to counsel for appellant under 5 U.S.C. § 7701(g)(1) and 5 C.F.R. § 1201.37(a)(2).

The presiding official found in an initial decision that the agency effected appellant's removal from the position of EEO Specialist, at least in part, in reprisal for appellant's having filed a formal grievance concerning her secretarial support and work assignments, thus constituting a prohibited personnel practice under 5 U.S.C. § 2302(b)(9). Accordingly, the presiding official reversed the removal action. See 5 U.S.C. § 7701(c)(2)(B). The Board granted the agency's petition for review and found that appellant showed by preponderant evidence that her protected conduct constituted a significant factor in the removal action and that the agency failed to show that it would have acted even absent the

protected conduct. Therefore, the Board affirmed the initial decision as modified. See Gerlach v. Federal Trade Commission, MSPB Docket No. DC07528010020 (December 15, 1981).

Counsel for appellant filed a request for payment of attorney fees, supported by affidavits, copies of time sheets for this case and court orders awarding attorney fees to senior counsel and co-counsel in other cases. The motion requested an award at hourly rates of \$100 for senior counsel and \$70 for co-counsel. Counsel stated in his affidavit that his hourly rates range from \$60 to \$100 for non-corporate clients based upon ability to pay; that in contingent fee cases his effective hourly rate exceeds \$100; and that when he bills a client at a flat rate he sets it with an anticipated return of \$100 per hour. However, counsel did not disclose the terms of his fee agreement with appellant, asserting that the agreement was confidential within the privilege of the attorney-client relationship.

The presiding official found in an addendum decision that appellant was the prevailing party in the appeal;1/ that attorney fees had been "incurred" in the course of an attorney-client relationship;2/ and that a fee award was

1/ See Hodnick v. Federal Mediation and Conciliation Service, 4 MSPB 431, 434 (1980).

2/ See O'Donnell v. Department of Interior, 2 MSPB 604, 610 (1980).

"warranted in the interest of justice" because the removal action constituted a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(9).^{3/} The presiding official determined that the fee which appellant agreed to pay was the maximum awardable. Based on counsel's proffer concerning his hourly rates and his failure to disclose his fee agreement, the presiding official presumed that counsel charged appellant his minimum hourly rate of \$60 per hour and that his associate's fee was reduced to a minimum rate of \$40 per hour and found these to be the appropriate rates.

The initial decision found with respect to the time required that the associate counsel provided appellant with effective legal representation throughout the appeal; that the associate counsel did most of the legal work after the two day hearing commenced; that both of appellant's attorneys participated in the hearing and the appearance of senior counsel was not duplicative as regards the first day of the hearing, particularly as the senior counsel left the hearing early. The presiding official deducted six hours claimed by senior counsel due to his failure to participate in the second day of the hearing. Accordingly, the presiding official awarded appellant \$5,377 in attorney fees, calculated from 22 3/4 hours at \$60 per hour for senior counsel and 100.3 hours at \$40 per hour for the associate counsel, and \$92.66 in costs, for a total award of \$5,469.66.

^{3/} See 5 U.S.C. § 7701(g)(1); Allen v. U.S. Postal Service, 2 MSPB 582, 593 (1980).

Appellant thereafter filed a motion for reconsideration of the attorney fee award with the presiding official, who forwarded the motion to the Board for processing as a petition for review. Appellant, by her counsel, asserts that the hourly rate awarded by the presiding official is less than the hourly rate paid by appellant. Appellant waives her claim of attorney-client privilege and has submitted her fee agreement with counsel, dated April 17, 1980. Appellant requests that the fee award be adjusted to reflect the agreed higher hourly rate of \$75 for senior counsel and \$45 per hour for associate counsel, for a total fee award, including expenses of \$6,312.41.

The agency replied and cross-petitioned for review, asserting that an award of attorney fees should be denied as not warranted in the interest of justice. The agency contends that the rate which appellant agreed to pay is the maximum rate awardable. Based on this premise, it argues that counsel improperly misled the Board by claiming an amount which substantially exceeded the agreed rate and by suggesting that the fee was contingent on success, while erroneously asserting that the fee agreement was confidential under the attorney-client privilege. In the alternative, the agency argues that the amount of the award is not reasonable because it compensates appellant's two counsel for unnecessary and duplicative hours spent in preparation of the case.

