

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2003B150(C)

ORDER OF THE ADMINISTRATIVE LAW JUDGE ON REMAND

TIMOTHY BENNETT,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

This matter is before the Administrative Law Judge upon the Board's Order On Remand, issued October 22, 2006.

The Board's Order outlined two issues which were to be addressed in this Order Of The Administrative Law Judge On Remand: 1) to determine the amount of fees and costs to be awarded to Complainant under the Amended Initial Decision; and 2) to determine the appropriate amount of the pay reduction in Complainant's base pay imposed as a result of the August 8, 2003 disciplinary action.

In deciding these two issues, the parties have filed the following with the Board: Complainant's Attorney Fee Application, filed November 17, 2006; Respondent's Notice of Intent To Challenge Fee Application and Objection To Complainant's Fee Application, filed November 29, 2006; Complainant's Response To Notice Of Intent To Challenge Fee Application And Objection To Complainant's Fee Application, filed December 1, 2006; Complainant's Submission of Additional Findings of Fact And Argument, filed December 4, 2006; and Respondent's Proposed Findings and Arguments On The Reduction In Pay For Complainant's Willful Misconduct Resulting In A Disciplinary Action, also filed December 4, 2006.

The parties also appeared at a hearing on December 8, 2006, to present additional argument and testimony on the issue of the fee application. At that hearing, Complainant filed a Supplemental Affidavit of William S. Finger, a Memorandum of Law On Interest, and a Supplemental Attorney Fee Application. Respondent filed a Submission Of Amendments To Complainant's Fee Application.

Attorney Fees and Costs

I. LEGAL PRINCIPLES IN DETERMINING THE LODESTAR:

A. Lodestar Calculations:

The Board historically has used a lodestar method of determining reasonable attorney fees for a party who is awarded fees and costs under C.R.S. § 24-50-125.5. See *David Teigen v. Department of Corrections*, SPB Case No. 2003B127, Order Awarding Attorney Fees and Costs, April 7, 2006. See also *Hibbard v. County of Adams*, 900 P.2d 1254, 1266 (Colo.App. 1995) (applying the lodestar method for calculation of attorney fees in state court under 42 U.S.C. §1988), *reversed on other grounds*, 918 P.2d 212 (Colo. 1996).

“The most useful starting point for determining the amount of 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, 433, 103 S.Ct. 1933, 1939, 76 L.E.d2d 40 (1983). “Counsel for the party claiming the fees has the burden of proving hours to the [tribunal] by submitting meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks.” *Case v. Unified School District No. 233, Johnson County, Kansas*, 157 F.3d 1243, 1250 (10th Cir. 1998). See also *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983).

The claimed hours are to be reviewed to determine if they were reasonably expended. “When scrutinizing the actual hours reported, the [tribunal] should distinguish ‘raw’ time from ‘hard’ or ‘billable’ time to determine the number of hours reasonably expended.” *Ramos*, 713 F.2d at 553. Hours that are excessive, redundant, or otherwise unnecessary should be excluded from the fee submission. Hours that are not properly billed to one’s client also are not properly billed to one’s adversary. *Hensley*, 461 U.S. at 434. Unnecessary hours are to be determined on a case-by-case basis, but fee application problems may include billing for time which normally would not be billed to a client but would be absorbed by the law firm’s general overhead, the duplication of services by having more than one attorney at meetings or hearings, and billing for the presence of layers of law clerks who do not participate in or contribute to the proceedings. *Ramos*, 713 F.2d at 553. If the documentation of hours inadequate, the award may be reduced accordingly. *Hensley*, 461 U.S. at 433. The reviewing tribunal “is not bound by the opinions of the parties regarding the reasonableness of the time they spent on the litigation.” *Case*, 157 F.3d at 1251.

Hours should also be limited to hours expended in pursuit of the ultimate result achieved. *Hensley*, 461 U.S. at 434-35 (quotation omitted). In a lawsuit in

which there are distinctly different claims based on different facts and legal theories, work on one claim will be unrelated to the work on another claim. The unrelated claims are to be treated as if they had been raised in separate lawsuits and no fee awarded for services on the unsuccessful claim. *Id.* See also *City of Wheat Ridge v. Cerveny*, 913 P.2d 1110, 1116 (Colo. 1996)(holding that, for purposes of an award of attorney's fees under TABOR, where the plaintiff has had only partial success in the litigation, "the court must exclude the time and effort expended on losing issues if it chooses to award attorney fees").

The exception to this principle occurs with interrelated claims. In cases where two claims are interrelated and a party is successful on one claim but not the other, a fully compensatory fee can still be awarded for the litigation of the two claims. *Zuchel v. City and County of Denver*, 997 F.2d 730, 744 (10th Cir. 1993)(citing to *Hensley*, 461 U.S. at 435). The touchstone for reasonableness, however, is the connection between the hours expended and the degree of success. See e.g. *Webb v. Board of Education of Dyer County*, 471 U.S. 234, 243, 105 S.Ct. 1923, 1928, 85 L.Ed. 2d 233 (1985)(holding that time spent pursuing optional administrative proceedings could properly be included in calculation of reasonable attorney's fees for federal court litigation if the work is "useful and of a type ordinarily necessary" to secure the final result obtained from the litigation).

