



**In the Matter of:**

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

**COMPLAINANTS,**

**v.**

**NEW YORK AIR NATIONAL GUARD,**

**RESPONDENT.**

**ARB CASE NO. 98-079**

**ALJ CASE NOS. 94-TSC-3  
94-TSC-4**

**DATE: December 16, 2003**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainants:*

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

*For the Respondent:*

**Major Paul Sausville, Esq., *Division of Military & Naval Affairs, Latham, New York***

**ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S  
THIRD SUPPLEMENTAL REQUEST FOR ATTORNEY'S FEES  
AND CLOSING CASE**

In 1995, the Secretary held that the Respondent, New York Air National Guard (NYANG), illegally blacklisted Marrita Leveille when it gave unfavorable employment references to the United States Office of Personnel Management and to Documented Reference Check, a company that obtains information that a previous employer would provide to a prospective employer about individuals (employees) who engage its services.<sup>1</sup> After remand to the Administrative Law Judge (ALJ) to calculate damages, the ALJ on February 9, 1998, recommended an award of \$45,000 for mental distress, \$529.28 for past medical expenses, \$10,000 for future medical expenses, and \$25,000 for damage to Leveille's professional reputation. R. D. & O. on Remand at 8. The ALJ denied Leveille's request for punitive damages. *Id.* at 9. He later issued a Recommended Supplemental Decision and Order on April 17, 1998, for the award of \$113,085 in

<sup>1</sup> The Secretary dismissed Daniel Leveille's complaint as untimely.

attorney's fees for work performed before March 11, 1998, and an award of \$12,930.13 in costs. ARB Decision and Order on Damages (ARB Damages Order) at 2, Oct., 25, 1999.

The Administrative Review Board (ARB) adopted the ALJ's recommendation on the awards for emotional distress and past and future medical expenses. The Board also adopted the ALJ's recommendation on a \$25,000 award for injury to Leveille's professional reputation and his recommendation to deny award of punitive damages. Finally, the Board adopted the ALJ's recommendation on the awards for attorney's fees and costs incurred by Leveille's counsel through March 11, 1998, as well as \$830.81 in costs incurred by Leveille herself. ARB Damages Order at 3. The Board permitted Leveille to submit a petition for additional attorney's fees and costs incurred after March 11, 1998.<sup>2</sup>

Leveille submitted her Second Supplemental Application for Attorney's fees on November 15, 1999, requesting \$51,532.35 in attorney's fees and \$1,972.40 in costs. The ARB agreed, in part, with the Respondent's argument in reply to this Second Supplemental Application for Attorney's Fees and Costs that the fees and costs should be reduced to \$19,582.30 and \$495.04, respectively. ARB Order Granting in Part Complainant's Second Supplemental Request for Attorneys' Fees and Costs (ARB Second Order) at 2-3, Feb. 15, 2000. Leveille filed a reply to the Respondent's brief that exceeded the ARB's page limitation and filed a reply to the Respondent's rebuttal brief that was not permitted by the briefing schedule. The Board noted that Leveille had not sought leave of the Board either to exceed the page limitation or file the reply to the Respondent's rebuttal.

However, Leveille sought reconsideration of the ARB Second Order on the grounds that she had in fact requested leave to exceed the page limitation and to file the reply to the Respondent's rebuttal brief. ARB Order Granting Reconsideration (ARB Reconsideration Order) at 2, May 16, 2000. The Board granted reconsideration but rejected Leveille's request for attorney's fees for a 52-page brief which exceeded the 30-page limitation in the briefing schedule. ARB Reconsideration Order at 5. The Board granted Leveille's request to file a reply to the Respondent's response to her Second Supplemental Application for Attorney's Fees but limited the pages for such a brief to 15 and ultimately awarded 57 percent of the fees and costs requested for work performed after March 11, 1998, \$29,373.44 and \$1,123.13, respectively. *Id.* In addition, the Board granted leave to Leveille to submit another supplemental application for attorney's fees and costs incurred since November 15, 1999. In doing so, however, the Board reminded Leveille of

---

<sup>2</sup> Leveille had actually submitted two applications for attorney's fees to the ALJ, one for work performed by her counsel from 1993 to June 17, 1996, and one, designated "supplemental application," for work performed from June 18, 1996, to March 11, 1998; hence, the application for attorney's fees submitted to the ARB was Leveille's second such application.

the Supreme Court's admonition that "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). In addition, we are mindful that requests for fees for preparing a petition for attorneys' fees should not become "a cascading, 'ad infinitum' series of fee requests . . . ." *Ragan v. Commissioner of Internal Revenue*, 2000 WL 430906, \*3 (5th Cir. Apr. 21, 2000).

