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NTSB Order No. EA-4612

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of December, 1997

BONNIE LEE MENDENHALL, Applicant, v. JANE F. GARVEY, Administrator, Federal Aviation Administration, Respondent.	)	Docket 150RM-EAJA-SE-12564

OPINION AND ORDER

Applicant appeals from the initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued on November 14, 1996, partially granting applicant's application pursuant to the Equal Access to Justice Act (EAJA). We grant the appeal, in part.

This is the second time we have been asked to review applicant's EAJA application. The first time, we affirmed the

law judge's denial of applicant's request for fees and expenses.[1] Applicant appealed to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"), which reversed our order and remanded the case for a determination of the fees and expenses recoverable by applicant.[2] On remand, the law judge awarded applicant $8,559.93 in attorney's fees and expenses.[3]

Applicant raises three issues in her brief. First, she claims that the law judge erred in denying recovery for $10.98 expended for photocopying and postage.[4] Second, applicant argues that all fees awarded should be based on an hourly rate of $300 per hour. Finally, applicant argues that the law judge erred in not awarding attorney's fees and expenses incurred in prosecuting her appeal before the Ninth Circuit.

Applicant argues that because the Ninth Circuit ordered that applicant be reimbursed at a "reasonable market rate" for attorney's fees and expenses, the rate ceiling specified in our regulations is inapplicable. The Ninth Circuit appears to have invoked the provisions of 28 U.S.C. § 2412(b) when, after

[1] Mendenhall v. Administrator, NTSB Order No. EA-4121 (1994).

[2] Mendenhall v. National Transp. Safety Bd., 92 F.3d 871 (9th Cir. 1996).

[3] A copy of the law judge's initial decision is attached.

[4] Our review of the record convinces us that the $10.98 expense was for "photocopying and postage" associated with a motion to strike, Applicant's Brief, App. III, p. 2, and the Administrator raises no objection. Administrator's Brief at 2-3. Accordingly, reimbursement of this expense is granted.

concluding that the "FAA . . . acted in bad faith," it ordered that applicant be reimbursed for attorney's fees "at a reasonable market rate." Mendenhall, supra, at 877. Section 2412(b), through its incorporation of common law, authorizes an award of attorney's fees and expenses when the United States has acted in bad faith and, unlike other provisions of EAJA, such awards are not subject to a rate ceiling. See, e.g., Brown v. Sullivan, 916 F.2d 492, 495 (9th Cir. 1990); Hyatt v. Shalala, 6 F.3d 250, 254 (4th Cir. 1993). We will not second-guess the Court's "bad faith" determination, but we are compelled to address a jurisdictional difficulty we perceive in the Court's decision.

Separate EAJA provisions exist for agency administrative proceedings, as opposed to judicial proceedings. Title 28, section 2412, authorizes a "court" to reimburse costs and fees for "any civil action . . ., including proceedings for judicial review of agency action . . . ." 28 U.S.C. § 2412(d)(1)(A). Title 5, section 504, in contrast, authorizes an agency to award costs and fees in an adversary adjudication. 5 U.S.C. § 504(a)(1). In both cases, fee caps of $125 are now applicable, with the court authorized to increase the cap by fiat and the agency authorized to increase the cap by regulation. 5 U.S.C. § 504(b)(1). The Board has done so, pegged to cost of living increases (COLA) demonstrated by the Consumer Price Index. Certain showings, however, must be made (notably evidence of the attorney's customary fees for similar services and the prevailing rate for similar services in the community in which the attorney

ordinarily performs services). 49 C.F.R. § 826.

Agencies have no authority under Title 5 comparable to 28 U.S.C. §§ 2412(b) or 2412(c)(2). That is, aside from the COLA increases, the only authority in Title 5 to award fees above the statutory cap is section 504(b)(1)(a)'s reference to a "special factor." We are unaware of any case under Title 5 defining this term to include government bad faith. See Pierce v. Underwood, 487 U.S. 552, 571-573 (1988) ("special factors" discussed). Indeed, the only bad faith recognized in section 504 is that of an applicant. There is no provision in section 504 corresponding to section 2412(b), with its reference to common law liability of the government. With this preface, we nevertheless see no reason not to proceed as the Court has directed. We can consider the matter as a sort of delegation, understanding that enforcement of our order is problematic, and on review the Court is free to modify our conclusions. We, thus, turn to the question of counsel's fees.

On the issue of reasonable market rate, "[t]he fee applicant has the burden of producing satisfactory evidence . . . that the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." Jordan v. Multnomah County, 815 F.2d 1258, 1263 (9th Cir. 1987) (citing Blum v. Stenson, 465 U.S. 886, 895, n. 11); National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1337 (D.C. Cir. 1986) (Tamm, J., concurring) (clarifying that in fee applications, "[t]he

burden of proof is, of course, on the applicant and remains with the applicant throughout the proceedings"). Moreover, as an example of adequate proof, "affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases provide prevailing community rate information." National Ass'n of Concerned Veterans, 675 F.2d at 1325 (emphasis added); accord Schwarz, 73 F.3d at 908 ("[t]o inform and assist the court in the exercise of its discretion, the fee applicant has the burden of producing satisfactory evidence, in addition to the affidavits of its counsel, that the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation") (emphasis added) (quoting Jordan, supra, at 1263). Our rules require the same. 49 C.F.R. § 826.6(c)(2).