In other words, the evaluation of reasonable attorney fees requires an evaluation of the case as it was presented to the Board rather than a numerical approach of simply comparing the total number of issues in the case with the number of issues in which Complainant was successful. Respondent has argued that, given that Complainant was successful on only one of the five Board appeals that he filed, he is entitled to no more than 1/5 of the total attorney fees incurred in this matter. This approach is too mechanical to allow the Board to properly evaluate the amount of work reasonably required to succeed on the layoff claim, and is rejected as a reasonable measure of attorney fees in this matter. See *Hensley*, 461 U.S. at 435 at note 11.

B. Degree of Success:

As mentioned above, it is hardly irrelevant to the fee award to consider the degree of success that Complainant has experienced in this matter. While there appears to be some dispute in reported cases as to when and how limited success at hearing is to be factored into the final result, a proper award of fees and costs in a cases where the recovering party has had limited success must reflect that fact. See *Cerveny*, 913 P.2d at 1116.

In this matter, Complainant was awarded fees on one issue" those fees and costs related to the appeal of the position abolishment." *Timothy Bennett v. Department of Corrections*, Amended Initial Decision, June 8, 2006, at p. 57. This issue consisted of the arguments that Respondent had failed to apply the

Board's rules on layoffs, and had unlawfully chosen Complainant as the life-safety office to be laid off from Colorado Territorial Correctional Facility. (For purposes of this Order On Remand, this issue shall be referred to as the "layoff" or "abolishment" issue.)

The layoff issue was not the only issue litigated in this matter. Complainant also litigated the following issues as well during the six days of hearing in this case:

- 1) a claim of age discrimination - see Amended Initial Decision at Findings of Fact 57 – 65 and Discussion at pp. 37 - 40;
- 2) a challenge to the retention offer decision – see Amended Initial Decision and Findings of Fact 29 – 56, and Discussion at pp 35 – 37;
- 3) a challenge to a disciplinary action taken based on four incidents – see Amended Initial Decision at Findings of Fact 66 – 93, and Discussion at pp. 40 – 45;
- 4) a whistleblower claim – see Amended Initial Decision at Findings of fact 98 – 99 and Discussion at pp. 52 – 53;
- 5) a retaliation/ hostile work environment claim encompassing a variety of actions on Respondent's part – see Amended Initial Decision at Findings of Fact 130 – 133, 145 – 154, and 184 – 189, and Discussion at pp. 51 and 53;
- 6) a challenge to Respondent's placing Complainant on administrative leave, and then the detention of Complainant and his wife when they later entered the Territorial Correctional facility grounds – see Amended Initial Decision at Findings of Fact 110 – 129, and Discussion at p. 50; and
- 7) a challenge to the propriety of Respondent's retention of various items from Complainant's office – see Amended Initial Decision at Findings of Fact 139 – 144, and Discussion at p. 51.

While the undersigned accepts Complainant's contention that counsel focused much of their time and energy on litigating the layoff and discipline issues because those issues had the highest chances of success, the outcome of this fees and costs litigation must also take into account that there were numerous other issues litigated in this matter for which Complainant cannot recover attorney fees and costs.

C. Fee Application Hours Claimed:

The Attorney Fee Application includes Exhibit K, which is a series of charts showing time entries. Each entry indicates the date (or, in the case of one entry, a range of dates), a brief description of the time expended, and identifies who incurred the time and provides a hourly figure. Additionally, Complainant has split the time entries into four categories, with each entry including a notation as whether it is Category 1, 2, 3 or 4 time.

The categories of time serve an important function in this matter. Category 2 time is time which has been shared among a number of cases handled by Frank & Finger, P.C. The time listed in the Attorney Fee Application, as Category 2, therefore, has already been apportioned among the number of clients who were raising similar issues. Category 3 time represents time expended on one activity but for multiple issues. Each category 3 notation, therefore, includes a percentage that Complainant's counsel has assigned to that time to account for the predominance of the layoff issue for that activity. Category 1 and Category 4 time are both apportioned at 100% to the layoff issue.

Once the time proration is applied to the billed time, Complainant's Attorney Fee Application asks for reimbursement of:

137.39 hours of attorney time for Mr. Finger, at \$295.00 per hour;
9.04 hours of attorney time for Mr. Gerganoff, at \$200.00 per hour;
14.57 hours of paralegal time for Ms. Gosnell, at \$100.00 per hour; and
1.22 hours of paralegal time for Ms. Morris, at \$60.00 per hour.

