UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

SOL Docket No. 09-0177

Charles McDonald,

Complainant

v.

Tom Vilsack, Secretary,
United States Department of Agriculture,

Respondent

MISCELLANEOUS OPINON AND ORDER AS TO APPLICATION FOR ATTORNEY FEES and COSTS OF BENJAMIN WHALEY LE CLERCQ & THE LE CLERCQ LAW FIRM

This matter is before the Administrative Law Judge for approval of the application for attorney fees and costs in the amount of $312,085.22 which has been submitted in this action by Benjamin Whaley Le Clercq and the Le Clercq Law Firm for services provided by Mr. Le Clercq as attorney, the services of his law clerk and paralegal and for costs incurred.[1] The record reflects that the application was served upon Counsel for the Respondent and that despite efforts to do so, no agreement was reached between the Respondent and Mr. Le Clercq as to his fees and costs. A Response and Supplemental Response has been filed objecting to portions of the billings and asking for an across the board reduction in the amount awarded. The objections raised by the Respondent include legitimate concerns over hours billed for matters outside the scope of

[1] The application filed by Mr. Le Clercq has three components. $251,125.00 is requested as an attorney fee, $56,615.00 is requested for the services of the law clerk and paralegal and $4,345.22 is request for costs.

the litigation before me, the number of hours billed, the lack of evidence to support the proposed hourly rate (which well exceeds that currently allowed in USDA cases[2]), the lack of documentation to support the number of hours billed, the absence of specificity which would allow identification of what issues specific hours were spent upon, redundancy in the hours billed, the absence of receipts or other documentation to support the expenses sought, and the number of hours requested for preparation of the attorney fee application. On September 29, 2010, Mr. Le Clerq sought to supplement his application and advised that he was optimistic that a settlement would be reached the following day; however, as significant time has passed since that communication, I will consider his supplemental material untimely filed and proceed to resolve the issues involved with the application for fees and costs.[3]

As noted in the Decision and Order entered in this case, the costs of the action and attorney fees are added to the award. 15 U.S.C. §1691e(d). Traditionally, the usual starting point for determining the amount of a reasonable fee is an examination of the number of hours reasonably expended multiplied by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Reasonableness is required in both the number of hours billed and the rate sought and parties seeking an award "should submit evidence supporting the hours worked and the rates claimed." *Id.* at 433, 437.

Where, as in this case, the fees and costs are being paid pursuant to the Equal Access to Justice Act (EAJA) (*See*, 7 C.F.R. §15f.25), three separate issues must be

[2] *See: In re: Sanford Skarsten and Carol Skarsten*, 59 Agric. Dec. 133 (2000); *Petition for reconsid. and Correction granted*, 59 Agric. Dec. 144 (2000); *In re: Dwight L. Lane and Darvin R. Lane*, 59 Agric. Dec. 148 (2000); *In re: Sum Mountain Logging, LLC, Sherman G. Anderson, and Bonnie Anderson*, 66 Agric. Dec. 1127 (2007).

[3] Application for the award of fees are required to be submitted to the ALJ within 30 days. 7 C.F.R. §15f.25. No request timely or otherwise was made for leave to supplement the application. I will also consider the letters from attorneys in the Philadelphia and Miami areas as untimely.

decided: whether the Complainant is a prevailing party, whether the Secretary's position was substantially justified, and exactly what fees and costs submitted by the Complainant are allowable.[4]

The framework for the analysis of a party's status as a "prevailing party" is set forth in *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.*, 532 U.S. 598 (2001) ("*Buckhannon"*). In *Buckhannon*, the Supreme Court surveyed its precedent on the issue of prevailing parties and made several observations. Initially, the Court noted that the term "prevailing party" is a legal term of art and that in accordance with both its precedent and Black's Law Dictionary a prevailing party is "one who has been awarded some relief by the court." *Buckhannon* at 603. The Court found that a party must "receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 604 (*quoting Hewitt v. Helms,* 482 U.S. 755, 760 (1987)). Even an award of nominal damages will suffice. *Id. (citing Farrar v. Hobby,* 506 U.S. 103 (1992)). Similarly, the Court looked at whether there was a court ordered change in the legal relationship of the parties. *Id. (citing Texas State Teacher's Assn. v. Garland Independent School Dist.*, 489 U.S. 782 (1989). In the instant case, the requirement to be a prevailing party has been met.

By statute, no award can be given if the position of the United States was substantially justified….28 U.S.C. §2412(d)(1)(A). The burden of proof is upon the Secretary. *Lundin v. Mecham,* 980 F. 2d 1450, 1459 (D.C. Cir. 1992). The findings set forth in the decision in this action need not be recounted in reaching a conclusion that

[4] Additional separate applications for fees and costs were previously decided as to the application of Michael W. Beasley and his former firm Wood, Bohm, Francis & Morrison, LLP which were stipulated by the Respondent and the costs of the economic damages analysis prepared by Snavely King Majoros O'Connor & Bedell, Inc. which were reduced for the reasons set forth in the Miscellaneous Opinion and Order entered on September 27, 2010.

although the Complainant prevailed on a number of issues, the position of the Respondent was upheld on others. Where a party prevails on some, but not all issues, the award of attorney fees must be calculated so as to reflect only that portion of the billing which was successful and conversely to eliminate any excess upholstery portion which was expended on issues where the party did not prevail. In this action, consistent with evidence introduced during the oral hearing of this the Complainant raised thirteen assignments of error for which relief was sought in the post hearing brief. Post Hearing Brief, p 9-10.

