Congressional Accountability Office of Compliance
LA 200, John Adams Building 110 Second Street, SE
Washington, DC 20540-1999

UNITED STATES CAPITOL POLICE, Respondent, and FRATERNAL ORDER OF POLICE, DISTRICT OF COLUMBIA LODGE NO. 1 U.S. CAPITOL POLICE LABOR COMMITTEE, Charging Party.	)	Case No. 15-LMR-02 (CA)

Before the Board of Directors: Barbara Childs Wallace, Chair; Susan S. Robfogel; Alan V. Friedman; Roberta L. Holzwarth; Barbara L. Camens, Members.

DECISION OF THE BOARD OF DIRECTORS

I. Statement of the Case

This case is before the Board pursuant to a petition for review ("PFR") filed by the United States Capitol Police ("Respondent" or "USCP") of the Hearing Officer's November 1, 2017 Decision and Order granting the motion of the Charging Party, FOP/U.S. Capitol Police Labor Committee ("Charging Party" or "Union") for attorney's fees and costs.

For the reasons that follow, we AFFIRM the Decision and Order.

II. Background

This case has a long and complex procedural history, which concerns the USCP's termination of the Officer Andrew Ricken in 2013. The USCP is an "employing office" within the meaning of CAA sections 101(9) and 220(a) (1). The Charging Party is a labor organization and is the duly-certified exclusive representative of the Respondent's officers who are included in the relevant bargaining unit. On July 22, 2013, the Union filed a grievance in accordance with the procedures set forth in the governing collective

bargaining agreement ("CBA"), which challenged the termination of USCP Officer Andrew Ricken.

The Arbitrator issued an Award on May 13, 2014, which reduced Officer Ricken's termination to a 30-day suspension and granted him lost wages and benefits. The USCP filed eight exceptions to the Award with the Board, which were denied. *FOP/U.S. Capitol Police Labor Comm. v. U.S. Capitol Police,* No. 14-ARB-01, 2014 WL 7215202 (OOC Dec. 12, 2014) ("*Ricken I*"). On June 17, 2015, the Arbitrator issued an Order clarifying and supplementing the May 13, 2014 Award. He directed the USCP to reinstate Officer Ricken immediately, and he determined that Officer Ricken was entitled to $340,487.70 in back pay, less offsets and interest, $648.60 for expenses; and attorney fees in the amount of $265,183 and expenses for $8,723.84. The USCP did not file exceptions to the Arbitrator's June 17, 2015 Order.

On July 28, 2015, the Union filed an unfair labor practice ("ULP") charge with the Office of Compliance ("OOC") alleging that the USCP violated the CAA and the Federal Service Labor Management Relations Statute ("FSLMRS") when it failed to implement the May 13, 2014 Award, as supplemented and clarified by the Arbitrator's June 17, 2015 Order. On August 31, 2015, the OOC General Counsel issued a Complaint based on the Union's ULP charge. On September 29, 2015, the Hearing Officer granted the USCP's motion to dismiss the Complaint on the ground that the Union's charge was untimely filed. By Order dated September 27, 2016, the Board reversed the dismissal of the complaint and remanded the case for further proceedings. *FOP/U.S. Capitol Police Labor Comm. v. U.S. Capitol Police,* No. 15-LMR-02, 2016 WL 5943737 (OOC Sep. 27, 2016) ("*Ricken II*").

On November 17, 2016, the Hearing Officer issued a Decision on Motions for Summary Judgment, which found that the Respondent had committed an ULP when it failed to fully implement the May 13, 2014 Arbitration Award, as supplemented and clarified by the Arbitrator's June 17, 2015 Order.

On December 7, 2016, the Union filed a Motion for attorney's fees and costs with the Hearing Officer. The motion sought compliance with the Arbitrator's award of fees and expenses through April 24, 2015, and it sought an additional award for attorney's fees and costs of $160,536.42 incurred from April 24, 2015 to December 1, 2016, to enforce the Arbitrator's Award and Order through the OOC's ULP procedures. Upon the USCP's timely filed PFR of the Hearing Officer's Decision on Motions for Summary Judgment, the Hearing Officer issued an order staying the Union's motion for attorney's fees and costs.

