



**In the Matter of:**

**GARY JOE PIERCE,**

**COMPLAINANT,**

**v.**

**UNITED STATES ENRICHMENT  
CORPORATION,**

**RESPONDENT.**

**ARB CASE NOS. 06-055  
06-058  
06-119**

**ALJ CASE NO. 2004-ERA-001**

**DATE: February 27, 2009**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Everett C. Hoffman, Esq., *Priddy, Cutler, Miller & Meade, PLLC*, Louisville, Kentucky; John Frith Stewart, Esq., *Stewart, Roelandt, Stoess, Craigmyle & Emery, PLLC*, Crestwood, Kentucky**

***For the Respondent:***

**Sharam Ghasemian, Esq., *United States Enrichment Corporation*, Bethesda, Maryland; Charles C. Thebaud, Jr., *Morgan, Lewis & Bockius, LLP*, Washington, District of Columbia**

**ORDER ON ATTORNEY'S FEES**

Gary Joe Pierce complained that the Respondent, United States Enrichment Corporation (USEC), suspended Pierce and then terminated his employment in violation of the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003). The Administrative Review Board (ARB or Board) issued a Final Decision and Order on August 29, 2008, affirming the Administrative Law

Judge's (ALJ) decision that USEC violated the ERA when it suspended and fired Pierce in retaliation for his whistleblower activities.

Before us at this time is Pierce's Petition for Supplemental Award of Attorney Fees and Costs for work performed before the Board. The petition, which USEC opposes, seeks \$54,338.75 in attorney's fees and \$275.70 in costs.

## DISCUSSION

We begin first with the language of the ERA. If the Secretary of Labor determines that a respondent has violated the Act, the Secretary "at the request of the complainant shall assess against the person against whom an order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued." 42 U.S.C.A. § 5851(b)(2)(B).

The ARB uses the "lodestar method" to calculate attorney's fees. This requires multiplying the number of hours reasonably expended by a reasonable hourly rate. *Scott v. Roadway Express*, ARB No. 01-065, ALJ No. 1998-STA-008, slip op. at 5 (ARB May 29, 2003).

The attorney requesting fees bears the burden of proof that the claimed hours of compensation are adequately demonstrated and reasonably expended. *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 04-161, ALJ No. 2003-STA-055, slip op. at 2 (ARB Apr. 3, 2008). The burden is also on the attorney to demonstrate the reasonableness of his hourly fee by producing evidence that the requested rate is in line with fees prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Gutierrez v. Regents Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 11 (ARB Nov. 13, 2002).

Pierce's attorney requests \$54,338.75 in attorney's fees and \$275.70 in costs for work performed from January 27, 2006, through September 30, 2008. The attorney's fee request represents 228.6 hours of work performed by counsel at rates varying between \$225.00 and \$250.00 an hour and 11.01 hours of paralegal work at \$125.00 per hour. Pierce has submitted a fully itemized and documented fee petition. We find the level of detail in the descriptions of the services to be adequate. We also find the hourly rates to be reasonable. Moreover, USEC does not object to the hourly rates billed.

Pierce's attorney requests \$6,050 in attorney's fees for attorney and paralegal work performed from January 27, 2006, through February 23, 2006, when Pierce filed his fee petition with the ALJ. USEC contends that the hours expended between January 27 and February 23 are not compensable because Pierce should have requested reimbursement for these fees before the ALJ when he filed his Motion and Memorandum for Approval of Attorney Fees on February 23, 2006. The ALJ's Recommended

Decision and Order (R. D. & O.) ordered Pierce to file a Petition for Fees and Costs within thirty (30) days after the filing of the R. D. & O, but did not specify a cut-off date for fees:

Counsel for Complainant shall file a Petition for Fees and Costs within thirty (30) days after the filing of the Recommended Decision and Order for all legal services.