Given the limited scope of the waiver of the statute of limitations contained in Section 741, only "the discrimination alleged in an eligible complaint" could be considered as not barred by the statute of limitations. Section 741(a). The term "eligible complaint" is well defined by statutory and regulatory provisions and is confined to those complaints filed before July 1, 1997 and which allege discrimination at any time between the period beginning on January 1, 1981 and ending on December 31, 1996. [5] Section 741(e). Accordingly, only those allegations previously filed during the specified period could be considered as eligible for relief. Even of the "eligible complaints," not all of the Complainant's requests for relief were sustained as the Agency's position was found to be substantially justified as to several issues, including eligibility for the 1984 Emergency (EM) loan, the February 1984 Operating (OL) and Farm Ownership (FO) denials of the partnership applications, and the 1986 application by Edna McDonald. Similarly, Petitioner's invocation of claims for relief under the Fifth and Fourteenth Amendment to the Constitution and the Civil Rights Act of 1964 fell outside my limited jurisdictional authority as an Administrative Law Judge.

[5] *See*, Footnote 14, *supra.*

As was done in the decision, identification of the specific allegations of discrimination reachable under Section 741 which were made during the pertinent time frame and which the Agency accepted for examination and investigation record was discernable by examining the two Reports of Investigation contained in the record. The issues presented by the Complainant at trial were not so confined and the time invested by Counsel in raising extraneous issues, even though possibly well intentioned, should not be compensated. Counsel for the prevailing party is ethically obligated to make a good faith effort to exclude from any fee request such hours that are excessive, redundant, or otherwise unnecessary, using appropriate "billing judgment." *Hensley* at 434. While it is not clear what remains in dispute at this point, the Agency's representation that despite well intentioned and reasonable efforts were made to reach a settlement concerning Mr. Le Clercq's fees and expenses, is clearly supported as the Respondent suggested only a very modest 25% reduction in the number of hours billed[6] and made significant other concessions in the Response and Supplemental Response. I would easily be justified in making a far more draconian reduction by finding the Agency position substantially justified on all but a portion of the three or arguably four of the thirteen issue shotgun approach employed during trial and set forth in the post hearing brief;[7] however, given the generous recommendation of the Respondent, latitude will be extended and I will allow a fee based upon 300 billable hours of attorney time.

In his application, Mr. LeClercq suggests that his "approved billing rate" is $410.00 per hour based upon the Laffey matrix adopted by the Civil Division of the

[6] With certain other reductions which are set forth in the Response and Supplemental Response to the Applications for fees and costs.

[7] The Court in *Hensley* noted that fee awards need not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. *Hensley* at 435, *citing Davis v. County of Los Angeles,* * E.P.D. ¶9444, at 5049 (CD Cal. 1974).

United States Attorney's Office for the District of Columbia. Under EAJA, the fees available to a prevailing party are "those reasonable and necessary expenses of an attorney incurred or paid in preparation for trial of the specific case before the court, which expenses are those customarily charged to the client where the case is tried." *Oliveira v. United States*, 827 F. 2d 735,744 (Fed. Cir. 1987). In setting an appropriate hourly rate, substantial discretion rests with the court and factors normally not considered include the difficulty of the issues, the ability of counsel, or the results received. *Pierce v. Underwood*, 487 U.S. 552, 572 (1988).[8] While it is clear that enhanced hourly rates are frequently awarded by Article III Courts using the Laffey or other matrices, **in the absence of a stipulation** as to fees at a higher rate, the Department's well established position which I am compelled to follow on the maximum rate allowable is currently $125.00 per hour and Mr. Le Clercq's quest for an enhanced hourly rate must be declined.[9] Accordingly, a fee of $37,500.00 will be allowed.

Although the Respondent withdrew its objection to the requested charges for law clerk and paralegal services, the application for such expenses is deficient in that it failed to set forth the "costs" expended by setting forth the hourly rate at which those employees are paid (rather than billed) by the law firm. Consequently, as the statute allows "costs," no amount will be awarded for fees for law clerk and paralegal services.

Last, the application requests $4,345.22 for costs and expenses incurred during the litigation, but failed to attach receipts for such expenses. While I will allow the photocopy expenses which were submitted without requiring an enumeration of the number of copies, all other expenses should have been supported with receipts or other

[8] The Court in *Hensley* however considered the results achieved to be significant. *Hensley* at 436.
[9] *See, Footnote 2, supra.*

documentation and will not be allowed. Accordingly, $1,701.73 will be awarded for costs and expenses.

Being sufficient advised, it is **ORDERED** as follows:

1. Attorney fees in the amount of $37,500.00 are awarded to Benjamin Whaley Le Clercq, Esquire for his representation of Charles McDonald in the above styled case.

2. As the record is silent as to the actual costs of the services of the law clerk and paralegal, no amount is awarded for such services.

3. The sum of $1,701.73 will be awarded for photocopy costs. As no supporting documentation or receipts were timely filed with the request for the other itemized costs, no amount is awarded for such costs.

Copies of this Order will be served upon the parties by the Hearing Clerk.

_____
Peter M. Davenport
Chief Administrative Law Judge

October 13, 2010

Copies to: Ben Whaley Le Clercq, Esquire
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