



In the Matter of:

**MARRITA M. LEVEILLE**  
**and**  
**DANIEL J. LEVEILLE,**  
  
**COMPLAINANT,**

**ARB CASE NO. 98-079**

**ALJ CASE NO. 94-TSC-3**  
**94-TSC-4**

**DATE: February 15, 2000**

**v.**

**NEW YORK AIR NATIONAL GUARD**  
**and SECRETARY OF THE AIR FORCE,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

David K. Colapinto, Esq., Stephen M. Kohn, Esq., *Kohn, Kohn, & Colapinto,*  
*Washington, D.C.*

*For the Respondent:*

Major Paul Sausville, *Latham, New York*

**ORDER GRANTING IN PART COMPLAINANT'S SECOND  
SUPPLEMENTAL APPLICATION FOR ATTORNEYS' FEES AND COSTS**

The Secretary of Labor issued a Decision and Order of Remand on December 11, 1995, finding in favor of Complainant Marrita Leveille in this case arising under several of the environmental whistleblower protection laws.<sup>1/</sup> The Secretary found that Respondents discriminated against Ms. Leveille by engaging in acts of blacklisting, and remanded the case to the ALJ for computation of damages, including attorneys' fees and costs. The Secretary dismissed Daniel Leveille's complaint as untimely.

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<sup>1/</sup> The Toxic Substances Control Act, 15 U.S.C. §2622 (1994); the Safe Drinking Water Act, 42 U.S.C. §300j-9(I) (1994); the Clean Air Act, 42 U.S.C. §7622 (1994); the Solid Waste Disposal Act, 42 U.S.C. §6971 (1994); the Clean Water Act, 33 U.S.C. §1367 (1994); and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9610 (1994).

As part of the proceedings before the ALJ on damages, on July 19, 1996, Complainant Marrita Leveille submitted an application for fees and costs incurred from the inception of the case in 1993 to June 17, 1996. The Administrative Law Judge issued a Recommended Decision and Order on remand on February 9, 1998, recommending payment of compensatory damages to Complainant and payment of attorneys' fees and costs for the period from 1993 to June 17, 1996. The ALJ permitted Complainant to submit a supplemental application for attorneys' fees and costs for the period after June 17, 1996, and on March 11, 1998, Complainant submitted such an application.

On April 17, 1998, the ALJ issued a Recommended Supplemental Decision and Order recommending the award of attorneys' fees and costs for work performed and costs incurred in litigating Marrita Leveille's complaint through March 11, 1998. The Administrative Review Board issued a Decision and Order on Damages on October 25, 1999, affirming the ALJ's award of damages and attorneys' fees and inviting Complainant to submit a supplemental petition for attorneys' fees and costs incurred after March 11, 1998.

Complainant submitted her Second Supplemental Application for Attorneys' Fees and Costs to the ARB on November 15, 1999, requesting \$51,532.35 in attorneys' fees and \$1,972.40 in costs above the amounts approved in our Order of October 25. The ARB directed Respondents to file their response to Complainant's supplemental petition for attorneys' fees and costs by November 25, 1999. On December 10, 1999, *i.e.*, fifteen days after their response was due, Respondents requested an extension of time to file their response. The ARB granted an extension until January 8, 2000. Respondents did not file a response within the time limitation of the Board's revised briefing order, but subsequently filed a Reply, dated January 12, 2000, to Complainant's Second Supplemental Application for Attorneys' Fees and Costs.<sup>2/</sup>

Complainant's Second Supplemental Application for Attorneys' Fees and Costs and the attached affidavits, as well as Respondents' Reply, have been reviewed. For the reasons discussed below, we agree, in part, with Respondents' argument that the claimed attorneys' fees and costs should be reduced, while disagreeing with some of Respondents' other contentions.

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<sup>2/</sup> Although dated January 12, 2000, Respondents' Reply was not received by the ARB until January 27, 2000. There is no information in the record to explain this delay, and Respondents did not submit a motion for leave to file their Reply out-of-time. Similarly, Respondents earlier had offered no explanation for the late filing of their December 10, 1999, request for an extension of time. To date, we have received no objection from Complainant to the most recent filing, *i.e.*, the substantive Reply to the attorney fee petition.

We have decided to accept and consider Respondents' Reply in this instance, notwithstanding these deficiencies. However, we note generally that attorneys who submit untimely pleadings to the ARB do so at great peril, particularly when no motion is presented requesting the Board's permission to submit the late filing.

Respondents argue that no attorneys' fees and costs should be awarded for work performed on Complainant's "Reply"<sup>3/</sup> brief before the ARB on review of the ALJ's Recommended Decision and Order on Damages because, in Respondents' view, Complainant was not successful in challenging the amount of damages awarded by the ALJ. We disagree. Complainant was successful in preserving the damage award recommended by the ALJ before the ARB. Attorneys' fees for work on that brief defending the ALJ's recommended award therefore were reasonably incurred as part of the successful litigation of Marrita Leveille's case.

We agree with Respondents, however, that the amount of attorneys' fees should be reduced because Complainant filed a 52 page "Reply" brief that exceeded the 30 page limitation in the Board's briefing schedule and order. In addition, Complainant filed a reply to Respondents' rebuttal brief that was not permitted by the briefing schedule. We note particularly that Complainant did not seek leave of the ARB to file a "Reply" brief substantially exceeding the page limitation, nor did Complainant seek leave to file the additional brief not contemplated by the ARB's briefing schedule. In our view, then, significant time was invested by counsel developing materials that were not authorized by the ARB's briefing order.

The ERA requires a respondent to pay only those costs, including attorney's fees, "reasonably incurred" in bringing a complaint. 42 U.S.C. §5851(b)(2)(B) (emphasis added). For example, where a complainant's attorney prepared and filed a brief on review by the Secretary several months late, and did not seek leave or provide any reason for the delay, a fee request for preparation of the brief was not reasonable and was properly deducted by the ALJ from his recommendation on attorney's fees. *Sprague v. American Nuclear Resources, Inc.*, Case No. 92-ERA-37, ARB Dec. Jul. 15, 1996, slip op. at 2, *rev'd on other grounds sub nom American Nuclear Resources, Inc. v. United States Dep't of Labor*, 134 F.3d 1292 (6th Cir. 1998). Thus an attorney who files tardy or superfluous briefs runs the risk that the fees associated with the pleading may not be assessed fully against the opposing party.

A second problem with an award of attorneys' fees in this case relates to the fact that Complainant's fee petition is insufficiently clear and precise. The ALJ in *Varnadore v. Oak Ridge National Laboratory*, Case Nos. 92-CAA-2 and 5 and 93-CAA-1 (ALJ Dec. Sept. 23, 1994), succinctly summarized the principles applicable in reviewing a request for attorneys' fees in cases under the environmental statutes:

The starting point for calculating a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Hensley [v. Eckerhart]*, 461 U.S. [424] at 433 [1983]. The party seeking a fee award must submit evidence documenting the hours worked and the rates claimed. If the documentation of hours is inadequate, the award may be reduced accordingly. *Id.* at 433. Hours not reasonably expended are to be

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<sup>3/</sup> Complainant styled her brief a "Reply" brief, even though Respondents had chosen not to file an initial brief because they agreed with the ALJ's Recommended Decision and Order on Damages.

excluded. Counsel seeking a fee award should exclude hours which are excessive, redundant or otherwise unnecessary. The same principles govern here as in the case of an attorney billing his client. *Id.* at 434. Where fee petitions insufficiently document the hours reported, a court need not engage in a detailed item by item reduction of the hours, an impossible burden where the documentation is inadequate. In these instances the trier of fact has the discretion to reduce the hours on a percentage basis. *See Ecos v. Brinegan*, 671 F. Supp. 381, 398 (M.D. N.C. 1987); *Goldstein v. Ebasco Constructors, Inc.*, 6 DOL Decisions No. 2 217, 222-223 (1992).

*Varnadore v. Oak Ridge National Laboratory*, slip op. at 2.

The time records submitted by Complainant's attorneys with their Second Supplemental Application are not detailed enough to determine how much time was spent on permissible and impermissible pleadings filed with the ARB. Because these detailed data are lacking, and because Complainant's attorneys filed excessive pleadings without obtaining leave from the Board, we conclude it is reasonable that Complainant's application for attorneys' fees and costs should be reduced by the proportion that the permissible pages of the Reply brief bear to the total pages filed, *i.e.*, 30 pages (the permissible length of the Reply brief) divided by 79 (the total pages filed) or 38 percent.

Accordingly, Respondents are ordered to pay Complainant \$19,582.30 in supplemental attorneys fees (38% of the requested \$51,532.35), \$254.08 in supplemental costs incurred by her attorneys and \$495.04 in supplemental costs incurred by Complainant herself.

**SO ORDERED.**<sup>4/</sup>

**PAUL GREENBERG**

Chair

**CYNTHIA L. ATTWOOD**

Member

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<sup>4/</sup> Board member E. Cooper Brown took no part in the consideration of or the decision in this case.