Complainant has also submitted a Supplemental Application for fees covering the period of litigation after submittal of the fee application. The supplemental application requests an increase in the billable rate to \$325.00 per hour for Mr. Finger's time and \$125.00 per hour for Ms. Gosnell's time "for all time devoted after the ALJ's Initial Decision in this matter." The hours requested in the supplemental fee application include:

17.60 hours of attorney time for Mr. Finger, at \$325.00 per hour
2.30 hours of paralegal time for Ms. Gosnell, at \$120.00 per hour
4.0 hours of attorney time for Andrew Newcomb, at \$195.00 per hour.

The supplemental fee application also requests that the increased billing rate be imposed for some of the time already requested as part of the Attorney Fee Application. Complainant calculates that this change will also increase the applicable billing for the original fee application time by \$484.50.

II. CALCULATION OF THE LODESTAR:

In calculating the lodestar amount to be awarded in this matter, it is helpful to examine the billed hours according to the phase of the litigation. The following analysis, therefore, divides the litigation in this matter into five phases: Pre-Hearing, Hearing, Exceptions Process, Fee Application, and Fee Litigation.

After determining the reasonable hours expended in this matter, the next three issues to be addressed are the issue of the reasonable hourly rate to be assigned to each type of time, how the costs are to be addressed, and how interest is to be assessed.

A. Pre-Hearing Phase:

The billing record describes pre-hearing phase activities occurring from May 18, 2003 through October 1, 2005. In this period, Mr. Finger has billed for 53.11 hours and Mr. Gerganoff has billed for 9.04 hours. Paralegal time in that period included 10.8 hours by Ms. Gosnell and 0.22 hours by Ms. Morris.

For larger blocks of time spent on multiple issues, Complainant has generally allotted a reasonable percentage of the time to the layoff issue. Respondent argues that the time for preparing and taking depositions has been overstated, given the number of pages that the depositions show were devoted to layoff issues in each of the contested depositions. The undersigned is not persuaded, however, that the time allocated by Respondent as pertaining to layoff issues is sufficient or reasonable, given the nature of the issues under discussion and the fact that a number of topic areas within each deposition could have potentially aided the layoff arguments. Complainant's proration of those depositions is accepted as fair and reasonable under the circumstances of this case. Complainant has also exercised care not to bill the time of two attorneys in conferences and other matters which could have involved more than one attorney. Other than as described directly below, the time expended in pre-hearing activities related to the layoff issue is reasonable and necessary, given the length of time that this period covers and the nature of the litigation activities on-going at that point.

Respondent has argued that the time spent conferring with Complainant and witnesses has been excessively billed. Mr. Finger has billed 7.0 hours of time for a total of 17 meetings with Complainant either by telephone or in person during the Pre-Hearing phase. That time has not been prorated to account for topics other than the layoff issue being discussed. While some time undoubtedly was expended discussing the status of the layoff issue with Complainant, seven hours is an unreasonable amount of time for this function. The undersigned will allow 2.5 hours of such time to be billed.

Respondent also objects to the billing proration on a number of meetings between Complainant's counsel and Respondent's counsel, arguing that the issues discussed included more than just the layoff issue. In the Pre-Hearing phase, the undersigned agrees that the billing for 0.6 hours of Mr. Finger's time on June 15, 2005 for a conversation with Respondent's counsel on depositions should be reduced to .3 hours.

For the pre-hearing phase, therefore, Complainant is entitled to recover for 48.3 hours of Mr. Finger's time, 9.04 hours of Mr. Gerganoff's time, 10.8 hours of Ms. Gosnell's time, and 0.22 hours of Ms. Morris' time.

B. Hearing Phase:

For purposes of billing, the undersigned has considered the Hearing Phase to extend from October 5, 2005, through the end of the litigation to amend or clarify the Initial Decision on July 7, 2006.

During this period, Mr. Finger billed for a total of 49.39 hours, Ms. Gosnell billed for 2.68 hours and Ms. Morris accounted for .33 hours.

On the whole, the total billed time represents reasonable and necessary time for a contested matter involving a total of six days of hearing and a period of written submissions. The time which needed to be apportioned because of multiple issues has generally been fairly apportioned by Complainant. There are only three points of concern noted for this period of time.

First, the billed time included .67 hours of Mr. Finger's work in November 2005 on a contested subpoena *duces tecum* issue that was not related to the layoff issue. Ms. Gosnell also billed 0.37 hours for the preparation of those subpoenas. Counsel agreed at hearing that the time related to the subpoena *duces tecum* should be deducted from the bill.

Second, the time billed during this period included a total of 7.96 hours of time meeting with Complainant or preparing Complainant and his wife for hearing testimony. This time is excessive when compared to the limited role that Complainant's testimony played in establishing the legal and factual issues related to the layoff decision, particularly as compared to the other hearing issues for which Complainant's testimony was necessary. The billable time spent with Complainant and counsel is therefore reduced to a more reasonable and necessary 2 hours.