In *FOP/U.S. Capitol Police Labor Comm. v. U.S. Capitol Police,* No. 15-LMR-02, 2017 WL 4335143 (OOC Sep. 25, 2017) ("*Ricken III*"), the Board affirmed the Hearing

Officer's Decision on Motions for Summary Judgment and ordered the Respondent to comply with the Arbitrator's Award and Order, including the immediate reinstatement of Officer Ricken, the payment of back pay, damages, and associated attorney's fees and costs awarded.[1]

The Hearing Officer thereafter issued an order lifting the stay regarding the Charging Party's motion for attorney's fees and costs, and provided it with the opportunity to amend its original motion. On October 11, 2017, the Charging Party filed an amended motion for attorney's fees and costs, including updated information to address additional fees and costs of $43,440.79 that the Union stated were incurred between December 1, 2016 and October 5, 2017, for a total of $202,872.90 in attorney's fees and $1,004.31 in costs, to enforce the arbitration award through the OOC's ULP process. After providing the parties the opportunity to submit evidence and argument, the Hearing Officer granted the Union's motion in its entirety.[2]

The USCP's PFR followed. In it, the USCP contends that sovereign immunity bars the payment of attorney's fees in this case; the CAA does not allow for the payment of attorney's fees to the Union; the award of attorney's fees was punitive and therefore impermissible; the Hearing Officer's determination concerning the rate requested by the Union was arbitrary and capricious; and the Hearing Officer erroneously failed to analyze the reasonableness of the hours claimed by the Union. The Union has filed a submission in opposition to the USCP's PFR.

III. Analysis and Conclusions

A. Standard of Review

The Board's standard of review for appeals from a Hearing Officer's decision requires it to be set aside if it is determined to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. § 1406(c). *Katsouros*

[1] The U.S. Court of Appeals for the Federal Circuit denied the USCP's appeal in this case in *USCP v. Office of Compliance*, 913 F.3d 1361 (Fed. Cir. 2019); it denied the USCP's petition for rehearing en banc on April 30, 2019; and the formal mandate in this case issued on May 7, 2019 pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

[2] As stated above, the Union's initial and amended motion for attorney's fees concerned work related to enforcing the Arbitrator's Award through the ULP process from April 24, 2015 to October 5, 2017. Charging Party's Amended Motion for Attorney's Fees and Costs at 2. Although the Hearing Officer granted the full amount requested by the Union, the Decision and Order erroneously states that it is for work performed "*through April 24, 2015, and between December 1, 2016 and October 5, 2017*." Decision and Order at 14, 16 (emphasis added). We find that this error was not prejudicial and provides no basis for granting the USCP's PFR.

v. Office of the Architect of the Capitol, Case Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2011 WL 332311, at *3 (Jan. 21, 2011).

B. Statutory Requirements for Attorney's fees

Under the CAA, the entitlement to attorney's fees is determined by reference to the Back Pay Act, 5 U.S.C. § 5596(b)(1). *See AFSCME Council 26 & Office of the Architect of the Capitol,* No. 17-ARB-03, 2017 WL 3229178 (OOC July 26, 2017); *U.S. Dep't of Veterans Affairs Med. Ctr., Detroit, Mich.,* 64 F.L.R.A. 794, 796 (2010) ("*DVA"*); *see also AFSCME Council 26 & Office of the Architect of the Capitol,* No. 00-LMR-03, 2001 WL 36175209 (OOC Jan. 29, 2001) (finding that the Back Pay Act is incorporated by reference through the CAA).

Specifically, section 220(a) of the CAA, 2 U.S.C. § 1351(a), extends to employing offices, employees, and collective bargaining representatives the rights, protections, and responsibilities established under various portions of the FSLMRS, including 5 U.S.C. §§ 7121-22, relating to grievance arbitration. *U.S. Capitol Police Bd. & FOP, U.S. Capitol Police Labor Comm.,* No. 01-ARB-01 (CP), 2002 WL 34461687, at *3 (OOC Feb. 25, 2002). Section 7122 of the FSLMRS explicitly authorizes the payment in grievance cases of back pay by covered Federal government entities:

> An agency shall take the actions required by an arbitrator's final award. The award may include the payment of back pay (as provided in section 5596 of this title).

5 U.S.C. § 7122(b).

Similarly, CAA section 220(b) provides that "[t]he remedy for a violation of subsection (a) shall be such remedy, *including* a remedy under section 7118(a)(7) of Title 5, as would be appropriate if awarded by the Federal Labor Relations Authority to remedy a violation of any provision made applicable by subsection (a)." 2 U.S.C. § 1351(a) (emphasis added). Section 7118(a)(7)(C) of title 5, in turn, provides that "backpay may be required of the agency (as provided in section 5596 of this title)," i.e., the Back Pay Act.

