

Case No. LWX-0014

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Supplemental Order

Name of Petitioner: Ronald A. Sorri

Date of Filing: September 26, 1994

Case Number: LWX-0014

This Decision supplements an Initial Agency Decision, dated December 16, 1993, issued by the undersigned Hearing Officer of the Office of Hearings and Appeals (OHA) of the Department of Energy in a case involving a "whistleblower" complaint filed by Ronald A. Sorri (Sorri) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. See Ronald A. Sorri, 23 DOE & 87,503 (1993) (Sorri). In the December 16 Decision, I found that Sorri had proven by a preponderance of the evidence that he engaged in activities protected under Part 708 and that these activities were a contributing factor in the decision by Sandia National Laboratories (Sandia) and L&M Technologies, Inc. (L&M) to terminate his employment. I further concluded that Sandia and L&M were jointly responsible for the termination of Sorri's employment and that a violation of Part 708 had occurred. In the December 16 Decision, I determined that Sorri should be awarded back pay lost as a result of the reprisals taken against him, as well as all costs and expenses reasonably incurred by him in bringing his complaint. At that time, Thad M. Guyer, attorney for Complainant, was directed to submit a full accounting of his hourly charges for attorney's fees together with any costs, expenses, and expert witness fees incurred in representing Sorri, and a full accounting of any other costs and expenses reasonably incurred by Sorri in bringing his complaint under Part 708.

Both Sandia and L&M filed requests for review of the December 16 Decision by the Secretary of Energy or her designee. See ' 708.11. Sandia subsequently withdrew its request; however, L&M did not. The parties entered into negotiations, and on June 7, 1994, they stipulated to the dismissal of the Part 708 proceeding against L&M. By so stipulating, the parties agreed that the dismissal of L&M shall not operate to affect the liability established against Sandia. In a Final Decision and Order issued on August 25, 1994, the Deputy Secretary, as the Secretary's designee under ' 708.11, approved the dismissal of L&M as a party to this proceeding, and affirmed the elements of relief ordered by the OHA. On September 26, 1994, Guyer submitted a motion for attorney's fees and costs, together with a supporting affidavit and attachments. The OHA served Sandia with a copy of Guyer's motion and Sandia submitted a response on October 11, 1994. On October 17, 1994, Guyer submitted a reply to Sandia's response. This Supplemental Order awards Guyer \$25,356.43 in attorney's fees and costs.

I. Discussion

Section 708.10(c) states that an Initial Agency Decision may "include an award of reinstatement, transfer preference, back pay and reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses (including attorney and expert-witness fees) reasonably incurred by the complainant in bringing the complaint upon which the decision was issued." In Sorri, I concluded that an award of back pay, together with reasonable costs and expenses, including reasonable attorney and expert witness fees was the appropriate remedy in this proceeding. Id. In addition, I determined that Sorri should receive restitution for any other costs "reasonably incurred" in bringing his complaint under Part 708, which includes mileage, long distance telephone charges, postage, copying, court reporters, and all other related expenses. As stated above, I further directed Guyer to submit a full accounting of his hourly charges for attorney's fees together with any costs, expenses, and expert witness fees incurred in representing Sorri, as well as a full accounting of any and all other costs and expenses reasonably incurred by Sorri in bringing his complaint.

As compensation for his costs and expenses, Guyer requests a total of \$25,356.43, of which \$22,093.75 is for attorney's fees, \$900.00 is for legal assistant costs, and \$2,362.68 is for litigation costs and expenses. In Guyer's affidavit in support of his request for attorney's fees and costs, Guyer describes his legal experience and states that his normal hourly billing rate is \$175, which is commensurate with that charged by other lawyers with his experience in Albuquerque, New Mexico. In an attached schedule, Guyer documents 126.25 hours that he spent working on the Sorri case from September 8, 1993 through April 6, 1994. At 126.25 hours, Guyer's fee totals \$22,093.75 (\$175 x 126.25). In addition, Guyer documents 60 hours that his legal assistant spent working on the Sorri case from October 12, 1993 through November 15, 1993. At 60 hours, Guyer's legal assistant costs total \$900.00 (\$15 x 60). Finally, Guyer documents his litigation costs and expenses which include the cost of depositions, the cost of an expert witness, as well as indirect litigation costs of transportation and lodging for him and his legal assistant at the hearing. These litigation costs and expenses also include costs personally incurred by Sorri, such as telephone, postage, and travel expenses. The total of these costs and expenses is \$2,362.68.

In its response to Guyer's Motion for Attorney's Fees and Costs, Sandia does not contest either the amount of Guyer's hours or the reasonableness of Guyer's hourly billing rate. However, Sandia states that Guyer's charges for the activities of organizing, abstracting and indexing exhibits, as well as conducting research for a post hearing brief appear to duplicate the time charged for these same categories of work performed by Guyer's legal assistant. Guyer has responded by explaining that his tasks were clearly distinct and different from those of his legal assistant. He states that he organized, abstracted and indexed the most important exhibits and that he used his legal assistant to organize, abstract and index exhibits which he determined were of lesser importance. See Guyer's Reply at 1 and 2. I find that Guyer's explanation of these charges resolves the question raised by Sandia about apparent double billing. The use of a legal assistant to perform this work was clearly a cost saving measure. I therefore find that the reimbursement of \$900 for the work performed by Guyer's legal assistant is reasonable, and it should be approved.

