

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

██████████

Employee

And

Peace Corps

Record of Proceeding

FSGB No. 2012-004

September 12, 2014

ORDER: LEGAL FEES AND COSTS

EXCISED

For the Foreign Service Grievance Board:

Presiding Member

John M. Vittone

Board Members:

Harlan F. Rosacker

Special Assistant:

Joseph J. Pastic

Representative for the Employee:

Dipo Akin-Deko, Esq.
Akin-Deko & Puig PLLC

Representative for the Agency:

Chuck Hobbie, Peace Corps

90Employee Exclusive Representative:

American Federation of State, County,
and Municipal Employees
Union Local 3548

ORDER: LEGAL FEES AND COSTS

I. BACKGROUND

On October 28, 2013, the charged employee's attorney filed a Request for Attorney's Fees, Costs, or Related Expenses. On November 8, 2013, the agency notified the Board that it did not object to the attorney's request. On December 20, 2013, the Board issued an order directing the attorney for the charged employee to provide more detailed information in support of his Request for Attorney's Fees, Costs or Related Expenses. In essence the Board found the October 28 filing to be deficient in that the attorney failed to explain why the fee request should be approved, and did not provide adequate documentation to support the claim. Even though the agency did not object to the original fee request, the Board found that it had the responsibility to insure that public funds are expended in accord with the law.

On January 20, 2014, the employee's attorney filed an amended Request for Attorney's Fees, Costs, and Related Expenses in response to the Board's order. The agency replied to the amended request on January 30, 2014. In this submission, the agency changed its position and made certain objections to the amended fee request. The employee's attorney submitted additional information in response to the Board's direction on March 6, 2014.

II. POSITIONS OF THE PARTIES

CHARGED EMPLOYEE'S ATTORNEY

In his response to the Board's order for more detailed information, the attorney requests that he be paid a total fee of \$30,390.22 which includes \$23,330.22 for attorney fees and \$7,060.00 for expert services provided by Forensic Pursuits, a consultant to the

attorney. The attorney's fees for the services rendered in this case range from \$160 to \$250 per hour.

The attorney argues that he achieved all the relief that he requested for his client including overturning the agency decision to remove the charged employee. The attorney asserts that approving the full amount of the fee request is consistent with the Supreme Court's holding in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), that fees should not be awarded for unsuccessful claims. In this case, the employee was successful in his challenge to the main charge that he viewed pornographic material on his workstation computer, but he was not successful in his challenge to the charge that he downloaded pornographic material. Relying on *Hensley*, the attorney argues that this case involved a "common core of facts" related to both charges that made it difficult to divide time spent on each charge, and that he achieved excellent results despite not succeeding on every claim.

The attorney also compares this case to several MSPB cases¹ for support of his argument that even though he was not successful on all arguments, the charged employee achieved all the relief that he requested. Namely, the recommendation to remove the employee was denied by the Board. The attorney also argues that approval of the whole requested fee is consistent with this Board's decision in FSGB Case No. 95-018. That is, even though the fees for the employee in that case were reduced for failure to succeed on all claims, the Board did not order any reduction for fees associated with the case's main charge involving a pattern of assignments on which she did prevail.

¹ *Freeman v. Dept. of Veteran Affairs*, 66 M.S.P.R. 125 (1995) and *Taylor v. Department of Justice*, 69 M.S.P.R. 299 (1996).

Petitioner argues that it is in the interest of justice to approve the fee requested since the “agency knew or should have known that it would not prevail on the merits,” citing *Allen v. U.S. Postal Service*, 2 U.S.P.R. 420 (1980). In petitioner’s view, the fact that the Board did not order the removal of the charged employee demonstrates that the agency should have known that it would not succeed on the merits since the Board’s decision was based on evidence available to the agency at the time it removed the employee.

