

April 24, 1997

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Supplemental Order

Name of Case: C. Lawrence Cornett

Date of Filing: February 3, 1997

Case Number: VWX-0010

This Decision supplements an Initial Agency Decision, dated December 19, 1996, 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. The complaint was filed by C. Lawrence Cornett (Cornett) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. See C. Lawrence Cornett, 26 DOE ¶ 87,507 (1996) (Cornett). (1) In Cornett, I found that Maria Elena Torano Associates, Inc. (META), a DOE contractor, had violated the provisions of 10 C.F.R. § 708.5 by terminating Cornett's employment in reprisal for his making protected disclosures related to public health and safety. The Decision further determined that Cornett should be awarded back pay and reimbursement for all costs and expenses reasonably incurred by him in bringing his complaint. Cornett was directed to supplement the record by providing certain specified information regarding back pay and expenses. Cornett submitted this information on January 30, 1997, along with a sworn declaration by his lead attorney, Robert Seldon (the "Seldon Declaration"). META submitted a response to the January 30 submission on March 17, 1997 (Response). This Supplemental Order awards Cornett a total of \$280,600 in back pay (including interest) and costs and expenses (including attorney fees). (2)

I. Cornett's Claim

A. Back Pay

Cornett calculates that his lost pay (including fringe benefits) during the period from the date his retaliatory discharge from META was effective, March 22, 1994, through December 31, 1995 (back pay period), the date he would have been terminated absent the retaliatory discharge, was \$162,138.21. From this amount, Cornett subtracted \$275 in earnings during the 4th quarter of 1994 to arrive at a net lost pay of \$161,863.21. Cornett then calculated that the interest accrued on this amount through January 31, 1997 was \$25,992.02. Thus, Cornett's claim through January 31, 1997 for back wages (including interest) totals \$187,855.23. Moreover, Cornett asserts that contrary to the instructions in the Initial Agency Decision, META had not provided him with any information pertaining to firm-wide cost of living or merit increases during the back pay period. Consequently, Cornett requests that he be permitted to amend this claim for back pay upon the receipt of this information from META.

B. Attorney Fees

In this proceeding, Cornett is represented by attorneys from the Government Accountability Project (GAP), Robert Seldon (Seldon), A. Alene Anderson (Anderson) and Eric Nelson (Nelson). (3) The Seldon Declaration describes the legal experience of the three attorneys who participated in the representation of

Cornett. Seldon states in the Declaration that in calculating the attorney fees claim he used a rate of \$265 per hour for his services, \$150 per hour for Anderson's services and \$75 per hour for Nelson's services. Seldon arrived at these rates after drawing upon his experience in both private and government practice and by referencing the Leffey matrix, a U.S. Attorney Office fee matrix which has been used by U.S. District Courts to determine the appropriateness of "lodestar" hourly rates for attorney fees requests in the District of Columbia. (4) In the Declaration, Seldon further states that Anderson worked 223.3 billable hours on the Cornett matter, Nelson worked 161.25 billable hours and that he worked 136.60 billable hours. Seldon calculated the total attorney fee claim by multiplying each attorney's per hour rate by the number of billable hours that attorney worked. Thus, for his services Seldon assessed \$36,199 (136.60 hours x \$265 per hour). For Anderson's services, Seldon assessed \$33,480 (223.3 hours x \$150 per hour) and for Nelson's services, Seldon assessed \$12,093.75 (161.25 hours x \$75 per hour). The total attorney fee claim for Cornett is \$81,772.75.

C. Other Costs and Expenses

Cornett also requests that he be reimbursed for costs he and GAP incurred in bringing his whistleblower complaint. Cornett alleges that he incurred expenses of \$6,350.48 and that GAP incurred \$2,299.14 in expenses. Additionally, Cornett requests reimbursement for \$435.67 of telephone calls which were charged to his home telephone account. In total, Cornett requests reimbursement of \$9,085.29 of expenses that he alleges were incurred in bringing his whistleblower complaint.

