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## CHAPTER 21: REMEDIES

### C. Attorney Fees

dependent upon a finding that they are distinctly different from the successful claims, because they rest on different facts and legal theories. In a case where a litigant's claims for relief involve a common core of facts or are based on related legal theories, however, the fee determination should reflect the significance of the overall relief obtained in relation to the hours reasonably expended on the litigation: the result is what matters.

*Heath v. Department of Transportation*, 66 MSPR 101, 105 (1995) (citations omitted). However, as the Board explained in *Taylor v. Department of Justice*, 69 MSPR 299 (1996), a reduction in the amount of fees may be appropriate where the appellant pursues segregable claims for relief:

[I]f an appellant makes multiple, distinct requests for relief in a single Board appeal, each of which could form the basis of a separate appeal, the Board will reduce claimed attorney fees, to reflect the degree of success obtained, if the appellant prevails on only some of the requests for relief.

*Taylor*, 69 MSPR at 305 (citations omitted). *See also Roman v. Department of Army*, 72 MSPR 409, 420 (1996).

#### c. Expenses and Costs

Under 5 U.S.C. § 7701(g)(1), the Board may award “attorney fees,” but not “costs.” Thus, an award of attorney fees may not include “costs” as defined at 28 U.S.C. § 1920. *See Bennett v. Department of Navy*, 699 F.2d 1140, 1144–45 (Fed. Cir. 1983). However, certain “expenses”—to be distinguished from “costs”—may be included as part of an attorney fee award:

We view an award of attorney fees to encompass those reasonable and necessary out-of-pocket expenses of providing a lawyer's services that are not covered by the hourly rate because they cannot always be anticipated with any certainty in a given case, that are routinely paid by counsel and billed to the client for services rendered, that are not taxable costs or prohibited by statute or authorized regulation, and that are not expenses incurred for the mere convenience of counsel.

Ideally the hourly rate would fully compensate attorneys for their services. In the real world of actual law practice, however, the hourly rate charged is only an approximation, benchmark, or lodestar. As a result, a few variable expenses of servicing a case must routinely be, and are, billed to clients

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in addition to the hourly rate.

*Bennett*, 699 F.2d at 1145 (footnotes omitted). Expenses that have been allowed by the Board include as part of an attorney fee award under 5 U.S.C. § 7701(g)(1) include expenses incurred for the following:

- Travel of counsel, postage, and telephone calls. *Bennett*, 699 F.2d at 1145–46.
- Reimbursement for services provided by paralegals, law clerks, librarians, statisticians, or investigators. *See Shimotsukasa v. U.S. Postal Service*, 78 MSPR 679, 681–84 (1998).
- Computerized legal research. *Thomas v. U.S. Postal Service*, 87 MSPR 331, ¶ 25 (2000).
- Long-distance facsimile transmissions (but not for local facsimile transmissions). *Thomas*, 87 MSPR 331, ¶ 26.

Certain other items, which may involve significant amounts of money, are not recoverable under 5 U.S.C. § 7701(g)(1):

- **Transcripts.** An attorney fee award under 5 U.S.C. § 7701(g)(1) may not include transcript costs. *See Helt v. Veterans Administration*, 34 MSPR 165, 170 (1987).
- **Photocopies.** Photocopy costs may not be included in an attorney fee award under 5 U.S.C. § 7701(g)(1). *See Koch v. Department of Commerce*, 19 MSPR 219, 222 (1984).
- **Expert witnesses.** Fees paid to expert witnesses are also precluded in attorney fee awards under 5 U.S.C. § 7701(g)(1). *See Fishback v. U.S. Postal Service*, 54 MSPR 257, 259–60 (1992).

Some of these items may be included in an attorney fee award where the award is made on the basis of a statutory authority that allows the Board to award such items as “reasonable costs” or “expert witness fees.” *See, e.g., McGovern v. Equal Employment Opportunity Commission*, 42 MSPR 399, 414 (1989) (awarding costs under 5 U.S.C. § 7701(g)(2)); *Smit v. Department of Treasury*, 61 MSPR 612, 623–24 (1994) (awarding costs under 5 U.S.C. § 1221(g)(2)). (See also the discussion of various statutory authorities under ATTORNEY FEES at p. 671.)

## 5. Procedures

The following procedures (set forth at 5 CFR § 1201.203) govern the Board’s processing of requests for attorney fees:

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- **Time limit for making request.** The appellant is required to make any request for attorney fees as soon as possible after a final decision of the Board, but no later than 60 calendar days after the date on which a decision becomes final.
- **Form and content of request.** The request must be made by motion, must state why the appellant believes he or she is entitled to an award of attorney fees under the applicable statutory standard, and must be supported by evidence substantiating the amount of the request. That evidence must include, at a minimum—
  - o Accurate and current time records.
  - o A copy of the terms of the fee agreement (if any).
  - o A statement of the attorney’s customary billing rate for similar work, with evidence that that rate is consistent with the prevailing community rate for similar services in the community in which the attorney ordinarily practices.
  - o A showing that there was an established attorney-client relationship.
- **Service and response.** The appellant must serve a copy of the request on the agency. The agency may respond by the time limit established by the Administrative Judge.
- **Adjudication of request.** The request for attorney fees is adjudicated in an “addendum proceeding”—a separate proceeding that takes place after there is a final decision in the “proceeding on the merits” of the action being appealed. The Administrative Judge “may” hold a hearing on the request for attorney fees, and will issue an initial decision that is subject to Board review in the same manner as other initial decisions.

In practice (*see* Judges’ Handbook, Ch. 13, § 3.a.), within three workdays after receipt of the request for attorney fees, the Administrative Judge will ordinarily issue an Acknowledgment Order that does the following:

- **Content of motion.** The Acknowledgment Order will require the appellant or the appellant’s attorney to submit an affidavit that includes the following information regarding the reasonableness of the requested fees:
  - o An itemized accounting of services and expenses claimed.
  - o Specific evidence of the attorney’s customary billing rate for similar work if the attorney has a billing practice or, in the

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absence of that practice, specific evidence of the prevailing community rate for similar work by attorneys of comparable qualifications.

- o Specific evidence of the customary billing rate for paralegals and law clerks, if appropriate.
- o The fee arrangement with the appellant, including a copy of any contract or agreement with respect to fees and expenses, or a summary of its terms.
- o A statement as to whether the attorney is required to turn over an award to a union or a union legal fund.
- o A statement as to whether the attorney is a union employee and, if so, a statement as to the attorney's gross salary reduced to an hourly basis, compensated time spent on the case, and out-of-pocket expenses.
- o The attorney's experience before the Board and any other administrative tribunal, number of years in practice, and position in the firm (senior partner, junior partner, or associate).
- o Any other evidence supporting the claim for attorney fees.
- **Briefing schedule.** The Acknowledgment Order will set three deadlines—
  - o **Supplementation of motion.** The appellant will have a period of time—generally 15 calendar days after the date of the Acknowledgment Order—to supplement or amend the motion.
  - o **Agency response.** The agency response will generally be due 30 calendar days after the date of the Acknowledgment Order.
  - o **Closing of record.** The record will generally close on the 40<sup>th</sup> calendar day after the date of the Acknowledgment Order, and any response by the appellant to the agency's submission must therefore be filed by that date.
- **Settlement.** The Acknowledgment Order will order the agency to contact the appellant's attorney within 35 calendar days to discuss the possibility of settlement of the attorney fee request.
- **Timeliness.** In appropriate cases, the Acknowledgment Order may include—or consist entirely of—a Show Cause Order requiring the