

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Earl E. Gibson,

Charging Party

and Earl Gibson and Leadership
Council for Metropolitan Open
Communities,

v.

Karen Simpson and Timothy Bangs,

Respondents.

HUDALJ 05-90-0293-1

Daniel M. Starr, Esquire
For Respondent Simpson

Ira A. Moltz, Esquire
For Respondent Bangs

Edward Voci, Esquire
For the Intervenors

Elizabeth Crowder, Esquire
For the Secretary and the Complainant

Before: Robert A. Andretta
Administrative Law Judge

**INITIAL DECISION
ON APPLICATION FOR ATTORNEY FEES**

The Intervenor, Earl Gibson, filed a Petition For Attorney Fees on March 3, 1993. The Petition has attached to it an Affidavit Of Edward A. Voci, Respondent's counsel, and a Schedule Of Time. On March 10, 1993, I ordered the Respondents to respond to the Petition by March 26, 1993. On March 18, 1993, Respondent Bangs filed his Response To Petition For Attorney Fees. Since by April 5, 1993, no response had been received from Respondent Simpson, she was again ordered on that date to file a response to the Petition or to show cause by April 20, 1993, why the Petition should not be granted, as to her, by default. She was also informed that a failure to timely respond to the Order would constitute her consent to a judgment by default. To date, Respondent Simpson has failed to file a response to the Petition or the Order of April 5, 1993. Accordingly, this matter is ripe for decision.

The Intervenor seeks \$8,967, which is based upon 42.7 hours expended by his attorney on this case at an hourly rate of \$210. Respondent Bangs disputes the Intervenor's entitlement to attorney fees, and asserts that the claimed hourly rate is excessive.

Applicable Law

Under the Fair Housing Act as amended, 42 U.S.C. § 3601, *et seq.* ("Fair Housing Act" or "Act"), a prevailing party is entitled to recover reasonable attorney fees and costs. 42 U.S.C. § 3612(p); *see also* 24 CFR 104.940. The Supreme Court has stated that "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." *Blum v. Stenson*, 465 U.S. 886, 888 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).¹ *See also, Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The burden of establishing the number of hours expended on the litigation, as well as the reasonable rate, is on the applicant. *Hensley, supra* at 437.

¹ These decisions interpret the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988). Similar language is found in the Fair Housing Act at 42 U.S.C. § 3612(p).

Applicants are required to submit "full and specific accountings [sic] of their time, that is to submit affidavits that are based upon contemporaneous time records and that give specifics such as dates and the nature of the work performed." *Hall v. City of Auburn*, 567 F. Supp. 1222, 1227 (D. Me. 1983). The affidavits must be sufficient for the decision making forum to ascertain whether or not there has been work performed by the applicant's attorney on an issue upon which the applicant did not prevail, that took an excessive amount of time, or that involved an unwarranted duplication of effort. *Id.*; *see also, Hensley, supra.*

Discussion

Entitlement

Respondent challenges the Intervenor's right to attorney fees by arguing that he was already represented by free counsel in the form of HUD's Regional Counsel before he intervened with his own counsel. Further, Respondent points out that the Intervenor's counsel is actually an attorney employed by a volunteer organization. For these reasons, Respondent argues, it would be unjust to impose the Intervenor's attorney fees upon the Respondents.

The Act and the departmental regulations specifically provide for the Complainant's right to intervene on his own behalf. *See* 24 CFR 104.430. While this section does not explicitly state that a Complainant in an administrative proceeding may retain his own attorney, the regulations do generally provide at 24 CFR 210 that parties may be represented by attorneys admitted to practice before federal or state courts. Finally, the regulations that provide for HUD's counsel to represent the interests of the Complainant do not make representation by government counsel conditional upon the foregoing of private counsel. *See* 24 CFR 103.410.

Respondent's second objection is without merit. The legislative history of the Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (amending 42 U.S.C. § 1988), makes it clear that Congress intended for complaining parties represented by public interest organizations, whether publicly or privately funded, to be awarded attorney's fees on the same basis as parties represented by other practitioners. *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. Code Cong. & Admin. News, pp. 5908, 5913. In the report, senators cited with approval the then recent decision of a California court which had decided:

In determining the amount of fees to be awarded, it is not legally relevant that plaintiffs' counsel ... are employed by ... a privately funded non-profit public interest law firm. It is in the interest of the public that such law firms be awarded reasonable attorney fees to be computed in the traditional manner when its counsel perform legal services otherwise entitling them to the award of attorney fees.