II. META's Response and Cornett's Reply

In its Response, META asserts that the number of attorney hours billed is unreasonable in light of the relatively limited amount of back pay that is at issue in this case. META argues that no client would agree to pay such large fees to recover such a back pay award. META also asserts that given the vague descriptions of the time billing summaries provided by Cornett's attorneys, it is impossible to determine the reasonableness of the time expended in the case. META also argues that the number of billable hours claimed was unnecessarily increased by the inefficient use of three attorneys for Cornett.

META also challenges other components of Cornett's claim. Specifically, META argues that Cornett's unemployment benefits should be subtracted from his back pay claim. META also challenges the compound daily interest calculation employed by Cornett. META asserts that OHA has previously held that interest on back pay should be compounded on a quarterly basis. META also contests various costs listed by Cornett that it asserts are not directly related to the litigation in the present case. (5)

On March 14, 1997, Cornett submitted his reply (Reply) to the Response. In an attached declaration ("the Second Declaration"), Seldon asserts that the documentation in the Seldon Declaration is sufficient for an award of attorney fees since it detailed the billing practices used, the hourly rates employed, the time actually recorded and the method of billing judgement exercised. Seldon further argues that the total amount of attorney fees is not unreasonable since this litigation dealt with complex subject matter and involved two hearings, two dispositive motions for dismissal, and various depositions and written submissions. With regard to the utilization of personnel, Seldon asserts that Anderson and Nelson were used to the maximum extent possible to minimize costs and that the activities he personally performed were absolutely necessary for effective trial advocacy. In response to META's argument about the high attorney fees vis a vis the back pay award, Seldon points out that the proceeding was not just about back pay but was an attempt by Cornett to vindicate himself and to increase his chances of obtaining further employment in his field of expertise. (6)

In the Reply, Cornett also reasserts his request for information regarding merit increases awarded by META during the time period specified in the Initial Agency Decision. As evidence that such increases may have been granted, Cornett has submitted several pages from the META business proposal for the

Programmatic Environmental Impact Statement (PEIS) contract that contain references to various types of employee pay raises. Cornett asserts that since he would have received such an increase, it should be considered in the final determination of back pay. Alternatively, Cornett argues that his back pay award should be adjusted by the total of the increase in the Consumer Price Index (CPI) during the back pay period plus an additional 5% for experience and merit. Cornett also argues that unemployment insurance should not be considered in determining back pay and notes that the "collateral source rule" would bar such consideration. With regard to the challenge to his interest calculation, Cornett argues that the Initial Agency Decision directed that interest calculation be calculated pursuant to 5 C.F.R. § 550.806, and that provision specifies calculation of interest on a daily basis. Finally, Cornett asserts that the cost items challenged by META were in fact related to the litigation and are recoverable costs.

III. Discussion

I have considered the submissions of the parties in accordance with the provisions of 10 C.F.R. § 708.10(c). This section states that an Initial Agency Decision may include 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." By its reference to "costs and expenses," this section is by its very terms broader than Rule 54(d) of the Federal Rules of Civil Procedure, which refers only to "costs."⁽⁷⁾ Thus, the first Initial Agency Decision issued under the DOE whistleblower regulations properly interpreted the "costs and expenses" covered by section 708.10(c) more expansively than the way "costs" have been interpreted under Rule 54(d). Compare Ronald A. Sorri, 23 DOE ¶ 87,503 at 89,016-18 (1993) (Sorri), with 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2677 at 370-72 (1983). Consequently, I will follow the standards outlined in Sorri. With these considerations in mind, I now turn to the remedy requested by Cornett.

A. Back Pay

After considering the submissions by Cornett and META, I have decided to approve Cornett's request for back pay plus interest subject to the modification described below.

In Cornett, I noted that META had stated that Cornett earned \$91,000 per year in salary and benefits. 26 DOE at 89,036. Cornett has calculated back wages for each quarter of the back pay period by prorating the \$91,000 per year salary and benefit figure. As indicated above, the only amount Cornett has subtracted from these figures is \$275 in earnings during the 4th quarter of 1994. Cornett has submitted income tax returns to substantiate that he did not earn more than this amount. Cornett asserts that, in accordance with the Initial Agency Decision, he calculated interest on the back pay using the method specified in 5 C.F.R. § 550.806(d) and (e).⁽⁸⁾ Cornett also asserts that this award should be adjusted upward to reflect merit pay or cost of living increases given by META.