Third, Respondent argues that time spent in discussion between Complainant's and Respondent's counsel involved more than the layoff issue, and that billed time should be reduced proportionately to reflect that division. The undersigned agrees that the bill for 1 hour of Mr. Finger's time on October 11, 2005, should be reduced to 0.67 hours to more accurately reflect the scope of the issues which were to be discussed to reach stipulations of fact in this matter. Additionally, the undersigned agrees that the bill for 0.5 hour of Mr. Finger's time on July 6, 2006, should be reduced to 0.17 hours for similar reasons.

As a result, Complainant is entitled to be compensated for a total of 42.10 hours of Mr. Finger's time, 2.31 hours of Ms. Gosnell's time, and 0.33 hours of Ms. Morris' time for the Hearing Phase of this matter.

C. Exceptions Process Phase:

Complainant also includes three types of attorney time associated with the post-hearing Exceptions Process.

First, Respondent appealed the layoff issue decision to the Board and Complainant was required to defend that finding from the Amended Initial Decision. Complainant included 5.1 hours of Mr. Finger's time related to the filing of an answer brief to Respondent's appeal to the Board. Respondent's appeal squarely addressed the conclusion of the Amended Initial Decision that Respondent had violated the Board rules in the layoff process. Complainant successfully defended the conclusions of the Amended Initial Decision before the board.

Second, Complainant requests a total of 12.08 hours of Mr. Finger's time, and 0.78 hours of Ms. Gosnell's time, related to the drafting and filing of a cross-appeal to the Board of the Amended Initial Decision. This time was incurred primarily in September and early October, 2006. Complainant's cross appeal covered several issues, including an argument that the Amended Initial Decision did not provide sufficient remedy to Complainant for the improper layoff procedure. Complainant did not succeed at the Board level with this argument.

Third, Complainant billed for 1.15 hours of Mr. Finger's time in handling the Board review process generally after the submission of the briefs to the Board and in reviewing the resulting Board order.

The question arises of whether, and under which circumstances, a post-hearing proceeding would be considered to be a continuation of the original litigation for which fees are to be awarded. The test as to whether appeal fees can be included in a fee award appears to be one of closeness of the relationship of the appeal to the prevailing claim. "Generally, we believe appeals and certiorari petitions should not be treated as unrelated if they are based upon common facts or legal theories intertwined with those on which the plaintiff has prevailed." *Ramos*, 713 F.2d at 556. The question at this juncture, then, is whether the litigation of issues before the Board during the Exceptions Phase should be considered as work on issues unrelated to the layoff determination.

Complainant's defense of the conclusion of the Amended Initial Decision that the layoff rules had been violated is directly connected to the issue. The 5.1 hours of Mr. Finger's time associated with this defense of the subject on appeal was reasonable and necessary. The 1.15 hours of attorney time expended in generally handling the Board review process was also reasonable and necessary in this case. Complainant is therefore entitled to be reimbursed for 6.25 hours of Mr. Finger's time for the Exceptions Phase.

The cross-appeal filed by Complainant on the appropriate Board remedy, however, was sufficiently different from facts and legal theories of the layoff issue that it should not be considered as part of the layoff issue for billing purposes. Accordingly, the 12.08 hours of Mr. Finger's time, and 0.78 hours of Ms. Gosnell's time billed for that project is disallowed.

D. Fee Application Phase:

Complainant includes 16.15 hours of Mr. Finger's time to prepare the Fee Application. This time is reasonable and appropriate for the complexity of the review made necessary by the need to apportion the time between the layoff litigation and the other issues. The Fee Application process was also made less complicated by the fact that Respondent was willing to accept the fee rate established in *Teigen*, and that agreement allowed Complainant to use several supporting materials previously generated for the *Teigen* filings. The hours on the fee petition would have undoubtedly been higher if that rate agreement had not been in effect.

E. Fee Litigation Phase:

(1) Supplemental Fee Application:

Complainant's Supplemental Attorney Fee Application includes a total of 17.60 hours for Mr. Finger's time, 2.30 hours for Ms. Gosnell's time, and 4.00 hours for the time of a second attorney, Mr. Newcomb.

(2) Initial Analysis Of Whether The Recovery of Fees for Fees Is Available Under C.R.S. § 24-50-125.5:

The threshold question to be answered is whether a second Board determination is necessary in order to award fees for the litigation of the fee award (the "fee for fees" stage). The U.S. Supreme Court faced a very similar issue under the federal Equal Access To Justice Act ("EAJA") in *Commissioner, Immigration and Naturalization Service v. Jean*, 496 U.S. 154, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990). The *Jean* analysis of the federal fee award statute is helpful in interpreting whether the Board's analogous fee statute authorizes recovery of fees for litigating the fee award.

In *Jean*, the plaintiff had prevailed in the underlying litigation and was awarded attorney fees and costs under the EAJA because the government's position was found to be without substantial justification. Once the fee application was filed, the parties extensively litigated the application and plaintiffs filed for additional fees associated with the fees litigation. The INS argued that the court could not award attorney fees for the fee litigation unless the court found that the government's position during the fee litigation – as opposed to just the position during the original litigation – had not been substantially justified.