The threshold requirement for entitlement to attorney's fees under the Back Pay Act is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. 5 U.S.C. § 5596(b)(1);[3] *see also AFSCME Council 26,* 2017 WL 3229178,

[3]Subsection (b)(1) of the Backpay Act provides, in relevant part:

at *2 (citing *U.S. Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.,* 51 F.L.R.A. 155, 158 (1995)). Once such a finding is made, the Act requires that an award of fees must be: (1) in conjunction with an award of back pay to the grievant on correction of the personnel action; (2) reasonable and related to the personnel action; and (3) in accordance with the standards established under 5 U.S.C. § 7701(g). *AFSCME Council 26*, 2017 WL 3229178, at *2. Section 7701(g), in turn, requires that: (1) the employee must be the prevailing party; (2) the award of fees must be warranted in the interest of justice; (3) the amount of the fees must be reasonable; and (4) the fees must have been incurred by the employee. *Id.*

An award resolving a request for attorney's fees under section 7701(g) must set forth specific findings supporting determinations on each pertinent statutory requirement under section 7701(g) of the FSLMRS and must state the specific reasons for approving or denying the request. *AFSCME Council 26*, 2017 WL 3229178, at *2*; see also DVA*, 64 F.L.R.A. at 796; *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 63 F.L.R.A. 524, 528 (2009); *AFGE Local 1770*, 63 F.L.R.A. 524, 528 (2009).

C. The USCP's Contention Lacks Merit that an Award of Fees is Barred by Sovereign Immunity.

The USCP contends that sovereign immunity precludes any award of attorney's fees in this case. We disagree. After briefing closed in this case, the Board rejected this contention in *FOP, U.S. Capitol Police Labor Committee v. U.S. Capitol Police*, Case No. 17-ARB-04, 2018 WL 950096, **9-10 (OOC Feb. 15, 2018):

> It is true, of course, that the Federal government is not liable for monetary awards unless its immunity has been waived, and a waiver of sovereign immunity must be expressed unequivocally in statutory text. *AFSCME Council 26 & Office of the Architect of the Capitol*, No. 00-LMR-03, 2001 WL 36175209, *2 (OOC Jan. 29, 2001) (finding that the Back Pay

---

> An employee. . . affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—
>
> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—
>
> * * *
>
> (ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, . . . shall be awarded in accordance with standards established under section 7701(g) of this title . . . .

> Act is incorporated by reference through the CAA). When Congress enacted the CAA in 1995, it expressly extended the rights, protections, and responsibilities contained in section 7122 of the FSLMRS to the USCP and its employees. . . . Therefore, by applying section 7122 of the FSLMRS to employing offices in the legislative branch, Congress made its intention clear to subject the employing offices to the obligations therein in the same manner as the Federal agencies covered by the FSLMRS, thereby effectively and unambiguously waiving sovereign immunity. *See U.S. Capitol Police Bd. & FOP, U.S. Capitol Police Labor Committee,* Case No. 01-ARB-01 (CP), 2002 WL 34461687, *6 (OOC Feb. 25, 2002) (holding that sovereign immunity does not obtain because the CAA incorporated the scope of grievance/arbitration from chapter 71 of the FSLMRS).

In addition to the foregoing, the CAA's generally applicable provisions at section 225 expressly provide that "[i]f a covered employee, with respect to any claim under this chapter . . . is a prevailing party in any proceeding under section 1405, 1406, 1407, or 1408 of this title, the hearing officer, Board, or court, as the case may be, may award attorney's fees, expert fees, and any other costs as would be appropriate if awarded under section 2000e–5(k) of title 42." 2 U.S.C. § 1361(a). There is no question here that Officer Ricken is a "covered employee" under the CAA. Further, as we discuss below, he is a "prevailing party" in these Board proceedings; he is represented by union counsel; and an award of attorney's fees is permissible on the basis of this representational status.

Therefore, for the reasons set forth above and in Case No. 17-ARB-04, we conclude that Congress has effectively and unambiguously waived sovereign immunity and that the Hearing Officer is authorized to award attorney's fees in this case.

D. Having Failed to File Exceptions to the Arbitrator's Award of Attorney's fees and Expenses, the USCP Cannot Collaterally Attack the Award in this Proceeding.