META does not challenge the methodology by which Cornett calculated his back pay. Therefore, I will accept Cornett's requested back pay amount. However, META asserts that Cornett improperly calculated the interest on the back pay by compounding it on a daily basis, and argues that Cornett's employment insurance benefits should be subtracted from the back pay award.

META's argument regarding the calculation of interest is well founded. In Cornett, only paragraph (d) of section 550.806 is cited, and it is cited for the purpose of determining the "overpayment rate" interest figure that will be used in calculating interest. Nowhere in the Initial Agency Decision did I refer to paragraph (e) of section 550.806 or adopt the daily compound interest calculation method specified in that paragraph.⁽⁹⁾ Consequently, in the Appendix to this Order, I have recalculated the interest on Cornett's back pay using quarterly compounding as has been done in prior DOE cases under Part 708. See Sorri; David Ramirez, 24 DOE ¶ 87,504 (1994), *aff'd*, 24 DOE ¶ 87,510 (1994) (Ramirez); Howard W. Spalletta,

25 DOE ¶ 87,502 (1996). Compound interest was calculated by multiplying the aggregate net amount of lost wages and benefits by the quarterly "overpayment rate" for that quarter.(10) The "overpayment rate," as established by the Secretary of Treasury pursuant to 26 U.S.C. § 6621, is the Federal short-term rate, plus two percentage points. The Federal short-term rate for a particular quarter is the short term rate for the first month of the preceding calendar quarter, rounded to the nearest whole percent See Rev. Rul. 97-12, 1997-11 I.R.B. 5.

META's argument regarding unemployment insurance is unavailing. META argues that awarding back pay without subtracting the unemployment insurance he received would place Cornett in a better position than he would have been absent his termination from employment from META. However, under the generally accepted "collateral source rule," unemployment compensation is not deducted from back pay awards. See Sorri, 23 DOE at 89,016 (citing *NRLB v. Gullet Gin Co.*, 340 U.S. 361 (1951)); see also Ramirez, 24 DOE at 89,015. META has brought forth no considerations which would mandate a change in these OHA precedents regarding this issue.

With regard to Cornett's request for an adjustment to his back pay award to reflect a merit pay or cost of living increases, I find that such an adjustment is not merited given the facts before me. META has certified that during the back pay period it did not give its employees any firm wide cost of living pay increases and Cornett has not produced any evidence to the contrary. With respect to merit pay, there is no evidence in the record that Cornett received such an increase during the time that he was employed by META. Nor did Cornett allege that he had been denied a merit pay increase as a reprisal for his disclosures. Accordingly, I find that it would be too speculative to adjust Cornett's back pay to reflect any merit pay increase.

Consequently, after considering the parties' submissions, I will award Cornett back pay of \$161,864 plus \$33,543 in interest through June 30, 1997. (11)

B. Attorney Fees

I have decided to approve Cornett's request for attorney fees subject to the reduction described below.

As described above, Cornett has submitted a claim for attorney fees totalling \$83,190.25 together with supporting declarations. (12) META has not challenged the hourly rates charged for Cornett's attorneys. Therefore, I will accept these hourly rates and will utilize them to calculate the amount of attorney fees to be awarded. (13) However, META has vigorously disputed the number of billable hours claimed by Cornett. META argues that the total claim for attorney fees is excessive and unreasonable since it is equal to approximately one-half of the total back pay award. Further, META argues that the description given for the work performed is inadequate and that the number of hours claimed is inflated due to inefficient and duplicative use of counsel by Cornett.

META's argument regarding the relative amounts of the back pay claim and the attorney fee claim is unconvincing and unsupported by any cited authority. There is no basis for setting an attorney fee award in proportion to the amount of back pay awarded in a case. No provision of Part 708 requires this and I am aware of no case law supporting META's position. Cf. *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (Supreme Court plurality refused to adopt a strict rule in a civil rights action under 42 U.S.C. § 1988 that attorney's fees must be proportional to damages). As Cornett has pointed out in his Reply, whistleblower actions typically seek more than just back pay. For example, attorneys for whistleblowers also seek vindication of reputations that have been impugned by employers. The actual value of having one's reputation restored goes beyond the actual monetary award in a whistleblower case. Consequently, I reject META's argument that attorney fees should be proportional to recovered back pay.

