

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

████████████████████

Grievant

And

Department of State

Record of Proceedings

FSGB No. 2000-075

Date: July 30, 2002

ORDER: ATTORNEY FEES

For the Foreign Service Grievance Board:

Presiding Member:

Barry E. Shapiro

Board Members:

James E. Blanford
Theodore Horoschak

Senior Advisor

Donna Anderson

Representative for the Grievant:

Self

Representative for the Department:

Joanne M. Lishman
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

OVERVIEW

In a Decision of March 20, 2002, we held that the agency did not establish that its reprimand of the grievant, who had been charged with failure to fulfill his just financial obligations, was justified. In addition to other forms of relief, the Decision permitted the grievant to submit a request for attorney fees.

The agency opposed the grievant's request for attorney fees. The agency asserted, first, that the Board's authority to award attorney fees under section 1107(b)(5) of the Foreign Service Act is coextensive with the authority of the Merit Systems Protection Board, and therefore does not extend to grievances over minor disciplinary action, such as reprimands. The agency also argued that, given the facts of the grievance, reimbursement of attorney fees would not be "in the interest of justice;" that reimbursement for one of the grievant's attorneys, who provided services in a foreign country, cannot be made because that attorney is not licensed as a member of the bar in any of the States or the District of Columbia; that the billing for some of work performed by attorneys in the United States is not clearly related to the grievance; and that the hourly rate for one of the United States attorneys is excessive.

We denied the agency's jurisdictional challenge. As we previously stated in FSGB Case Nos. 98-061 (Order of March 8, 2000) and 98-033 (Order of June 23, 2000), we hold that our authority to award attorney fees must be exercised in the same manner as the comparable authority is exercised by the MSPB, but that it extends to all grievable matters within our jurisdiction.

We applied the analytical framework set forth by the MSPB in *Allen v. United States Postal Service*, 2 MSPR 420 (1980), and held as follows:

1. The grievant was the prevailing party.
2. An award of attorney fees is "in the interest of justice" because the agency's decision to discipline the grievant was "wholly unfounded"; and
3. Except for a reduction from \$250 to \$225 of the hourly rate attributed to one of the attorneys, and the correction of some minor computational errors, the amounts claimed by the grievant were reasonable and related to the grievance.

Additionally, we cited Federal case law involving the application of Federal attorney fee-shifting statutes similar to FSA section 1107(b)(5), in support of our conclusion that there is no bar to the reimbursement of fees paid to foreign attorneys. So long as the fees are otherwise reasonable, related to the grievance, and not duplicative of work performed by attorneys in the United States, they may be reimbursed.

ORDER: ATTORNEY FEES

I. BACKGROUND

Grievant [REDACTED] appealed to this Board the Department of State's (Department, agency) decision of August 4, 2000, to issue him a written reprimand on grounds of failure to pay his just financial obligations. The action was based upon a purported failure to honor a March 25, 1999 order of a [REDACTED] court that he make monthly payments to support a child he allegedly fathered out of wedlock with a [REDACTED] national while he was posted in [REDACTED]. In our March 20, 2002 Decision, we concluded that the [REDACTED] Court's March 25, 1999 order did not encumber grievant with a just financial obligation. Accordingly, we held that the Department did not establish that its disciplinary action was justified. We directed the Department to: (1) rescind the disciplinary action; (2) remove all records of the issuance of a letter of reprimand to grievant; and (3) lift the temporary removal of grievant's name from the promotion list and direct the retroactive promotion as agreed in its letter of October 20, 2000. Further, the Decision permitted grievant to submit a request for attorney fees and the Department to respond to any such request.

On June 19, 2002, the Board received [REDACTED] request for attorney fees. The Department's opposition was received June 20. Grievant submitted his reply to the agency's opposition to the fee request on July 8, 2002. The Department repeated its opposition to [REDACTED] request on July 26, 2002.

II. DISCUSSION AND FINDINGS

The Merit Systems Protection Board (MSPB) long ago established the basic framework that we consistently use in considering requests for attorney fees and costs.

Allen v. United States Postal Service, 2 M.S.P.R. 420 (1980), and its progeny. There, the MSPB ruled that three fundamental requirements must be met:

- (1) The appellant must be the “prevailing party.”
- (2) The award of attorney fees must be “warranted in the interest of justice.”
- (3) The fees awarded must be “reasonable.”

These requirements are applied *seriatim*.

Jurisdiction

Before turning to the three fundamental requirements of *Allen*, we wish to make some general observations about the relationship between the standards and criteria set by the MSPB in attorney fee cases and the rulings of the FSGB. This Board has jurisdiction over the appeals of many fewer employees than does the MSPB. However, with respect to those that are covered, i.e., members of the Foreign Service, our jurisdiction is broader. The MSPB is essentially limited to the review of adverse actions, its predominant workload, and claimed prohibited personnel practices.