The *Jean* court disagreed that two such determinations were necessary to award fees related to the fee litigation.

The *Jean* opinion examined the wording of the EAJA statute. It found that the statute required fees to be awarded if the government's position in the civil action (or by the underlying agency action upon which the suit was based) was not substantially justified, and that the statute made reference to only that one determination concerning the government's position. The court considered the absence of textual support in the statute for a second determination to an important fact in its analysis, finding that "a fee award presumptively encompasses all aspects of the civil action." *Jean*, 496 U.S. at 161.

The state statute under which Complainant is entitled to recover attorney fees before the Board contains analogous language to the EAJA:

Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee bringing the appeal or the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee or agency against whom such appeal or personnel action was taken, including the cost of any transcript together with interest at the legal rate.

C.R.S. § 24-50-125.5(1).

The Board's statute refers to only one determination which will control whether a party is entitled to fees and costs: that is, whether the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously or as a means of harassment or was otherwise groundless. Once that initial threshold is met, there is no statutory language suggesting that recovery for all of the phases of the litigation is not to occur unless another threshold has been met. Additionally, the statutory language contains authorization for recovery of "any attorney fees and costs... including the cost of any transcript together with interest at the legal rate." (emphasis added). This broad language supports that the intent behind this statute was to provide full recovery for the party to receive fees and costs, rather than to provide a more limited recovery.

Accordingly, C.R.S. § 24-50-125.5 is interpreted to permit recovery of fees associated with the fee litigation. This position is consistent with the result in *Teigen*. See *Order Awarding Attorney Fees and Costs*, April 7, 2006, at page 14 (awarding 53 hours for litigation of the attorney fee issue).

(3) Review of Hours For The Fee Litigation:

Of the 17.60 hours billed for Mr. Finger's time, 1.0 hour is billed for the a reply on the Motion On Finality On Illegal Abolition – a motion filed directly with Board and not a part of the fee litigation. That hour will be deducted from the Supplemental Fee Application as incorrectly included.

The remainder of the attorney time is split between 2.4 hours of attorney time spent in settlement negotiations and in communicating with Complainant, 14.2 hours of Mr. Finger's time for litigating the fee issue, and 4.0 hours of hearing preparation for Mr. Newcomb. Ms. Gosnell also contributed 2.3 hours of time preparing materials for filings or for hearing.

The time spent litigating the fee petition is reasonable and necessary. Mr. Finger's time is not excessive given the amount of material he needed to review and draft in order to litigate the issue. Mr. Newcomb's time is also reasonable given that it was a possibility that Mr. Finger was going to testify at the fee hearing and, if so, would need a second attorney present to direct the questioning. Although Mr. Newcomb did not end up taking an active role in the hearing, his preparation time is not unreasonable under these circumstances. The extended time expended for settlement considerations, however, is not as directly connected to the fee petition litigation and is excessive for the purpose of assessing fees and costs. That time is reduced to 1.0 hours.

Accordingly, Complainant is entitled to recover 14.2 hours of Mr. Finger's time for litigating the fee petition, 4 hours of Mr. Newcomb's time for preparing to take an active role in the fee hearing, and 2.3 hours of paralegal time for Ms. Gosnell's contribution.

F. Summary – Reasonable Hours:

Complainant is awarded the following hours as reasonable and necessary to litigate the layoff issue and subsequent fee petition:

Phase	Mr. Finger	Mr. Gerganoff	Mr. Newcomb	Ms. Gosnell	Ms. Morris
Pre-Hearing	48.3 hrs.	9.04 hrs.	0	10.8 hrs.	0.22 hrs.
Hearing	42.10	0	0	2.31	0.33 hrs.
Exceptions	6.25	0	0	0	0
Fee Application	16.15	0	0	0	0
Fee Litigation	14.2	0	4.0	2.3	0
Totals	110.85 hrs.	9.04 hrs.	4.0 hrs.	15.41 hrs.	0.55 hrs.

G. Amount of the hourly fee:

The reasonable hourly fee is set according to the “prevailing market rate” for such services. *Balkind v. Telluride Mountain Title Company*, 8 P.3d 581, 588 – 89 (Colo.App. 2000). See also *Hibbard v. County of Adams*, 900 P.2d 1254, 1266 (Colo.App. 1994)(defining the reasonable hourly rate as the rate “that would be charged by private lawyers in the community”). The specific test is “to determine what lawyers of comparable skill and experience practicing in the area in which the litigation occurs would charge for their time.” *Ramos*, 713 F.2d at 555.

At the time of the filing of the Attorney Fee Application, Respondent had agreed that the hourly rates found in *Teigan* would not be contested by Respondent, and the initial fee application was filed using those hourly rates. In the Supplemental Fee Application, however, Complainant changed position and argued that all billed time from the point of the Initial Decision in this matter should be awarded at the higher billing rate currently in effect for Mr. Finger and Ms. Gosnell.

