IN THE MATTER OF STAUTZENBERGER COLLEGE
Respondent.

Docket No. 90-102-SA
Student Financial Assistance Proceeding

DECISION

Appearances: Stanley A. Freeman, Esq. of Washington, D.C. for the Respondent

Steven Z. Finley, Esq. of Washington, D.C., Office of the General Counsel, United States Department of Education for the Office of Student Financial Assistance

Before: Judge Allan C. Lewis

This aspect of the proceeding addresses the request by Stautzenberger College (Stautzenberger) for the award of fees and other expenses under 5 U.S.C. § 504 which was added by Section 203(a)(1) of the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2321 and extended and amended by Section 1 of the Act of August 5, 1985, Pub. L. 99-80, 99 Stat. 183. Stautzenberger seeks an award of fees and other expenses in the total amount of $21,400.84. The United States Department of Education (ED) opposes Stautzenberger's request. Based upon the discussion, infra, Stautzenberger's request for an award is granted; however, the amount of the award is limited to $10,988.34.

OPINION

Pursuant to 5 U.S.C. § 504(a)(1) (hereinafter Section 504), "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust."

In this proceeding, ED concedes only that the prior final decision vacating ED's final audit determination and dismissing this action was issued in an adversary adjudication and that Stautzenberger satisfies the financial and employee restrictions in order to qualify as a party which may receive an award of fees and expenses incurred, that is, its corporate net worth was less than $7 million and it employed fewer than 500 individuals. Section 504(b)(1)(B) and (C). Therefore, in order to award fees and other expenses to Stautzenberger, it must be determined that Stautzenberger was the prevailing party in the adjudication; that ED's position was not substantially justified; and that special circumstances do not exist to make an award unjust. In the event Stautzenberger prevails on these issues, the remaining issue for resolution is the amount of fees and other expenses to which Stautzenberger is entitled.

In Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), the Court identified the standard for determining a prevailing party as--

> plaintiffs may be considered as 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.

Moreover, it is not necessary for a matter to be litigated to a conclusion. A prevailing party also includes a party which--

> obtains a favorable settlement, a voluntary dismissal, or where he may be deemed to have prevailed due to a decision in his favor or prevailed on less than all the issues or if the amount of the judgement against his [sic] was only a fraction of the amount the Government sought.
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> H. Rep. No. 96-1005, pt. 1, 96th Cong., 2d Sess. at 6 (1980).

In the instant case, Stautzenberger sought dismissal of the final audit determination on two primary grounds, i.e. it was not issued by the appropriate ED official or alternatively, that Stautzenberger did not have Federal cash on hand in excess of its immediate needs and therefore, it was not liable for imputed interest.

In order to conserve resources, the parties addressed the authorization issue first and left the remaining matters for resolution later should the necessity arise. On March 11, 1991, an initial decision was issued which granted Stautzenberger's motion to vacate and declared the September 28, 1990 final audit determination null and void. ED did not appeal the initial decision and it became the final decision of the agency on April 2, 1991. Thus, the September 28, 1990 final audit determination was voided and Stautzenberger's potential liability thereunder was terminated. Hence, Stautzenberger was clearly the victor and achieved one of the primary purposes of its appeal. As such, it is the prevailing party for purposes of Section 504(a)(1).

ED argues that Stautzenberger is not the prevailing party as it "has not prevailed in its claim that the Chief of the Audit Review Branch for the Division of Audit and Program Review was not authorized to issue the final audit determination." (Opp. Br., at 5). This argument ignores, however, the final decision of the agency, namely that based on the evidence, the Chief of the Audit Review Branch was not authorized to serve as the Designated Department official regarding the final audit determination. Therefore, it is rejected.

ED also asserts that a prevailing party arises only after a ruling on a substantive or significant issue that achieves some benefit sought in bringing the action. This requires, in ED's view, a ruling on the merits underlying the final audit determination, that is, a ruling on whether Stautzenberger held Federal cash in excess of its needs and therefore is liable for imputed interest.

ED's view is too restrictive. There are issues, like the authorization issue, which are clearly substantive and significant yet they do not address the underlying merits as that term is employed by ED. The statute of limitations issue is one illustration. In these situations, the victorious party

is clearly a prevailing party. In addition, ED's view ignores the fact that the authorization issue was one of two primary grounds, either of which would have resulted in a favorable final decision for Stautzenberger and eliminated Stautzenberger's potential legal liability under the final audit determination of September 28, 1990. Accordingly, ED's position is rejected.

Next, ED contends that its position was substantially justified and therefore Stautzenberger is not entitled to an award of attorney fees. A position of the Government is substantially justified if it has "a reasonable basis both in law and fact." Pierce v. Underwood, 487 U.S. 552, 565 (1988). Thus, the focus is "essentially one of reasonableness" (H. Rep. No. 96-1418, 96th Cong., 2d. Sess. at 10 (1980 U.S. Code Cong. & Admin. News 4984, 4989)), not whether the legal or factual positions of the Government were rejected. Nichols v. Pierce, 740 F.2d 1249 (D.C. Cir. 1984).

