

David Ramirez

Case No. VWX-0001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Supplemental Order

Name of Petitioner: David Ramirez

Date of Filing: January 17, 1995

Case Number: VWX-0001

On December 2, 1994, the Deputy Secretary of Energy issued a Final Decision and Order in a case involving a "whistleblower" complaint filed by David Ramirez ("Ramirez") under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. David Ramirez, 24 DOE 87,510 (1994). In that Decision, the Deputy Secretary affirmed, and adopted as a Final Agency Decision, an Initial Agency Decision and a Supplemental Order issued by the undersigned Hearing Officer in the Ramirez case. The present Supplemental Order is a final determination of the amount of attorney fees and disbursements awarded to Mr. Ramirez under 10 C.F.R. 708.11(c).

Background

In the Initial Agency Decision, dated March 17, 1994, I found that Brookhaven National Laboratory/Associated Universities, Inc. (BNL), a DOE contractor, had violated the provisions of 10 C.F.R. 708.5 by directing the termination of Ramirez' employment as a BNL subcontractor employee in reprisal for his making protected safety disclosures. David Ramirez, 23 DOE 87,505 (1994) ("the March 17 Decision"). The March 17 Decision further determined that Ramirez should be awarded back pay and reimbursement for all costs and expenses reasonably incurred by him in bringing his complaint.

In a Supplemental Order dated June 8, 1994, I determined that Ramirez was entitled to back pay of \$96,463.41 ^{1/} This included interest on the back pay of \$9,278 as of June 30, 1994. As of December 31, 1994, the cumulative interest amount is \$12,929. and reimbursement of (i) \$24,740 for attorney fees,^{2/} The attorney's fee award was based on 140 hours of work by Ramirez' attorney at \$175 per hour and 24 hours of work by the attorney's law clerk at \$10 per hour. (ii) \$87.35 for attorney disbursements, and (iii) \$797.42 for other reasonable costs and expenses reasonably incurred by Ramirez in this proceeding. David

Ramirez, 24 DOE 87,504 (1994) ("the June 8 Decision"). I denied the request of Claire Tierney, Ramirez' attorney, for a specific amount of additional attorney fees for work that had not been documented. However, since BNL had requested that the Secretary of Energy or her designee review the March 17 Decision, I did approve an unspecified additional amount at the rate of \$175 per hour for each hour in excess of the 140 hours reasonably spent by Ms. Tierney in representing Ramirez during the review phase of the proceeding. Id. at Ordering Paragraph (1)(e). I also approved an additional amount as reimbursement for documented, reasonable disbursements incurred by Ms. Tierney subsequent to April 15, 1994, the date that she had prepared her statement of costs and expenses in the proceeding which resulted in the Supplemental Order. Id. at Ordering Paragraph (1)(f).

The Deputy Secretary upheld the June 8 Decision in its entirety. In order to implement the Deputy

Secretary's determination in accordance with the provisions of 10 C.F.R. 708.11(c), the Director of the DOE Office of Contractor Employee Protection (OCEP) provided Ms. Tierney with an opportunity to submit a final accounting of allowable costs and attorney fees. In a submission to OCEP dated December 12, 1994 (December 12 Letter), Ms. Tierney stated that she had spent 80.5 hours representing Mr. Ramirez during the review phase of this proceeding and, on the basis of an hourly rate of \$175, requested an additional award of \$14,087.50. She also requested \$27.90 as reimbursement for postage expenses that were incurred after April 15, 1994. When added to the initial attorney fee award of \$24,740, the total amount of Ms. Tierney's revised fee request is \$38,855.40.^{3/} This amount does not include the \$87.35 for attorney disbursements approved in the June 8 Decision.

The December 12 Letter also included four exhibits which I have considered in evaluating Ms. Tierney's fee request: (i) a copy of Ms. Tierney's Attorney's Affirmation in support of her initial fee request ("Attorney's Affirmation"), (ii) a copy of a June 30, 1994 letter from Andrea S. Christensen, attorney for BNL, to OCEP ("June 30 Letter"), in which Ms. Christensen argued that an additional fee request made by Ms. Tierney should be denied in its entirety,^{4/} That request was made in a June 22, 1994 letter from Ms. Tierney to OCEP ("June 22 Letter"). A copy of that letter has been provided to me by OCEP and is a part of the record presently before me. In the letter, Ms. Tierney had requested additional legal fees to compensate her for the time she spent in connection with a reply brief that she submitted on June 9, 1994. No determination has previously been made on that request, and it is therefore included in the request made in the December 12 Letter.(iii) a copy of Ms. Tierney's July 28, 1994 letter in response to the June 30 Letter ("July 28 Letter"), and (iv) a statement of services rendered by Ms. Tierney on the Ramirez case from September 1993 through July 1994 ("Statement of Services").

