

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

MARVIN D. THOMPSON, JR.,
Appellant,

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

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: September 16, 2011

THIS FINAL ORDER IS NONPRECEDENTIAL¹

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

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

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

FINAL ORDER

The agency has filed a petition for review of the remand initial decision awarding the appellant market-rate attorney fees. For the reasons set forth below, we VACATE portions of the remand initial decision but still order the agency to pay \$43,753.06 in market-rate attorney fees.

¹ This Order may not be cited or referred to except by a party asserting collateral estoppel (issue preclusion), res judicata (claim preclusion), or law of the case.

In the underlying Chapter 75 appeal, the administrative judge reversed the appellant's removal from his Senior Officer Specialist position. MSPB Docket No. CH-0752-08-0632-I-1, Initial Appeal File, Tab 34. Thereafter, the appellant moved for attorney fees and costs incurred by his union-retained attorney, William Persina.² MSPB Docket No. CH-0752-08-0632-A-1, Attorney Fees File (AF File), Tab 1. The administrative judge awarded attorney fees and costs in the amount of \$43,753.06, finding, inter alia, that an attorney-client relationship existed between the appellant and Mr. Persina and that the appellant was entitled to a reasonable award of attorney fees and costs based on Mr. Persina's customary market rate. AF File, Tab 11. The agency filed a petition for review of this decision challenging the award of market-rate attorney fees where a percentage of the awarded fees would be deposited into the Legal Representation Fund (LRF) of the American Federation of Government Employees, Council of Prison Locals 33 (Union). Petition for Review (PFR) File, Tab 1.

The Board affirmed the administrative judge's finding that the appellant was entitled to an award of attorney fees; however, it vacated the findings that the LRF meets the requirements under *Raney v. Federal Bureau of Prisons*, 222 F.3d 927 (Fed. Cir. 2000) (en banc), and that the appellant is entitled to an award of market-rate fees. *Thompson v. Department of Justice*, 115 M.S.P.R. 564, ¶¶ 1, 5, 7 (2010); see AF File, Tab 9. Because the record was insufficient to determine

² Mr. Persina and the American Federation of Government Employees, Council of Prison Locals 33 (Union) entered into a Memorandum of Understanding agreeing, among other things, that Mr. Persina's law firm would be paid a percentage of any attorney fees awarded, and that the remainder of any attorney fees award would be turned over to the Union's Legal Representation Fund. MSPB Docket No. CH-0752-08-0632-B-1, Remand File, Tab 10 at 13-15. Further, the parties agreed that: (1) all attorney fees awards pursuant to this agreement would be made payable to Mr. Persina and would be deposited into the Union Trust Account maintained by Mr. Persina's firm for the purpose of receiving such attorney fees awards and (2) the Union Trust Account would require the signature of Mr. Persina or another designated representative of his firm, as well as the signature of the Union's National Secretary/Treasurer or another union-designed representative. *Id.* at 14.

whether the LRF meets the *Raney* criteria, the Board remanded the appeal to the regional office for further adjudication of this issue. *Thompson*, 115 M.S.P.R. 564, ¶¶ 14-17.

On remand, the administrative judge again awarded \$43,753.06 in market-rate attorney fees. MSPB Docket No. CH-0752-08-0632-B-1, Remand File (RF), Tab 19, remand initial decision (RID) at 9. He found that, under the Memorandum of Understanding (MOU), a non-attorney Union Secretary/Treasurer or a non-attorney-union designee could exercise at least partial control over the Union Trust Account. RID at 8. However, because he found that the circumstances could be remedied by the Union Secretary/Treasurer's delegation of his signatory authority over the Union Trust Account to a union attorney, the administrative judge concluded that both the LRF agreement between the Union and the law firm of Hicky and Collins, the administrator of the LRF, and the MOU meet the *Raney* requirements. *Id.* The administrative judge "reconfirmed" his finding that the fees were reasonable and awarded fees, conditioned upon the appellant providing the agency with a copy of the Union Secretary/Treasurer's written delegation of his signatory authority over the Union Trust Account to a union attorney. *Id.* The agency filed a petition for review of this remand initial decision.³ Remand Petition for Review (R-PFR) File, Tab 6. The appellant responded in opposition. R-PFR File, Tab 8.