R. D. & O. at 25.

Pierce states in his reply brief in support of his fee petition that he used the date of the ALJ's decision, January 27, 2006, as the cutoff date for his fee request. He agrees with USEC that he could have included the fees for work between January 27 and February 23 in his fee petition before the ALJ, but argues that the ALJ's order does not expressly require inclusion of all fees incurred before filing of his fee petition. Furthermore, Pierce contends that by not including these post-decision fees, he did not waive his right to request the fees in his supplemental petition before the Board. USEC offers no precedent in support of its argument that we should deny Pierce all fees that could have been included in his February 23 motion for attorney's fees, and we see no compelling reason to deny the fees as long as they were "reasonably incurred" in connection with Pierce's complaint. 42 U.S.C.A. § 5851(b)(2)(B). *Tipton v. Indiana Michigan Power Co.*, ARB No. 04-147, ALJ No. 2002-ERA-030, slip op. at 2 (ARB Dec. 18, 2008) (Board awards attorney's fees for work before ALJ, Board and Court of Appeals).

We next consider whether the fees requested for hours from January 27, 2006, through February 23, 2006, were reasonably incurred in connection with Pierce's complaint. The hours billed for accounting and tax issues related to Pierce's damages award are not compensable because the work is not related to litigation of the case. *See Tipton*, slip op. at 2 (time spent on coordination of payment of damages and tax consequences of damages not compensable under the whistleblower laws); *Leveille v. New York Air Nat'l Guard*, ARB No. 98-079, ALJ Nos. 1994-TSC-003, 1994-TSC-004, slip op. at 3 (ARB Dec. 16, 2003) (same). We therefore disallow the 2.75 hours spent by attorney Stewart on February 22, 2006, on tax issues related to Medicare. We also disallow the 2.5 hours spent by attorney Hoffman on February 8 and 9, 2006, in preparation of Pierce's cross-petition for review because Pierce did not prevail on any of the issues raised in his cross-petition. We therefore reduce the fee request by \$1,250 for the January 27 through February 23 time frame.

USEC also objects to the time requested for work between April 16 and 18, 2006, and between May 18 and June 3, 2006, related to researching and briefing issues raised in Pierce's cross appeal because Pierce did not prevail on any issues presented to the Board in his cross appeal. The work during the April time frame was related to preparation of Pierce's brief in support of his cross appeal, and the work during the May/June time frame was related to work on Pierce's rebuttal brief, which addressed USEC's arguments concerning the issues in Pierce's cross appeal. We agree that Pierce is not entitled to compensation for hours spent on issues on which he did not prevail. Pierce, however,

contends that he is entitled to at least 50% of the compensation requested for preparation of the "Introduction," "Factual Background" and "The ALJ's Recommended Decision and Order" portions of his opening brief. With regard to the rebuttal brief, both Pierce and USEC agree that 50% of the compensation requested would be appropriate. We have reviewed Pierce's opening and rebuttal briefs and find that 50% of the time requested for preparation of the briefs is adequate compensation for those portions of both briefs that provide legal and factual bases for both the cross appeal and Pierce's opposition to USEC's appeal. We therefore reduce the fee request for work spent on Pierce's opening brief by 6.95 attorney hours or \$1,568.75 and reduce the fee award for work spent on Pierce's rebuttal brief by 15.65 attorney hours and .385 paralegal hours or \$3,634.35. The total fee award for April 16-18, and May 18-June 3, 2006, is therefore \$5,203.10.

We award the remainder of attorney's fees and costs requested for work before the ARB because the hours expended and the hourly rate are reasonable, and the fees were reasonably incurred in connection with litigation of the case. Moreover, USEC does not challenge the remaining fees and costs requested.

#### **CONCLUSION**

Pierce's attorney has submitted an appropriately itemized and documented attorney fee application. With the exceptions noted, we find the hours expended and the hourly rates charged are reasonable. We reduce the requested hours for attorney and paralegal work before the ARB by \$6,453.10, resulting in a total award of \$47,885.65 in fees and \$275.70 in costs.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Chief Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**