

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Supplemental Order

Name of Petitioner: Howard W. Spaletta

Date of Filing: August 31, 1995

Case Number: VWX-0004

This Decision supplements an Initial Agency Decision involving a "whistleblower protection" complaint filed by Howard W. Spaletta (Spaletta) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. *See Howard W. Spaletta*, 24 DOE & 87,511 (1995) (*Spaletta* or "the January 4 Decision." <1> In that Decision, I found that EG&G Idaho, Inc. ("the Contractor") had violated the provisions of 10 C.F.R. ' 708.5 by referring fewer and less important work assignments to Spaletta and by lowering his annual merit pay increases in reprisal for his making protected safety disclosures. I further determined that Spaletta should be awarded back pay corresponding to the difference between the annual merit pay increases that he should have received for work performed during the years 1989 through 1991 and the annual merit pay increases that he actually did receive, plus interest, and reimbursement for all costs and expenses reasonably incurred by him in bringing his complaint. My Decision required both Mr. Spaletta and the Contractor to submit information to facilitate my computation of damages. Mr. Spaletta submitted his information on August 21, 1995. The Contractor submitted its response to the August 21 submission on September 11, 1995. This Supplemental Order awards Spaletta \$12,321.05.

I. Back Pay

For the work performed during the years 1989, 1990 and 1991, the Contractor based percentage merit pay increases on the employee's evaluation and the salary quintile of his work group into which his base salary fell. During this time period, Spaletta's salary was in the second highest salary quintile of his work group. Utilizing information submitted by the Contractor, I have identified the name of each employee in Spaletta's work group, his or her annual salary, and the annual merit pay increase received. I have then divided the salaries of the employees into quintiles. This has allowed me to identify the individuals who comprised the second salary quintile for each of the three years. Since it is safe to assume that within a salary quintile, those individuals who had received the best performance evaluations would have also received the highest merit pay increases, Spaletta should have received annual merit pay increases equal to the highest merit pay increases given to the other members of the second highest salary quintiles for each year. These increases would have become effective in March of the succeeding year.

Accordingly, I find that Spaletta should have received an annual merit pay increase of 5.7 percent in 1990 instead of the 3 percent increase that he actually received. In 1991, Spaletta should have received an annual merit increase of 7.99 percent instead of the 2.48 percent that he actually received. In 1992, Spaletta should have received an annual merit increase of 5.48 percent instead of the 2.87 percent increase he actually received. The total amount of back pay I will award Spaletta is \$6,336.

In addition, Mr. Spaletta should receive pre-judgment interest on this back pay award. *David Ramirez*, 24 DOE ¶ 87,504 at 89,015, *affirmed*, 24 DOE ¶ 87,510 (1994). Interest in whistleblower protection cases is based upon the "overpayment rate," as established by the Secretary of the Treasury pursuant to 26 U.S.C. ' 6621. The appendix to this decision shows the quarterly overpayment rate, the quarterly interest amount, and the cumulative back pay and interest award. The total amount of interest that has accrued on the back pay award is \$2,569. That amount will be added to the back pay award, provided that payment is made within 30 days of the date of this order. Thus, the total amount of back pay, including interest, that I will award Mr. Spaletta is \$8,905.

II. Attorneys' Fees

Spaletta requests legal fees for the services rendered by John M. Ohman, Esq. and Stephen A. Meikle, Esq. As I stated in the January 4 Decision, legal fees will be calculated by the use of the Alodestar@ approach described by the U.S. Supreme Court in *Blanchard v. Bergeron*, 489 U.S. 87 (1989), and generally applied by OHA Hearing Officers to proceedings under 10 C.F.R. Part 708. *See, e.g., Ronald A. Sorri*, 23 DOE & 87,503 (1993), *affirmed as modified*, 24 DOE ¶ 87,509 (1994). Under the lodestar approach, reasonable legal fees are calculated as the product of reasonable hours multiplied by reasonable rates. The fee applicant has the burden of producing satisfactory evidence that his requested rates are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *See Blum v. Stenson*, 465 U.S. 886, 888 (1984).