Because of that difference in jurisdictional coverage, the Department argued (in its June 19 opposition to ██████ request) that our authority to award attorney fees is limited to the types of cases that the MSPB would decide. We declined that approach in FSGB Case No. 98-061 (Order of March 8, 2000), where we stated:

From the time that the Board was empowered by Congress to award attorney fees nearly 20 years ago, we have never considered that authority limited solely to cases over which the MSPB has jurisdiction. Our decisions have invariably reflected the view that the authority granted by Section 1107(b)(5) of the FSA to direct payment of attorney fees “to the same extent and in the same manner as such fees may be required by the [MSPB] under section 7701(g) of Title 5,” (1) extends to any grievance that the Board may find meritorious; (2) is subject to the criteria stated in section 7701(g), namely that the employee prevails, award is in the interest of justice, and the fees are reasonable and were incurred by the

employee; and (3) our awards are reasonably consistent with the application of section 7701(g) by the MSPB.

In FSGB Case No. 98-033 (Order of June 23, 2000) we elaborated on the above, stating:

When the MSPB reviews and rules on a request for attorney fees, it naturally views the request through the prism of the kinds of cases that come before it. It does not consider the circumstances under which attorney fees are appropriate in a case involving the appeal of an EER, a failure to pay for a child's tuition, claimed moving expenses, or any of the other kinds of cases which may come before this Board but not before the MSPB. For that reason, therefore, our obligation in attorney fee decisions is that they be "reasonably consistent with the application of section 7701(g) by the MSPB."

In the instant case the Department argues that we cannot award attorney fees for cases involving a written reprimand. Their reasoning in support of this position, while citing specific statutory language, basically mirrors its arguments presented in earlier cases that were declined by this Board: specifically, that this Board is bound by the regulations governing the MSPB. In the instant case, the Department provided neither new evidence nor argument compelling enough to cause us to amend our position.

So long as the Departmental action being complained of is a grievance under the Foreign Service Act, then the Board has the authority to award attorney fees to a prevailing party. This is made clear in the case of *Costello v. Agency for International Development*, 843 F.2d 540 (D.C. Cir. 1988) where the court stated:

Since the action in which the appellant prevailed was a "grievance," the Board has the authority pursuant to section 1107(b)(5) to order an award of attorney fees if the criteria set forth in 5 U.S.C. 7701(g) are met.

Prevailing Party

The guiding framework for determining whether an employee is the prevailing party is the Supreme Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992). There the Court held that the one who seeks attorney fees "prevails" when actual relief on the merits of his claim "materially alters the legal relationship" between the parties by modifying the opponents' behavior in a way that directly benefits the moving party. In the context of FSGB decisions, the Board decided (see FSGB Case No. 94-062, December 7, 1995) that its directive granting a remedy to a grievant was equivalent to an enforceable judgment against the agency inasmuch as its effect was to change the legal relationship between the parties in a way providing substantial potential benefit to the grievant. [REDACTED] is clearly the "prevailing party" here, as he received an enforceable judgment which directly benefited him. The legal relationship between grievant and the agency was clearly changed as a consequence.

Interest of Justice

To determine whether attorney fees are "warranted in the interest of justice," in *Allen* the MSPB established five "directional markers" to serve as guides. While *Allen* describes them as illustrative, both the MSPB and this Board have consistently used these markers as the conceptual basis for this determination. The five criteria are:

- (1) Where the agency engaged in a "prohibited personnel practice."
- (2) Where the agency's action was "clearly without merit" (7701(g)(1)), or was "wholly unfounded," or the employee is "substantially innocent" of the charges brought by the agency.

- (3) Where the agency initiated the action against the employee in “bad faith” including (a) where the agency’s action was brought to “harass” the employee, or (b) where the agency’s action was brought to “exert improper pressure on the employee to act in certain ways.”
- (4) Where the agency committed a “gross procedural error which prolonged the proceedings” or “severely prejudiced” the employee.
- (5) Where the agency “knew or should have known that it would not prevail on the merits . . .”

A grievant need not meet all criteria to qualify. Satisfaction of any one of these markers is sufficient with respect to the *Allen* factors regarding the “interest of justice.” And, as *Allen* notes, we exercise discretion to ascertain on a case-by-case basis whether fees should be awarded. For the following reasons, we find that grievant meets this requirement based on the second marker: “Where the action was . . . wholly unfounded or the employee is ‘substantially innocent’ of the charges brought by the agency.”