As stated above, both the Arbitrator and the Hearing Officer awarded attorney's fees and expenses in this case: the Arbitrator's award concerned fees incurred in the grievance/arbitration process under the parties' CBA, and the Hearing Officer's award concerned fees incurred in the course of enforcing the award through the OOC's ULP proceedings. The USCP challenges both awards on review. Thus, for example, it contends that the Arbitrator's Order requiring it to pay attorney's fees must be vacated because only the OOC has been granted the statutory authorization to pay awards under the CAA. As we discuss below, however, the Arbitrator's award of attorney's fees and expenses is not subject to collateral attack on review.

The Arbitrator's May 13, 2014 Award reduced Officer Ricken's termination to a 30-day suspension and granted him lost wages and benefits. As stated above, the USCP filed eight exceptions to the Award with the Board, which were denied in *Ricken I*. The USCP did not, however, file exceptions to the Arbitrator's June 17, 2015 Order, which, *inter alia*, awarded Ricken attorney's fees and expenses incurred in the grievance/ arbitration process.

As we recognized in *Ricken III*, when a party fails to file timely exceptions to an arbitration award under section 7122(a) of the FSLMRS, the award becomes final and binding and the employing office must take such actions as are required by the award. As explained by the court in *Department of the Air Force v. FLRA*, 775 F.2d 727, 735 (6th Cir.1985):

> [s]ince an award becomes final and must be implemented if the parties fail to file an exception within the required period, the necessary implication is that a party can no longer challenge the award by any means. It has become final for all purposes.

In this case, because the USCP did not file exceptions to the Arbitrator's Order awarding attorney's fees and expenses, under the terms of section 7122(b) of the FSLMRS, the award became final and binding. Consequently, the USCP was for all purposes unequivocally obligated to comply with that award and cannot now challenge any of its terms. *Dep't of Def. Dependents Schs. & Fed. Educ. Ass'n,* 54 F.L.R.A. 773, 1998 WL 549499, at **7-9 (1998) (agency could not collaterally attack award of attorney's fees in arbitrator's original award where no exceptions to the award were filed); *Dep't of Def. Distrib. Region E. New Cumberland*, 51 F.L.R.A. at 159-60 (same); *Dep't of Health and Human Serv., Social Security Administration v. FLRA*, 976 F.2d 1409 (D.C. Cir. 1992) (court affirmed the Authority's determination that, in an ULP proceeding brought as a result of an agency's refusal to comply with an arbitration award, the agency could not attack the arbitrator's contractual jurisdiction in the original proceeding). Accordingly, only the Hearing Officer's award of attorney's fees and costs associated with the enforcement of the Arbitrator's Award through the OOC's ULP proceedings are properly before the Board on review.

E. We Affirm the Hearing Officer's Determination that the Grievant was Affected by an Unjustified or Unwarranted Personnel Action.

Having rejected the USCP's contentions that sovereign immunity bars an award of attorney's fees in this case, and having clarified the permissible scope of this appeal, we now turn to the Hearing Officer's award of attorney's fees and costs associated with the enforcement of the Arbitrator's Award through the OOC's ULP proceedings.

As stated above, the threshold requirement for entitlement to attorney's fees under the Back Pay Act is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. 5 U.S.C. § 5596(b)(1). Here, the Board determined in *Ricken III* that the USCP committed an ULP when it failed and refused to comply with the Arbitrator's Award reinstating Officer Ricken with backpay, notwithstanding the Board's denial of the USCP's exceptions to that Award.

An Authority order finding a violation of the FSLMRS for failing to award backpay to an employee is effectively a determination that the employee has been affected by an unjustified or unwarranted personnel action that resulted in the loss of pay. *U.S. Customs Serv. & NTEU*, 46 F.L.R.A. 1080, 1091 (1992); *Dep't of the Air Force, Luke Air Force Base*, 32 F.L.R.A. 1084, 1095 (1988); *Dep't of Justice Bureau of Prisons, Washington, D.C.*, 32 F.L.R.A. 20, 26-27 (1988). Thus, we agree with the Hearing Officer that these requirements of the Back Pay Act are satisfied.

F. We Affirm the Hearing Officer's Prevailing Party Determination.

The Hearing Officer next determined that "the Union and Officer Ricken are the prevailing parties based on [the Hearing Officer's] original order that the Respondent must comply with the Arbitration award and reinstate Officer Ricken, pay him back pay plus interest and attorneys' fees due to the actions of the Respondent in improperly terminating him." We agree.