The Board has determined that the fee arrangement agreed upon by counsel and appellant establishes a presumption that it is the maximum reasonable attorney fee:

. . . [A] fee award under the Reform Act must not provide a windfall to counsel at the expense of the public fisc. Accordingly, where it is agreed that a specific fee be paid to counsel for legal services rendered on behalf of an appellant in a case before the Board, we will presume that the amount agreed upon represents the maximum reasonable fee which may be awarded.

* * *

Ordinary experience warrants the presumption that private law firms do not operate as eleemosynary institutions, and that a bill rendered by such a firm accurately reflects the partnership's fair judgment of the maximum fee that is commercially reasonable under the circumstances.

O'Donnell v. Department of the Interior, 2 MSPB 604, 611 (1980) (citations and footnotes omitted). The Board indicated that clear evidence to the contrary is necessary to rebut this presumption. Id at 611-12.

O'Donnell did not establish an absolute ceiling on the amount of an award, as both the agency and the presiding official appear to have assumed. Rather, it held that the fee arrangement, absent evidence to the contrary, is so important an indication of the attorney's assessment of the market value of his services that it is presumed to be the prevailing market rate in the community for similar work by attorneys of like standing. This presumption is not, however, irrebuttable. 4/ Thus, we reject the agency's contention that a request for rates

4/ It could be overcome, for example, by convincing evidence that the agreed rate was not based on marketplace considerations and that counsel's customary rate for similar work is higher.

in excess of the agreed rate is in itself improper and a basis for denying a fee award as unwarranted. 5/ We are also not persuaded by the agency's alternative contention that the hours allowed by the presiding official were not reasonably required.6/

Accordingly, the agency's cross-petition for review is DENIED. The appellant's petition for review based on the submission of the fee agreement must also be DENIED since there is no showing that the agreement constitutes new and material evidence. However, the case is REOPENED to consider whether the initial decision has correctly applied the Board's decisions interpreting the statutory standard, "reasonable fees."

The initial decision gave conclusive effect to a presumption that, in the absence of evidence as to the fee arrangement's terms, counsel's minimum rate was the agreed rate here. Counsel

5/ The agency also asserts mistakenly that the appellant's attorneys sought to mislead the Board by falsely suggesting that their fee was contingent. The agency misread counsel's request for consideration of the delay in receipt of payment for purposes of a "contingency" adjustment. Such delay is a factor which the courts have incorporated in this concept. E.g. Copeland v. Marshall, 641 F.2d 880, 893 (D.C. Cir. 1980).

6/ The presence of two attorneys at Board proceedings is not necessarily duplicative, and the presiding official is in the best position to evaluate the reasonableness of such staffing decisions. Melanson v. Veterans Administration, MSPB Docket No. BN07528110076ADD (Jan. 26, 1984). The presiding official fully examined the hours claimed and found that only six hours claimed by appellant's senior counsel were unnecessary. See addendum decision at 3-4. The Board notes that this case required a two-day hearing and ultimately presented a novel and difficult issue involving the application of the "but for" test enunciated in Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977), to an affirmative defense of reprisal raised in adverse action proceedings before the Board. The Board finds that the agency has shown no basis for disturbing the presiding official's determinations. See Weaver v. Department of the Navy, 2 MSPB 297 (1980).

would have facilitated resolution of the issue raised by the agency concerning the effect of the agreement if he had submitted it or stated its terms.^{7/} However, the agency did not seek to discover the agreement, nor did the presiding official order its submission.

The Board has not previously required appellants to submit the terms of their fee arrangements with counsel. However, the need for articulating the evidence required to support motions for attorney fees has become increasingly clear. Thus, in Mitchell v. Department of Health and Human Services, supra, slip op. at 7, the Board required attorneys with a billing practice to state in their fee applications the average rate at which they billed clients for similar work during the relevant time period because such evidence has an important bearing on the prevailing market rate. We believe that it is also appropriate to require submission of the fee agreement or a statement of its terms with future fee motions, and we so hold now. Its relevance, in light of the O'Donnell presumption,

^{7/} His contention that the agreement constituted a confidential attorney-client communication is mistaken. The courts have long determined that in the absence of unusual circumstances, the fact of a retainer and the amount of the fee do not come within the privilege of the attorney-client relationship. See, e.g. United States v. Haddad, 527 F.2d 537, 538 (6th Cir. 1975), cert. denied, 425 U.S. 974 (1976); In re Michaelson, 511 F.2d 882, 888 (9th Cir.), cert. denied, 421 U.S. 978 (1975); In re Senel, 411 F.2d 195, 197 (3d Cir.), cert. denied, 396 U.S. 905 (1969).

is obvious, and this rule will ensure that the significance of this evidence will be addressed by the parties whenever the asserted prevailing market rate exceeds the agreed rate in the particular case.