Order Granting Reconsideration at 6. The Board ordered that "[n]o further briefing and no further requests for attorneys' fees will be allowed." *Id.*

Leveille submitted her Third Supplemental Request for Attorneys' Fees and Costs on June 7, 2000, seeking \$30,460 in fees and \$1,448.29 in costs for work performed since November 15, 1999. Leveille also requested in a covering letter that the record be kept open for her to file an additional supplemental fee request "in regards to the ongoing need to represent [Leveille] as a result of the ARB's order on damages dated October 25, 1999 which provided for the payment of future medical expenses in the amount of \$10,000."

NYANG replied to this request, objecting to the award of attorney's fees for some specific hours claimed as unrelated to the litigation of this case or the attorney's fees issues in the case, and also requesting that the fees be adjusted downward due to Leveille's limited level of success on the attorney's fees. The Respondent suggested that the fees awarded for work since November 15, 1999, on the attorney's fees issue should be reduced to \$8,342.50, and costs reduced by \$437.

NYANG specifically opposed the award of fees for:

1. Time spent and costs incurred in determining the tax consequences of Leveille's damages award;
2. Time spent for correspondence and conversations with opposing counsel (i.e., NYANG's counsel) as to whether NYANG would appeal the ARB's decision in favor of Leveille;
3. Time spent on discussions with NYANG's counsel concerning settlement;
4. Time spent coordinating the payment of damages;
5. Time spent preparing rejected documents.

In addition, NYANG asserted that the fees should be adjusted downward by 50% due to Leveille's limited success in litigating the fees requested in the Second Supplemental Request for Attorney's Fees.

## DISCUSSION

We agree with NYANG that time spent by Leveille's counsel on the question of the tax consequences of her damages award is not compensable because it is not related to litigation of the case and therefore was not "reasonably incurred." *See, e.g.*, 42 U.S.C. § 7622(b)(2)(B)(2000). Once Leveille receives the monetary damages ordered by the Board, the litigation of the case is at an end and the impact on her financial situation cannot be related to litigation of the case.

Leveille's attorneys' time spent on correspondence and in conversations with NYANG counsel to discern whether NYANG would appeal the ARB's decision also had no reasonable relationship to litigating the case. If NYANG had appealed, Leveille would have received notice and an opportunity to respond which would have been an integral part of litigating the case; attempting to tease out advance notice of NYANG's intentions has no relationship to litigation of the case.

Time spent in discussions with NYANG's counsel on settlement of "remaining issues" also is not related to litigation of Leveille's whistleblower claim and is not compensable. All claims related to the facts in this case and Leveille's whistleblower complaint were fully litigated and decided. Any "remaining claims" cannot relate to the whistleblower complaint and therefore were not "reasonably incurred" for purposes of this litigation.

For the same reasons discussed above, time spent on the coordination of payment of damages is not compensable under the whistleblower laws.

With respect to what NYANG characterizes as the "rejected documents," we note that the Board did consider Leveille's motions for leave to exceed the page limitation for Leveille's reply brief and for leave to file a response to NYANG's reply brief, and did grant Leveille's request for leave to file a reply to NYANG's brief, although shorter than the length requested. Thus, we find that Leveille is entitled to an award of some attorney's fees for this work. However, the net result of the work performed after November 15, 1999, was to increase the fees allowed for work performed between March 11, 1998, and November 15, 1999, by approximately \$10,000 (from 38% of the total \$51,523.35 requested, or \$19,582.30, to 57% of that total, or \$29,373.44). We find it is appropriate to award \$5,000 of the requested \$30,460.00 in additional attorney's fees for this degree of success, and we so order. For the same reason, we deny out of pocket expenses for Dr. Carter of \$437.50, and award one-sixth of the remaining costs, \$165.25.

Finally, we reject Leveille's request to keep the record open for the filing of an additional fee request "in regards to the ongoing need to represent [Leveille] as a result of the ARB's order on damages . . . for the payment of future medical expenses in the amount of \$10,000." The Board's reference in the Reconsideration Order to cases which admonish the litigants not to draw out attorney's fees requests "ad infinitum," and the Board's clear declarative statement that "no further requests for attorneys' fees will be

allowed,” should be taken seriously and this matter is now closed. Reconsideration Order at 6.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGALSS**  
**Chief Administrative Appeals Judge**