The Authority has determined that an employee is the prevailing party within the meaning of § 7701(g)(1) when the employee "received an enforceable judgment or settlement which directly benefited [the employee] at the time of the judgment or settlement." *Nat'l Ass'n Gov't Emps., Local R5-66 & Dep't Veterans Affairs Med. Ctr., Memphis, Tenn.*, 65 F.L.R.A. 452, 454 (2011). Further, where, as here, an employee receives a mitigated penalty, he is considered to have received significant relief and is, therefore, a prevailing party. *Id.* (citing *Hutchcraft v. Dep't of Transp.,* 55 M.S.P.R. 138, 142 (1992), *aff'd*, 996 F.2d 1235 (Fed. Cir. 1993)).

Moreover, the record clearly establishes counsel's status as attorneys for the Union that prosecuted the case on Officer Ricken's behalf. The United States Court of Appeals for the D.C. Circuit has approved the grant of fees to union counsel on the basis of this representational status. *AFGE Local 3882 v. FLRA*, 944 F.2d 922, 924-25 (D.C. Cir. 1991) (fees under the Back Pay Act are available to a labor union whose attorney has served the cause of an aggrieved employee in a grievance or ULP matter); *see also U.S. Dep't of Def., Educ. Activity,* 57 F.L.R.A. at 25-26; *Ala. Ass'n Civilian Techs. & Dep't of Def. Ala. State Military Dep't Ala. Nat. Guard*, 56 F.L.R.A. 231, 233 (2000) (holding that an attorney-client relationship exists when an attorney represents the employee on behalf

of a union); *Dep't of Def. Dependents Schs.,* 54 F.L.R.A. 773, 1998 WL 549499, at **11-12 (finding that Union was entitled to fees as a prevailing party); *Dep't of Def. Distrib. Region E. New Cumberland,* 51 F.L.R.A. at 160 (same).[4]

The Board has also determined that attorney's fees are "incurred" within the meaning of section 7701(g)(1) where a labor union attorney renders legal services on behalf of an employee grievant. *AFSCME Council 26,* 2017 WL 3229178, at *2 n.1; *see also AFGE Local 3882,* 944 F.2d at 933 (incurrence by an employee of liability for attorney fees is not a requirement for an attorney's fee award under Back Pay Act to a labor union attorney who served the employee's cause in grievance or unfair labor practice matters). Therefore, the attorney's fees at issue in this appeal were also "incurred" within the meaning of section 7701(g). Thus, the Hearing Officer correctly determined that Officer Ricken and the Union were "prevailing parties" within the meaning of section 7701(g)(1).

G. The Hearing Officer Correctly Determined that an Award of Fees is Warranted in the Interest of Justice.

The Authority looks to the decisions of the Merit Systems Protection Board ("MSPB") and the United States Court of Appeals for the Federal Circuit for guidance on the issue whether an award of attorney's fees is warranted in the interest of justice. *See Dep't of Def., Def. Distrib. Region E., New Cumberland, Pa.,* 51 F.L.R.A. at 160 n.5. In *Allen v. United States Postal Serv.*, 2 M.S.P.R. 420 (1980), the MSPB listed five broad, albeit non-exhaustive, categories of cases in which an award of attorney fees would be warranted in the interest of justice: (1) cases involving a prohibited personnel practice; (2) agency actions clearly without merit or wholly unfounded, or in which the employee is substantially innocent of charges brought by the agency; (3) agency actions taken in bad faith to harass or exert improper pressure on an employee; (4) agency gross procedural error which prolonged the proceeding or severely prejudiced the employee; or (5) cases where the agency knew or should have known it would not prevail on the merits when it brought the proceeding. 2 M.S.P.R. at 434-35.

In this case, the Hearing Officer determined that an award of fees are warranted in the interest of justice, stating:

[4] The USCP also contends on review that: (1) the only "prevailing party" in an ULP proceeding is the OOC General Counsel, because only he can issue a Complaint; (2) the Union cannot recover fees because its participation in the OOC's ULP proceedings was voluntary; and (3) an award of attorney's fees in an ULP proceeding is "punitive" and not authorized. Because these contentions are inconsistent with well-established FSLMRS precedent discussed above approving grants of attorney's fees to union counsel based on its status as the employee/grievant's representative, we find that they lack merit.