Davis v. County of Los Angeles, 8 EPD para. 9444 (CD Cal 1974). This case was also cited with approval by the Supreme Court in *Blum v. Stenson*, 465 U.S. 895, 899 (1984). Since then, the

federal courts, in numerous cases, have rejected Respondent's position and have held that fee awards should in no way be affected by the fact that counsel for the complaining party is employed or affiliated with legal services or other public interest entities. Thus, Respondent is entitled to reasonable attorney's fees.

Hourly Rate

As noted above, a reasonable fee is the number of hours reasonably expended multiplied by a reasonable hourly rate. In *Blum, supra* at 895, the Court stated that the hourly rate should be "calculated according to the prevailing market rates in the relevant community." Thus, the applicant must establish that the claimed rate is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Id.* at 896, n.11. "Compensable time includes the total number of hours related to the case, including travel, appellate work, monitoring post-decrees and other compliance matters, pursuing the fee award and work in agency or other ancillary proceedings if this work is useful and of a type ordinarily necessary to secure the final result obtained from the litigation." Schwemm, *Housing Discrimination: Law and Litigation*, para. 25.3(5)(c) at 25-64.

In support of the \$210 hourly rate requested by the Intervenor's attorney, that attorney submitted his Affidavit Of Edward A. Voci. He states that \$210 is the "current reasonable market" for attorneys of his experience and expertise in handling housing discrimination cases. He has been an attorney since 1976, and is licensed to practice law in three states plus the U.S. courts, including the Supreme Court. Mr. Voci is the General Counsel and Legal Director of the Leadership Council for Metropolitan Open Communities, an Illinois not-for-profit fair housing organization. In that capacity, Voci annually reviews approximately 175 complaints alleging housing discrimination and is currently appearing in 30 active cases of that nature.

Mr. Voci's private practice in the Chicago area since 1977 has concentrated on civil rights plaintiff litigation, and he is an adjunct professor of law at the John Marshall Law School, where he supervises the school's Fair Housing Clinic. He has participated on panels and given presentations on fair housing law on a number of occasions, and he has litigated over 45 cases under the Fair Housing Act in the federal courts. Thus, Mr. Voci is highly qualified for the type of legal service required by this case.

Mr. Voci also states that he is familiar with and knowledgeable about the hourly rates

² See, e.g., *Palmigiano v. Garrahy* 616 F.2d 598, 601-02 (1st Cir.) cert. denied, 449 U.S. 839, 101 S. Ct. 115, 66 L.Ed.2d 45 (1980); *Rodriguez v. Taylor*, 569 F.2d 1231, 1247-48 (3d Cir.) cert. denied, 436 U.S. 913, 98 S. Ct. 2254, 56 L.Ed.2d 414 (1978); *Oldham v. Ehrlich*, 617 F.2d 163, 168-69 (8th Cir. 1980).

³ Schwemm's extensive citations in support of the factors and standard contained in this statement are omitted here.

charged by attorneys in housing discrimination cases. He cites 18 of his own cases in which he was awarded attorney's fees. These cases range from a February 1993 case in which he was awarded \$250 per hour back to a 1981 case for which he was awarded fees at \$80 per hour. It includes two 1992 cases in which he was awarded fees at an hourly rate of \$200. In contrast, in his Response, Respondent states that Mr. Voci's request for \$210 per hour is not supported by the data and that Respondent "believes it to be in excess of the norm." He provides no evidence or any statements of his own to support this position. Accordingly, I find the requested \$210 per hour to be reasonable.

Hours Expended

I have reviewed Exhibit A, Schedule Of Time, to Mr. Voci's Affidavit. This schedule lists 20 entries for which compensation for time is requested. Each entry provides a date, the amount of time expended, and the purpose for which the time was expended. It includes, for examples, 1.4 hours for the initial client interview, 0.75 hours to review the reasonable cause determination and discuss it by phone with the client, 0.4 hours for a phone conversation with HUD counsel, 9.5 hours for hearing preparation including preparation of witnesses, and 3.0 hours for preparation of the Petition, for a total of 42.7 hours. None of the entries appears unreasonable, and all of them are within the criteria derived from the applicable cases. Respondent does not dispute any of the individual entries with any degree of specificity. Thus, granting the full 42.7 hours at \$210 would appear to be appropriate.

Special Circumstances

Respondent's counsel also argues that it would be "grossly unjust to impose the Leadership Council's legal fees upon the Respondent" in a case where the Leadership Council acted as a volunteer organization and the Complainant was "already represented by free and eminently capable legal counsel in the form of the Office of Regional Counsel of the Department of Housing and Urban Development." He further argues that it would be "wholly unconscionable" to award the amount petitioned for in this case where both Respondents are of limited financial means.

The HUD regulation that is codified at 24 CFR 104.940(b) provides that:

To the extent that an intervenor is a prevailing party, the respondent will be liable for reasonable attorney's fees unless special circumstances make the recovery of such fees and costs unjust.

It remains to be determined, then, whether the Respondents' financial circumstances, the

⁴ See p. 19 of the Initial Decision. Respondent Bangs is a construction electrician whose salary frequently must carry his two apartment buildings through months of negative cash flow. Respondent Simpson is only able to work part time, her husband is chronically unemployed, and both she and her daughter are in need of health care for which Simpson has no medical insurance.

representation by government counsel, or any other factors qualify as "special circumstances" for the purposes of the quoted regulation.

In *Inmates of Allegheny County Jail v. Pierce*, which is also a Seventh Circuit case, the court held that "... the losing party's financial ability to pay is not a 'special circumstance'..." 716 F.2d 177 (1983). In reaching this conclusion, the court cited *Spartacus, Inc. v. Borough of McKees Rocks*, 694 F.2d 947, 949 n. 6 (3d Cir. 1982); *Kirby v. United States*, 675 F.2d 60, 62 n. 3 (3d Cir. 1982); *Third National Bank v. Winner Corp.*, 632 F.2d 658, 660-61 (6th Cir. 1980).

In coming to the same conclusion, the Circuit Court for the Southern District of New York extended a finding of the Seventh Circuit's in a manner with some application to this case. It stated:

... even if capacity of defendants to pay fees is a factor that should be weighed, irrespective of whether the defendant is public or private ... financial condition -- ability to pay -- should only be given substantial weight in cases of real or extreme hardship."

Taken together, the Respondents in this case do not fit that description.

Next, there is the question whether the Intervenor's enjoying the benefits of government counsel should constitute a "special circumstance" for purposes of lowering or eliminating his award of attorney's fees. In *Grove v. Mead School District*, the Supreme Court let stand a holding by the Ninth Circuit Court of Appeals that "[a]wards to intervenors should not be granted unless the intervenor plays a significant role in the litigation." 753 F.2d 1528 (1985); *cert. denied*, 474 U.S. 826 (1985); *see also Seattle School District No. 1 v. State of Washington*, 633 F.2d 1338, 1349-50 (9th Cir. 1980), *aff'd*, 458 U.S. 457, 102 S. Ct. 3187, 73 L.Ed.2d 896 (1982). Further, the court held that a district court's denial of fees [for special circumstances] is reviewed [only] for abuse of discretion. *Citing Seattle School District No.1*, 633 F.2d at 1349.

In 1982, the Court of Appeals for the District of Columbia decided *Donnell v. United States*, 682 F.2d 240, and its decision was left standing by the Supreme Court, 459 U.S. 1204 (1983). In this case, the intervenors participated on the side of the Department of Justice (DOJ), and the significance of their efforts was in controversy. The appellants claimed that the intervenors' participation was subordinate and unnecessary. They argued that DOJ needed no aid in defending the suit and that it had prevailed on the basis of its own efforts. In the appellants' view, the role of the intervenors was redundant, and constituted a special circumstance rendering an award of attorney's fees unjust.

