

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
CENTRAL REGIONAL OFFICE**

MARVIN D. THOMPSON, JR.,  
Appellant,

DOCKET NUMBER  
CH-0752-08-0632-B-1

v.

DEPARTMENT OF JUSTICE,  
Agency.

DATE: April 15, 2011

William E. Persina, Esquire, Washington, D.C., for the appellant.

Andrea Geiger, Esquire, Washington, D.C., for the agency.

**BEFORE**

Gregory A. Miksa  
Administrative Judge

**INITIAL DECISION**

**INTRODUCTION**

On July 31, 2009, Marvin D. Thompson, Jr., timely moved for an award of attorney fees and costs as the prevailing party in his removal appeal based on the Board's May 28, 2009 Initial Decision, which became final on July 2, 2009, in *Marvin Thompson, Jr. v. Department of Justice*, MSPB Docket No. CH-0752-08-0632-I-1. The Board has jurisdiction to award attorney fees in this matter. *See* 5 U.S.C.A. §§ 7511 & 7701(g) (West 2007).

In a November 30, 2009, Initial Decision, the undersigned granted the appellant's motion finding the appellant had established that an award of attorney fees and costs was warranted in the interest of justice and that his experienced

counsel's attorney fees and costs in the amount of \$43,753.06, supported by his billing records, was reasonable. Without challenging the reasonableness of the appellant's request for fees or the amount approved, the agency argued on petition for review that the appellant's counsel, Mr. Persina, was not a salaried employee of the appellant's union, the American Federation of Government Employees (AFGE); that pursuant to an August 14, 2008 Memorandum of Understanding (MOU) between Mr. Persina and AFGE, the majority of his requested fees would go to the union's Legal Representative Fund (LRF); that no attorney-client relationship existed between Mr. Persina and the LRF, and that the MOU creates a conflict of interest that does not exist when a fee award involves salaried Union attorneys. See Opinion and Order in *Thompson v. Department of Justice*, MSPB Docket No, CH-0752-08-0632-A-1, slip op. at ¶ 6 (MSPB, December 16, 2010). Alternatively, the agency argued that even if Mr. Persina could show he was a salaried Union attorney, the MOU did not satisfy the requirement that the LRF be controlled by Union counsel. *Id.*

The Board held, however, that the MOU between Mr. Persina and the AFGE does not make it inappropriate to award attorney fees based on the attorney's market-rate fee, so long as any fees owing to the Union under the MOU are paid into an LRF meeting the criteria set forth by the court in *Raney v. Federal Bureau of Prisons*, 222 F.3d 927 (Fed. Cir. 2000). In this regard, the Board stated:

. . . [T]he court concluded that the Back Pay Act "provides no basis for distinguishing between in-house and private firm counsel when calculating or assessing fees." [citation omitted] Given this language, we believe that the court's holding in *Raney* applies in cases where an award of attorney fees would be apportioned between private counsel retained by the Union and the LRF, provided that the fund meets the criteria set forth in *Raney*, *i.e.*, that the "legal fund is separated from other union funds and is controlled exclusively by attorneys for the sole benefit of employee litigation."

*Thompson v. Department of Justice*, MSPB Docket No, CH-0752-08-0632-A-1, slip op. at ¶ 11 (emphasis added); *see also Raney v. Federal Bureau of Prisons*, 222 F.3d 927, 932. The Board further rejected the agency's assertion that the subject MOU "implicates" fee splitting or could result in the loss of independent judgment on the part of Mr. Persina, because the agency never asserted that these ramifications ever occurred in this case. *See Thompson* at ¶ 13. The Board concluded, however, that it could not determine if the LRF is separate from other union funds and "is controlled exclusively by attorneys for the sole benefit of employee litigation." *Id.* at ¶ 14. It noted that according to the MOU, before any funds go into the LRF, they are first deposited into a Union Trust Account maintained by Mr. Persina's firm and then distributed between the LRF and Mr. Persina. It noted that two signatures are required for money to be disbursed from the Trust Account, one from Mr. Persina, or another designated member of his Firm; and one signature from the AFGE National Secretary Treasurer, or another designated representative of the Union. *Id.* The Board opined that if the AFGE National Secretary/Treasurer is not an attorney, then the trust account might not meet the *Raney* criteria because it is not controlled exclusively by attorneys. The Board noted the appellant submitted no evidence on the question whether AFGE may have delegated signatory authority over the trust account to an attorney. The Board further noted the appellant did not submit a copy of the retainer agreement between the AFGE and the law firm of Hicky and Collins, located in Forest City, Arkansas, "for the [claimed] sole and express purpose of that firm exercising exclusive control over the LRF, consistent with the requirements of *Raney*." *Id.* The Board, accordingly, remanded the appellant's attorney fee petition to the undersigned to:

. . . [T]ake evidence and argument regarding the nature of the trust account, including whether an attorney has delegated signatory authority, and the precise nature of the LRF, including whether the LRF is the same Legal Representation Fund discussed in *Raney*.

*Id.* at ¶ 16 (emphasis added).

For the reasons given below, the appellant's motion for attorney fees and costs is GRANTED in the amount of \$43,753.06, contingent upon the appellant presenting evidence to the agency that the Secretary/Treasurer of the AFGE Council of Prison Locals has delegated his signatory authority under the Union's August 14, 2008 MOU with Mr. Persina to a Union attorney.

### ANALYSIS AND FINDINGS

With respect to the National Secretary/Treasurer's authority under the MOU with appellant counsel's firm, appellant counsel submitted a February 18, 2011, sworn affidavit from Roger Payne, the elected National Secretary/Treasurer of the AFGE Council of Prison Locals (CPL). *See* Record at tab 9. Mr. Payne attests that as the CPL National Secretary/Treasurer, he is responsible for ensuring that funds associated with the CPL are maintained in a manner consistent with all applicable laws, and the AFGE and CPL Constitutions and By-Laws.

Mr. Payne further attests that he was a signatory to the August 14, 2008 MOU that CPL entered with Mr. Persina for the purpose of providing legal representation to CPL employees and local union chapters in third party hearings. *See* Record at tab 10, attachment 1 to Mr. Persina's February 18, 2011 affidavit. The MOU provides:

All attorney's fee awards pursuant to this agreement will be made payable to William E. Persina and will be deposited into a separate account maintained by the Firm for the purpose of receiving such attorney's fee awards (the "Union Trust Account)." The Union Trust Account will require two signatures for money to be disbursed from it. One signature will be by William E. Persina or another designated representative of the Firm. The other signature will be by Roger Payne, the National Secretary/Treasurer of the Union, or another designated representative of the Union. Once attorney's fees are paid into the Union Trust Account, the Firm will be paid its percentages set forth herein. The remainder of the attorney's fee award will be turned over to the Union to be placed into an account controlled by the Union (and not by the Firm) to be used solely to

pay litigation costs and expenses (the "Litigation Representation Fund") related to representation.

*Id.* (Emphasis added). The percentages to be paid the Firm are set forth in paragraph 4 of the agreement, which states:

The Firm will be paid forty percent (40%) of any attorney fees awarded due to the representation of the Union, an Employee, or a Local by any administrative law judge, arbitrator or formal complaint deciding official. This percentage will be increased to forty-five percent (45%) or (sic) total attorney fee awards for the calendar year of over one hundred thousand dollars (\$100,000). This percentage will be increased to fifty percent (50%) for total attorney fee awards for the calendar year of over two hundred thousand dollars (\$200,000). The remainder of any attorney fees awarded due to the representation of an Employee or a Local by any administrative law judge, arbitrator or formal complaint deciding official shall be turned over to the Union's Litigation Representation Fund (LRF).

*Id.* Mr. Payne does not state in his affidavit that he has delegated his signatory authority under the August 14, 2008 MOU to a Union attorney. The appellant has not otherwise produced evidence to show that such a delegation has been made.

