UNITED STATES OF AMERICA
FEDERAL MEDIATION AND CONCILIATION SERVICE

In The Matter of Arbitration Between	)	Case Number 03-03192
	)	
	)	Arbitrator, Lawrence M. Oberdank
Defense Finance and Accounting Service	)	
	)	
and	)	SUPPLEMENTAL OPINION AND AWARD
	)	
American Federation of Government Employees, Local 2510, AFL-CIO	)	

APPEARANCES

FOR THE AGENCY

Deborah Kamat, Attorney

FOR THE UNION

Stuart A. Kirsch, Attorney

STATEMENT OF THE FACTS

On July 30, 2003, I issued an award finding that union president, William Roach, had been suspended for fourteen days without just cause and directing Defense Finance and Accounting Service, herein the "Agency", to rescind the same and expunge all references to the discipline, AWOL and lack of candor charges from his personnel file. I also ordered it to pay Roach for the fourteen days together with interest from August 24, 2002. The award also found the agency interfered, restrained, coerced and discriminated against Roach in violation of Article 2, Section 2 of the Master Labor Agreement and 5 USC, Section 7102 by denying him access to perform union duties while he was suspended: had interfered with the employees' right to assist a labor organization in violation of 5 USC Section 7102 and had refused to bargain in good faith in violation of Article 4, Section 3 of the labor agreement and 5 USC 7114(b)(4) by refusing to provide American Federation of Government Employees. Local 2510, herein the "Union", with information and documents needed to assess the relative strengths and weaknesses of Roach's

grievance. I retained jurisdiction to allow the union to file and Application for Attorney Fees and give the parties an opportunity to address several concerns I had with regard to an award of the same.

The union filed an Application for Attorney Fees and Expenses on August 13, 2003 and the agency filed its response in opposition on September 12th. The union then filed a reply on September 23rd. On October 3, 2003, the agency filed a letter objecting to the union's reply and asking that it receive no consideration or, in the alternative, that the agency's letter be accepted in rebuttal.[1]

OPINION

The Back Pay Act establishes the criterion which must be met before an aggrieved employee is entitled to an award of attorney fees, 5 USC Section 5596(b)(1). The employee must show he was affected by an unjustified or unwarranted personnel action; that it resulted in the withdrawal or reduction of his pay, allowances or differentials and that he would not have suffered the withdrawal or reduction but for such action. Once these facts are proven, the fee award must, nevertheless, still comply with the standards set forth in 5 USC Section 7701(g).

William Roach satisfied the prerequisites contained in 5 USC Section 5596(b)(1). He was suspended for fourteen days on August 24, 2002 after being charged with AWOL and lack of candor. No one disputes the fact he was denied fourteen days pay as a result of this personnel action. I held the discipline was unwarranted because Roach's absence was authorized and, therefore, not within the accepted definition of AWOL. Nor had he been less than candid with the

[1] I have considered all these submissions, as well as the union's response to the agency's rebuttal filed on October 9, 2003, in fashioning this supplemental award. The request to strike the agency's rebuttal is denied.

agency by intentionally misrepresenting or concealing material facts. Roach certainly would not have lost any pay had discipline been withheld and I ordered him made whole for all losses sustained together with interest from the first day of his suspension.

Roach is entitled to an award of attorney fees pursuant to 5 USC Section 5596(b)(1)(A)(ii) provided the same is made in accordance with the standards set forth in 5 USC Section 7701(g)(1) of the Act. Five separate conditions must be met before an award of attorney fees is supportable under Section 7701(g)(1), however, the first of which is that the fees must be incurred for the services of an attorney. Attorney fees are incurred within the meaning of the Act if an attorney-client relationship is shown to exist and the attorney renders legal services on behalf of the employee. See: *Naval Air Development Center & AFGE, Local 1928,* 21 FLRA No. 25, 21 FLRA 131 (1986) and *O'Donnell v Department of Interior,* 2 MSPB 604 (1980). In this case, Roach was represented by Stuart A. Kirsch who is an attorney and Assistant General Counsel of the American Federation of Government Employees, AFL-CIO, herein the "National Union", and Mr. Kirsch provided legal services to him from the beginning of the grievance procedure to the end of the arbitration process. Indeed, Mr. Kirsch is still pursuing attorney fees on Roach's behalf. The attorney-client relationship exists, moreover, even when the attorney represents the employee on behalf of a union as Mr. Kirsch did here. *United States Department of the Army, Corpus Christi Army Depot and American Federation of Government Employees, Local 2142, et al.,* 58 FLRA 87 (2002). Roach then has satisfied the first requirement of Section 7701(g)(1), in my judgment.

