

H. ATTORNEY FEES

OVERVIEW:

The Back Pay Act provides, in part, that an employee who is found to have been "affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee" is entitled to receive "all or any part of the pay, allowances, or differentials" which the employee normally would have earned or received during the period if the personnel action had not occurred and "**reasonable attorney fees** . . . awarded in accordance with standards established under section 7701(g) of this title" 5 U.S.C. § [5596](#)(b)(1)(A)(i) and (ii) and OPM's implementing regulations, specifically at 5 C.F.R. § 550.807, which concern the payment of reasonable attorney fees.

Pursuant to Part [2430](#), which implements the Equal Access to Justice Act, 5 U.S.C. § 504, (EAJA), an award of attorney fees may be made to eligible individuals and entities who are parties and prevail in a ULP proceeding.

OBJECTIVE:

To describe when prevailing individuals or entities are entitled to attorney fees in proceedings before the OGC and the Authority under either the Back Pay Act or EAJA and the Region's role in (1) deciding attorney fee requests during the settlement process based on an analytical framework; (2) refraining from taking a position should the ULP be litigated before an ALJ and/or the Authority; and (3) responding to fee requests made by a Charging Party under the EAJA.

BACK PAY ACT**1. RDS HAVE DISCRETION ON WHETHER TO AWARD ATTORNEY FEES IN SETTLING ULPs PRIOR AND SUBSEQUENT TO ISSUANCE OF COMPLAINT BUT BEFORE LITIGATION:**

Before litigation ensues, whether before or after issuance of complaint, the settlement stage of a ULP involves the exercise of an RD's discretion, as delegated by the GC. As part of this discretion, RDs may determine whether attorney fees under the Back Pay Act are warranted. An RD may decide to accept a settlement agreement without the imposition of attorney fees.

2. SUMMARY OF ANALYTICAL FRAMEWORK FOR MAKING ATTORNEY FEE DETERMINATIONS WITH RESPECT TO SETTLEMENTS:**a. *Threshold requirements:***

The settlement of the ULP charge or complaint must be an informal settlement agreement approved by the RD that requires the payment of backpay under the provisions of the Back Pay Act and that the Region would have litigated the alleged ULP but for the approved settlement agreement.

b. *Standards for awarding attorney fees:*

If the initial threshold determinations have satisfied the Back Pay Act, 5 U.S.C. § [5596\(b\)\(1\)\(A\)\(ii\)](#) provides that fee requests must be judged under the following standards for awarding attorney fees provided in 5 U.S.C. § 7701(g):

i. Who may incur attorney fees?

Incurrence of attorney fees may be incurred by a union's staff attorney, an attorney retained by the union, or an attorney retained by the individual employee.

ii. The employee must be the prevailing party.

This requirement is met if the employee has obtained all or a significant part of the relief sought.

- iii. The interest of justice standard is met.

See Allen v. United States Postal Service, 2 MSPR 420 (1980) where, if any of five criteria is satisfied, an award of attorney fees is warranted under the interest of justice standard; see also National Association of Government Employees, Local R5-188 and U.S. Department of the Air Force, Seymour Johnson Air Force Base, North Carolina, 54 FLRA No. 122, 54 FLRA 1401 (1998) (discussion of "interest of justice" standard).

Only if this standard is met may an RD approve a settlement with attorney fees. If the standard is not met, no attorney fees are approved in the settlement agreement and a unilateral settlement agreement is approved, accompanied by a letter which states, among other things, both the reasons why attorney fees were not approved and the right to appeal such determination to the GC.

- iv. The amount of the award must be reasonable.

The RD can, but need not, decide an exact amount in approving a settlement agreement. In a bilateral settlement agreement, the parties may agree to incorporate an exact amount of attorney fees as a term of the agreement or they may agree to work out the details in compliance. In any event, hours must be reasonably expended and the rate is judged according to the "market rate." See National Association of Government Employees, Local R4-6 and the U.S. Department of the Army, Fort Eustis, Virginia, 54 FLRA No. 137, 54 FLRA 1594 (1998) (reasonableness of the amount of attorney fees); and American Federation of Government Employees, Local 2241 and U.S. Department of Veterans Affairs, Medical Center, Denver, Colorado, 49 FLRA No. 127, 49 FLRA 1403 (1998) (reasonableness of amount of attorney fees).

3. ATTORNEY FEES REQUESTS BEFORE AN ALJ:

A union can request attorney fees before an ALJ at the hearing, in post-hearing brief, or on motion to the ALJ after the ALJ has recommended a decision and order. In keeping with the Regions' role as a neutral third party representing the public interest, it is inappropriate for the OGC to take a position as to whether attorney fees are warranted and the amount of any such fees.

4. WHEN A CHARGING PARTY REQUESTS ATTORNEY FEES FROM THE AUTHORITY IN CASE WHERE AUTHORITY HAS FOUND A ULP:

As in the preceding paragraph, the Trial Attorney refrains from taking a position with respect to the attorney fees request and the amount of any such fees.

EQUAL ACCESS TO JUSTICE ACT (EAJA)

1. APPLICABLE PRINCIPLES UNDER THE (EAJA):

A Respondent Union that prevails in a ULP proceeding before the Authority may not prevail in a request for attorney fees under the EAJA from the OGC, notwithstanding eligibility and success, if the GC's "position in the proceeding was substantially justified, or special circumstances make an award unjust." § 2430.1. "Substantially justified" depends on whether the position has a "reasonable basis in law or fact." American Federation of Government Employees, Local 987, 55 FLRA No. 71, 55 FLRA 432, 434-35 (1999) (citations omitted).

2. REGIONS FILE OPPOSITION TO ATTORNEY FEES REQUESTED UNDER EAJA:

Even if the Charged Party prevails, the GC's position may be "substantially justified." [Id.](#) at 436 (where the Authority had not previously ruled on dispositive issues it decided in case, even though GC did not prevail, GC had a reasonable basis in fact and law to pursue the litigation).

a. *Opposition to fee application before the ALJ:*

Where a Union prevails in a ULP case before the ALJ, and files a fee application asserting that the GC's position was not substantially justified, the Region files an opposition to the fee application that explains in detail the reasonable basis/es in law and fact for maintaining the litigation.

b. *Exceptions filed with the Authority:*

Should a Union prevail before the ALJ, the Trial Attorney files exceptions with the Authority.

RESERVED