Finally, in response to our specific direction for more detailed information, petitioner argues that that the expert witness fees should be approved because of the unique nature of this case. He acknowledges that such fees are not usually awarded by courts, but are required here because he incurred the costs after the agency refused to accept his settlement offer. In his view, the expert was needed to prove that his client did not view or download pornographic material, and he points to Rule 68 of the Federal Rules of Civil Procedure for support of his argument.²

AGENCY

The agency responds that an award of fees in this case is not warranted in the interest of justice and the petition should be denied. The agency concedes that the charged employee was the prevailing party, and is eligible to receive attorney fees. In addition, the agency concedes that the hourly rate set forth in the request is reasonable and in accord with the Supreme Court’s decision in *Hensley*. Also the agency does not dispute that the number of hours spent by petitioner was reasonable given the complexity

² Rule 68 provides, in part, that “if the judgment that an offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.”

of the case. However, the agency asserts that the time spent disputing the downloading charge should be excluded since the employee did not prevail on that charge.

In the agency's view, petitioner relies on only one of the *Allen* factors in determining whether an award of fees is warranted in the interest of justice, that is "whether the agency knew or should have known it would not prevail on the merits when it brought the proceeding." The agency asserts that he has failed to explain why or how the facts of this case support a finding that the agency's actions meet that part of the test.

III. DISCUSSION

This Board's authority to award attorney fees is found in section 1107(b)(5) of the Foreign Service Act of 1980, as amended (22 USC § 4137(b)(5)). That subsection provides:

(b) If the Board finds that the grievance is meritorious, the Board shall have the authority to direct the Department—

* * * * *

(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 under section 7701(g) of title 5, United States Code.

In adjudicating attorney fee requests, this Board consistently has followed MSPB precedents while at the same time exercising considerable judgment based upon the nature of the specific case before us. *See Sterner v. Department of the Army*, 711 F.2d 1563 (Fed. Cir. 1983).

Section 7701(g) provides, in part, that the MSPB may:

(g)(1) [R]equire payment by the agency involved of reasonable attorney fees incurred by an employee . . . if the employee . . . is the prevailing party and the Board . . . determines that payment by the agency is warranted in the interest of justice[.]

In order for the Board to exercise its authority to award attorney fees, a grievant must show that an attorney-client relationship exists; that legal services were rendered; and that fees have been incurred.³ The charged employee also must prove that he is a “prevailing party,” that an award of attorney fees is “warranted in the interest of justice,” and that the fee request is “reasonable.”

PREVAILING PARTY

In *Buckhannon v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001), the Supreme Court held that a claimant must simply receive “at least some relief on the merits of his claim before he can be said to prevail.” In this case, the agency concedes that the charged employee is the prevailing party as a result of the Board’s decision and is eligible to receive attorney fees. In the Board’s decision, the charged employee was found to have used his government computer to download sexually explicit material, but the agency did not prove the main charge that he had viewed such material on his computer and that his behavior warranted separation from his position. Accordingly, we find that the charged employee meets the standard to be a prevailing party.

WARRANTED IN THE INTEREST OF JUSTICE

Both parties agree that attorney fees may be awarded only if the Board finds that such fees are warranted in the “interest of justice.” They both agree that the Board should apply the framework established by the MSPB in *Allen v. United States Postal Service*, 2 MSPR 420 (1980), in determining whether the “interest of justice” standard has been met. In *Allen*, the MSPB set forth five circumstances (often referred to as the “Allen factors”) as guidance in the determination of whether the fee award would be in

³ The agency acknowledges that the fee petition meets these tests.

the interest of justice. *See* FSGB Case No. 2005-049 (Sept. 6, 2006), and FSGB Case No. 2009-032 (May 23, 2012).

Relying on the fifth *Allen* factor, the attorney argues that a fee award is justified because the “the agency knew or should have known that it would not prevail on the merits.” In essence, he argues that since the Board found that the agency did not prove that the employee’s removal was consistent with penalties imposed for similar offenses that the agency knew or should have known that it would not prevail on the merits. Grievant cites two MSPB cases to support his argument, but fails to explain how these cases support his argument.⁴ In the *Hilliard* decision, a non-precedential decision, the initial decision of the administrative judge denying attorney fees was upheld by a split two member MSPB who could not agree on the disposition of the petition for review. How either case supports the petition in this case is not explained. .