Applicant argues that, because she is a resident of California and her attorney practices in Washington, D.C., "the relevant community in this case [for purposes of determining market rate] consists of those attorneys engaging in the practice of aviation law in Washington, D.C., and California." Applicant's Brief at 22. The Ninth Circuit petition, which is appended to applicant's current application, contains an affidavit in which her attorney states that the market rate for his services is $300 per hour. There are also affidavits from four other attorneys who, like applicant's attorney, purport to specialize in aviation matters. Two of these attorneys practice

in Washington, D.C., and their affidavits indicate that they both typically charge $315 per hour. The other two attorneys practice in California, and their affidavits indicate that they typically charge $260 an hour and $250 per hour. Applicant's Brief, App. VI, Exhibits ("Ex.") 1-5.[5] The Administrator argues that the affidavits do not establish the reasonable market rate for applicant's attorney's services.[6]

We do not think applicant has satisfied her burden of demonstrating that the appropriate market rate for her attorney's services is $300 per hour.[7] See, e.g., Schwarz, 73 F.3d at 908-909 (rejecting as insufficient an application containing proof somewhat similar to that offered by applicant). Even if we accepted applicant's argument that the relevant measuring

[5] No other exhibits are offered by applicant in support of her claim that the market rate for her attorney's services is $300 per hour.

[6] The Administrator also argues that because every invoice submitted with applicant's application indicates that applicant was billed at a rate of $150 per hour by her attorney, any award greater than $150 per hour would result in a "windfall" for applicant. In support of this argument, the Administrator notes that one of the purposes of EAJA is to mitigate deterrents to challenging unreasonable government conduct. Administrator's Brief at 4-6. While we would normally agree with this characterization of EAJA, we think that the argument is misplaced given the Ninth Circuit's direction. The "bad faith" exception in 28 U.S.C. § 2412(b) has been construed to be "punitive" in nature. See, e.g., Brown, 916 F.2d at 495.

[7] We reject applicant's argument that we must award fees at the requested rate of $300 per hour because the Administrator did not timely object to applicant's Ninth Circuit petition. Applicant's principal authority for this proposition is a Ninth Circuit procedural rule which has no bearing on our process.

community is "attorneys engaging in the practice of aviation law in Washington, D.C., and California,"[8] the affidavits in applicant's fee application merely contain a brief recitation of the affiants' experience, training, and usual hourly rate. There is no information on the type of work the affiants typically perform, other than a general description of "aviation matters," in order to earn their stated hourly rate. We do not believe -- as applicant apparently does -- that cases can be deemed "comparable" for the simple fact that they both pertain to aviation matters. For example, aircraft accident liability litigation is far different from enforcement proceedings such as this one. Cf. Gay v. Administrator, NTSB Order No. EA-3763 at 6-7 (1993) (stating, in the context of EAJA's "special factors" exception to the rate ceiling, that "the aviation law expertise of applicant's attorney, however extensive it may be, does not qualify for an increased fee"). Moreover, although applicant cites to cases where rates of $300 or more per hour were awarded, she offers no argument as to why the work performed in those cases is analogous to that of her attorney in this case. Simply put, applicant has not afforded us a sufficient basis for comparing the work performed by applicant's attorney in this case to other instances where a rate of $300 per hour was found to be reasonable.

[8] Doing so would be contrary to our own rule, which considers the rate in the community in which the attorney normally works -- in this case, Washington, D.C. 49 C.F.R. § 826.6(c)(2).

Rather, we think the record evidence demonstrates that the reasonable market rate for the type of services rendered by applicant's attorney in this case is $150 per hour. Aside from her attorney's claim that the market rate for his services is $300 per hour, there is nothing in applicant's fee application that explains why the $150 per hour indicated on the invoices from her attorney is not a true reflection of the market for these services. See National Ass'n of Concerned Veterans, 675 F.2d at 1326 ("the actual rate that applicant's counsel can command in the market is itself highly relevant proof of the prevailing community rate").[9]

Turning to the fees and expenses incurred on appeal to the Ninth Circuit, applicant filed with the Ninth Circuit a petition for their reimbursement ("petition" or "Ninth Circuit petition").

