U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

MICHAEL COLLINS,

COMPLAINANT,

v.

VILLAGE OF LYNCHBURG, OHIO,

RESPONDENT.

ARB CASE NO. 07-079

ALJ CASE NO. 2006-SDW-003

DATE: September 11, 2009

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul H. Tobias, Esq., and David G. Torchia, Esq., *Tobias, Kruas & Torchia,* Cincinnati, Ohio

For the Respondent:
Fred J. Beery, Esq., Lynchburg Village Solicitor, Hillsboro, Ohio

ORDER ON ATTORNEY'S FEES

On March 30, 2009, the Administrative Review Board (ARB or Board) issued a final decision and order affirming the Administrative Law Judge's (ALJ's) Recommended Decision and Order in this case.[1] We concurred with the ALJ's determination that the Village of Lynchburg, Ohio, violated the employee protection provisions of the Safe Drinking Water Act

[1] *Collins v. Village of Lynchburg, Ohio*, ARB No. 07-079, ALJ No. 2006-SDW-003 (ARB Mar. 30, 2009).

(Act) when it terminated the employment of the complainant, Michael A. Collins.[2] We also concurred with his award of back pay and compensatory damages. But we reversed his award of punitive damages. On June 30, 2009, we issued a decision affirming the ALJ's recommended Attorney Fee Order of $69,643.84 in attorney's fees and costs for work performed before the ALJ.[3]

Before us now is Collins's May 1, 2009 petition for award of $12,787.50 in attorney and paralegal fees for work performed before this Board.[4] Collins served his current fee petition on the Village's counsel. The Village has not filed an opposition. We therefore review the petition for compliance with applicable standards.

DISCUSSION

The Act provides that, in a case in which the Secretary issues an order in favor of a complainant, the Secretary may order the respondent to pay all costs and expenses, including attorney's fees, "reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued."[5] Generally, the lodestar method of calculation is used, which requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate.[6]

The party seeking a fee award must submit evidence documenting the hours worked and the rates claimed. A "complainant's attorney fee petition must include 'adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area,' as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs."[7] If the documentation of hours is inadequate, the award may be reduced accordingly.[8]

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[2] 42 U.S.C.A. § 300j-9(i) (West 2006).

[3] *Collins v. Village of Lynchburg, Ohio*, ARB No. 09-040, ALJ No. 2006-SDW-003 (ARB June 30, 2009).

[4] The total listed is the Board's calculation because counsel has not provided us with a grand total of attorney and paralegal fees requested. With respect to that portion of the fee request for which he has provided a total, multiplication of the hours requested by the hourly rate requested does not yield the totals listed in the fee application. For the reasons stated below in this decision, we have not attempted to correct counsel's calculations.

[5] 42 U.S.C.A. § 300j-9(i)(2)(B)(ii).

[6] *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

[7] *Gutierrez v. Regents, Univ. of Cal.,* ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 11 (ARB Nov. 13, 2002); *Fabricius v. Town of Braintree/Park Dep't*, ARB No. 97-144, ALJ No. 1997-CAA-014, slip op. at 8 (ARB Feb. 9, 1999).

Here, counsel's request for time before July 24, 2007, states that "counsel spent 18.30 hours preparing the petition for fees, reviewing Respondent/s appeal and Respondent's brief, reviewing the ALJ decision again, reviewing Complainant's previous briefs, and memos and writing Complainant's brief."[9] Rather than providing detailed records identifying the date, time, and hours necessary to accomplish each activity, counsel has provided his affidavit attesting to the total amount of time expended, and computer print-outs purporting to show attorney time expended. The print-outs list hours with accompanying notations such as "Fees:Fee/Atty.tim:Review Docs" or "Fees: Fee/Atty.tim:Research." Counsel left it to the Board to attempt to determine what document or pleading each entry referenced.

Counsel has also submitted a request for hours from July 24, 2007, through April 30, 2009, supported only by computer print-outs and the affidavit of Patricia M. Losacker, counsel's legal assistant. Losacker's affidavit states, "Attached as Exhibit 1 and 2 are records for attorney Paul H. Tobias and paralegals Grant Swartzentruber and Chris Cline which I retrieved from QuickBooks for the period July 24, 2007 to April 30, 2009." Exhibits 1 and 2 are print-outs containing notations such as "Fees:Fee/Atty.Time" or "Fees:Fee/Atty.tim:Draft." Finally, counsel has provided us with a statement entitled "Activities of Attorney Paul H. Tobias in Representing Complainant Michael Collins since the Period Covered by the ALJ Award." The "Activities" statement (not in chronological or any other discernible order), without affidavit, simply lists the attorney's work on the case for all time frames covered by the fee petition. The "Activities" statement does not indicate the amount of time spent on that work. Two of the items on the "Activities" list appear duplicative: item 1, "Complainant's response of May 14, 2008 to Respondent's reply to show cause order," and item 3, "Preparation of Complainant's response to Respondent's reply to show cause order and filing of response dated May 14, 2008."

We find the fee petition inadequate. Relying only on the supporting documentation counsel submitted, we cannot determine the amount of time actually expended on each listed activity; therefore, we will examine the work recorded on the activities list and the pleadings submitted in this case to determine an appropriate fee.

We disallow all time spent preparing the fee petition before us because the petition is clearly inadequate. We will, however, allow 2 of the 5 hours requested for preparation of the fee petition before the ALJ because the ALJ relied on counsel's petition in preparing his Attorney Fee Order. Since the Complainant's response to the Respondent's brief on the merits was largely duplicative of the Complainant's post-trial brief, we allow 3 hours for preparation of the response. We allow 15 minutes for review of the ALJ's show cause order and 1 hour for preparation of the Complainant's May 14, 2008 response to the order. We allow 1 hour and 15

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[8] *Hensley*, 461 U.S. at 433 (court may reduce the fee award where the documentation is inadequate).

[9] Based on our analysis of the remainder of the fee petition, we suspect that counsel meant to say "18.5 hours."

minutes for review of the ALJ's Attorney Fee Order and 30 minutes for review of the Respondent's petition for review of the ALJ's Attorney Fee Order. We allow 2 hours for preparation of the Complainant's response to the Respondent's petition for review of the ALJ's attorney fee order and supporting brief. Finally, since we are unable to determine what documents the paralegals reviewed or what research they performed, and since the Losacker affidavit does not further enlighten us on the paralegal work, we disallow all paralegal time.

We turn now to the hourly rate requested. In support of his hourly rate request, counsel states, "For the reasons set forth in our original brief, we request that Paul H. Tobias' rate of $350.00 be used rather than the $300.00 set by the ALJ."[10] The ALJ's Attorney Fee Order thoroughly and fairly discussed and evaluated the request for an hourly rate of $350 and correctly applied the relevant law. He also acknowledged problems with the Complainant's fee petition similar to the problems we have encountered: "Even if I were inclined to award fees at a slightly higher hourly rate, there is the problem of the difficulty of my correlating the hours reported with attorney services rendered, as referenced."[11] We therefore adopt the $300 hourly that the ALJ awarded.

Collins's attorney has not submitted an appropriately itemized and documented attorney fee application. We reduce the requested hours for work before the ALJ and the Board to 10 hours and award an hourly rate of $300 for a total attorney's fee award of $3,000.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

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[10] Memorandum in Support of Petition at 2.

[11] ALJ Order at 4.