Complainant’s counsel argues that his and Ms. Gosnell’s current billing rate is authorized by *Ramos*. It is correct that *Ramos* holds that “the hourly rate at which compensation is awarded should reflect rates in effect at the time the fee is being established by the court, rather than those in effect at the time the services were performed.” *Ramos*, 713 F.2d at 555.

Complainant’s submission, however, contains insufficient persuasive evidentiary support that \$325 per hour for Mr. Finger’s time and \$125 per hour for Ms. Gosnell’s time represents a market rate for State Personnel Board litigation. Complainant does not perform a market analysis to support this request but instead leaves the argument with the assertion that the rates are the current billing rates for Mr. Finger and Ms. Gosnell. While it is relevant that these rates are currently being charged by Frank & Finger, P.C., that assertion does not answer the entire question. See *Case*, 157 F.3d at 1257 (noting, in a 42 U.S.C. §1983 case, “[w]e do not mean to suggest that a plaintiff’s attorney is automatically entitled to his or her normal market rate. Instead, the parties should submit, and the district court must consider, evidence of the hourly rate the attorneys would be able to charge if working in the civil rights field”).

On the other hand, Complainant’s submissions support that, at least as of the time of the *Teigan* decision in April 2006, \$295 and \$100 per hour, respectively, were reasonable market rates for Mr. Finger’s and Ms. Gosnell’s time.

The undersigned declines Complainant’s invitation to award hourly rates in excess of \$295 per hour for Mr. Finger’s time, \$200 per hour for Mr. Gerganoff’s

time, \$195 per hour for Mr. Newcomb, \$100 per hour for Ms. Gosnell and \$60.00 per hour for Ms. Morris's time.

As a result of this hourly rate, Complainant is entitled to reimbursement for 110.85 hours of Mr. Finger's time at \$295 per hour, or \$32,700.75. He is also entitled to \$1,808 for Mr. Gerganoff's charge for 9.04 hours at \$200 per hour, and \$780 for Mr. Newcomb's charge of 4.0 hours at \$195 per hour. As for paralegal time, Complainant is entitled to \$1,541 for Ms. Gosnell's billing of 15.41 hours at \$100 per hour, and reimbursement of \$33 for Ms. Morris's billing of 0.55 hours at \$60 per hour. The total awarded for reasonable and necessary attorney fees in this case is \$36,862.75

H. Costs:

Complainant has presented a list of expenses totaling \$7,363.07 in a spreadsheet format. See Attorney Fees Application, Exhibit M. These expenses cover postage and fax fees, photocopy fees, messenger fees, process server fees, federal express charges, outside copy fees, deposition fees, mileage and parking, witness fees, Personnel Board fees, and transcription fees. The expenses are listed by date, but have no other identifying information associated with them.

Complainant is only entitled to collect those costs which are related to the layoff claim litigation, and is not entitled to recover costs associated with the numerous other claims and issues litigated in this matter. The submissions by counsel, however, provide no explanation for how these costs were incurred and do not attempt to prorate the costs according to a claim or issue.

It is reasonable to assume that at least some costs would be incurred in the litigation of the layoff claim, and the letter describing the billing arrangements with Complainant references that he will be responsible for at least some categories of expenses in addition to hourly fees. The undersigned is concerned, however, that no representations have been made as to whether these all of these costs are expenses which have not been commingled with the general costs of conducting business, or whether Complainant has been billed for each category of cost. See *Ramos*, 713 F.2d at 559 ("Although some firms separately itemize and bill long distance telephone charges, copying costs, and some other expenses, these kinds of expenses should be allowed as fees only if such expenses are usually charged separately in the area").

Given the uncertainty created by the documentation of the costs, the most reasonable available method is to reduce the costs to account for only a portion of the claimed expense. Cf. *Hensley*, 461 U.S. at 433. Respondent's argument that 20% of the costs should be assigned to the layoff issue reflects the most reasonable solution for apportioning the costs to account for the uncertainty of

the documentation and the limited degree of success in this matter. Complainant is therefore awarded 20% of the claimed expenses, or \$1,472.61.

I. Interest:

Complainant requests that the current statutory interest rate, 8%, be awarded from entry of the Initial Decision forward, with interest on fees from various stages of the litigation after the Initial Decision was issued to be assessed at the end of each stage.

C.R.S. § 24-50-125.5 expressly provides that, for parties who are eligible for an award of attorney fees and expenses, the type of expense which should be awarded includes "interest at the legal rate." The question, therefore, is when that interest is to be applied.

Respondent cites to *Kennedy v. King Soopers, Inc.*, __ P.3d __ (Colo. App. 2006), 2006 WL 2567754 (September 6, 2006) for the proposition that "when attorney fees are awarded, not as damages, but to shift the burden of litigation, interest on the award runs from the date of the final order quantifying the amount of fees, and not from any earlier judgment or order that might have established a party's right to recover damages or fees without specifying an amount." *Id.* at *5.