Secondly, fees may only be sought by the prevailing party and Roach certainly was that in this case. The agency suspended him for fourteen days but I reversed its decision and directed it to pay him for the lost time together with interest from August 24, 2002. I also directed the

agency to expunge all references to the suspension from Roach's personnel file. Roach did, indeed, obtain all the relief he sought and, therefore, the second standard set forth in Section 7701(g)(1) has been met

Next, the employee must show an award of attorney fees is warranted in the interest of justice. This standard includes cases involving prohibited personnel practices; agency actions clearly without merit; agency actions taken in bad faith to harass or exert improper pressure on an employee; agency gross procedural error which prolonged the proceeding or severely prejudiced the employee and cases where the agency knew or should have known it would not prevail on the merits when it brought the proceeding. This list is not all-encompassing and includes instances where a service is rendered to the federal work force or there is a benefit to the public derived from maintaining the action. *Naval Air Development Center and AFGE, Local 1928,* supra.

I believe an award of attorney fees serves the interests of justice in this case for a number of reasons. In the first place, the agency either knew or should have known it would not prevail on the charge of AWOL when it brought these proceedings. Its own Supervisor's Handbook defines Absence Without Leave as "*** time away from the work site that has not been approved or for which a request for leave has been denied ***". Management knew Roach's immediate supervisor, Sharon Arnold, had approved his request for three days administrative leave beginning February 26, 2002 and ending February 28th and that his travel orders authorized him to be away for the entire period.[2] Neither the travel orders nor the terms of his leave required Roach to return

[2] Roach was authorized to be away for three full days and, therefore, there was no need for him to contact his supervisor to obtain permission to return later on February 28th. Nor do I find merit in the assertion that his absence during that afternoon had an adverse impact on the agency's mission. Certainly, no evidence was offered showing this and I doubt the agency failed to make arrangements to cover his absence since it was not expecting him to return.

to the Charleston facility on the afternoon of the 28th. Indeed, Section T4030H of Appendix O of the Joint Travel Regulations specifically allows one day for commercial air travel in the Continental United States. All this was known to management and leads to the inescapable conclusion that Roach was not AWOL while attending a labor-management meeting at agency headquarters in Arlington, Virginia. AWOL only became an issue when Arnold changed her mind about the length of Roach's administrative leave after he returned to work on March 1st.

A careful reading of the travel regulations and examination of witnesses relied on by the agency would have shown, moreover, that its interpretation of AWOL was erroneous. Section 1059A makes clear that travel orders establish when travel status starts and ends and, as previously mentioned, Section T4030H of Appendix O specifically allows one day for travel by commercial air in the Continental United States. Absent an explicit directive requiring Roach to return sooner, he was entitled to travel anytime before midnight on February 28th and careful review of the regulations would have alerted management to this fact. Section C1059 does not order employees on TDY to return to their permanent duty station by the earliest available transportation the day after completing their assignment, as the agency argues and, therefore, does not provide the mandate needed to support a charge of AWOL in this case. Rather, it seeks to avoid the improper denial of per diem and travel allowances by telling administrators it is not unreasonable for an employee to do so to avoid traveling between 2400 and 0600 hours.[3] Nor does the e-mail sent by Labor Relations Specialist, Teresa Briley on February 19, 2002 supply the missing command, even though it advised union representatives they should return by the first available flight following the labor-management meeting of February 27th.because Briley

[3] Section C1059A,2 requires travel to be scheduled between 0600 and 2400 hours.

considered her memo neither an order nor a directive but merely guidance which the union representatives could accept or ignore. What's more, Labor Relations Officer, Darryl Roberts didn't care if the officials returned by the first available flight or not. This information certainly should have been discovered in the exercise of due diligence and, had it been, should have drawn management's attention to the fact that an essential element of its case was missing.