It is not the duty of this Board to search for and explain arguments in the petitioner’s favor. However, in this case we find that the petitioner has met the requirements of the fifth *Allen* factor for the simple reason that the agency failed to produce any evidence that the charged employee viewed sexually explicit material at his workstation. As stated in the Board’s decision:

The agency concedes that no one witnessed [REDACTED] viewing the sexually explicit material at his work station. All of [REDACTED] coworkers, who testified for the agency, stated no one had ever seen him watch any sexually explicit material at his workstation. There is no evidence of any kind in this record to support the “Reason” statement in the proposal to terminate.

In *Hensley*, the Court stated that the most critical factor in the determination of fee awards in situations of mixed claims is the degree of success obtained by the

⁴ *Hilliard v SUPS*, 111 MSPR 634 (2009) and *Lambert v. Dept. Of the Air Force*, 34 MSPR 501 (1987).

prevailing party. *Id.* at 437. The primary reason for seeking the discipline of the employee was “Willfully Viewing Sexually Explicit Material on a Peace Corps Computer”. The notice of removal cited Peace Corps Manual Section 643.4.5 (e) which forbids the viewing and downloading of sexually explicit material on a workstation of the agency. In this case the employee achieved very substantial success. Even though the Board found that he had downloaded the pornographic material, it found that the agency failed to prove the primary reason for the disciplinary action of viewing sexually explicit material on an agency computer. The Board did not order his removal from the service, required his reinstatement with back pay, and his record expunged of references to his termination.

The agency knew early in this proceeding that it had no evidence to support the primary reason cited for the action to remove the charged employee that he willfully viewed sexually explicit material on his agency computer. As our decision found, there was no evidence to support that charge, and the agency conceded that point at the hearing. Thus the agency knew or should have known early in this proceeding that it could not support that charge. The Board finds that petitioner has met the requirements of the fifth *Allen* factor.

Petitioner also argues that he should be awarded the full amount of attorney fees even though the employee was found to have violated the regulation by downloading pornographic material on his workstation computer. Petitioner argues that the charge of viewing and downloading such material involved a common core of facts that makes it difficult for counsel to divide the hours spent for each claim. Petitioner relies on *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The agency responds that the time spent by petitioner

on the downloading charge should be excluded. The record before us does not provide us with any information on how much attorney time was spent on the charge of viewing versus the charge of downloading.

The *Hensley* case does provide that time spent on unsuccessful claims should be excluded from the fee determination. However, where a grievant prevails on a claim the fee should not be reduced simply because the Board did not accept all of the arguments set forth in support of that claim. In *Hensley*, the Court was clear that where a party has achieved excellent results, the petitioning attorney should receive a fully compensatory fee to include all hours reasonably expended on the litigation. If the petitioner does not provide a breakout or itemized report by each charge, then the Board may make an analysis to determine how many hours should be disallowed. The Court noted that the decision maker has discretion in making such an equitable judgment, but should keep in mind the “most critical factor is the degree of success.” *Hensley* at 437.

In this case, petitioner has not provided a breakdown of the hours devoted to the charge of viewing and to the specification of downloading. He asserts that this case involved a common core of facts applicable to both allegations. There is considerable merit to his argument. The agency did not attempt to divide the allegations against the employee. There was one charge against the employee with two elements: viewing and downloading with viewing stated as the “Reason” for the removal action. Our review of the evidence of record and the billing records does not provide a basis for us to distinguish the evidence of record between the two interrelated charges.

More importantly, it is clear that the charged employee achieved substantial success. The agency sought to remove the employee from the service for viewing

pornographic material on his computer. In our decision, we found that main charge of viewing was not proved, but that downloading was proved. In addition, we found that the agency inappropriately took into account certain aggravating factors and relied on information that he copied pornographic material when copying was not specified in the proposal to terminate in its determination of the penalty. Accordingly, the agency failed to demonstrate that termination was proportionate to the violation proved or that it was consistent with actions taken in prior cases. *See* Decision of September 30, 2013 at 23-26.

Accordingly, we find no basis to reduce the number of hours requested by the petitioning attorney based on the failure of the charged employee to prevail on the downloading charge.