The intervenors in *Donnell* countered that their aggressive litigation efforts impelled DOJ into a strong defense, and that they produced facts and arguments of substantial value to the district court. They further argued that their role had differed from that of DOJ because it was particularized to their own needs, whereas DOJ's interests were in the overall scheme of applicable law. Given these opposing views to consider, the court concluded that in determining

whether to grant an intervenor's request for attorney's fees, a district court must examine the role played by the intervenor in the case:

Courts have held that one type of "special circumstance" that creates an exception to the ordinary presumption in favor of granting attorney's fees to a prevailing party is "where, although plaintiffs received the benefits sought in the lawsuit, their efforts did not contribute to achieving those results." An example is where a lawsuit was filed to achieve an objective that was already being achieved independently. We think the same principle applies here as well. If a lawsuit is successful, but the intervenor contributed little or nothing of substance in producing that outcome, then fees should not be awarded.

Thus, it has been held that where, as here, Congress has charged a government agency with enforcement of certain laws, and the agency successfully does so, an intervenor should be awarded attorney's fees only if it contributed substantially to the success of the litigation. In this case, this inquiry entails determining whether, as argued by Respondent, the government attorney would have adequately represented the Intervenor's interests. It also entails considering both whether the intervenor proposed different theories and arguments for this forum's consideration and whether the work it performed was of important value to the decision maker. *Donnell*, at 249.

In this case, there is no evidence to show that the HUD attorney would not have adequately represented the Intervenor's interests. Thus, I find that the government's representation would have been adequate had it not been bolstered by the participation of the Intervenor's attorney. There also is no evidence from which to know whether the Intervenor proposed different theories and arguments from those of the Secretary. This is at least in part because the Intervenor did not submit a post-hearing brief.

If the Intervenor's attorney had done nothing but show up at dispositions and the hearing, and spent time reading the parties' documents, an award of attorney's fees would be inappropriate. I do not believe this to be true of this attorney. In the hearing, he carried much of the case, and did so quite capably. His performance indicated that a great deal of effort had been expended on preparation for litigation.

⁵ *Connor v. Winter*, 519 F.Supp. 1337, 1343 (S.D. Miss. 1981).

⁶ *See, e.g., Bush v. Bays* 463 F.Supp. 59,66 (E.D. Va. 1978) (holding alternatively that plaintiffs were not prevailing parties and that an award would be unjust under the "special circumstances" doctrine) ("It is apparent to the Court that the attorneys for the plaintiffs in this case merely caught hold of a train on its way out of the station and are seeking to ride it to a substantial award of attorneys' fees. Plaintiffs' lawsuit played no part in firing the boiler, getting up a head of steam, or opening the throttle. Plaintiffs just went along for the ride.")

⁷ *Baker v. City of Detroit* 504 F. Supp. 841 (E.D. Mich. 1980) *Seattle School Dist. No. 1, supra*.

However, while the Intervenor's attorney's efforts in court were commendable, the work he performed was of limited value to this decision maker. In spite of having been told at the hearing how important post-hearing briefs are to this decision maker, Intervenor failed to submit a post-hearing brief, thus depriving this forum of having the benefit of his views on the facts and their application to the relevant law. This failure is a "special circumstance" within the meaning of 24 CFR 104.940(b).

Conclusion

The Intervenor in this case is entitled as a matter of law to an award of attorney's fees to the extent that his part in the case was of value to its resolution. His attorney's hourly rate is reasonable given his expertise, experience, and the prevailing rates where the case was conducted. The number of hours claimed are also deemed reasonable. The "special circumstance" of Intervenor's attorney's failure to file a post-hearing brief is sufficient to warrant a major reduction of the award of fees.

ORDER

The Intervenor is entitled to attorney's fees at a rate of \$210 per hour for 42.7; this amount to be halved in view of the special circumstance that is applicable to this award. Accordingly, within 45 days of the date this initial decision becomes final, Respondents are hereby ORDERED to pay the Intervenor \$4,483.50 for the purpose of settling his fee to his attorney.

Robert A. Andretta
Administrative Law Judge

Dated: April 16, 1993

CERTIFICATE OF SERVICE

I hereby certify that copies of this ORDER issued by ROBERT A. ANDRETTA, Administrative Law Judge, HUDALJ 05-90-0293-1, were sent to the following parties on this 16th day of April, 1993, in the manner indicated:

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