In the instant proceeding, ED proffered no evidence which was admissible in support of its position that the Secretary had delegated and thereafter that his subordinates had redelegated the authority to issue the final audit determination to the Chief of the Audit and Review Branch. Accordingly, it was concluded that ED had failed to meet its burden of production to establish the facts necessary to support its position. Where, as here, there was no evidence to support ED's position, it is clear beyond doubt that ED did not have a reasonable, factual basis for its position in the litigation.

Nonetheless, ED urges that its factual position was reasonable and substantially justified "given the vague statements set forth in Stautzenberger's appeal of the September 1990 final audit determination." It complains that "Stautzenberger's general assertions in its appeal that FPD was not issued by the appropriate department official" did not articulate succinctly the precise nature of the deficiency in the final audit determination. In short, ED blames Stautzenberger for its own negligence in failing to submit its evidence in a timely manner.

Stautzenberger responds, and correctly so, that ED had ample notice of the precise issue raised with respect to the final audit determination. Stautzenberger stated in its request for review at 2 and 3 that--

> [t]he determination letter is null and void because it was not issued by a "Designated ED official" as required by 34 CFR Part 668, Subpart H.
>
> . . . .
>
> Unless issued by a "Designated ED official" as defined at 34 C.F.R. §668.112, the determination letter is null, void, and of no effect whatsoever. A Freedom of Information Act request seeking information concerning the authority and status of the issuer has been filed, and the response is pending.

In light of this notice, ED's argument is wholly without merit.

Lastly, ED asserts, on the matter of entitlement to attorney fees, that special circumstances exist to make an award of attorney fees unjust. It argues that, as a matter of policy, schools should not be funded to obtain procedural delays in adjudicating the merits of their appeals as such "temporal and transient victories encourages dilatory pleading practices that delay rather than

foster an adjudication on the merits." ED's view is premised on the theory that Stautzenberger's potential liability to ED regarding the alleged presence of excess Federal cash has not been resolved. ED indicates that it will issue in the near future another final audit determination regarding this matter and that it will be signed, once again, by the Chief of the Audit Review Branch.

The special circumstances exception was designated to provide the tribunal "with discretion to deny awards where equitable considerations dictate an award should not be made" and to permit the Government to advance "in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." H. Rep. 96-1418, supra, at 11 (1980 U.S. Code Cong. & Admin. News, at 4990). However, the circumstances in this case do not warrant the denial of fees.

As explained above, the final decision in this case represented a disposition on a substantive matter and had legal impact. The September 28, 1990 final audit determination was declared null and void. In the event ED issues another final audit determination with respect to the same facts, it will constitute a separate, independent action by ED. As such, it bears no significant legal relationship to the present action other than, as noted by Stautzenberger, the possibility that such a determination may be barred under the doctrine of res judicata.

In addition, it appears that Stautzenberger's action produced a positive effect on ED. On April 4, 1991, some 24 days after the initial decision in this case was issued, ED purportedly vested the Chief of the Audit Review Branch with the authority to serve as the Designated Department official with respect to audit determinations under 34 C.F.R. Part 668, Subpart H. ED. Doc. Control No. EPMC/EPMC1/170. This delegation was subsequently voided and replaced with delegations purportedly vesting, again, the Chief of the Audit Review Branch with the authority to serve as the Designated Department official with respect to audit determinations under 34 C.F.R. Part 668, Subpart H. ED. Doc. Control Nos. EP/EPM/171, EPM/EPMC/172, and EPMC/EPMC1/173. Thus, there are no equitable considerations present which warrant the denial of attorney fees.

As determined above, Stautzenberger is entitled to recover attorney fees and other expenses. The remaining issue concerns the amount of the award of attorney fees and other expenses. Under Section 504(b)(1)(A), fees and other expenses include "reasonable attorney or agent fees" and--

> [t]he amount of fees awarded . . . shall be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.

Based on its submission, ED concedes that Stautzenberger may recover attorney fees at the rate of $75 per hour. However, the parties dispute whether ED has provided under its regulations for the payment of attorney fees in excess of the $75 per hour rate. In addition, ED seeks to limit Stautzenberger's recovery of attorney fees and expenses to those fees and expenses incurred with respect to its successful motion to vacate the final audit determination. Thus, ED argues, in

effect, that an award of fees and other expenses cannot be made with respect to all other activities performed by Stautzenberger's attorneys including, apparently, the preparation of the notice of appeal. As held below, Stautzenberger is entitled to an award for all of the services rendered; however, the award is limited to $75 per hour for these services.

In Stautzenberger's view, the regulations promulgated by the Secretary are ambiguous and internally inconsistent regarding whether an award in excess of $75 per hour can be made. While it acknowledges that 34 C.F.R. § 21.50(b)(1) (1990) (hereinafter Reg. § 21.50(b)(1)) apparently limits "[a]n award for the fee of an attorney or agent [to not] in excess of $75.00 per hour," it urges that this provision must be construed in view of other special factors in the regulations which reflect a contrary view by the Secretary that would permit an award of attorney fees in excess of $75 per hour. In this regard, it notes that allowable fees and expenses include "an award of fees based on rates customarily charged by attorneys" (Reg. § 21.33(c)(1)) and that the standard "[i]n determining the reasonableness of the amount sought . . . [includes the attorney's] customary fee for similar services, . . . [t]he prevailing rate for similar services in the community [and] . . . the difficulty or complexity of the covered issues." Reg. § 21.50(a). All these factors lead, in its view, to the conclusion that the Secretary intended to allow an award of attorney fees in excess of $75 per hour.