> Here there is no question that the award of Attorneys' Fees is in the interest of justice. Officer Ricken was visited with an unwarranted personnel action and the Respondent has continued its refusal to comply with the Arbitrator's June 17, 2015 award. Lastly, it is noted that the Respondent has elongated the legal process by making the same arguments despite prior decisions of the Board that once an award is final and binding it cannot be collaterally attacked.

Decision and Order at 10.

We agree. In *Ricken III*, we stated that:

> [I]n this unfair labor practice proceeding regarding the USCP's failure to comply with a final arbitration award, the only issues properly before the Hearing Officer were ones of compliance. The May 13, 2014 Award cleared the hurdles suggested by the USCP when the Board considered and rejected its exceptions in [*Ricken I*], and the USCP did not file exceptions to the Arbitrator's subsequent June 17, 2015 Order. . . . Having failed to do so, the USCP may not now challenge the Award on that basis. . . . If we were to agree with the USCP in this case, then final arbitration awards could be rendered non-final by the simple election to defy the final award and then challenge its merits in an unfair labor practice proceeding.
>
> * * *
>
> To date, the USCP has not taken any actions to comply [with the Arbitrator's Award and Order]. The failure to do so constitutes an unfair labor practice.

Moreover, we also determined in *Ricken III* that the USCP was collaterally estopped from re-litigating issues that were actually litigated and were necessary to the Board's resulting judgment on the USCP's exceptions to the Award in *Ricken I*.

Faced with almost identical circumstances in *AFGE Local 3882*, the D.C. Circuit has stated that "[a]n agency bears a statutory duty to comply with 'an arbitrator's final award,' and surely that obligation extends to adverse-action arbitration awards. *The interest of justice is served by an allowance of attorneys' fees whenever 'the agency's action [is] clearly without merit,'* and without a doubt so it was here." 944 F.2d at 933-35 (emphasis added). As in *AFGE Local 3882*, we conclude that the USCP's action in failing to comply with the Arbitrator's final Award and Order in this case was clearly

without merit. Therefore, the interest of justice is served by an allowance of attorneys' fees and costs in this case.

H. Reasonableness of the Fee

We turn now to the statutory call for reasonable attorney fees. The requirement of § 7701(g)(1) that the amount of fees be reasonable has two components: reasonableness of the hourly rate; and reasonableness of the number of hours expended.

1. Reasonableness of the Rate

The Union attached to its motion for attorney's fees and costs, contemporaneous time records (Ricksecker Declaration, Ex. 1(a), 1(b, and 1(c)), and the retainer agreement with Woodley & McGillivary, LLP ("Law Firm") that provides for the payment by the Charging Party of a monthly set amount for professional services rendered. In the event of an award of attorneys' fees and costs in any proceeding, the Law Firm seeks reimbursement at market rates and the Charging Party is reimbursed for the amounts it paid the Law Firm. The Law Firm then retains the difference between that amount and the amount awarded.

In *United States Department of Agriculture, Animal & Plant Health Inspection Service, Plant Protection and Quarantine*, 53 F.L.R.A. 1688, 1692 (1998) ("*PPQ*"), the Authority held that a similar fee agreement permitted the arbitrator to award fees at the law firm's non-retainer, billing rates as long as they were reasonable and consistent with prevailing market rates. The Board has also held that the counsel is entitled to recover fees at the market rate. *Johnson v. Office of the Architect of the Capitol*, No. 99-AC-326 (DA), 2002 WL 34461690, at *1 (July 2, 2002).

We agree with the Hearing Officer that the Law Firm's billing rates are reasonable and consistent with prevailing market rates. In so concluding, the Hearing Officer properly relied upon the so-called *Laffey* matrix as a means for establishing the appropriate hourly rate for attorneys in the Washington, D.C. area. *AFGE, Local 2608*, 63 F.L.R.A. 486, 487 n.2 (2009). The Authority has specifically identified the *Laffey* matrix as "the Washington, D.C./Baltimore rate." Moreover, the Authority's approach is consistent with the judicial approach to the matrix. *Cobell v. Norton*, 231 F. Supp. 2d 295, 302 (D.D.C. 2002) (describing the matrix as establishing a standard hourly rate for attorneys in "the Baltimore-Washington area").