Under *Raney*, a petitioner is entitled to an award of market-rate fees incurred by salaried union attorneys under the Back Pay Act if the legal fund is

³ The agency appears to assert that the Board should grant its petition for review to consider alleged new and material evidence, i.e., the LRF agreement, which was not created until after the September 14, 2009 close of the record in MSPB Docket No. CH-0752-08-0632-A-1, and that, despite its due diligence, the agency did not obtain this evidence until after the appellant produced the LRF agreement in the remanded appeal pursuant to the administrative judge's order. See R-PFR File, Tab 6 at 4-6. However, the LRF is already contained in the record in the remanded appeal and therefore is not new. RF, Tab 10, Attachment 1; see *Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980). Because the LRF agreement is in the record, we have considered it.

separated from other union funds and is controlled exclusively by attorneys for the sole benefit of employee litigation. *Raney*, 222 F.3d at 938. “[S]uch segregation eliminates ethical barriers to market rate calculation for attorney fee awards.” *Id.* Fees incurred by union-retained private attorneys may also be awarded provided the *Raney* criteria are met. *Thompson*, 115 M.S.P.R. 564, ¶ 11.

The threshold issue in this appeal is whether the LRF is exclusively controlled by attorneys. The requirement for exclusive control by an attorney arises from a concern that awarding market-rate attorney fees that will, in part, be deposited into a union litigation fund violates canons of ethical conduct, i.e., encourages unethical fee splitting with laypersons and the unauthorized practice of law by laypersons. *See Raney*, 222 F.3d at 936-38. It is well established that laymen are prohibited from the practice of law; this arises from “the need of the public for integrity and competence of those who undertake to render legal services.” MODEL CODE OF PROF’L RESPONSIBILITY EC 3-1 (1980). Thus, the practice of law is confined to those who are subject to and governed by professional regulations and are committed to high standards of ethical conduct. *Id.* at 3-1, 3-3, 3-8. Splitting fees with a lay organization could enable a lay organization to compromise an attorney’s independent, professional judgment and to engage in the unauthorized practice of law, violating not only the canons of ethical conduct, but also the disciplinary rules governing attorneys. *See* MODEL CODE OF PROF’L RESPONSIBILITY DR 3-101, 3-102; *Raney*, 222 F.3d at 938; *Thompson*, 115 M.S.P.R. 564, ¶ 13; *Sailor-Nimocks v. Office of Personnel Management*, 66 M.S.P.R. 438, 441 (1995) (citing *National Treasury Employees Union v. U.S. Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981)).

In *Raney*, our reviewing court adopted the viewpoint of its sister circuit in *Kean v. Stone*, 966 F.2d 119, 123 (3rd Cir. 1992) that, where fees are paid into a separate account used solely by lawyers for employee litigation, there is neither fee sharing with the union, nor is there a real danger that the union will influence the independent judgment of the attorney representing the employees. *Raney*,

222 F.3d at 938; *Kean*, 966 F.2d at 123. The U.S. Court of Appeals for the Third Circuit stated that, “[a]lthough the prospect of indirect benefits through successful litigation might encourage lay organizations to litigate more meritorious cases, they would still necessarily rely on attorneys to conduct the litigation.” *Kean*, 966 F.2d at 123 (quoting *Curran v. Department of the Treasury*, 805 F.2d 1406, 1408 (9th Cir. 1986)). Based on the foregoing, we interpret the requirement that the LRF be exclusively controlled by attorneys to mean that attorneys, who are governed by standards of professional conduct and held to a higher standard of ethical conduct, must control the disbursement of monies from the LRF and ensure that the monies are used solely for representing employees in litigation.