The appellant further submitted a copy of the current "Legal Representation Fund Agreement of the AFGE Council of Prison Locals AFGE Council 33 (LRFA)." Record at tab 10, attachment 2. The agreement was executed by the AFGE Council 33 President and Preston G. Hickey, Esquire for the Hicky and Collins Firm on November 5, 2009; and by the AFGE General Counsel on November 13, 2009. *Id.* This agreement states:

Purpose: The purpose of this agreement is to establish a Legal Representation Fund (Fund) to support litigation on behalf of AFGE's members in constituent locals of Council 33 and to thereby augment the legal representation provided by Council 33 through its retained attorneys. The emphasis of the Fund is to litigate cases which are meritorious and involve potential back pay recoveries. Council 33 will hire an attorney, or attorneys, who will provide legal services to Council 33 and its constituent locals and be paid from the Fund, obtaining attorney's fees awards whenever possible and depositing such awards into the Fund.

*Id.* Section 3 of the agreement specifies that the Hicky and Collins Firm (the Firm) is responsible for “establishing, maintaining, and administering an interest-bearing account, which is separate from Council 33’s other accounts and under exclusive control of the Fund Administering Attorney of the Firm, into which is deposited awards of attorneys fees.” *Id.* The agreement further specifies the Firm is responsible for “assuring that the Fund’s monies are not comingled with Council 33’s monies or used to pay the non-litigation costs and expenses of Council 33.” *Id.*

Section 6, entitled, “Fee Awards,” provides:

The Fund will meet all the necessary requirements set out in *Raney v. Dept. of Justice* [sic], 222 F.3d 927 (Fed. Cir. 2000), for obtaining market rate fee awards in back pay cases. All fee awards are to be deposited in the Fund.

Under the subheading “Fund Expenditures and Fiscal Integrity,” section 5 of the agreement specifies:

Expenditures by the Fund shall be approved by the Fund Administering Attorney, who has ultimate control over the Fund. Any Fund check must contain two signatures: (1) Council 33 President or Council 33 Secretary-Treasurer and (2) the Fund Administering Attorney. Monthly statements pertaining to the Fund’s account shall be provided to the President and Secretary-Treasurer of Council 33.

*Id.* (Emphasis added).

With respect to section 5 of the agreement, the appellant’s counsel submitted a document entitled “Memorandum Amending Legal Representation Fund Agreement Of the AFGE Council of Prison Locals AFGE Council 33,” that was signed by the AFGE General Counsel on January 25, 2011; and by the AFGE Council 33 President and Judith Collins of the Hicky and Collins Firm on February 1, 2011. Record at tab 10, attachment 3. This document states:

Section 5 of the November 9, 2009 Agreement is stricken. In its place, the following language becomes effective upon execution of this Memorandum:

“5. Fund Expenditures and Fiscal Integrity: Expenditures by the Fund shall be approved by the Fund Administering Attorney, who has exclusive control over the Fund. Any Fund check must contain the signature of at least one attorney from the Firm. Monthly statements pertaining to the Fund’s account shall be provided by the Firm to the President and Secretary-Treasurer of Council 33.”

All other provisions of the November 2009 Legal Representation Fund Agreement remain in full force and effect.

*Id.* (Emphasis added). I find the subject amendment eliminates any potential control by the AFGE Council 33 President or Secretary/Treasurer, as non-attorney officers of the Union, over the disbursement of LRF funds

The agency vigorously opposes appellant’s reliance on the submitted LRFA, as amended, to describe the purpose, independence, and control of the LRF to which a portion of an fee award in this case would be allocated under the Union’s August 14, 2008 MOU with Mr. Persina. The agency notes the LRF is not the same LRF considered by the court in *Raney* as it did not exist until eight weeks after the original attorney fee record in this closed on September 14, 2009, but before issuance of the undersigned’s November 30, 2009 Initial Decision regarding the appellant’ motion for attorney fees. The agency further protests that the LRFA was not amended until after the appellant’s motion for fees was filed.