The Board decided this case based upon the information available as of August 4, 2000, the date of the Department’s decision letter. As regards the issue of paternity, it is clear the question had not been resolved when the Department issued its decision. The Department argues that given the fact [REDACTED] paternity was subsequently affirmed, its position on August 4, 2000, was valid. We disagree. The Department provided no legal argument to support its assertion. Given the lack of conclusive evidence of [REDACTED] paternity at the time the Department made its decision to discipline him, the charge was “wholly unfounded.”

With respect to the [REDACTED] court order of March 25, 1999, we found grievant's argument persuasive that it was not binding on him at the time the Department reprimanded him (FSGB Case No. 00-075, March 20, 2002, page 13). We find the basis for the Department's decision to discipline [REDACTED] on this charge to be "wholly unfounded."

Accordingly we find that an award of attorney fees is "warranted in the interest of justice."

Reasonableness of Fees

Section 1107(b)(5) of the Foreign Service Act of 1980, as amended, provides that:

[i]f the Board finds that the grievance is meritorious, [it] shall have the authority to direct the [agency] . . . (5) to pay reasonable attorney fees to the grievant to the same extent and in the same manner as such fees may be required by the Merit Systems Protection Board [MSPB] under section 7701(g) of Title 5, United States Code.

We have consistently followed MSPB practice, although in doing so, we exercise considerable judgment based on the nature of the case. See *Sterner v. Department of the Navy*, 711 F.2d 1563 (Fed. Cir. 1983).

In FSGB Case No. 93-26 (Interim Decision of August 22, 1995) we noted that:

In determining whether fees claimed are reasonable, the MSPB and the courts apply the "lodestar" test, in which the two principal elements to be considered are the attorney's billing rate and the number of hours devoted to the case. Each of these two figures, which when multiplied together establish the fee incurred, must be reasonable and adequately documented. The rate charged must accord with the standing and expertise of the attorney and be consistent with the normal billing rates in the relevant market or forum; evidence that the rate agreed to was the customary billing rate for the attorney in the market will, absent special circumstances, ordinarily suffice to show that the rate is reasonable. See *Montreuil v. Department of the Air Force*, 55 M.S.P.R. 685 (1992)

Grievant's fee request seeks an award of \$8,637.83. Of this amount, \$5,350 is for legal services provided by the firm of Crouch & Crouch of Arlington, Virginia. The remaining \$3,287.83 represents legal services provided by the firm Powers Abogados of [REDACTED].

We address first the fees and expenses billed for services provided by Crouch & Crouch. The primary counsel was Richard Crouch, whose hourly rate was \$250 per hour. Attorney John Crouch, whose hourly rate was \$180.00, assisted.

The Department contested the hourly rate charged by R. Crouch, believing it to be excessive for legal work before the Board. We concur. In FSGB Case No. 98-081 (November 13, 2001) the Board addressed the issue of what constitutes the forum to be utilized in its determination of a reasonable hourly rate. Therein we stated that "the forum in which these grievances appeals are litigated is the Foreign Service Grievance Board, and not the broader Washington legal community." We have determined that an hourly rate of \$225.00 is consistent with the hourly rates customarily approved by this Board for attorney fee reimbursement. See FSGB Case No. 98-081 (November 13, 2001); FSGB Case No. 98-021 (April 29, 2002); and FSGB Case No. 99-081 (May 9, 2002). Accordingly, the hourly rate approved for R. Crouch is \$225, consistent with Board practice.

The firm billed grievant \$5,340 for 23.2 hours less a \$250 discretionary reduction. The 23.2 hours of service was divided as follows: R. Crouch 20.2 hours and J. Crouch 3.0 hours. The Department argues that "the accounting for professional services" indicates "billings for services not related to the grievance." Based upon our review of

the ROP and the time log, we determine that the 23.2 hours expended addressed issues raised in the Department's notice of proposed discipline action.

Our review of the submission reveals that on the June 26, 2000 invoice, [REDACTED] was billed for 1.8 hours of services provided by R. Crouch at \$250 per hour. However, the ROP contains no receipt or other evidence that this obligation was paid. A motion for attorney fees is to be complete when filed, including all documentation to support the claim. See FSGB Case No. 98-033 (Motion for Reconsideration, April 1, 2000). We pare the request by the 1.8 hours shown.

For legal services provided by Crouch & Crouch, we award \$4,430.00, broken out as follows:

R. Crouch -- 18.4 hours @ \$225.00 per hour:	\$4,140.00
J. Crouch -- 3.0 hours @ \$180.00 per hour:	540.00
Less Discretionary reduction shown on the December 3, 1999 invoice:	(250.00)
Net:	\$4,430.00

As part of his attorney fees request, [REDACTED] seeks \$10.90 for courier services. We find this expense reasonable and permissible. Accordingly, the total awarded for expenses and legal services provided by Crouch & Crouch is \$4,440.90 (\$4,430.00 + \$10.90).

