UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 244

Docket No. CH-0752-08-0632-A-1

Marvin D. Thompson, Jr.,

Appellant,

v.

Department of Justice,

Agency.

December 16, 2010

William E. Persina, Esquire, Washington, D.C., for the appellant.

Andrea Geiger, Esquire, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency petitions for review of an addendum initial decision that awarded the appellant $43,753.06 in attorney fees and costs. For the reasons set forth below, we GRANT the agency's petition for review, AFFIRM the addendum initial decision in part, VACATE the addendum initial decision in part, and REMAND the appeal for further development of the record and adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant filed a Board appeal after he was removed from his Senior Officer Specialist position based on one charge and three specifications of unnecessary use of force. *See Thompson v. Department of Justice*, MSPB Docket No. CH-0752-08-0632-I-1 (IAF), Tabs 1, 34 (initial decision). After the hearing, the administrative judge issued an initial decision that did not sustain any of the specifications or the charge and reversed the agency's action. IAF, Tab 34. The agency did not file a petition for review of that initial decision, and it became final on July 2, 2009. *See id.* at 72.

¶3 The appellant timely filed a motion for attorney fees and costs. *See Thompson v. Department of Justice*, MSPB Docket No. CH-0752-08-0632-A-1 (A-1 File), Tab 1. With the motion, the appellant's counsel included an affidavit requesting attorney fees in the amount of $42,397.50,[1] $73.98 in postal costs, $32.26 in copy costs, and $1,281.58 in travel costs; counsel also submitted a Memorandum of Understanding (MOU) between him and the American Federation of Government Employees (AFGE), Council of Prison Locals 33 (Union), which retained him for representation in these matters. *See* A-1 File, Tab 1 at 10-20 (Affidavit), 21-23 (MOU). The agency objected to an award of attorney fees because the MOU, which provided that 50 to 60 percent of any awarded attorney fees "shall be turned over to the Union's Litigation Representation Fund (LRF)," was improper in that it gave a third party (the Union) a windfall. A-1 File, Tab 5 at 2; *see* A-1 File, Tab 1 at 21-23 (MOU). After the appellant filed a response to this argument, *see* A-1 File, Tab 7, the agency filed a motion to reopen the record, so that it could submit a reply, *see* A-1 File, Tab 6. The parties filed additional submissions. *See* A-1 File, Tabs 8-10.

[1] The Affidavit states that this request is based on counsel's $375.00 per hour market-rate fee. *See* A-1 File, Tab 1 at 14-16.

¶4 The administrative judge issued an addendum initial decision that denied the agency's motion to reopen the record "[f]or lack of good cause shown." A-1 File, Tab 11 at 1-2. The administrative judge concluded that the appellant was a prevailing party, that an award of attorney fees was warranted in the interest of justice on the basis that the appellant was substantially innocent of the agency's charge and that the agency knew or should have known it would not prevail, and that the appellant's request for attorney fees and costs was reasonable. *Id.* at 2-8. He granted the appellant's motion for attorney fees and costs in the amount of $43,753.06.[2] *Id.* at 8. The agency filed a petition for review and the appellant filed a response. *See* A-1 Petition for Review File (A-1 PFR File), Tabs 1, 3. The appellant subsequently filed a June 15, 2010 submission that included a May 27, 2010 arbitration decision. *See* A-1 PFR File, Tab 7. We have considered this submission but it does not change the outcome on review.

ANALYSIS

¶5 The agency does not challenge on review the administrative judge's conclusions that the appellant was a prevailing party and that an award of attorney fees was warranted in the interest of justice.[3] We therefore affirm these conclusions on review. *See Allen v. U.S. Postal Service*, 2 M.S.P.R. 420, 426, 434-35 (1980) (under 5 U.S.C. § 7701(g)(1), the Board may require payment by the agency of reasonable attorney fees incurred by an employee if the employee is the prevailing party and the Board determines that payment is warranted in the interest of justice, including when the employee was substantially innocent of the charges).

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[2] The administrative judge disallowed the claim of $32.26 in copy costs, *see id.* at 8, and the appellant did not file a petition for review of this decision.

[3] Notably, the agency does not challenge "the reasonableness of the amount claimed by [William E. Persina] for [the] work performed." A-1 PFR File, Tab 1 at 9. We understand this statement to mean that the agency does not challenge Mr. Persina's hourly rate, the number of hours expended, or the additional costs that he incurred.

¶6 On review, the agency argues that the appellant's counsel, Mr. Persina, was not a salaried employee of the Union, that pursuant to the MOU, the majority of his requested attorney fees would go to the LRF, that no attorney-client relationship existed between Mr. Persina and the LRF, and that the MOU created a conflict of interest that does not exist when the fee award involves salaried Union attorneys. A-1 PFR File, Tab 1 at 6-8. Alternatively, the agency argues that, even if Mr. Persina could show that he was a salaried Union attorney, the MOU does not satisfy the requirement that the fund be controlled by Union counsel.[4] *Id.* at 8-9.

¶7 Although the parties raised these arguments below,[5] the administrative judge did not address them in the initial decision. Rather, he noted the fee arrangement described in the MOU, briefly discussed the Federal Circuit's decision in *Raney v. Federal Bureau of Prisons*, 222 F.3d 927 (Fed. Cir. 2000) (en banc), and concluded that an attorney-client relationship existed between the appellant and his Union-retained attorney and that he was entitled to an award of attorney fees and costs "based at counsel's customary market rate for his services as a solo practitioner in the Washington, D.C. metropolitan area." A-1 File, Tab 11 at 5-6. The administrative judge erred when he failed to identify and analyze the agency's arguments regarding the propriety of the MOU. *See Spithaler v.*

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[4] To the extent that the agency contends on review that the administrative judge erred by not granting its September 15, 2009 motion to reopen the record, we discern no error with the administrative judge's decision to deny this request.

[5] *See, e.g.*, A-1 File, Tabs 5 at 2 (challenging the attorney fee award based on the terms of the MOU), 6 at 2 (explaining that an award of attorney fees under the MOU would result in "unethical fee splitting with a lay entity"), 7 at 2 (the appellant noting that it is proper to award attorney fees, so long as an attorney-client relationship exists), 9 at 2 (arguing that Mr. Persina is not an employee of the Union, and that the attorney fee award is not placed in a fund controlled by him, thus, the fee agreement constitutes impermissible fee splitting), 10 at 2 (the appellant's counsel stating that, "based on information provided [to him], the LRF is controlled by Union counsel, not non-lawyer Union officers").

Office of Personnel Management, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests).

The MOU between the appellant's attorney and the Union does not make it inappropriate to award attorney fees based on the attorney's market-rate fee, so long as any fees owing to the Union under the MOU are paid into an LRF meeting the *Raney* criteria.

¶8 The April 11, 2008 MOU between the Union and Mr. Persina (referred to as the "Firm" in the MOU), states, in pertinent part:

> The Firm will be paid forty percent (40%) of any attorney fees awarded due to the representation of the Union, an Employee, or a Local by any administrative law judge, arbitrator or formal complaint deciding official. This percentage will be increased to forty-five percent (45%) or total attorney fee awards for the calendar year of over one hundred thousand dollars ($100,000). This percentage will be increased to fifty percent (50%) for total attorney fee awards for the calendar year of over two hundred thousand dollars ($200,000). The remainder of any attorney fees awarded due to the representation of an Employee or a Local by any administrative law judge, arbitrator or formal complaint deciding official shall be turned over to the Union's Litigation Representation Fund (LRF).
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> All attorney[] fee awards pursuant to this agreement will be made payable to William E. Persina and will be deposited into a separate account maintained by the Firm for the purpose of receiving such attorney[] fee awards (the "Union Trust Account" [UTA]). The [UTA] will require two signatures for money to be disbursed from it. One signature will be by William E. Persina or another designated representative of the Firm. The other signature will be by Roger Payne, the National Secretary/Treasurer of the Union, or another designated representative of the Union. Once attorney[] fees are paid into the [UTA], the Firm will be paid its percentages set forth herein. The remainder of the attorney[] fee award will be turned over to [the] Union to be placed into an account controlled by the

> Union (and not by the Firm) to be used solely to pay litigation costs and expenses (the [LRF]) related to representation.

A-1 File, Tab 1 at 21-22.

¶9 The Federal Circuit's decision in *Raney* informs our analysis of this issue. There, the court reviewed a case where an appellant was ordered reinstated by the arbitrator and his AFGE attorneys, who were salaried attorneys of the union, requested attorney fees and stated that any fees received would be deposited into a separate union Legal Representation Fund. *Raney*, 222 F.3d at 929. The AFGE attorneys in *Raney* represented that the Legal Representation Fund "[was] separate from other union funds, administered only by the AFGE General Counsel, and used solely to support litigation brought on behalf of union members or other federal employees to enforce their individual rights." *Id.* at 929-30. Further, the AFGE attorneys stated that the Legal Representation Fund "[was] not used to support litigation when the union is a defendant," and it was financed by "recovered attorney fees and costs, as well as donations, and [was] not supported by any union funds." *Id.* at 930. Although the arbitrator credited the AFGE attorneys' description of the Legal Representation Fund, which the government did not challenge, *id.*, n.1, he declined to award market-rate fees based on ethical concerns identified in earlier court decisions, and instead issued an award based on the cost of providing legal services. *Id.* at 930.

¶10 Based on the arbitrator's fact findings and precedent from the Supreme Court and other circuits, the *Raney* court held that, "when a legal fund is separated from other union funds and is controlled exclusively by attorneys for the sole benefit of employee litigation, such segregation eliminates ethical barriers to market rate calculation for attorney fee awards." *Id.* at 938. The court determined that the Legal Representation Fund satisfied these elements and it

reversed the arbitrator's decision denying market-rate attorney fees and remanded the appeal for the entry of a market-rate fee award to Mr. Raney.[6] *Id.*

¶11 As the agency properly notes, this case is factually distinguishable from *Raney* because Mr. Persina is not Union staff counsel; rather, he is a private attorney retained by the Union to represent its members. In *Raney*, however, our reviewing court observed that the text of the Back Pay Act did not "differentiate between an attorney in private practice and an attorney who is employed by a non-profit legal organization, including one established by a labor union." *Raney*, 222 F.3d at 932. Therefore, the court concluded that the Back Pay Act[7] "provides no basis for distinguishing between in-house and private firm counsel when calculating or assessing fees." *Id.* Given this language, we believe that the court's holding in *Raney* applies in cases where an award of attorney fees would be apportioned between private counsel retained by the Union and the LRF, provided that the fund meets the criteria set forth in *Raney*, i.e., that the "legal fund is separated from other union funds and is controlled exclusively by attorneys for the sole benefit of employee litigation."

¶12 We find unpersuasive the agency's contention that a contractual arrangement like the one in this case is more ethically problematic than the arrangement approved by the court in *Raney*. The agency argues that:

> When an attorney is a salaried employee of the union, there is no benefit to that attorney-employee, direct or otherwise, regardless of how much money is paid into a litigation fund, because the attorney already is compensated as an employee. The MOU, however appears to be a questionable *quid pro quo* exchange. In other words, in

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[6] The court also overturned its earlier precedent in *Devine v. National Treasury Employees Union*, 805 F.2d 384 (Fed. Cir. 1986), and *Goodrich v. Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984). *Raney*, 222 F.3d at 938.

[7] While this case arises under 5 U.S.C. § 7701(g)(1) rather than the Back Pay Act, *see* 5 U.S.C. § 5596, the court's analysis of the Back Pay Act in *Raney* is relevant to our analysis in this matter because the Back Pay Act explicitly adopts the standards for awarding attorney fees under section 7701(g)(1). 5 U.S.C. § 5596(b)(1)(A)(ii).

> exchange for turning over between 50 and 60% of his fee awards to the Union, the attorney is assured a minimum of 15 cases a year. Such an exchange implicates not only the dangers of fee splitting, but also could result in the loss of independent judgment on the part of the attorney and thereby further implicate the unauthorized practice of law.

A-1 PFR File, Tab 1 at 7. In his response to this argument, the appellant contends that, under the fee arrangement described in the MOU, "there is every incentive for both counsel and Union officials to exert maximum effort to achieve a successful result for the employee[s] being represented" because fees are only earned if the litigation succeeds. A-1 PFR File, Tab 3 at 7-8. Moreover, the appellant notes that, to the extent that "Union officials may seek to influence counsel to act in the Union's, and not the represented employee's, interest, that dynamic is[,] if anything[,] more pronounced with salaried staff counsel," as Union officials can exert more control over salaried employees than private counsel. *Id.* at 8.

¶13 The *Raney* court addressed similar arguments and concluded that there was no reason to assume that non-lawyer union officials exercised control over union attorneys, and that there was "no realistic threat that depositing fees in the [Legal Representation Fund] will encourage the unauthorized practice of law or result in the interference with the professional judgment of union attorneys." *Raney*, 222 F.3d at 938; *see Kean v. Stone*, 966 F.2d 119, 123 (3d Cir. 1992) ("The fear that the benefit may amount to unauthorized practice of law or compromise an attorney's independent judgment or constitute splitting fees with laypersons is highly speculative.") (internal citation omitted). Here, the agency has not claimed that any of the potential improper influence or loss of independent judgment about which it expresses concern actually occurred in this case, and we see no evidence of such in the record.

A remand is necessary to determine whether the LRF meets the *Raney* criteria.

¶14 Having determined that *Raney* should be extended to cases in which the appellant is represented by private counsel retained by the Union, we must now determine if the LRF is separate from other union funds and "is controlled exclusively by attorneys for the sole benefit of employee litigation." *Raney*, 222 F.3d at 938. Based on the record before us, we cannot determine if the LRF meets the *Raney* criteria. According to the MOU, before any funds go into the LRF, they are first deposited into a union trust account and then distributed between the LRF and counsel. A-1 File, Tab 1 at 22. The MOU states that two signatures are required for money to be disbursed from the trust account, one signature from Mr. Persina, or another designated representative of the Firm, and one signature from the Union National Secretary/Treasurer or another designated representative of the Union. *Id.* If the Union National Secretary/Treasurer is not an attorney, as appears to be the case with the current National Secretary/Treasurer, Jeffrey David Cox, Sr., *see* http://www.afge.org/Index.cfm?page=NationalSecretaryTreasurer, then the trust account may not meet the *Raney* criteria because it is not controlled exclusively by attorneys. It is possible that the Union has delegated signatory authority over the trust account to an attorney, but the appellant did not submit any evidence on this issue.

¶15 Additionally, in his response to the agency's petition for review, counsel states that the Union has an agreement with the private law firm of Hicky and Collins in Forest City, Arkansas, "for the sole and express purpose of that firm exercising exclusive control over the LRF, consistent with the requirements of *Raney*," that the retainer agreement was approved by the Union's General Counsel, and pursuant to the retainer agreement, "the Hicky firm ensures that LRF funds are not commingled with other Union funds, and that expenditures from the LRF are made exclusively to pay for the legal expenses of representation

of employees represented by the Union."[8] A-1 PFR File, Tab 3 at 8-9. However, counsel did not provide a copy of the retainer agreement between the Hicky law firm and the Union, and he did not proffer his allegations in the form of an affidavit or sworn statement. It is well established that the statements of a party's representative in a pleading do not constitute evidence. *Hendricks v. Department of the Navy*, 69 M.S.P.R. 163, 168 (1995). Accordingly, there is no evidence of record to support Mr. Persina's unsworn contentions, which the agency disputes, regarding the nature and management of the LRF.

¶16 For these reasons, we find that the existing record is insufficient to determine whether the LRF meets the *Raney* criteria. We therefore remand this appeal to the regional office so that the administrative judge can take evidence and argument regarding the nature of the trust account, including whether an attorney has delegated signatory authority, and the precise nature of the LRF, including whether the LRF is the same Legal Representation Fund discussed in *Raney*. The administrative judge shall make findings on these issues to determine whether the LRF meets the *Raney* criteria; and shall adjudicate the appellant's motion for attorney fees and costs.

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[8] In his response to the petition for review, the appellant also includes a December 28, 2009 arbitration award granting attorney fees to the appellant's counsel under the same MOU. *See* A-1 PFR File, Tab 3 at 11-20, Tab 5. Arbitration awards are not binding on the Board, *Leazenby v. U.S. Postal Service*, 8 M.S.P.R. 384, 390 n.4 (1981), and the appellant has not otherwise shown that the award is entitled to collateral estoppel effect.

ORDER

¶17 We REMAND the appeal for the administrative judge to further develop the record and to make findings consistent with this Opinion and Order. The administrative judge shall give the parties specific notice that they must submit evidence in support of their factual assertions, and that unsworn representations of counsel do not constitute proof of the statements contained therein.

FOR THE BOARD:

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