[9] Applicant's attorney asserts, in general language, that "[o]cassionally [sic], I lower my billing rate, in the interest of justice, for clients who are unable to pay the market rate." We note, however, that applicant's attorney does not mention any specific decision or agreement with applicant to depart from his claimed normal rate of $300 per hour. Applicant's Brief, App. VI, Ex. 1; compare National Ass'n of Concerned Veterans, 675 F.2d at 1326 (the "rate is not what [counsel] would have liked to receive, or what the client paid in a single fortunate case, but what on average counsel has in fact received") with applicant's attorney's affidavit ("$300 per hour is the highest rate that clients with the ability to pay are willing to pay for my services"). We also note that applicant offers no proof (e.g., billings) of a rate of $300 per hour, and the fee claimed by applicant's attorney in a case currently before us was $125 per hour. Allen v. Administrator, NTSB Docket No. 234-EAJA-SE-14453; see National Ass'n of Concerned Veterans, 675 F.2d at 1326 ("[a] fee applicant should be required to state the rate at which he actually billed his time in other cases during the period he was performing the services for which he seeks compensation").

The Ninth Circuit responded by ordering, on October 25, 1996, that the Board "reimburse Petitioner at a reasonable market rate for attorneys' [sic] fees and expenses incurred during this appeal."[10] The petition claims that applicant's attorney expended 141 "billable" hours on the Ninth Circuit appeal. The petition also claims $1,961.00 in expenses. Applicant's Brief, App. IV at 5-10. The documentation is adequate, and we do not discern the time expended to be excessive. Nor do we find anything objectionable in applicant's request for $1,961.00 in expenses, and we grant those. Thus, applying a rate of $150 to applicant's entire fee claim -- the 73 hours and 10 minutes expended in connection with the administrative proceedings before this Board, as well as the hours expended during the appeal to the Ninth Circuit -- we modify the law judge's award to $32,125.00 in fees, and $2,038.82 in expenses.[11]

Applicant has also submitted a supplemental application for an award of fees and expenses incurred in this appeal from the law judge's decision. Applicant seeks reimbursement "at the reasonable market rate" for 21 hours and 30 minutes of "billable"

[10] The law judge's decision was based, apparently, on applicant's original EAJA application and several supplemental requests filed thereafter, but it made no reference to the fees and expenses requested in applicant's Ninth Circuit petition.

[11] We further note that, under 5 U.S.C. § 504, the maximum fee we can award for adversary adjudication is $125, as increased by the formula in 49 C.F.R. § 826.6. That amount is now $130 per hour for work performed in 1996.

attorney time, and $75.22 in expenses.[12] Applicant's Fourth Supplemental Amendment to Application for Fees and Expenses at 2. The Administrator has not responded to this supplemental claim, but we think the fees claimed are excessive. Applicant's supplemental application claims that applicant's attorney expended "8:45 for analysis of [the law judge's] decision and legal research [on] agency bad faith, 28 U.S.C. [§] 2412(b), and [the] effect of failure to oppose [an] application for fees; 10:30 for drafting [the] notice of appeal and [the] appeal brief; and 2:15 for collection and compilation of appendices." We think it unreasonable to charge for research on "agency bad faith" when that issue was previously and conclusively determined in applicant's favor by the Ninth Circuit. Moreover, much of applicant's appeal brief -- including the sections pertaining to "agency bad faith" and section 2412(b), as well as those setting forth the facts and procedural history of the case -- merely reiterates content and language from applicant's Ninth Circuit petition. Based on these considerations we think that applicant's claim -- particularly because it seeks reimbursement for all time expended at the hourly rate of an experienced attorney -- should be reduced by five hours to a total of 16 hours and 30 minutes. See Hensley v. Eckerhart, 461 U.S. 424,

[12] Applicant's supplemental application claims that the reasonable market rate for her attorney's services is $300 per hour, but, consistent with our above discussion, we will apply a rate of $150 per hour.

433-37 (1983) ("[t]he district court . . . should exclude from this initial fee calculation hours that were not 'reasonably expended'"); Norman v. Housing Auth. of Montgomery, 836 F.2d 1292, 1301 (11th Cir. 1988) (billing judgment "must necessarily mean that the hours excluded are those that would be unreasonable to bill a client and therefore to one's adversary"). This modification reflects our judgment that proper exercise of billing judgment would result in a reduction of the hours claimed by, at least, five hours. Thus, applying a rate of $150 per hour, and adding the $75.22 claimed for expenses, we calculate an additional award of $2,550.22 for fees and expenses associated with this appeal.[13]

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is partially granted; and

2. The initial decision awarding $8,559.93 in attorney's fees and expenses is modified, and the Administrator shall pay applicant a total of $36,714.04.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

[13] Applicant has also submitted two short briefs that discuss "supplemental authority" to which the Administrator has not responded. Both of these briefs were filed after applicant's deadline for filing her appeal brief, and neither provides any indication that the authorities cited were decided after applicant had filed her brief. We do not think that the cited authority can be deemed "new," and as such these briefs are unauthorized and will be stricken. 14 C.F.R. 821.48(e). Accordingly, applicant's request for an additional $2,196.00 in fees for the preparation of these briefs is denied.