Ms. Christensen was provided an opportunity to respond to the December 12 Letter, but declined to do so. See January 12, 1995 Memorandum from Sandra L. Schneider, OCEP Director, to Ted Hochstadt, Hearing Officer.

Discussion

The only issue before me is the reasonableness of the amount of hours that Ms. Tierney claims to have spent performing legal services during the review phase of this case. Ms. Tierney has documented that she spent 80.5 hours on office interviews, research, and the preparation of a reply brief and two legal issue letters during the two-month period from May 20, 1994 to July 29, 1994. This expenditure of time appears disproportionately high when compared to the approximately 140 hours that she spent during the seven months from September 14, 1993 through April 15, 1994, a period of time that included the preparation of three written submissions (a preliminary statement, a closing statement, and a statement of damages) and the preparation for, and appearance at, a two-day hearing.^{5/} The amount of hours claimed by Ms. Tierney is not, however, as disproportionately high as asserted by Ms. Christensen in her June 30 Letter. Ms. Christensen erroneously asserts that Ms. Tierney claimed that she spent 138 hours preparing her reply brief in the review stage of the proceeding and 81 hours in performing legal services in the hearing phase of the proceeding. In fact, in the June 22 Letter to which Ms. Christensen was responding, Ms. Tierney documents 138.5 hours spent on the hearing phase and only 64.5 hours spent in the preparation of the reply brief. For this reason, I have scrutinized very closely Ms. Tierney's description of the legal services that she performed during the review phase of this proceeding, the documents that she prepared during this period, and the BNL submissions that she was responding to. On the basis of that review, I have concluded that the award that she has requested is, for the most part, reasonable.

The bulk of the additional attorney fee claim requested by Ms. Tierney involves the 64.5 hours spent in connection with her June 9, 1994 reply brief to BNL's May 16, 1994 Appeal to the Secretary of Energy. Ms. Tierney claims that her time was spent as follows: office interviews, 5 hours; review of case, 9 hours; research, 9 hours; drafting and modifying the reply brief, 40 hours; copying, binding and mailing the brief, 1.5 hours.

In her June 30 Letter, Ms. Christensen argued that all of these time charges are excessive, particularly the

amount of time claimed for client interviews, research, and copying, binding and mailing the reply brief. Ms. Tierney disputed Ms. Christensen's contentions in her July 28 and December 12 Letters. With respect to the number of hours spent on research and in writing the reply brief, Ms. Tierney, who is a solo practitioner, stated that her law student law clerk, who had assisted her during the hearing phase of this proceeding, was not available to assist her with the reply brief.

With one exception, I accept as reasonable Ms. Tierney's claimed hours in connection with the reply brief. To understand the basis for this determination, it is necessary to review what transpired procedurally in this case subsequent to the March 17 Decision. The Part 708 regulations do not provide for the filing of a legal brief in connection with a request for review of an initial agency determination. However, in this case, Ms. Christensen requested permission to file a brief, and that request was granted by OCEP. See April 7, 1994 Letter from Sandra L. Schneider, OCEP Director, to Ms. Christensen. Accordingly, on May 16, 1994, Ms. Christensen filed a skillfully-drafted 35-page brief which contested the findings of fact and conclusions of law in the March 17 Decision. See Appeal to the Secretary of the Department of Energy of the Office of Hearings and Appeals Initial Agency Decision ("May 16 Appeal"). This document had numerous references to the 560-page transcript of the hearing held in December 1993, including the extensive testimony by Ramirez. There was also discussion of federal court and administrative decisions regarding the issues of retaliatory termination of employment in whistleblower and NLRB cases and damages.

