

January 14, 2003  
DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Supplemental Order

Name of Case: Janet Benson  
Date of Filing: September 26, 2002  
Case Number: VBX-0082

Janet Benson (Benson or Complainant) filed a Complaint of Retaliation alleging that her former employer, Lawrence Livermore National Laboratory (LLNL or the Laboratory), retaliated against her for engaging in activity that is protected by 10 C.F.R. Part 708, the Department of Energy's Contractor Employee Protection Program. On August 21, 2002, the Office of Hearings and Appeals (OHA) of the Department of Energy issued a Decision and Order granting relief to Benson in connection with that complaint. *Janet K. Benson*, 28 DOE ¶ 87,027 (2002) (*Benson*). In *Benson* we found that LLNL had not shown by clear and convincing evidence that it would have given Benson a "less than satisfactory" performance evaluation in the absence of her protected disclosures. Since the Complainant was successful on this issue, we found she was eligible for relief, which included removal of the performance evaluation from her personnel file, and attorney fees and costs. 1/ The instant decision will determine the amount of attorney fees and costs that should be awarded in this case.

We asked the attorney to file a statement showing the fees and costs she is claiming, including a justification for any expenses claimed. She submitted a request for attorney fees of \$80,693 and costs of \$1,012.36. The attorney fees were calculated as follows. The hourly rate applied was \$310. The attorney calculated that she worked a total of 457.5 hours on this proceeding. At the hourly rate of \$310, she would be entitled to receive a total of \$141,685, if she were reimbursed for all hours spent on this case. However, she points out that she did not prevail on the issue covered in the

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1/ We did not find that LLNL had retaliated against Benson by  
(i) assigning her to work on a different project;  
(ii) assigning her to work in a different building; or  
(iii) terminating her employment.

second hearing held in this case, which considered Benson's claim that she was improperly terminated by LLNL. The attorney therefore subtracted all professional hours associated with this second hearing (197.2) and requested fees in the amount of \$80,693 based on 260.3 hours at \$310 per hour. The \$1,012.36 in costs were in large part associated with expenses incurred in connection with attending the first hearing in this proceeding.

LLNL filed a response to the fee request in which it contends that the fees should be further reduced because Benson prevailed on only one out of three remaining alleged retaliations by the Laboratory that were the subject of the first hearing. LLNL believes that the attorney should receive only one third of the total \$80,693. LLNL further contends that the attorney costs should be denied in full because (i) they are not substantiated by documentation, such as receipts; and (ii) they are not the types of costs ordinarily allowed. LLNL maintains that allowable costs are those such as docket fees, expert witness fees, court reporter and printing costs.

#### Attorney Fees

We are inclined to agree with LLNL that a further reduction in fees is warranted in this case. We believe that the fees awarded should in some measure reflect the degree of success achieved by counsel. However, while the attorney only prevailed on one out of four issues, we do not think that means she should receive only one fourth of the total possible fees. For example, the issue on which she prevailed may have required more research or other services than the ones on which she did not prevail. Moreover, much research in litigation is general in nature. We do not believe that each professional hour spent can be discretely assigned to an issue on which the attorney prevailed or to an issue that she lost. There are certainly some overlapping hours that apply to all issues of the case, whether they were won or lost. For example, the attorney needed to read documents submitted to her by her client, filings of LLNL and other LLNL material in order to familiarize herself with this case, and decide which issues to pursue and what approach to take. She is entitled to be fully paid for that time. It would be unreasonably burdensome, if not impossible, to dissect all the hours spent and determine precisely which merit a fee award, based on the one issue in which Benson prevailed. Accordingly, after reviewing all the activities and services outlined by the attorney in Appendices A and B of her fee request, we find that \$58,000 is a reasonable award. This represents about 40 percent of the asserted total fees of \$141,685.

Attorney Costs

As an initial matter, we do not agree with LLNL's position that the attorney costs should be fully denied because they are not typically the types of costs that are reimbursed, such as witness fees and printing and filing costs. The attorney has asked for and is certainly entitled to be reimbursed for her expenses associated with attending the hearing. We would award her those costs whether she included them as part of her fees in this case, or, as she has done here, designated them as costs. After reviewing each of those costs, we find them to be utterly reasonable. The hearing lasted from February 1 to February 3. For these three days, the attorney requested, for example, hotel expenses of \$241, airfare of \$167 (from Seattle, WA to Oakland, CA), rental car costs of \$201 and meal costs of \$90. All of these types of costs are entirely ordinary expenses to be expected in attending a hearing. Further, the amounts requested are moderate and well within the norm. Therefore, we will not require the attorney to provide specific documentation for those costs.

This Supplemental Order has been reviewed by the National Nuclear Security Administration (NNSA), which has not objected to the above determinations, provided any substantive comments, or specified any changes. Accordingly, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the Supplemental Order shall be implemented by each affected NNSA element, official or employee, and by each affected contractor.

It Is Therefore Ordered That:

(1) Lawrence Livermore National Laboratory shall pay A. Alene Anderson the amount of \$58,000 for attorney fees and \$1,012.36 for costs incurred in this proceeding.

(2) Interest shall begin to accrue on that amount at the rate of 2/3 of one percent per month compounded monthly, beginning on February 1, 2003.

(3) The obligation to make the payment to Ms. Anderson shall be stayed pending the outcome of the Petition for Secretarial review (Case No. VBB-0082) that is currently pending with respect to Janet Benson's Part 708 complaint.

(4) An appeal of any of the determinations made in this Order may be made by filing a supplemental submission in the petition for Secretarial review proceeding referred to in Paragraph (3) above. A party must file this submission within 10 days of receipt of this Decision and Order.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: January 14, 2003