META's argument regarding the descriptions of Cornett's attorneys' activities is also unavailing. After reviewing the two declarations and the schedules of billable hours, I find that Cornett has provided sufficient detail to support an award of attorney fees. In addition, I do not find that the attorney fee claim

for Seldon's work is suspect merely because a significant portion of the claimed time spent is rounded off to the nearest hour. Seldon has asserted that he rounded off figures in an exercise of his billing judgement and that this rounding off actually reduced the number of hours claimed. I find this explanation to be sufficient. Counsel should be encouraged to reduce billable hour claims which he or she believes may not be commercially reasonable. Further, there is no other evidence before me indicating that the number of hours claimed by Seldon is otherwise irregular.

However, I find there is merit to META's argument regarding the number of hours billed. An examination of the billable hour schedules suggests that some duplication of effort and inefficiencies are reflected in Cornett's attorney fee claim. Cornett defends the claimed attorney fees by asserting that META's own litigation tactics increased the cost of the litigation by its initial challenge of jurisdiction before a hearing on the merits, thus forcing two hearings to be conducted with associated briefs. Cornett also asserts that costs were driven upward in this case by the recanting of statements made by a key witness and META's insistence on challenging the initial factual findings of the Office of Contractor Employee Protection (OCEP). With regard to the utilization of personnel, Seldon, in the Seldon Declaration, asserts that he reduced the claim for Nelson's billable hours by one-third and personally reviewed Anderson's billing on an item-by-item basis. Seldon also argues that the activities he personally performed were absolutely necessary for effective trial advocacy and that these functions could not have been delegated to anyone else. Some of these arguments are surely correct. Nevertheless, Seldon's arguments fail to convince me of the necessity of all of the billed hours. Even recognizing the nature of the litigation between the parties, the novel issues presented, and the fact that this hearing ultimately resulted in a record of approximately 5,000 pages, I find that the number of hours billed by Anderson and Seldon for services up to the issuance of the Initial Agency Decision are still somewhat excessive.

Consequently, I will reduce Anderson's and Seldon's pre-Initial Agency Decision billable hours by 10 percent. Thus, in calculating the attorney fee award I will reduce Seldon's billable hours to 127.4 hours (136.60 hours x .9 + 4.5 hours for the Reply) and Anderson's billable hours to 202.5 hours (223.30 x 0.9 + 1.5 hours for the Reply). I will award Cornett \$33,761 (127.4 hours x \$265 per hour) for Seldon's services, \$30,375 (202.5 hours x \$150 per hour) for Anderson's services and \$12,094 (161.25 hours x \$75 per hour) for Nelson's services. The total attorney fees awarded is \$76,230.

C. Other Expenses

The bulk of the remaining costs and expenses for which Cornett requests reimbursement relate to various photocopying, telephone, postage and delivery, travel and deposition expenses incurred during the litigation of this case. With the exceptions noted below I will approve reimbursement of these expenses.

META claims that some of the telephone calls listed by Cornett do not appear to be eligible for reimbursement. Specifically, META refers to the telephone calls made to D. Hancock, "MPN" and T. Connor, who are not identified in Cornett's submission. Cornett argues that he made these calls prior to retaining counsel to seek advice as to how to proceed before OCEP. However, given the record before me, it is not apparent that the cost of those calls was reasonably incurred by Cornett in bringing his whistleblower complaint. Consequently, the \$99.34 incurred in connection with those calls will not be reimbursed.

Similarly, I accept META's argument with respect to Cornett's requested reimbursement for \$23.00 of costs associated with a meeting he had with then Secretary Hazel O'Leary. Cornett alleges that this meeting was in connection with his whistleblower complaint. However, he does not provide any specific information about the meeting from which I can find that the costs associated with it were reasonably incurred in bringing the whistleblower complaint. Consequently I will deny reimbursement for those costs.