Complainant argues that his request is for pre-judgment interest, and not post-judgment interest as was discussed in *Kennedy*. Complainant also points out that the Board's fee and expense statute expressly allows for the award of interest, while the different statute discussed in *Kennedy* did not

When a party is awarded fees in a Board case, it is because the conduct of the other party has dropped below a critical threshold. Fees are not awarded in Board cases merely to shift the burden of litigation. Fee awards are also designed to discourage bad faith actions, unreasonable positions, and frivolous or otherwise groundless litigation before the Board. The analysis in *Kennedy* turns on the analysis of when a judgment has been rendered for purposes of interest in a fee shifting statute. The Board's statutory scheme in C.R.S. §24-50125.5, however, does not require that there be a judgment in place before interest can be awarded.

For these reasons, the undersigned is not persuaded that the *Kennedy* analysis should be applied to an award of attorney fees and expenses under C.R.S. §24-50-125.5. The purpose of the statute would be better effectuated by the imposition of statutory interest at the time of the Initial Decision, as requested by Complainant.

Disciplinary Pay Reduction:

I. Board Order:

As part of the Board's Order On Remand, the Board concluded that a permanent sanction of \$300 per month, imposed on September 1, 2003, was excessive. The Board was not satisfied, however, with the revised sanction proposed in the Amended Initial Decision – that is, a sanction of \$300 per month for six months. The Board concluded that the total of \$1800 “is not sufficient given the record before the Board.” The undersigned was ordered to make written findings of fact and enter an order regarding the monetary award.

In order to comply with the Board's Order, and to provide a factual basis for the disciplinary decision, the undersigned is filing a series of supplemental findings of fact concerning the incidents for which Complainant is to be disciplined. These supplemental findings combine some of the previous findings with more extended statements of the factual circumstances. These findings do not replace the original findings, but supplement them.

II. Supplemental Findings of Fact:

A. Events Related to the Sleeping On Duty/ Early Return Charges:

1. On Wednesday, June 25, 2003, Complainant was at his desk at about 9:30 in the morning and he fell asleep. At least one other employee noted that Complainant was sleeping, and notified Major Linda Maifeld.
2. Complainant had taken Xanax for the first time the day before to help with a sleeping problem. The drug had been prescribed by his physician on June 23, 2003.
3. Complainant worked in an area of the facility which is not within the area that inmates normally are permitted but to which inmates have access. Sleeping on the job is taken seriously by Respondent. Correctional officers who become drowsy at work are expected to immediately notify a supervisor of the ill effect of any medication or other problem so that they could be relieved of duty. Complainant did not notify his supervisors of the medication he was taking or that he was becoming drowsy.
4. Major Maifeld sent Complainant home soon after she discovered that he was sleeping.
5. By phone on Wednesday, Complainant and Major Maifeld discussed the effect of the drug on Complainant's system.

Complainant told Major Maifeld that the drug would be in his system for 48 hours. The two of them also discussed what would happen with a class that Complainant was to teach on Thursday morning. Major Maifeld made the decision that Complainant would not teach the class.

6. Major Maifeld told Complainant during the phone call on Wednesday that he was not to return until Friday and to obtain a medical clearance before he returned.
7. Complainant contacted his physician for a medical clearance on Wednesday afternoon. He picked up the document on Thursday morning.
8. Complainant returned to the facility on Thursday afternoon. Complainant did not provide his doctor's note to anyone when he returned to work, and he did not notify Major Maifeld that he had returned. Major Maifeld was informed at the end of the day on Thursday that Complainant had returned to the facility.
9. On Friday, Major Maifeld located Complainant and asked him why he had returned to the facility on Thursday when he had been told to return on Friday. Complainant said that he had a doctor's note by that time so he came back. Major Maifeld reminded Complainant that a doctor's note does not, in itself, allow an employee to return to work, and that the warden's office had to agree that it was appropriate. Complainant admitted to Major Maifeld that he was often at the fringes of obeying departmental policies and procedures.

B. Inspection Issues:

10. In early 2003, Doug Reams was a housing officer in CTCF's cell house 1. Part of Officer Reams' duties were to check the fire extinguishers and air packs in cell house 1 and to report any problems to the Life/Safety officer.
11. On May 5, 2003, Mr. Reams noted that fire extinguisher #073 needed to be recharged and was showing a red status. He filled out an incident report regarding the issue and put that report in Complainant's mailbox. This was the standard procedure for obtain service on discharged extinguishers.
12. Mr. Reams also spoke with Complainant about the need to check the extinguisher at about this time as well.

