

OFFICE OF ADMINISTRATIVE LAW JUDGES WASHINGTON, D.C. 20424-0001

UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, WASHINGTON, D.C. AND BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION, RAY BROOK, NEW YORK

Respondent

and

Case No. 1-CA-40368

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3882

(46 FLRA No. 89)

Charging Party/ Union

William C. Owen For the Respondent

Martin R. Cohen For the Charging Party

Before: GARVIN LEE OLIVER Administrative Law Judge

DECISION ON ATTORNEY FEES

Statement of the Case

On December 18, 1992 the Authority, pursuant to a remand from the United States Court of Appeals for the District of Columbia in American Federation of Government Employees, Local 3882 v. FLRA, 944 F.2d 922 (D.C. Cir. 1991), remanded to this Office the attorney fee request for Martin R. Cohen "to determine the hourly rate and the amount of fees appropriate for the work Cohen performed." On December 29, 1992 the Chief Administrative Law Judge ordered Mr. Cohen, in the absence of agreement or stipulation, to produce satisfactory evidence of the prevailing rate in the community for similar services. He afforded the Respondent the opportunity to submit a response. The parties' responses were assigned to the undersigned for disposition.

Findings of Fact and Conclusions

Number of Hours

On June 16, 1987 Mr. Cohen billed for 2.5 hours expended in the preparation of a supplemental brief in support of the Charging Party's motion for attorney fees. I found the number of hours requested to be reasonable, and the Authority found no error in the granting of the hours requested. See United States Department of Justice, Bureau of Prisons, Washington, D.C. and Bureau of Prisons, Federal Correctional Institution, Ray Brook, New York, 32 FLRA 20 (1988) at 28 and 42. The Authority in its recent remand stated, in part,

Although it is clear that Cohen expended 2.5 hours of work on this case, we are
able to determine the market rate basis on which to award Cohen attorney fees.

Noting that this case arose at a time when the Authority was applying a cost-plus basis for determining attorney fees, we will remand Cohen's request for attorney fees to the Judge to determine the hourly market rate and the amount of fees appropriate for the 2.5 hours of work Cohen performed.6/

6/ On September 23, 1992, Cohen mailed a Motion for Payment of Attorney Fees Upon Reversal and Remand to the Office of the Administrative Law Judges. On October 7, 1992, the document was transferred to the Authority's Docket Room. The Judge may consider this material on remand or request additional documentation.

It is not clear that the Authority was restricting my consideration of Mr. Cohen's attorney fee request to the 2.5 hours he expended on the motion for attorney fees on June 16, 1987, or whether additional hours expended by Mr. Cohen in connection with the current request for attorney fees should also be considered. In view of the Authority's reference to Mr. Cohen's September 23, 1992 motion, in which he requests that one additional hour be allowed for preparation of that motion on September 22, 1992 following the Court's reversal and remand, and the Authority's more general order which requires me "to determine the hourly rate and the amount of fees appropriate for the work performed," I conclude that, although not free from doubt, the additional hours requested should be considered to avoid a further remand.

The Authority has held that an award for work performed in connection with the application for attorney fees is reasonable under the Back Pay Act. Department of the Air Force Headquarters, 832D Combat Support Group DPCE, Luke Air Force Base, Arizona, 32 FLRA 1084, 1106-08 (1988) (Luke AFB); National Association of Government Employees, Local R5-188 and U.S. Department of the Air Force, Seymour Johnson Air Force Base, North Carolina, 46 FLRA 458, 469 (1992). An award for work performed on the attorney fee application following the Authority's remand is also reasonable. This is nothing more than a derivative or continuing action enforcing the original entitlement to fee and is "related to the personnel action" as required by the Back Pay Act.⁽¹⁾Cf. U.S. Department of Treasury, U.S. Customs Service, Washington, D.C. and U.S. Customs Service, Region IV, Miami, Florida, Case

No. 4-CA-90748, ALJ Decision Reports, No. 95 (1991). A fee award has already been held to meet the other standards of the Back Pay Act.

As noted, Mr. Cohen states that he spent one hour preparing the motion on September 23, 1992. Mr. Cohen has also detailed 9.5 hours of work performed since the Authority's remand decision. This was expended studying the Authority's decision (1 hour), studying the Authority's decision together with the Chief Judge's order (1 hour), discussing settlement of the attorney fee with Union representatives and agency counsel pursuant to the Chief Judge's order (1 hour), and researching and drafting the requested response and affidavits (6.5 hours). The total of two hours spent studying the Authority's decision and the Chief Judge's order appear excessive in light of their length and content and, accordingly, is reduced by one hour. It is determined that the remaining 12 hours were reasonably expended.

Hourly Market Rate

With respect to the 2.5 hours expended in 1987, Mr. Cohen stated in his affidavit of June 19, 1987, without any supporting documentation, that "Market value in the Delaware Valley would be \$100 an hour." Mr. Cohen now claims that the market rate for his services in the area where he practiced in 1987 was \$150.00 an hour. He has submitted satisfactory documentation that such a rate was at that time in line with those in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. Accordingly, the rate of \$150 for the 2.5 hours is reasonable.

Mr. Cohen requests a market rate of \$171.82 an hour for the 9.5 hours of work performed in 1992 and 1993. The documentation he has submitted shows that in 1990-1991 a comparable lawyer in his area billed between \$160-165 an hour. He also established that in August 1992 he was awarded a fee of over \$14,000.00 using a rate of \$171.82 an hour. Awards from courts can constitute relevant evidence regarding an attorney's market rate. Luke AFB, 32 FLRA at 1112. Accordingly, it is determined that \$171.82 is a reasonable hourly rate for the 9.5 hours.

Fee Enhancement for Delay in Payment

In his submission of September 23, 1992 Mr. Cohen requested 4% simple interest per year since 1987 due to the delay in payment. The Back Pay Statute, 5 U.S.C. § 5596(b)(2)(A), provides that an amount "payable under paragraph (1)(A)(i) of this subsection shall be payable with interest." Inasmuch as paragraph (1)(A)(i) is specifically referenced and pertains only to the payment of pay, allowances, or differentials and not to reasonable attorney fees as specifically provided for in paragraph (1)(A)(ii), it must be determined that there is no statutory authorization for the payment of interest with respect to attorney fees in back pay cases. Cf. Library of Congress v. Shaw, 106 S. Ct. 2957 (1985).

In his submission of January 28, 1993 Mr. Cohen requests that the 2.5 hours he expended in 1987 be paid at his current rate of \$171.82 an hour in order to compensate him for the now six year delay in payment. Mr. Cohen cites no authority for such an adjustment under the Back Pay Act, and I am not aware of any. Accordingly, the request is denied.

Based on the foregoing findings and conclusions it is recommended that the Authority issue the following Order.

Order

Pursuant to the Back Pay Act, 5 U.S.C. § 5596, and the Civil Service Reform Act of 1978, 5 U.S.C. § 7701(g), the Authority grants an award in the amount of \$2007.29. The Authority orders the U.S. Department of Justice, Bureau of Prisons, Washington, D.C. and the Bureau of Prisons, Federal

Correctional Institution, Ray Brook, NY to pay such sum to the AFGE Legal Representation Fund.

Issued, Washington, DC, April 9, 1993

GARVIN LEE OLIVER

Administrative Law Judge

1. The parties have advised that the availability of "fees for fees" under the Back Pay Act is one of the issues that was argued before the U.S. Court of Appeals for the District of Columbia Circuit on January 12, 1993 in AFGE.

AFL-CIO, Local 3882 v. FLRA and U.S. Department of Justice, No. 88-1375.