META also challenges Cornett's request for \$1,059.50 for the cost of purchasing a copy of the transcript of the hearing on the merits. META argues that Cornett's counsel does not need a copy of the transcript since he is located in Washington, DC and could have access to the transcript at DOE Headquarters. I find

this argument to be without merit. The obtaining of a hearing transcript clearly was reasonably incurred in bringing the complaint especially since counsel had to respond to META's appeal of the Initial Agency Decision. (14) The fact that a copy of the transcript is available to the public during specified hours at DOE Headquarters does not make the transcript an "unreasonable cost." Consequently, I will approve the \$1,059.50 incurred to obtain a transcript of the hearing on the merits.

I will also approve the remainder of the costs submitted by Cornett. Consequently, Cornett will be awarded \$8,963 in reimbursement for expenses incurred by him in bringing his complaint.

IV. Conclusion

For the reasons set forth above, Cornett shall be awarded the following amounts of back pay and reimbursement for costs and expenses in accordance with the provisions of 10 C.F.R. § 708.10(c):

Back Pay: \$161,864

Interest on Back Pay \$ 33,543

(through June 30, 1997)

Attorney Fees \$ 76,230

Costs \$ 8,963

It Is Therefore Ordered That:

(1) Maria Elena Torano Associates shall pay C. Lawrence Cornett the following amounts in compensation for actions taken against him in violation of 10 C.F.R. § 708.5:

(a) \$161,864 for lost salary and fringe benefits for the period March 22, 1994, through December 31, 1995.

(b) \$33,543 in interest on the lost salary and fringe benefits as of June 30, 1997 plus additional interest from July 1, 1997 until the date of payment calculated by multiplying the cumulative amount of unpaid back pay plus interest each calendar quarter by the quarterly "overpayment rate" for that quarter.

(c) \$8,963 for reimbursement for expenses and costs incurred by C. Lawrence Cornett in bringing his complaint under 10 C.F.R. Part 708.

(d) \$76,230 in attorney fees incurred in this proceeding with respect to his attorneys, Robert Seldon, Esq., A. Alene Anderson, Esq. and Eric Nelson of the Government Accountability Project.

(2) This is a Supplemental Order to the Initial Agency Decision issued on December 19, 1996, and shall be subject to review by the Secretary of Energy or his designee pursuant to the request for review that Maria Elena Torano Associates, Inc. submitted to the Assistant Inspector General for Assessments on January 3, 1997.

Ted Hochstadt

Hearing Officer

Office of Hearings and Appeals

Date: April 24, 1997

Appendix

Cumulative

Quarterly Interest Rate Interest Back Pay

Quarter Back Pay (per annum) + Interest

2nd Quarter, 1994 \$25,639* 6% \$ 192 \$ 25,831

3rd Quarter, 1994 \$23,111 7% \$ 654 \$ 49,596

4th Quarter, 1994 \$22,114 8% \$1,213 \$ 72,923

1st Quarter, 1995 \$22,659 8% \$1,685 \$ 97,267

2nd Quarter, 1995 \$23,389 9% \$2,452 \$123,108

3rd Quarter, 1995 \$22,659 8% \$2,689 \$148,456

4th Quarter, 1995 \$22,293 8% \$3,192 \$173,941

1st Quarter, 1996 \$ 0 8% \$3,479 \$177,420

2nd Quarter, 1996 \$ 0 7% \$3,105 \$180,525

3rd Quarter, 1996 \$ 0 8% \$3,611 \$184,136

4th Quarter, 1996 \$ 0 8% \$3,683 \$187,819

1st Quarter, 1997 \$ 0 8% \$3,756 \$191,575

2nd Quarter, 1997 \$ 0 8% \$3,832 \$195,407

* Includes back pay for the period March 22, 1994 to March 31, 1994.

(1)The OHA case number for the Cornett Decision is VWA-0007. As indicated above, the OHA case number for this Supplemental Order is VWX-0010. I will also refer to the Cornett Decision as the Initial Agency Decision.