Sandia also argues that the guidelines established in DOE's interim policy statement for litigation management limit the reimbursement of travel time to the portion of time during which an attorney actually performs legal work. See 59 Fed. Reg. 44981 (August 31, 1994). Sandia states that "Guyer's charges for travel should be reduced accordingly." Sandia's Response at 1. However, Guyer has responded by explaining that he did not bill Sorri for his travel time, but only for legal work actually done while in flight. As an example, Guyer explains that he drove his car "five hours each way to get to the Sacramento airport to get the cheapest flight to Albuquerque" and that he did not charge Sorri for this travel time. Guyer's Reply at 2. Guyer also explains that while in flight he studied exhibits, reviewed DOE regulations and worked on pleadings. Id. Based on Guyer's explanation, I find that his requested legal fees for time spent working on the case during travel are reasonable.

Sandia nevertheless argues that according to the interim guidelines, incidental postage charges, long distance telephone charges, mileage reimbursements, and travel expenses should be considered part of Guyer's general overhead and not recoverable as litigation costs. In regard to travel expenses, Sandia cites cases which generally state that they are not recoverable as costs.¹ However, these cases are distinguishable because they involved costs sought under the Rule 54(d) of the Federal Rules of Civil Procedure, and the Supreme Court has stated that such costs are generally limited to the restrictive list of items set forth in 28 U.S.C. ' 1920 and other related statutes.² This restrictive definition of costs is clearly inapposite to the present case, where there is a more expansive provision in the governing regulations that authorizes the reimbursement of costs to the complainant. As noted above, 10 C.F.R. ' 708.10(c) states that an Initial Agency Decision "may include...reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses...reasonably incurred by the complainant in bringing the complaint upon which the decision was issued." 10 C.F.R. ' 708.10(c). I find that Guyer's travel expenses are reasonable out-of-pocket expenses that should be recoverable as costs. With regard to the incidental postage charges, long distance telephone charges and mileage reimbursements, Guyer has indicated that these expenses were personally incurred by Sorri and not a part of Guyer's overhead. These charges have been sufficiently documented and I find that they are also reasonable costs. I have therefore determined that Guyer's request for reimbursement of \$2,362.68 for these litigation costs and expenses is reasonable, and it should be approved.

It is important as a matter of Departmental policy to recognize the public interest nature of representing an alleged whistleblower under Part 708, and to award a reasonable fee to encourage attorneys to take these cases. See Sorri, 23 DOE & 87,503 at 89,018 (1993) and cases cited therein. Based upon my review of Guyer's Motion and the supporting Affidavit and attachments, I have decided to approve Guyer's request for attorney's fees and costs. As indicated above, Guyer has documented 126.25 hours of work performed on the Sorri case and has affirmed that \$175 is a reasonable hourly billing rate for lawyers with similar experience in Albuquerque, New Mexico. Sandia does not contest these figures, and I find that they are reasonable. See David Ramirez, 24 DOE 87,504 (1994), appeal pending, (OHA Hearing Officer determined that the attorney's hourly rate of \$175 for representing a whistleblower under Part 708 was reasonable and awarded fees of \$24,740). Accordingly, I have concluded that Guyer should be awarded attorney's fees of \$22,093.75, which is consistent with the "lodestar" approach (the product of reasonable hours times a reasonable rate for determining the amount of attorney's fees to award a successful complainant) approved by the Supreme Court in *Blum v. Stenson*, 465 U.S. 886, 888 (1984).

II. Conclusion

For the reasons set forth above, Guyer shall be awarded the following amounts of attorney's fees, legal assistant costs, and litigation costs and expenses in accordance with the provisions of 10 C.F.R. ' 708.10 (c):

Attorney's Fees \$22,093.75

Legal Assistant Costs \$900.00

Litigation Costs and Expenses \$2,362.68

Total \$25,356.43

It Is Therefore Ordered That:

- (1) Sandia National Laboratories shall pay Thad M. Guyer \$25,356.43 in compensation for actions taken against Ronald A. Sorri in violation of 10 C.F.R. ' 708.5.
- (2) Sandia National Laboratories shall pay the above amounts to Thad M. Guyer within 20 days of the issuance of this Order.
- (3) This is a Supplemental Order to the Initial Agency Decision issued on December 16, 1993, and may be appealed to the Deputy Secretary of Energy.

Thomas O. Mann

Deputy Director

Office of Hearings and Appeals

Date:

1 *Wahl v. Carrier Mfg. Co., Inc.*, 511 F.2d 209 (7th Cir. 1975); *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F. 2d 1163 (7th Cir. 1968). 2 See *Crawford Fitting Co. v. J.J. Gibbons, Inc.*, 482 U.S. 437 (1987); see also Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d ' 2677 (1983).