UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EVERETT H. ROTHSCHILD, Appellant, v. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Agency.	DOCKET NUMBER DC075290A0403 DATE: JUN 10 1992

Joseph B. Scott, Esquire, Kator, Scott & Heller, Washington, D.C., for the appellant.

Dolores L. Keegan, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member[1]

OPINION AND ORDER

The agency petitions for review of the addendum initial decision issued August 9, 1991, that awarded the appellant lodestar attorney fees of $194,384.00, costs of $603.99, and a contingency enhancement of 100%. For the reasons set forth below, we GRANT the petition, VACATE the fee enhancement

[1]Member Parks has recused herself and not taken part in the adjudication of this case.

portion of the addendum initial decision, and REMAND the appeal to the regional office.

BACKGROUND

The appellant holds the GS-13 position of Chief of the Property Disposition Branch in Washington, D.C. Before the actions that led to his appeal, his position required him to deal with Marilyn Harrell, an escrow agent who allegedly stole several million dollars from the agency from 1985 to 1988. After the agency became aware of Ms. Harrell's alleged theft, it suspended the appellant for 15 days and demoted him to a GS-12 Loan Management Specialist position in Charleston, West Virginia, based on a charge of mismanaging the property disposition program. Essentially, the agency alleged that the appellant had failed to take appropriate action in response to various indications that Ms. Harrell was not carrying out certain responsibilities in a proper manner. These indications included millions of dollars' worth of bad checks, hundreds of failures to remit sales proceeds to the agency in a timely manner, and area management brokers' continued receipt of fees in connection with numerous properties that no longer belonged to the agency.

The charge against the appellant was supported by several specifications, and the parties engaged in extensive discovery and submitted a voluminous amount of evidence. After reviewing this evidence and the parties' argument, the administrative judge found that the agency had not proven any

of its specifications by the preponderance of the evidence and that the appellant's demotion and suspension therefore could not be sustained. *See Rothschild v. Department of Housing & Urban Development*, 47 M.S.P.R. 457 (1991) (Table). His decision became the final decision of the Board when the Board denied the agency's petition for review.

The appellant filed a motion for an award of attorney fees. The administrative judge found that fees were incurred, that the appellant was the prevailing party, and that fees were warranted in the interest of justice because the appellant was substantially innocent of the charges and because the agency knew or should have known that it would not prevail on the merits of its case. He found that lead counsel established that his hourly rates were $175.00 from April 1988 to January 1990, $200.00 from January 1990 to January 1991, and $225 commencing January 1991, and that the two associate counsels' hourly rates were $115.00 for one and $110.00 for the other during the entire time period when they assisted in the appellant's case. He awarded fees based on these rates.

The administrative judge found that counsel were entitled to a lodestar attorney fee award of $194,384.00, and that the fee award should include time spent by counsel defending the appealed actions and opposing two agency actions preceding the appealed actions, the appellant's placement on administrative leave in December 1988 and a notice of proposed removal dated April 17, 1989. He also found that counsel were entitled to fees for the time spent requesting a stay of the appealed

actions, and seeking a mandamus order against the agency in Federal court.

The administrative judge found further that the appellant was entitled to a 100% contingency enhancement for the $154,466.25 in fees incurred under a contingency agreement.[2] Thus, the administrative judge awarded the appellant fees of $348,850.25. He also awarded the appellant costs of $603.99, for a total award of $349,454.24.

In its petition for review, the agency contends that the administrative judge erred by: Awarding fees for matters not related to the Board proceeding and issues on which the appellant did not prevail; failing to reduce the hours on which the lodestar was based; enhancing attorney fees incurred in connection with the motion for attorney fees; and enhancing the lodestar.

ANALYSIS

The appellant is entitled to an award of fees for counsels' work on the mandamus order, but not on the stay request.

An inquiry as to whether a requested fee award is reasonable must address, in addition to the reasonableness of the requested hours and rate, the important factor of the results obtained. In a case in which more than one claim for relief is made, and in which the claims involve a common core

---

[2]Fees in the amount of $39,917.75 were incurred before the appellant and his attorney entered into the contingency fee agreement on April 30, 1990. *See* Initial Appeal File, Tab 1, Subtab 1B.

of facts or are based on related legal theories, the fee determination should reflect the significance of the overall relief obtained in relation to the hours reasonably expended. The results are an especially important factor when a party has prevailed on only some of his claims for relief. *See Lizut v. Department of the Army*, 42 M.S.P.R. 3, 8 (1989); *see also Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 1940 (1983).

The administrative judge correctly found that counsels' efforts to obtain a mandamus order from the court were expended in pursuit of the ultimate result achieved, the cancellation of the agency's actions and the reinstatement of the appellant to his former position. As a result of that action, initiated in March 1990, Initial Appeal File (IAF), Tab 26 (appellant's exhibit LL), the agency designated a substitute deciding official and promptly issued a decision on the appellant's proposed removal, which had been pending since July 1989. Thus, a fee award is appropriate for the time spent seeking the mandamus order.

We do not, however, award fees for counsels' work on a request that the Board stay the appealed actions. Although the request is related to this appeal in that it concerns the agency actions at issue in the appellant's appeal, and although the request appears to be non-frivolous and to have been raised in good faith, the appellant was not successful in that request. *See Hensley*, 461 U.S. at 436, 103 S. Ct. at 1941 (the most critical factor in determining whether an award

may include hours spent on related claims is the degree of success obtained); *Lizut*, 42 M.S.P.R. at 8-9. Further, in the request the appellant sought a stay, or temporary relief, a distinctly different form of relief from the cancellation of adverse personnel actions, the relief that the appellant ultimately sought and received. The difference between these two forms of relief is underscored by the fact that the Board provides separate proceedings for stay requests. *See* 5 C.F.R. part 1209, subpart B. We therefore find that the hours spent in connection with the stay should not be included in the fee award.

Accordingly, we reduce the hours for which fees are awarded to attorney Scott by 12.75, and the hours for which fees are awarded to attorney Weiser by 24.1 hours. This results in a reduction of the overall fee award by $200.00 x 12.75 (Mr. Scott worked on the stay request only in 1990 when his fees were $200.00 an hour), plus $115 x 24.1 (all of Mr. Weiser's work was compensated at the same rate), or $5,321.50.

The appellant is entitled to a lodestar fee in the amount of $189,062.50.

The agency's assertion that the administrative judge erred in failing to reduce the lodestar hour base by hours other than those expended on the stay action represents mere disagreement with the administrative judge's findings. The agency has not shown that counsels' tactical decisions were unrelated to their client's objective, improper, or unusual. Nor has it established that compensable hours claimed by

counsel were duplicative, padded, or frivolous. In sum, counsels' lodestar hours are adequately documented. *See Crumbaker v. Merit Systems Protection Board*, 781 F.2d 191, 195 (Fed. Cir. 1986), *modified*, 827 F.2d 761 (Fed. Cir. 1987). Therefore the appellant is entitled to the lodestar fee award of $189,062.50.

Counsel has not established entitlement to a 100% contingency enhancement.

Attorney fee claimants must meet a strict burden of proof to establish legitimate contingency enhancements. In *Brown v. Department of Health & Human Services*, 50 M.S.P.R. 523 (1991), the Board established a two-tier proof of entitlement to an enhancement. First, the prevailing claimant must establish that the relevant market compensates contingency fee agreements at a higher rate than hourly agreements. Second, the claimant must show what the higher market rate is. The Board also held that court decisions awarding contingency enhancements were not persuasive authority with regard to the first tier of proof of entitlement to an enhancement, i.e., whether the relevant market compensated contingency fee enhancements at a higher rate than other work, and reserved decision on whether court decisions awarding enhancements in the relevant market were persuasive authority with regard to the second tier of proof, i.e., the rate of enhancement.[3]

[3]We note that contingency fee enhancements are not available within the jurisdiction of the District of Columbia Circuit because the U.S. Court of Appeals for that circuit has interpreted *Delaware Valley Citizens' Council for Clear Air v.*

In *Jones v. Department of the Navy*, 51 M.S.P.R. 542, 547 (1991), the Board reiterated its reliance on Justice O'Connor's concurring opinion in *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 483 U.S. 711, 731 (1987), which held that contingency cases were to be viewed as a class and that no risk enhancement was appropriate unless the applicant could establish that, without a risk adjustment, the prevailing party would have faced substantial difficulties in finding counsel in the local or other relevant market. The Board held that in cases before it the term "other relevant market" meant the product market of all employment cases within the geographical market where the case was heard. In other words, the Board held that, to establish entitlement to a contingency enhancement, the appellant was required to show that an employee seeking representation in an employment case of the type heard by the Board would not, in the area where the case was heard, find counsel willing to accept the case on a contingency basis in the absence of a contingency fee enhancement. *Jones*, 51 M.S.P.R. at 547.

Pennsylvania, 483 U.S. 711 (1987) (*Delaware Valley II*), as precluding contingency enhancements of awards under Federal fee-shifting statutes. *See King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (en banc), *petition for cert. filed*, 60 U.S.L.W. 3617 (U.S. Feb. 21, 1992) (No. 91-1370). Although the appellant's case arose within the jurisdiction of the District of Columbia Circuit, *King* is not a bar to his request for a contingency enhancement. The decisions of the United States Court of Appeals for the Federal Circuit are controlling authority for the Board, *see Fairall v. Veterans Administration*, 33 M.S.P.R. 33, 40-46, *aff'd*, 844 F.2d 775 (Fed. Cir. 1987), and that court has interpreted *Delaware Valley II* as allowing contingency enhancements in cases such as this, *see Crumbaker v. Merit Systems Protection Board*, 827 F.2d 761 (Fed. Cir. 1987).

In *Jones*, the Board also reiterated its holding in *Green v. Department of the Navy*, 43 M.S.P.R. 34, 38 (1989), quoting *Delaware Valley II*, 483 U.S. at 733, that "determinations involving different markets should also comport with each other [and] the applicant should be able to point to differences in the markets that would justify the different rates of compensation." A claimant seeking a contingency fee enhancement before the Board must submit detailed evidence to explain what differences exist between the relevant market and the other markets where the Board has awarded contingency enhancements and explain why any differences in enhancement percentages are warranted. Because the Board has awarded a contingency enhancement only in the Seattle, Washington, market, the claimant here must show why he is entitled to a percentage higher than the 20% awarded in the Seattle, Washington, market.

Additionally, in *Jones*, the Board announced its adoption of a rebuttable presumption that the maximum enhancement was the one-third-of-the-lodestar maximum enhancement posited in the opinion of the plurality in *Delaware Valley II*. *Jones*, 51 M.S.P.R. at 548. If the claimant establishes that the relevant geographical and product market compensates contingency fee agreements at a rate higher than one third of the lodestar, he must show why that rate exceeds the presumptive maximum enhancement.

Because the appellant's motion for a fee award, with its request for a contingency enhancement, was filed, argued, and

decided prior to the Board's issuance of *Brown* and *Jones*, the parties did not have the benefit of the guidance provided in those cases. Thus, the Board remands this case to the regional office to allow the parties to submit additional evidence regarding the appellant's entitlement to a contingency enhancement consistent with *Brown* and *Jones*.

Any contingency enhancement should be based on the lodestar award minus the amount awarded for preparation of the motion for fees.

Finally, we find that the administrative judge erred in enhancing the fees awarded for counsels' preparation and pursuit of the fee award motion. The Board concurs in the following reasoning, expressed by the U.S. Court of Appeals for the Third Circuit in *Baughman v. Wilson Freight Forwarding Company*, 583 F.2d 1208, 1219 (3d Cir. 1978):

> [H]ours devoted to the fee petition should not be augmented or diminished because of the contingency nature of the case.... Such hours are incurred apart from the prosecution of the main case, and it is upon the nature of the main case ... that adjustments to the lodestar are based.

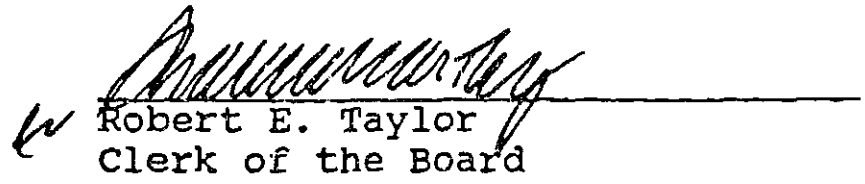
Thus, on remand, the hours devoted to preparation of the fee petition should not be included in the lodestar amount for purposes of adjusting that amount should the appellant establish entitlement to a contingency enhancement.

ORDER

Accordingly, the administrative judge shall issue a

supplementary addendum initial decision on remand, consistent with this Opinion and Order.

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.