Nonetheless, as the previous decisions have not announced the above requirement, the presiding official's decision to award the minimum rate because of failure to submit the terms of the fee agreement is unwarranted. Appellants should have an opportunity to comply with a new requirement of this kind, and ordinarily it is our practice to remand the case to permit them to do so. E.g., Mitchell v. Department of Health and Human Services, supra. A remand is not necessary in this case, however, since appellant has already submitted the fee agreement with her petition for review, and the agency has not challenged its authenticity. Accordingly, we will determine the appropriate hourly rate based on the evidence before the Board, including the agreement.

The evidence submitted by appellant's attorneys includes fee awards in three other cases in the same community at rates of \$70, \$75, and \$80 an hour to senior counsel and in two of them awards to associate counsel at rates of \$50 and \$60 an hour. Counsel has stated in an affidavit that his hourly rates to non-corporate clients vary from \$60 to \$100 an hour, but no statement as to his average billing rate in such cases has been provided. There is no evidence as to co-counsel's customary billing rate. The hourly rates which appellant has agreed to

pay are \$75 an hour for senior counsel and \$45 for associate counsel. The agency has introduced no evidence that the prevailing market rates for attorneys of comparable experience are lower. Although associate counsel had less than two years experience at the time the appeal was filed, senior counsel had eleven years experience, including considerable experience in employment law.^{8/}

Taken as a whole, this evidence supports the conclusion that the reasonable value of the attorneys' services in this case are their billed rates of \$75 and \$45 an hour. What little evidence there is of the higher rates requested is insufficient to show that these were the prevailing market rates for similar work in the community by lawyers of comparable experience and standing. Certainly it falls far short of the convincing evidence needed to overcome the O'Donnell presumption that the agreed rate is the market rate. Thus we conclude that senior counsel is entitled to \$1706.25 (22.75 hours x \$75) and associate counsel to \$4513.50 (100.3 hours x \$45).

Finally, we note that the presiding official awarded \$92.66 for counsel's out-of-pocket expenses. This amount includes \$55.21 for duplicating and printing. Such expenses are "costs" which may not be awarded as an item of attorney fees under section 7701(g)(1). Koch v. Department of Commerce, MSPB Docket No. DC03518110733ADD (Jan. 25, 1984). See Bennett v. Department of the Navy, 699 F.2d 1140, 1146 (Fed. Cir. 1983). Thus we award expenses of \$37.45.

^{8/} We note our approval in Erdman v. Department of Labor, 6 MSPB 54, 56 (1981), of a finding that \$70-90 an hour was the normal fee range for local attorneys with experience in this area of law.

Accordingly, the initial decision is VACATED, and the agency is hereby ORDERED to pay to Gary H. Simpson, counsel for appellant, a total of \$6257.20.

The agency is hereby ORDERED to submit written verification of its compliance with this Order to the Secretary of the Board within Twenty (20) days of the date of this Order. In the event of agency noncompliance, a petition for enforcement may be filed with the Washington Regional Office pursuant to 5 C.F.R. § 1201.181(a).

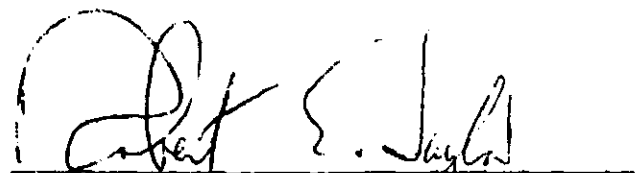
This is the final order of the Merit Systems Protection Board in this appeal.

Appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

MAR 19 1984
(Date)

Washington, D.C.


Robert E. Taylor
Secretary