There are two versions of the matrix: one version is maintained by the Civil Division of the Office of the United States Attorney, which calculates the matrix rate for each year by adding the change in the overall cost of living as reflected in the United States consumer price index ("CPI") for the Washington, D.C. area for the prior year and

rounding that rate to the nearest multiple of $5. *Smith v. D.C.*, 466 F. Supp. 2d 151, 156 (D.D.C. 2006). That version is commonly referred to as the "traditional *Laffey* matrix" or the "USAO *Laffey* Matrix. By contrast, the so-called "adjusted" *Laffey* matrix calculates the matrix rates for each year by using the legal services component of the CPI rather than the general CPI. *Id*.

Here, the USCP contends that the Hearing Officer erred by employing the adjusted *Laffey* matrix rather, than the USAO *Laffey* matrix. We conclude that this provides no basis for finding the award deficient. Indeed, the Authority has affirmed the use of the adjusted *Laffey* matrix rates. *FMC Carswell & AFGE Local 1006, Council of Prison Locals Council 33*, 65 F.L.R.A. 960, 967 (2011); *Army Dental Activity, Fort Bragg, N.C.*, 65 F.L.R.A. 54, 58 (2010). Accordingly, substantial evidence in the record supports the Hearing Officer's determination that the Union's billing rates are reasonable and consistent with prevailing market rates.

2. Reasonableness of the Hours Expended

The Authority requires that fee requests be closely examined to ensure that the number of hours expended was reasonable, because the number of hours expended is not necessarily that reasonably expended. *Dep't of Homeland Sec. Immigration & Customs Enf't,* 64 F.L.R.A. 1003, 1008 (2010). Additionally, an arbitrator [or Hearing Officer] must support his or her determination as to the reasonableness of a fee request. *Id.*

The standard of review as to the reasonableness of the number of hours awarded is deferential. *Id.* In this connection, the MSPB has stated that the fact-finder is "in the best position to determine whether the number of hours expended is reasonable[.]" *Id. (citing McKenna v. Dep't of Navy*, 108 M.S.P. R. 404, 411 (2008). "[A]bsent a specific showing that the [fact-finder's] evaluation was incorrect," the fact-finder's evaluation will not be second-guessed. *Id.* Consistent with this approach, the Authority has rejected an agency's "unsupported" exception to the number of hours that an arbitrator awarded a union attorney. *Id.;* (citing *U.S. Dep't of Def., Educ. Activity, Arlington, Va.*, 57 F.L.R.A. 23, 26 (2001) (Chairman Cabaniss concurring in part and dissenting in part)).

The USCP asserts that the Hearing Officer erroneously failed to analyze the reasonableness of the hours claimed by the Union and that they are unreasonable. However, these assertions are unsupported. As stated above, this unfair labor practice proceeding has been litigated for more than 3 years. The Hearing Officer relied on affidavits submitted by the Union, and we find no evidence to contradict the accuracy of the Union's request. In concluding that the Union should be awarded the full lodestar dollar amount of attorneys' fees and costs, the Hearing Officer stated that:

> There is no question that the Law Firm is comprised of experienced labor employment lawyers who achieved a high degree of success on behalf of Officer Ricken in returning him to work, the award of lost wages, attorneys' fees and costs, all because of the Respondent's unwarranted termination. The record establishes that the attorneys' hours were not excessive or unnecessary, and were most reasonable to present and bring this action to a successful conclusion.
>
> * * *
>
> In reaching this determination, I reject the Respondent's position that the Charging Party failed to provide sufficient documentation to support the Original and Amended Motion for Attorneys' fees and costs. Thus, I find that it was not inappropriate for the Charging Party to (1) include the billable time of Senior Law Firm Partner Gregory McGillivary in its computations, nor do I find, (2) it is necessary to eliminate the $4,249 cost of the FOP's share for the Arbitrator. Likewise, I find that it is not appropriate to (3) reduce the billed hours by 50%, [or] to (4) reduce any alleged vague description of billing activities by 30% . . . .

Because the Hearing Officer's findings support his legal conclusion that the number of hours requested by the Union is reasonable, we conclude that the award of attorney fees is not contrary to law in this regard, and that it is supported by substantial evidence.

Accordingly, we find that the USCP has not demonstrated that the number of hours the Hearing Officer awarded renders the amount of the fee award unreasonable.

ORDER

The Hearing Officer's Decision and Order is affirmed.

It is so ORDERED.

Issued, Washington, DC, August 20, 2019