Here, both the LRF agreement and the affidavit of the Union Secretary/Treasurer expressly provide that the Fund Administering Attorney at the law firm of Hicky and Collins, the administrator of the LRF, exclusively controls the disbursement of the LRF to pay legal fees and litigation costs and expenses incurred by attorneys representing employees. RF, Tab 9 at 4, Tab 10 at 16, 18. The Fund Administering Attorney who, as an attorney, is subject to discipline for aiding a non-lawyer in the unauthorized practice of law and/or sharing legal fees with a non-lawyer, is responsible for administering the LRF including, but not limited to, ensuring that the monies in the LRF are not comingled with the other Union monies or used to pay non-litigation costs and expenses. See MODEL CODE OF PROF’L RESPONSIBILITY DR 3-101, 3-102; RF, Tab 10 at 16-17. The affidavit of the Union’s Chief Financial and Accounting Officer corroborates that the LRF is segregated from the Union’s other monies. *Id.* at 12. Based on the foregoing, we perceive no threat of unauthorized fee splitting or any real danger that the union will cloud the independent judgment of an attorney and encourage the unauthorized practice of law. See *Raney*, 222 F.3d at 938; *Kean*, 966 F.2d at 123.

Contrary to the administrative judge's findings, the mere fact that the Union Secretary/Treasurer or a union designee with signatory authority over the Union Trust Account co-signs the check made out to Mr. Persina for the awarded attorney fees, does not mean that a non-attorney controls the LRF. *See* RID at 8. It is undisputed that any attorney fees awarded in the appellant's case which are not retained by Mr. Persina are directly disbursed into the LRF. RF, Tab 10 at 13. The Union Secretary/Treasurer has no approving authority for the expenditure of funds in the LRF or the authority to direct recovered attorney fees to any other fund or bank account; this authority rests solely with the Fund Administering Attorney at Hicky and Collins. RF, Tab 9 at 2-4, Tab 10 at 9, 13, 16. The Union Secretary/Treasurer averred that the sole purpose of his co-signing the check is to ensure that the funds are properly apportioned pursuant to the agreed-upon percentages set forth in the MOU and that there is no fraud or malfeasance regarding the disbursement of the funds. RF, Tab 9 at 2. This is a purely ministerial function. Consequently, we find the Union Secretary/Treasurer has no control over the LRF. Thus, we VACATE the portions of the remand initial decision in which the administrative judge found that the Union Secretary/Treasurer or any potential written designee has control over the LRF and conditioned the award of attorney fees upon proof that the Union Secretary/Treasurer designated his signatory authority over the Union Trust Account to a union attorney.

We find the LRF is exclusively controlled by attorneys, and that the appellant has proven that all of the *Raney* requirements have been met.⁴ We therefore order the agency to pay \$43,753.06 in market-rate attorney fees.⁵

⁴ Here, it is undisputed that the purpose of the LRF is to support litigation on behalf of union members with funds acquired, in part, from recovered attorney fees. *See* RF, Tabs 9 at 1-3, Tab 10 at 11, 16. The Union Secretary/Treasurer averred that the LRF agreement and the February 2011 amendment are the only documents concerning the administration of the LRF. RF, Tab 9 at 3. Thus, we find that the LRF is for the sole benefit of employee litigation. *See Raney*, 222 F.3d at 938.

ORDER

Accordingly, the agency is ORDERED to pay the sum of \$43,753.06 in market-rate attorney fees. The agency must complete this action within 20 days of the date of this decision. *See generally* 5 U.S.C.A. § 1204(a)(2) (West Supp. 1992).

We also ORDER the agency to inform the appellant and the attorney of all actions taken to comply with the Board's order and the date on which it believes it has fully complied. *See* 5 C.F.R. § 1201.181(b). We ORDER the appellant and the attorney to provide all necessary information that the agency requests in furtherance of compliance. The appellant and the attorney should, if not notified, inquire as to the agency's progress. *Id.*

Within 30 days of the agency's notification of compliance, the attorney may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the attorney believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance. *See* 5 C.F.R. § 1201.182(a).

This Nonprecedential Final Order is the final order of the Board in this attorney fees proceeding. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has

⁵ Attorney time spent preparing a response to an agency's petition for review is compensable. *Johnston v. Department of the Treasury*, 104 M.S.P.R. 527, ¶ 3 (2007). Therefore, the appellant may file an additional motion for fees for time spent responding to the agency's petition for review of the initial attorney fees award, the Board's remand order, and the agency's petition for review of the remand initial decision.

jurisdiction to review this final decision. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

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. 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.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.