In view of the arguments presented in the May 16 Appeal, it was essential for Ms. Tierney to confer with her client, Mr. Ramirez, and to perform legal research. For her to simply rely on the findings in the March 17 and June 8 Decisions would have been irresponsible, if not outright malpractice. Thus, Ms. Tierney responded to the May 16 Appeal with a generally cogent 38-page reply brief that also referred extensively to the hearing transcript and discussed judicial and administrative decisions. Granted, the research of the issues and preparation of the brief might have been performed more efficiently, as Ms. Tierney herself acknowledges in her July 28 Letter. I am unwilling, however, to find that the amount of time that she spent was unreasonably excessive, particularly since this is one of the first cases arising under the DOE's Contractor Employee Protection Program. I am also unwilling to find excessive the five hours Ms. Tierney spent in two office interviews with her client. From the record of this case it is clear that Mr. Ramirez was actively involved in assisting his attorney to understand and deal with the factual issues in this case.

I reject, however, Ms. Tierney's claim with respect to the 90 minutes spent copying, binding and mailing the reply brief. While I do not doubt that performing this work consumed the amount of time claimed, I find it unreasonable to compensate her for these clerical tasks at the rate of \$175 per hour. That hourly rate was approved as reasonable since it appeared to be commensurate with the value of the legal services that she stated that she had spent or would spend on this case. In her initial request for attorney fees, Ms. Tierney described these legal services as "office interviews and telephone conferences ..., interviewing witnesses, research, preparing [legal documents], the Computation of Damages and reviewing the entire record...." Attorney's Affirmation at 2. Since she did not initially indicate that she was requesting compensation for clerical tasks at the rate of \$175 per hour, and since such a request would not have been approved, I will not approve it at the present time. However, since time was actually spent on these necessary tasks, I will approve compensation at the rate of \$10 per hour, the rate of payment of Ms. Tierney's law clerk.

Finally, I find reasonable Ms. Tierney's legal fee claim for 16 hours spent in July 1994 on research and drafting two substantive letters. In the June 8 Decision, I increased Ramirez' requested back pay award by \$17,700, the amount of unemployment benefits that he had received and had deducted from his claim for lost wages. In opposition to that determination, Ms. Christensen submitted letters to OCEP on June 21 and June 22, 1994, raising various legal arguments and citing a number of federal court cases in support of her position. In her Statement of Services, Ms. Tierney documents that she spent ten hours researching this issue and four hours preparing a substantive letter to OCEP discussing relevant court decisions. A copy of this July 29, 1994 letter to OCEP has been furnished to me and is part of the record. Ms. Christensen has not objected to this portion of Ms. Tierney's fee claim. Since I raised this contentious issue sua sponte in

the June 8 Decision, it had not been briefed previously. I therefore find that the 14 hours of research and writing claimed by Ms. Tierney is reasonable. In support of this finding I also note that in his decision the Deputy Secretary expressly considered and affirmed this aspect of the June 8 Decision.

The final two hours of the revised fee claim pertain to the preparation of the July 28 Letter to OCEP. In that letter, Ms. Tierney supported her legal fee claim with respect to the preparation of the reply brief and responded to the objections raised in Ms. Christensen's June 30 Letter. As the present Supplemental Order demonstrates, that portion of the fee claim raised a number of issues. The July 28 Letter assisted me in my consideration of those issues. Accordingly, I find that the amount of time claimed for the preparation of that letter is reasonable.

In sum, I am approving reimbursement to Ms. Tierney of \$13,825 for 79 additional hours of work at \$175 per hour and \$15 for an hour and a half of work at \$10 per hour.⁶ At the time the June 8 Decision was issued, not all of the approved 140 hours had been fully documented. However, the updated Statement of Services attached to the December 12 Letter satisfactorily accounts for the small amount of time not previously documented. Accordingly, the 80.5 hours approved in this Decision are over and above the initial 140 hours. Thus, the revised award for attorney fees is \$38,580 (\$24,740 granted in the June 8 Decision and \$13,840 approved in this Decision). In addition, Ms. Tierney shall receive \$115.25 for disbursements (\$87.35 granted in the June 8 Decision plus \$27.90 approved in this Decision.) Thus the total reimbursement amount approved in the present Decision is \$38,695.25.

It Is Therefore Ordered That:

(1) Brookhaven National Laboratory/Associated Universities, Inc. shall pay Claire C. Tierney, Esq., \$38,695.25 for legal services rendered and disbursements incurred in her representation of David Ramirez.

(2) This is a final Order of the Department of Energy.

Ted Hochstadt

Hearing Officer

Office of Hearings and Appeals

Date: