

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 55

Docket No. PH-0432-09-0135-A-1

**Diane R. Smith,
Appellant,**

v.

**Department of the Navy,
Agency.**

March 22, 2010

Phillip R. Kete, Esquire, Baltimore, Maryland, for the appellant.

Angela D. Hall, Esquire, Indian Head, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the addendum initial decision granting the appellant's motion for attorney fees and awarding the appellant attorney fees in the amount of \$99,638.55. For the reasons set forth below, we GRANT the agency's petition, REVERSE the award of \$3,360.30 in deposition transcription costs, and AFFIRM the addendum initial decision AS MODIFIED by this Opinion and Order, awarding the appellant \$96,278.25 in attorney fees.

BACKGROUND

¶2 The appellant filed an appeal of the agency's performance-based removal action and prevailed. The appellant's attorney thereafter filed a detailed petition for the award of attorney fees and costs, citing [5 U.S.C. § 7701\(g\)\(2\)](#). Attorney Fees File (AFF), Tab 1. The appellant sought a total of \$104,415.75 in attorney fees and \$3,360.30 in deposition transcription costs. AFF, Tab 1, attachments; Tab 3 at 30 of 42; Tab 5 at 11 of 51. The agency disputed the applicable hourly billing rate and the reasonableness of some of the time spent on the case by the appellant's attorney. AFF, Tab 4 at 1-5. The agency did not object to the appellant's request for reimbursement for deposition transcription costs or contest the appellant's assertion that 5 U.S.C. § 7701(g)(2) applies.

¶3 The administrative judge found that the appellant was entitled to the attorney fees and costs the Board is authorized to award under [5 U.S.C. § 7701\(g\)\(1\)](#), but that [5 U.S.C. § 7701\(g\)\(2\)](#) was inapplicable because there had been no finding of prohibited discrimination. AFF, Tab 6, Addendum Initial Decision (AID) at 3. The administrative judge rejected the agency's arguments regarding the applicable hourly billing rate. AID at 7. The administrative judge addressed each of the agency's objections to the appellant's billable hour itemizations and ultimately concluded that the appellant's request for a total of \$107,776.05 in attorney fees should be reduced by \$8,137.50 in unreasonable fees. AID at 8-9. The administrative judge did not separately address the \$3,360.30 in deposition transcription costs requested by the appellant as part of her attorney fees request because the agency failed to raise any objection to those costs below. The administrative judge granted the appellant's request for attorney fees and awarded counsel a total of \$99,638.55 in attorney fees. AID at 9.

¶4 The agency has filed a petition for review and the appellant has filed a response in opposition. Petition for Review File (PFR File), Tabs 1, 3.

ANALYSIS

¶5 We have considered the agency's assertions of error in the addendum initial decision and find that only one alleged error possesses merit and requires discussion. The agency asserts for the first time on review that the administrative judge erred in including in the attorney fees award the \$3,360.30 in deposition transcription costs because such costs are only awarded under the standards established by [5 U.S.C. § 7701\(g\)\(2\)](#) and the administrative judge had properly found that the appellant was only entitled to the attorney fees authorized under [5 U.S.C. § 7701\(g\)\(1\)](#), under the circumstances of this case. PFR File, Tab 1 at 4-5.

¶6 Ordinarily, the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). However, the Board has noted that *Banks* did not involve a Board order directing the payment of public funds in contravention of any federal statute. *See Pagum v. Office of Personnel Management*, [55 M.S.P.R. 648](#), 650 n.2 (1992). Because we find that the administrative judge's order would erroneously require the agency to pay funds that are not authorized under [5 U.S.C. § 7701\(g\)\(1\)](#), we will address the agency's argument. *See Pagum*, 55 M.S.P.R. at 650-51.

¶7 It is well-established that the Board is not authorized under section 7701(g)(1) to award deposition costs to a prevailing party. *See Bennett v. Department of the Navy*, [699 F.2d 1140](#), 1143-44 & n.4 (Fed. Cir. 1983). Although such costs may be awarded when there has been a finding of prohibited discrimination and section 7701(g)(2) applies, *see generally Chin v. Department of the Treasury*, [55 M.S.P.R. 84](#), 86 (1992) (the Board has found that all costs may be awarded under [5 U.S.C. § 7701\(g\)\(2\)](#)), we find no reason to disturb the administrative judge's explained finding that section 7701(g)(2) does not apply here because there has been no finding of discrimination, AID at 3. The appellant

has not filed a cross petition for review regarding the administrative judge's determination on that issue, *see* [5 C.F.R. § 1201.114\(b\)](#) ("The Board normally will consider only issues raised in a timely filed petition for review or in a timely filed cross petition for review."), and his response to the agency's petition for review contains only a brief restatement of arguments that were considered and rejected by the administrative judge, PFR File, Tab 3 at 7; AID at 3. Because we agree with the administrative judge's explained finding that the appellant is only entitled to the attorney fees and costs awardable under section 7701(g)(1), and because the Board may not award deposition transcription costs under that authority, *see Bennett*, 699 F.2d at 1143-44 & n.4, we reduce the fee award by \$3,360.30 to exclude these costs.

ORDER

¶8 We ORDER the agency to pay the attorney of record \$96,278.25 in attorney fees. The agency must complete this action no later than 20 days after the date of this decision. *See generally* Title 5 of the United States Code, section 1204(a)(2) ([5 U.S.C. § 1204\(a\)\(2\)](#)).

¶9 We also ORDER the agency to tell the appellant and the attorney promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. We ORDER the appellant and the attorney to provide all necessary information that the agency requests to help carry out the Board's Order. The appellant and the attorney, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181\(b\)](#).

¶10 No later than 30 days after the agency tells the appellant or the attorney that it has fully carried out the Board's Order, the appellant or the attorney may file a petition for enforcement with the office that issued the initial decision on this appeal, if the appellant or the attorney believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the

appellant or the attorney believes the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. See [5 C.F.R. § 1201.182\(a\)](#).

¶11 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See *Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.