I find the agency’s arguments misplaced. The record concerning the instant attorney fee motion was reopened on remand from the Board for the purpose of taking additional evidence and argument concerning whether appellant counsel’s MOU with the AFGE and the AFGE’s applicable LRF comply with the requirements of the court’s *Raney* decision for an attorney fee award. The relevant issue for consideration is the compliance with the *Raney* requirements of the Union’s current LRF, to which an award of attorney fees would ultimately be deposited, not to an LRF that existed in the past or to which an award of fees will not be transferred.

I find the LRF administered by the Hicky and Collins Firm that was established under the November 2009 LRFA, as amended in February 2011 by the eliminating partial signatory control over the disbursement of LRF funds by non-attorney Union officials, currently meets the *Raney* requirements, *i.e.*, that the fund be separate from other AFGE Union funds and be controlled exclusively by attorneys for the sole benefit of employee litigation. I further find Mr. Persina's April 2008 MOU with the AFGE Council also fulfills the *Raney* requirements that his Union Trust Account be maintained separate from other Union accounts and be used solely for the purpose of AFGE employee legal representation. The appellant's counsel has not established, however, that language in the MOU providing that the AFGE Secretary/Treasurer, or his designee, must countersign checks written on the Trust Account by the appellant's counsel vests in the non-attorney Secretary/Treasurer only "ministerial" authority over disbursements from the account. Notwithstanding the fact that the MOU authorizes only two prescribed disbursements from the account, one to Mr. Persina and one to the LRF, I find a non-attorney Secretary/Treasurer, or designee, could exercise at least partial control over the Trust Account by withholding his or her signature on the required disbursement checks. This circumstance can be remedied, however, upon the written delegation by the Union of the Secretary/Treasurer's signatory authority over the Union Trust Account to a Union attorney.

I further reconfirm the determinations and findings concerning the reasonableness and the amount of attorney fees and costs set forth in my November 30, 2009 Initial Decision in this matter. On condition that the appellant presents to the agency's representative a written delegation by the National Secretary/Treasurer for the AFGE Council of Prison Locals signatory authority under the subject MOU to a Union attorney, I find an award of attorney fees and costs in the amount of \$43,753.06 is warranted in the interest of justice.



decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

### **BOARD REVIEW**

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board  
Merit Systems Protection Board  
1615 M Street, NW.  
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you

and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

#### **JUDICIAL REVIEW**

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, NW.  
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the

court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

#### **ENFORCEMENT**

If the agency fails to pay the attorney fees awarded within 20 calendar days after the date this initial decision becomes final, you may ask the Board to enforce its decision by filing a motion with this office.

#### **NOTICE TO AGENCY/INTERVENOR**

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

**DECISION CASE CITES LISTING**

Marvin D. Thompson, Jr. v. Department of Justice

Docket No. CH-0752-08-0632-B-1

Raney v. Dept. of Justice, 222 F.3d 927 (Fed. Cir. 2000).....6  
**Raney v. Federal Bureau of Prisons, 222 F.3d 927 (Fed. Cir. Aug. 11, 2000)**  
**(Nos. 97-3469, 98-3043)**

Raney v. Federal Bureau of Prisons, 222 F.3d 927 (Fed. Cir. 2000).....2  
**Raney v. Federal Bureau of Prisons, 222 F.3d 927 (Fed. Cir. Aug. 11, 2000)**  
**(Nos. 97-3469, 98-3043)**

Thompson v. Department of Justice, MSPB Docket No, CH-0752-08-0632-A-1,  
 slip op. at ¶ 6 (MSPB, December 16, 2010).....2  
**Thompson v. Department of Justice, MSPB Docket No, CH-0752-08-0632-A-**  
**1, slip op. at ¶ 6 (MSPB, December 16, 2010)**

THIS CITE CHECK CONDUCTED BY \_\_\_\_\_ ON April 14, 2011.