The agency would have learned the lack of candor charge was equally deficient had it conducted a prudent inquiry into the evidence presented by Roach on March 21, 2002. Roach made a passing comment about the unfairness of the AWOL accusation against him while discussing the agency's smoking policy and a survey being sent to bargaining unit employees with Director, David Gates on March 18th. Gates asked for the flight numbers and assured Roach the AWOL charge would be withdrawn if he could substantiate the fact that Roach had been unable to return on the 8:45 AM flight from Regan National Airport on February 28th. Roach gave him the information and Gates subsequently learned Roach had been scheduled to leave on the 8:45 flight but had changed the reservation. Gates confronted Roach with this information on March 21st and accused him of lying about his inability to return on the early morning flight. Roach admitted his wife cancelled the reservation when he told her union representatives were meeting after the get-together with management to discuss bargaining strategy and that their deliberations were expected to last into the wee hours of the morning. Roach learned his reservation had been changed to an afternoon flight after the strategy session ended at 1:00AM. He tried to obtain a seat on the earlier flight but was unable to do so because it was full and, therefore, returned the afternoon of February 28th. Gates was not interested in Roach's explanation, however, and failed to investigate the state of affairs surrounding the change in flights to determine if they were true. Had he done so and considered the information against the background of Roach's March 18th

statements, Gates would have ascertained that the lack of candor charge was without merit because Roach had not intentionally misrepresented or concealed material facts.

Furthermore, an award of attorney fees is warranted in the interest of justice because the action in this case rendered a service to the federal work force, in my opinion. The agency admitted it held union representatives to a higher standard of conduct than rank and file employees and, for that reason, suspended Roach even though others received less punishment for being AWOL. I held the agency infringed upon an employee's right to act as a labor organization representative and engage in collective bargaining in violation of 5 USC Section 7102(1)&(2) and infringed upon an employee's right to form, join or assist a union without fear of penalty or reprisal in violation of Article 3, Section 1 of the Master Agreement by doing so and ordered it to cease holding union officers to a higher standard of conduct in the future. I also determined the agency violated the same statutory and contractual provisions, as well as 5 USC 7116 (a)(1)&(5), by barring Roach from its facility while he was suspended and suggesting employees seek representation from other officials because it has no right to select the union's representatives or choose the officials it will deal with. The agency was also directed to cease this behavior. Finally, I concluded the agency failed to provide the union with the narrative report explaining the factors used in selecting the fourteen day suspension or all disciplinary information regarding its treatment of AWOL charges needed to realistically assess the weaknesses or strengths of Roach's grievance in violation of 5 USC Section 7114(b)(4) and Article 4, Section 3 of the Master Agreement and ordered it to refrain from doing so in the future. These findings certainly benefit federal employees at the Charleston facility.

Having concluded Roach is entitled to an award of attorney fees in this case, the question then become what constitutes a reasonable fee? The method of computing attorney fees that has

been accepted by administrative bodies and most courts is known as the "lodestar" concept, wherein the attorney's customary hourly billing rate is multiplied by the number of hours reasonable devoted to the case. *Naval Air Development Center and AFGE, Local 1928*, supra. Mr. Kirsch, a salaried staff attorney employed by the national union, has no customary hourly billing rate but this does not defeat Roach's claim because litigants who employ union staff counsel are not barred from receiving market-rate attorney fees when the same are deposited into a separate fund controlled exclusively by lawyers and used solely to support litigation on behalf of employees' rights. *Larry Raney v Federal Bureau of Prisons,* (Fed. Cir, 2002) 222 F3rd 927, *Blum v Stenson,* 4665 US 886, 894-96 (1984), *Kean v Stone,* (3rd Cir. 1992) 966 F2nd 119, *American Federation of Government Employees, AFL-CIO, Local 3882 v Federal Labor Relations Authority,* (DC Cir 1991) 944 F2nd 922 and *Curran v Department of Treasury,* (9th Cir 1986) 805 F2d 1406. The appropriate market rate, moreover, is that where the attorney practices, not where the hearing is held. *Corpus Christi Army Depot and American Federation of Government Employees, Local 2142, et al.,* 58 FLRA No. 17 (2002).

The fairness of the fees being sought must, therefore, be measured by the market rate charged by comparable attorneys in Atlanta, Georgia where Mr. Kirsch now practices. Mr. Kirsch was graduated from the American University Law School in 1977 and completed a graduate course in Federal Sector Labor Relations at Georgetown University in 1978. He is admitted to the Georgia and DC Bars and is a member of the bar of The Supreme Court of The United States, as well a number of District Courts and Circuit Courts of Appeal. He joined the staff of the national union in 1979 and since then has devoted his time to representing federal employees before the Merit Systems Protection Board, the Federal Labor Relations Authority, U. S. District Courts, U.S. Courts of Appeal and in federal sector arbitrations. In addition, Mr. Kirsch has briefed and