(2)On January 3, 1997, META submitted a request for review of the Cornett Decision pursuant to 10 C.F.R. § 708.10(c). That request is currently pending. This Supplemental Order will be transmitted to the Assistant Inspector General for Assessments with the expectation that it will be forwarded to the Secretary or his designee so that it may be reviewed together with the Initial Agency Decision. See David Ramirez, 24 DOE ¶ 87,504 (1994). Compare David Ramirez, 24 DOE ¶ 87,512 (1994) (Supplemental Order implementing Final Agency Decision issued as a final Order of the DOE).

(3)The Seldon Declaration describes the effort of a fourth attorney, Thomas Carpenter, who participated in representing Cornett but for whom no compensation is requested. During the pendency of this case, Nelson was a legal intern who performed some of his services as an attorney pursuant to Washington (State) Admission to Practice Rule 9. Nelson's participation in this case ended shortly before the hearing on the merits in this matter in late October 1996. For purposes of this Supplemental Order, I will refer to Nelson as an attorney.

(4)The Leffey matrix was developed in *Leffey v. Northwest Air Lines, Inc.*, 572 F. Supp 354, 371-75 (D.D.C. 1983). An updated Leffey matrix is found in *Brown v. Pro Football, Inc.*, 846 F. Supp 108, 120 (D.D.C. 1994). In *Cornett*, I stated that I would utilize the "lodestar approach" to determine the amount of attorney fees. 26 DOE at 89,037. Under this approach, a reasonable attorney fee is the product of reasonable hours times a reasonable rate.

(5)In a letter dated February 3, 1997, META responded to Cornett's assertions regarding the issue of firm-wide cost of living or merit increases. In the letter, META asserted that during the relevant period it did not give any firm-wide, cost of living increases and that any raises in salary it provided were merit-based and employee-specific. META further contended that the Initial Agency Decision does not provide for Cornett to recover back pay for speculative, merit-based salary increases.

(6)Seldon also states that he spent 4.5 hours and Anderson spent 1.5 hours in preparing the Reply. Using the "lodestar" rates utilized in the Seldon Declaration, Cornett claims an additional \$1,417.50 in attorney fees for this work.

(7)In *Crawford Fitting Co. v. J.J. Gibbons, Inc.*, 482 U.S. 437 (1987), the Supreme Court held that costs awarded under Rule 54(d) are limited to the items set forth in 28 U.S.C. § 1920 and other related statutes.

(8)Section 550.806(d) calculates the overpayment rate by rounding the federal short term rate for the first month of the "last quarter" and adding two percentage points. Cornett determined the federal short term interest rate (5.64%) for the first month (October 1996) of the quarter in which the Initial Agency Decision was issued. Rounding that figure up to 6% and adding 2% produces an interest rate of 8% which Cornett used for each quarter in calculating interest on the back pay amount through January 1997. In accordance with section 550.806(e), Cornett compounded the interest on a daily basis.

(9)Cornett's interest calculation was also flawed by his failure to calculate an interest rate for each quarter based on each quarter's specific overpayment rate as determined by the Secretary of the Treasury.

(10) In calculating the interest for each quarter of the back pay period, the back pay amount for each quarter was divided by two and added to the prior quarter's cumulative back pay and interest amount. This sum was then multiplied by the per annum "overpayment rate" and divided by four to determine that quarter's interest.

(11)All of the sums awarded in this Supplemental Order have been rounded to the next whole dollar.

(12)This total includes the claim for attorney fees for preparation of Cornett's Reply to META's Response.

(13)Since two of Cornett's attorneys practiced primarily in Seattle, Washington, I was initially concerned as to the reasonableness of basing their hourly rates on those applicable in the District of Columbia. However, since there is authority for determining rates by reference to the location of the litigation, my concern has been resolved. See *Martin v. Mabus*, 734 F. Supp. 1216 at 1226-27 (S.D. Miss. 1990) (relevant legal community for determining attorney fees is the judicial district where the litigation occurred, rather than the attorney's primary location of practice).

(14)OHA usually provides a free copy of the transcript to the parties in whistleblower cases. This was not done in this case. If a copy had been provided, Cornett would not have had to incur that cost.