REASONABLENESS OF FEE

The petitioning attorney must demonstrate that the amount of the fees requested is “reasonable.” This requirement has several components. First, the hourly rate charged by the attorney must be reasonable; and second, the number of hours expended by the attorney must be reasonable given the complexity of the case.

The attorney charged the employee rates of \$160.00 to \$250.00 per hour. He is a member of at least three state bar associations, and has been practicing law for at least eight years. As noted, the agency concedes that the hourly fee requested is reasonable for an attorney of petitioner’s experience and the customary rate charged in Washington-Baltimore metropolitan area. We agree and find the hourly rate charged to be reasonable.

With regard to the total hours expended, our review of counsel’s monthly breakout for hours expended in this case is reasonable given the complexity of the case and its potential effect on the employee’s career. The agency does not dispute the

number of hours spent by the petitioner except for hours spent on the charge of downloading. However, it does not suggest how many hours should be deducted from the total hours charged. As discussed above, we find the number of hours to be reasonable and in the interests of justice will be approved.

Certain charges for contacts with the Treasury Department in the amount of \$240.00 are listed on Invoice Number INV-0061, ROP at 2030. The charges for contacts with the Treasury Department are not related to this proceeding and will be denied.

EXPERT WITNESS FEE

Although, the charged employee's attorney recognizes that expert witness are not traditionally awarded under the Foreign Service Act or 5 U.S.C. 7701(g), he asserts that the unwillingness of the agency to accept his settlement offer required him to retain an expert, [REDACTED] to prove that the employee did not view or download pornographic material on his workstation. According to the attorney, the agency refused to accept the employee's offer to accept a settlement in lieu of termination if the agency removed information about the charges from the employee's record. In his view the expert was needed to demonstrate that the agency's forensic analysis did not demonstrate how the pornographic material came to be on the employee's hard drive. The expert retained charged \$7,060.00 for his services including testifying at the hearing.

The agency contests the expert fee request on the grounds that the Board lacks authority to order fees for expert fees under Section 1107(b)(5) of the Act which provides that the Board can only award fees "in the same manner as such fees may be required by the Merit Systems Protection Board' under 5 U.S.C. 7701(g). Relying on that mandate, the agency notes that the MSPB and the courts have consistently denied fees for work

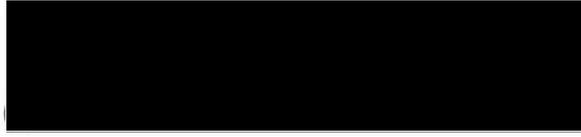
performed by experts. See *Fishback v. U.S. Postal Service*, 54 M.S.P.R. 257 (1992) and *Bennett v. Department of the Navy*, 699 F.2d 1140 (Fed. Cir. 1983)

The Board has consistently followed the MSPB practice of not approving fees for expert witnesses in a testimonial or non-testimonial capacity. See Order: Attorney Fees, FSGB Case No. 95-018, dated February 19, 1999 at 27-28. The employee's attorney has not provided any reason or case law for this Board to consider deviating from that consistent practice. In addition, the attorney fails to recognize that the expert retained did not demonstrate that the employee did not download the pornographic material on his work station computer. Quite the opposite, the retained expert's testimony and report reinforced the agency's evidence that it was his client who downloaded the pornographic material on his government computer. As discussed in the Board's decision at pages 16-18, the ██████ report found 30 sexually explicit images on the charged employee's workstation while the agency's analysis found only seven. ██████ testified that he did not know who downloaded the material onto the workstation, but that it was someone using the employee's user identification. The Board found that the preponderance of evidence demonstrated that the charged employee was that person. Even if the Act allowed for the awarding of expert fees, we would be compelled to deny the request in this instance.

IV. ORDER

Petitioner has requested a total fee award of \$30,390.22. We have deducted the following sums from that request: \$7,060.00 for all charges related to Forensic Analysis's services, and \$240.00 for charges related to contacts with the Treasury Department. Those deductions leave a balance of \$23,570.00. Accordingly, the agency is directed to pay attorney's fees and costs in the amount of \$23,570.22 to the charged employee.

FOR THE FOREIGN SERVICE GRIEVANCE BOARD



John M. Vittone
Presiding Member



Harlan F. Rosacker
Member