13. On June 2, 2003 Mr. Reams again noticed that the same fire extinguisher was still showing that it needed to be recharged. He completed another incident report on the matter.
14. On June 7, the fire extinguisher was replaced by maintenance personnel. Complainant did not replace the extinguisher.
15. On June 17, 2003, Mr. Milyard spoke to Complainant about the fire extinguisher. Complainant told Mr. Milyard that he had checked the extinguishers around May 22, 2003, and that it did not need to be recharged because it was still in the low green section.
16. On June 30, 2003, Mr. Milyard checked with Mr. Reams about whether the needle was in the red on the extinguisher or was reading at a low green level. Mr. Reams confirmed that the extinguisher was in the red. Mr. Milyard had Mr. Reams draft another report noting both checks of the fire extinguisher and his report to Complainant.
17. Mr. Reams wrote a report on or about July 8, 2003. In it he repeated the information about the fire extinguisher status, and added that he had also told Complainant that the cell house 1 Scott Air packs were also low and Complainant had failed to service those devices.
18. Complainant suffered from a bout of his chronic lung problems on about May 13, 2003, and began taking Family and Medical Leave Act (FMLA) leave beginning on May 19, 2003. Complainant took intermittent sick leave for the remainder of May and part of June 2003.

III. Discussion and Analysis:

Respondent argues that the disciplinary sanction to be imposed in this matter should be a \$300 / month reduction in base pay from the September 1, 2003, until the date of the Initial Decision, June 1, 2006. This would entail a salary reduction total of \$9,900 over 33 months. Respondent argues this action is warranted because the Life/Safety Officer position is a critical position that requires a reliable and trustworthy person. Respondent notes that the facts of this disciplinary scenario point to problems that Complainant has had in the past with failing to maintain fire extinguishers, not obeying orders as directed, and not telling the complete truth when asked about issues.

Complainant argues that any pay reduction completed under pay-for-performance, the maximum amount of pay reduction cannot exceed a one year period because the controlling procedure in 2003, Director's Procedure T-3-19,

required annual pay for performance evaluations without regard to corrective or disciplinary action. Under this argument, the pay reduction could last no longer than March 31, 2004, which is a period of 7 months.

Complainant also argues that mitigating circumstances were not taken into account in this matter, but the undersigned is not persuaded by this argument.

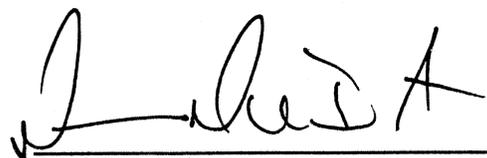
In reconciling the competing interests presented by Complainant's argument on pay for performance and Respondent's interest in maintaining the seriousness of the offenses, the undersigned is persuaded that the incidents warrant a pay reduction amount which totals \$4,000. That amount could have been assessed before the end of the 2003-2004 pay period by assessing an amount of approximately \$571 per month, which would have been a reasonable option under the circumstances.

ORDER

Respondent shall pay Complainant's reasonable attorney fees and costs in the amount of \$38,335.36, with statutory interest to be assessed as of June 1, 2006, for all fees and costs incurred by that date. Fees and costs incurred after June 1, 2006, shall be awarded statutory interest from the date of this decision.

The \$300 a month permanent pay reduction assessed against Complainant's base salary is modified so that the equivalent of a \$571.43 per month (with the last month at \$571.42) reduction is taken from Complainant's pay from September 1, 2003 through March 31, 2004. Complainant is to be refunded any amount taken from his pay in excess of \$4,000. Interest on the salary amount refunded to Complainant shall be payable at the statutory rate from the date of the Initial Decision, June 1, 2006. Complainant's base pay for period after the assessment of the \$4,000 reduction in pay shall be restored to the level it would have been if the pay reduction had lasted only seven months.

Dated this 20th day of December, 2006.



Denise DeForest
Administrative Law Judge
Colorado State Personnel Board
633 17th St., Suite 1320
Denver, CO 80202
(303) 866-3300

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is \$50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 9 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.

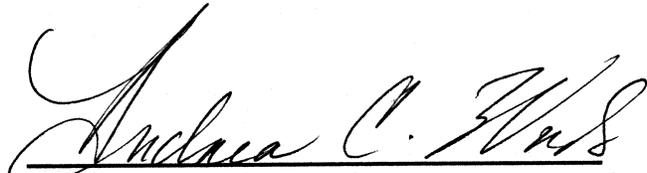
CERTIFICATE OF SERVICE

This is to certify that on the 22nd day of Dec., 2006, I placed true copies of the foregoing **ORDER OF THE ADMINISTRATIVE LAW JUDGE ON REMAND** in the United States mail, postage prepaid, addressed as follows:

William S. Finger, Esq.
Frank & Finger, P.C.
29025-A Upper Bear Creek Road
P.O. Box 1477
Evergreen, CO 80437-1477

and in the inter-office mail addressed to

Vincent E. Morscher
Assistant Attorney General
Civil Litigation and Employment Law Section
1525 Sherman St., 5th Floor
Denver, CO 80203


Andrea C. Woods