ED argues that the phrase "unless the agency determines by regulation" in Section 504(b)(1)(A)(ii) vests the agency with the power to determine whether fee awards exceeding $75 per hour could be granted in its proceedings based on special factors. Here, ED asserts that it withheld this discretion in its regulation when it established a maximum permissible hourly rate of $75 per hour for attorney fees under Reg. § 21.50(b)(1). In addition, it argues that fee enhancement factors may be considered to raise a hourly rate above a prevailing rate in the community for complex, difficult or efficient work performed by an attorney with specialized knowledge so long as the award rate does not exceed $75 per hour.

Initially, the plain meaning of Reg. § 21.50(b)(1) supports ED's view. It provides clearly for a ceiling rate of $75 per hour--

> (b) The adjudicative officer does not grant:
> (1) An award for the fee of an attorney or agent in excess of $75.00 per hour;

The general framework of the regulations also supports ED's position. Reg. § 21.33 addresses the type and kind of fees and expenses which are allowable and which are not allowable such as fees incurred in a nonadversary adjudication. With respect to allowable fees and expenses, Reg. § 21.50(a) establishes standards to determine whether the total amount sought is reasonable. In this regard, attorney fees are awarded based on the prevailing rate in the community, not the rate charged by the attorney. Section 504(b)(1)(A); H. Rep. No. 96-1418, supra, at 14 (1980 U.S. Code Cong. & Admin. News, at 4993). The regulation allows for consideration of factors generally applicable to a broad spectrum of litigation in determining the reasonableness of an award, such as the amount of time spent on the matter and the complexity and difficulty of the litigation. cf. Pierce v. Underwood, 487 U.S. 552, 573 (1988). Once the reasonable amount is ascertained, Reg. § 21.50(b) places a ceiling on the award which an adjudicative officer may grant. This ceiling is $75 per hour. Thus, these regulations are internally consistent and do not

allow an award of attorney fees in excess of $75 per hour under any circumstance.See footnote 1 1/

Lastly, ED argues, without citing any support, that any award of attorney fees should be restricted to a payment for the time spent only on the issue actually decided. ED's argument is contrary to Section 504 which "awards fees and expenses incurred by that party in connection with that proceeding" and excludes an award only "for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings."

Moreover, ED's position is also contrary to the standards governing the allowance of attorney fees set forth in Reg. § 21.33.

In view of the above, Stautzenberger's request for an award of attorney fees which reflects 102.75 hours of work and hourly rates between $175 and $250 is rejected. Stautzenberger may recover attorney fees based on a rate of $75 per hour and other fees and expenses as follows:

attorney fees--102.75 hours @ $75 per hour . . . $7,706.25
other fees (law clerks) 2,167.50
other expenses 1,114.59
Total $10,988.34

Accordingly, on the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED that Stautzenberger is awarded attorney fees and other fees and expenses in the total amount of $10,988.34.See footnote 2 2/

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Allan C. Lewis
Administrative Law Judge

Issued: July 29, 1991
Washington, D.C.

Footnote: 1 1/ In short, ED has not promulgated regulations under which the "cost of living or a special factor" exception under Section 504(b)(1)(A)(ii) may be considered which could justify an award of attorney fees at a rate higher than the cap. The special factor formulation is a narrow consideration which "refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question--as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation." Pierce v. Underwood, 487 U.S., at 572.

Here, Stautzenberger was represented by attorneys Fulton and Freeman. They specialize in education matters and have entered appearances as counsel in numerous proceedings before ED. Attorney Fulton has nearly 30 years of experience in legal matters relating to postsecondary educational institutions, including proceedings before accrediting commissions, guaranty agencies, and state licensing agencies. Attorney Fulton has frequently counseled clients with

respect to the intricacies of the law and regulations governing institutional participation in the student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1070 et seq. Attorney Freeman performs functions similar to Mr. Fulton; however, he has only 9 years of experience in the area.

The minimal time spent in the preparation of the appeal and the prosecution thereof reflects the expertise of these attorneys.

Footnote: 2 *2/ Pursuant to Reg. § 21.51(b)(3) and (4), Stautzenberger is notified of its right to request a review of this initial decision by the Secretary. The review by the Secretary is governed under Reg. § 21.52 and any request for review must be submitted to the Secretary in writing, within 30 days after the initial decision is issued. Stautzenberger is referred to Reg. § 21.52 for further details regarding any request for review. In the event Stautzenberger is dissatisfied with the final decision under Reg. §§ 21.52 or 21.53, Stautzenberger may seek judicial review of that determination under Section 504(c)(2).*