argued cases before the Supreme Court of The United States; is an Adjunct Professor of Employment Law at Kennesaw State University and has published articles on the subject in the Federal Labor Relations Reporter. Affidavits submitted from attorneys specializing in federal employment matters attest that the market-rate in Atlanta is somewhere between Two Hundred and Three Hundred Dollars per hour.[4] The updated Laffey Matrix for 2002, moreover, suggests an hourly rate of Five Hundred Twenty-Two Dollars would not be unwarranted for attorneys, such as Mr. Kirsch, with twenty or more years experience. The market rate of Two Hundred Twenty-Five Dollars per hour being requested is at or below that charged by attorneys with comparable experience in the metropolitan Atlanta area and, in view of Mr. Kirsch's background, is not unreasonable, in my judgment.

Mr. Kirsch submitted a statement claiming three hundred thirty-two hours were expended representing Roach between August 26, 2002 and August 12, 2003. These included interviews with Roach and other witnesses; legal research regarding the substantive charges and study of Joint Travel Regulations and Comptroller General decisions regarding an employee's obligation to return from TDY on the first available flight the day after the assignment ends. Additional time was spent attempting to persuade management to change its mind concerning Roach's bar from the Charleston facility. Lengthy requests for information and documentation were prepared and discussed with agency counsel. Numerous letters were exchanged between counsel to arrange interviews with potential witnesses; discuss the relative merits of objections raised to producing

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[4] One affiant having more than thirty years experience bills at $250.00 an hour while another with eleven years experience charges his time at $300.00 an hour. A third with twenty-eight years experience bills at $240.00 per hour.

some of the requested information and whether compliance with the requests was had.[5] Time was expended in successfully defending Roach against charges of unsatisfactory performance which were dropped during the grievance procedure and in preparing witnesses for the hearing which took five days. Evidence was presented in support of the unfair labor practice charges brought against the agency as well as that presented on Roach's behalf. Significant time was expended preparing a post-hearing brief on all issues and the Application for Attorney Fees. While the agency contends the hours attributed to research should be scrutinized, no evidence was offered to suggest the same were not expended or were inflated. The statement submitted by Mr. Kirsch indicates that only thirty-three and a half of the three hundred thirty-two hours claimed were spent researching the many issues raised in this case and I do not believe this is excessive or inflated, especially when one considers the time was spent over the period of one year. Consequently, I think the number of hours being claimed is fair and an award of attorney fees in the amount of Seventy Four Thousand Seven Hundred and 00/100 Dollars, ($74,700.00) is reasonable Mr. Kirsch also submitted receipts showing he incurred expenses in the amount of One Thousand Nine Hundred Seventy-eight and 48/100 Dollars ($1978.48) while representing Roach in this matter and these should be recovered as well.

The fee will not be paid directly to Mr. Kirsch, of course, but to the AFGE Legal Representation Fund which is kept under the exclusive control of the national union's General Counsel in Washington, DC. The fund is used to support litigation brought for or on behalf of bargaining unit employees represented by AFGE to advance or enforce their constitutional and

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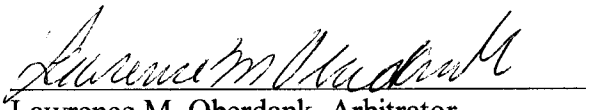
[5] The union suggests the agency purposely raised frivolous objections; engaged in dilatory tactics and failed to produce documents and witnesses to frustrate its ability to represent Roach successfully. No evidence proves this to be the case, however, and any notion that the agency did so played no part in my determination.

statutory rights. It is not used to support political, organizing or legislative activities; to support litigation or other activities relating to internal union matters or matters involving internal union discipline. Nor is it used to support activities related to AFGE internal staff labor relations or health program matters. The fund then satisfies the requirements enunciated in *Raney v Federal Bureau of Prisons,* supra and is a proper recipient of the award.[6]

AWARD

The Application for An Award of Attorney Fees in the amount of Seventy Four Thousand Seven Hundred and 00/100 Dollars, ($74,700.00) is granted. The agency will pay this amount together with expenses in the amount of One Thousand Nine Hundred Seventy Eight and 48/100 Dollars to the AFGE Legal Representation Fund.

Respectfully submitted,



Lawrence M. Oberdank, Arbitrator

This award made at Savannah, Georgia
this 13th day of October, 2003.

[6] There is no need to address the requirement that the award of fees be set out in a fully articulated, reasoned decision because I believe this award satisfied that standard.