We turn now to the request for an award of fees for the services provided by Powers Abogados of [REDACTED]. The Department argues that [REDACTED] is not entitled to attorney fees as such an award can not be granted to a foreign law firm. We find its argument and citations inapposite. In *Talia Distler: In the Matter of Roy Distler and Eleanor Distler, infants under the age of 16, Petitioner v. Kenneth Distler, Respondent* (26 F.Supp. 2d 723; 1998 U.S. Dist. LEXIS 20798), the court held:

In the case at bar, however, Mr. Moran did more than just act as a consultant. He acted as petitioner's legal counsel by giving her legal advice of her rights under the Hague Convention, helping her retain counsel in the United States, preparing a Legal Opinion, putting together affidavits with petitioner's Israeli relatives and friends for potential use in the case before this Court, and more. He also obtained, through Israeli Ministry of Justice, the request of Israel's "Central Authority" under the Treaty for international judicial assistant to repatriate the Distler children. As Mr. Moran performed legal services, petitioner is entitled to reimbursement for his fees.

And in *Gui Ying Wang, as Guardian ad litem of Li NaLi, an incompetent, Plaintiff, and Kananack, Murgatroyd, Baum & Hedlund; and Pu Dong Law Office, real Parties in Interest-Appellants v. Douglas Aircraft Co., a division of McDonnell Douglas Corp., Defendant* (U.S. Court of Appeals for the Ninth Circuit; 1997 U.S. App. LEXIS 19117), the court stated:

The district court refused to award attorney's fees to Pu Dong on grounds that "no grant may be made for fees to a foreign law firm in a United States case." There is no categorical prohibition that prevents a district court from awarding attorney's fees to a foreign attorney who has not formally associated as counsel of record. We remand to the district court for a determination of whether Pu Dong performed services for Li's benefit that did not duplicate the services of the attorneys working on her case in California. If Pu Dong performed such services, the district court should make an appropriate award of attorney's fees based on the reasonable value of the services that Pu Dong performed in Shanghai.

In each of the cases cited above, the Court was applying the terms of an attorney-fee shifting statute similar to that at 5 U.S.C. 7701(g). Thus, as Powers Abogados performed legal services relevant to the grievance, [REDACTED] is entitled to reimbursement for those fees.

[REDACTED] seeks an award of \$3,287.83¹ for 31.3 hours of work performed by Powers Abogados. Based upon our review of the ROP and the time sheet/invoice, we

¹ [REDACTED] notes in his submission that the total legal fees he incurred in [REDACTED] exceeded \$20,000 and that he was seeking reimbursement for only that portion directly related to his grievance.

determine that the 31.3 hours expended addressed issues directly pertaining to this grievance and did not duplicate services provided by Crouch & Crouch. Of this total, 19.4 hours were attributable to lead attorney Elizabeth Powers and 11.9 hours to associate attorneys. For services provided in the February 2000 to March 2001 period, the hourly rates charged by Powers Abogados were:

E. Powers -- \$100.00 per hour
Associate Attorneys -- \$55.00 per hour

In November 2001, the firm increased its hourly rates to:

E. Powers -- \$160.00 per hour
Associate Attorneys -- \$80.00 per hour

We find these rates to be in accordance with the hourly rates customarily approved by this Board. Of the 19.4 hours charged by Powers, 14.4 hours were at the former rate of \$100.00/hour (\$1,440) and 5.0 hours at \$160.00/hour (\$800) for a total of \$2,240. Of the 11.9 hours charged to associates, 2.9 hours were at \$55.00/hour (\$159.50) and 9.0 hours at \$80.00/hour (\$720.00) for a total of \$879.50. This results in a combined total for Powers and the associate attorneys of \$3,119.50.

██████████ was actually billed, on a periodic basis, in amounts converted from dollars to ██████████ or ██████████, at the exchange rates that existed when the bills were rendered. He paid these bills in ██████████. He is claiming reimbursement for a total of \$3,287.83, an amount that is \$178.33 higher than the total we show above. This discrepancy may be attributed to the changes in the exchange rates that occurred over the lengthy period of time (February 2000 through November 2001) during which Powers Abogados provided legal services. Inasmuch as the record shows

██████████ actually paid a total of \$3,287.83, we conclude that this is the amount for which he is entitled to reimbursement.

Summarizing, we find a total attorney fee award of \$7,728.73 (\$4,440.90 + \$3,287.83) to be reasonable.

III. ORDER

1. The Department is directed to pay attorney fees and expenses in the amount of \$7,728.73 to ██████████.
2. The Department is directed to initiate payment action within 30 days.

For the Foreign Service Grievance Board:

Barry E. Shapiro
Presiding Member

James E. Blanford
Member

Theodore Horeschak
Member