Spaletta seeks reimbursement of \$473.60 for legal services rendered by John M. Ohman, Esq. According to the information submitted by Spaletta, Ohman provided 2.364 hours of legal services to Mr. Spaletta for which he charged \$473.60. Spaletta is therefore effectively seeking reimbursement for fees at the rate of \$200 per hour, a rate which the Contractor asserts is excessive. In support of this assertion, the Contractor has submitted the affidavit of Edward W. Pike, a local attorney, who states that under

the customary attorney billing practices in Idaho Falls, the maximum hourly rate is \$125 per hour. Even though Spaletta has submitted the affidavit of Steve Hart, Esq. who states that @the regular hourly billing rates . . . for John M. Ohman . . . are reasonable and comparable to the hourly billing rates prevailing in Idaho Falls . . ., @ I find that Spaletta has not met his burden of producing satisfactory evidence that his requested rates are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. The Hart Affidavit is ambiguous and does not squarely support Spaletta=s request for \$200 per hour since it only states that the *regular* hourly billing rates for Ohman are reasonable. The billing statements submitted by Spaletta actually indicate that Ohman=s *regular* hourly rate is \$120 per hour rather than the \$200 per hour he charged Spaletta. In light of the affidavit submitted by the Contractor, the statement about Mr. Ohman's regular hourly rate, and the contrast between the hourly rate claimed for Ohman=s services and the hourly rate claimed by Spaletta for legal services provided by Meikle (at \$100 per hour), I find that Spaletta has failed to meet his burden of showing that \$200 per hour is a reasonable rate for John Ohman=s services. Accordingly, I will award Spaletta \$295.50 for the services of Ohman, representing 2.364 hours multiplied by \$125 per hour, the rate which I find to be the maximum reasonable hourly rate for the Idaho Falls community.

Stephen A. Meikle, Esq. also performed legal services for Mr. Spaletta. Spaletta seeks \$2,350 in fees, representing 23.5 hours multiplied by an hourly rate of \$100. Most of that time was associated with Mr. Meikle's presence at the two-day hearing that I held in this matter. The Contractor does not challenge the claimed hourly rate, but has challenged the reasonableness of the number of hours sought by Spaletta. Specifically, the Contractor contends:

(1) Since the January 4 Decision did not award any additional relief for Spaletta over that which was already awarded to him in the Office of Contractor Employee Protection=s Proposed Disposition, Spaletta should not be reimbursed for his prosecution of the case before the Office of Hearings and Appeals;

(2) Since Spaletta=s Appeal before the Deputy Secretary was unsuccessful, he should not be compensated for bringing it; and,

(3) Spaletta=s demands that a report be retracted have unduly prolonged the proceeding.

The position advanced by the Contractor is untenable. If adopted, it would make a person who seeks protection under the DOE whistleblower protection program assume the risk of success in challenging reprisals at each stage of the administrative process. If he were unsuccessful in obtaining additional relief at a particular stage of the process, the Contractor would have us refuse to reimburse fees and costs. This policy would likely have a chilling effect on the pursuit of these remedies. The DOE program is clearly designed to reimburse someone who has been reprimed against for all damages and expenses, including legal fees. "It is important as a matter of Departmental policy to recognize the public interest nature of representing an alleged whistleblower under Part 708, and to award a reasonable fee to encourage attorneys to take these cases." *Ronald A Sorri*, 24 DOE ¶ 87,508 at 89,045 (1994).

Moreover, the Contractor's contention that Spaletta did not obtain any additional relief at the hearing stage of this proceeding is incorrect. The proposed disposition found that Spaletta should receive back pay for work performed in 1990 and 1991. I expanded that proposed relief to include work performed in 1989. *Spaletta* at 89,058. Thus, the Initial Agency Determination increased the amount of lost wages to be awarded to Spaletta by lengthening the period for which Spaletta was found to have received unduly small annual merit pay increases from February 1991 through April 1992 to February 1990 through April 1992.

Similarly, the Contractor urges that Mr. Spaletta should not be compensated for legal fees spent in pursuing an appeal of my initial determination to then Deputy Secretary, William H. White. For the reasons stated above, I do not agree. Accordingly, I will award Mr. Spaletta the one hour of legal fees he claims for revision to his brief on appeal on February 27, 1995.

I now turn to the third of the Contractor=s contentions concerning the reasonableness of the number of hours claimed. While it may be true that Spaletta=s attempts to have a report retracted may have prolonged the present proceeding, Spaletta=s pursuit of this remedy does not warrant a reduction in the legal fees claimed by him. First I am unable to quantify the time by which these proceedings were unduly prolonged, if in fact that were the case. More importantly, I am concerned that reducing Spaletta=s fees for pursuing a remedy that ultimately proved to be outside the jurisdiction of this proceeding might have a chilling effect upon other whistleblower claimants= seeking novel relief. In view of the lack of precedents interpreting the Part 708 regulations, I will not exercise my discretion to reduce the number of hours awarded.

In summary, Spaletta seeks reimbursement for 23.5 hours of legal services at \$100 per hour for Meikle=s services. I find that amount to be reasonable. I am therefore awarding Spaletta \$2,350 of legal fees for the services of Stephen A. Meikle, Esq. To that I will add \$295.50, the fees I will award for work performed by Mr. Ohman. Thus, the total legal fees I will award Spaletta are \$2,645.50.

III. Other Expenses

Spaletta also requests reimbursement for a number of other miscellaneous expenses related to his whistleblower claim. These expenses include 13 hours of secretarial services provided by Meikle=s office staff at \$50 per hour, \$30.89 in postage costs, and \$30.20 of other miscellaneous costs charged to him by Meikle=s office.

The Contractor contends that these expenses are excessive because (1) separate billings by attorneys in Idaho Falls for secretarial services are neither customary nor reasonable; (2) the number of hours charged for secretarial services used to complete two separate statements of Aattorney=s fees and client costs@ are excessive; (3) Spaletta was charged an excessive rate for photocopying services provided by Meikle=s Office; and, (4) Spaletta has not substantiated that all of the reproduction costs

claimed by him were incurred in connection with his whistleblower claim.

The regulations governing the award of expenses provide for "reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses (including attorney and expert-witness fees) reasonably incurred by the complainant in bringing the complaint upon which the decision was issued." 10 C.F.R. § 708.10(c). This section, by its reference to "costs and expenses," is by its very terms broader than FRCP Rule 54(d), which refers only to "costs." Thus, Initial Agency Decisions under the DOE whistleblower regulations have interpreted the "costs and expenses" covered by § 708.10(c) more expansively than the way the word "costs" is generally interpreted under FRCP Rule 54(d). Compare Ronald A. Sorri, 23 DOE & 87,503 at 89,016-89,018 (1993) (Sorri), with 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure ' 2677 at 370-372 (1983).

The Contractor first challenges Spaletta's request for reimbursement for secretarial services performed at his attorney's office. While I am convinced that the customary practice in the Idaho Falls legal community is to include secretarial services in the hourly fee charged by attorneys, it is also apparent that Spaletta had a unique arrangement with Meikle under which Spaletta actually drafted some of the letters and pleadings supporting his whistleblower claim and then had Meikle's office staff prepare them. This practice resulted in smaller legal fees. However, I find that Spaletta has not met his burden of showing that \$50 an hour is a reasonable fee for secretarial services. It seems unlikely that secretarial services would customarily command this hourly rate, which rate is half that of Mr. Meikle. Moreover, Spaletta has not supported his request for secretarial services with evidence indicating that \$50 per hour is comparable to the prevailing rate in Idaho Falls for similar services. I will therefore reduce the hourly rate for secretarial services to \$25 per hour.

After reviewing copies of statements of legal fees and client costs in the record, I also agree with the Contractor's contention that two hours is an excessive amount of time to be awarded for the preparation of statements of attorney's fees and client costs, especially in the case of the second statement for which a great deal of the preparation had already occurred when the first statement was prepared. Accordingly, I will reduce the number of hours of secretarial service for preparation of these statements by one hour. I will therefore award Spaletta a total of \$300 in secretarial fees, representing 12 hours at \$25 per hour.

Finally, the Contractor contends that Spaletta has failed to substantiate that all of the reproduction costs claimed by Spaletta were incurred in connection with his whistleblower claim. Having reviewed the numerous and voluminous documents submitted by Spaletta during the course of this proceeding, I am convinced that Spaletta incurred substantial photocopying costs in pursuing his whistleblower claim. I therefore find that his claim of \$409.46 in reproduction costs is entirely reasonable.

For the reasons set forth above, I will award Spaletta the following expenses or costs:

Secretarial Services \$300.00

Photocopying Services \$409.46

Postage \$ 30.89

Other Miscellaneous costs \$ 30.20

Subtotal \$770.55

IV. Conclusion

For the reasons set forth above, Spaletta shall be awarded the following amounts of back pay and reimbursement for costs and expenses in accordance with the provisions of 10 C.F.R. ' 708.10(c):

Back Pay, including interest \$8,905.00

Legal Fees \$2,645.50

Expenses and Costs \$ 770.55

Total \$12,321.05

It is Therefore Ordered That:

(1) Lockheed Idaho Technologies Company shall pay to Howard W. Spaletta \$12,321.05 within 30 days of the date of this order.

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

Roger Klurfeld

Hearing Officer

Office of Hearings and Appeals

Date: April 19, 1996

Appendix - Case No. VWX-0004

Calculation of Back Pay and Interest

Quarter	Quarterly Interest Rate		Cumulative	
	Back Pay (per annum)	Interest + Interest	Back Pay	Interest + Interest
1st Quarter 1990	\$0	10%	\$0	\$0
2nd Quarter 1990	\$363	10%	\$5	\$368
3rd Quarter 1990	\$363	10%	\$14	\$745
4th Quarter 1990	\$363	10%	\$23	\$1,131
1st Quarter 1991	\$363	10%	\$33	\$1,527
2nd Quarter 1991	\$795	9%	\$43	\$2,365
3rd Quarter 1991	\$795	9%	\$62	\$3,222
4th Quarter 1991	\$795	9%	\$81	\$4,098
1st Quarter 1992	\$795	8%	\$90	\$4,983
2nd Quarter 1992	\$426	7%	\$91	\$5,500
3rd Quarter 1992	\$426	7%	\$100	\$6,026
4th Quarter 1992	\$426	6%	\$94	\$6,546
1st Quarter 1993	\$426	6%	\$101	\$7,073
2nd Quarter 1993	\$0	6%	\$106	\$7,179
3rd Quarter 1993	\$0	6%	\$108	\$7,287
4th Quarter 1993	\$0	6%	\$109	\$7,396
1st Quarter 1994	\$0	6%	\$111	\$7,507
2nd Quarter 1994	\$0	6%	\$113	\$7,620
3rd Quarter 1994	\$0	7%	\$133	\$7,753
4th Quarter 1994	\$0	8%	\$155	\$7,908
1st Quarter 1995	\$0	8%	\$158	\$8,066
2nd Quarter 1995	\$0	9%	\$181	\$8,247
3rd Quarter 1995	\$0	8%	\$165	\$8,412
4th Quarter 1995	\$0	8%	\$168	\$8,580
1st Quarter 1996	\$0	8%	\$172	\$8,752
2nd Quarter 1996	\$0	7%	\$153	\$8,905
Total Back Pay Plus Interest				\$8,905

<1>/ The OHA case number for the *Spaletta* Decision is LWA-0010. As indicated above, the OHA case number for this Supplemental Order is VWX-0004.

<1>/ In *Crawford Fitting Co. v. J.J. Gibbons, Inc.*, 482 U.S. 437 (1987), the Supreme Court held that costs awarded under Rule 54 (d) are limited to the items set forth in 28 U.S.C. ' 1920 and other related statutes.