UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

August 20, 1997

EARL RUSSELL HORNE, JR., Complainant,	)
v.	) 8 U.S.C. §1324b Proceeding
	) OCAHO Case No. 96B00106
TOWN OF HAMPSTEAD, Respondent.	)

ORDER GRANTING RESPONDENT'S REQUEST FOR ATTORNEY'S FEES

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.,* on behalf of Complainant.
Thomas J. Gisriel, Esq., and Steven B. Schwartzman, Esq., on behalf of Respondent.

I. *Procedural History*

Pursuant to the January 17, 1997, Decision and Order Dismissing Complaint, 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.), the Town of Hampstead, Maryland (Respondent), by its attorneys, timely filed its Application for an Award of Attorneys Fees (Application) on April 1, 1997 for the proceeding in 6 OCAHO 906, Docket No. 96B00106 (*Horne II*), and for the work performed in conjunction with 6 OCAHO 884 (1996), 1996 WL 658405 (O.C.A.H.O.), Docket No. 96B00050 (*Horne I*). Earl Russell Horne, Jr. (Horne or

Complainant) neither contests nor otherwise responds to Respondent's Application.[1]

Respondent requests $4,620[2] in attorney's fees and provides a detailed explanation and summary in support of its request. Complainant does not question the reasonableness of either the time set forth or the hourly rates claimed in Respondent's Application.

II. *Discussion*

A. *Test for Awards of Attorney's Fees Under 8 U.S.C. §1324b*

Attorney's fees are awarded in an unfair immigration-related employment practice action based on a two-part test: (1) determination of prevailing party status; and (2) qualification of the action as frivolous or unreasonable. 8 U.S.C. §1324b(h) provides in part that

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[1]On February 4, 1997, Complainant filed a post-decision Motion for Findings of Fact and Conclusions of Law and Reconsideration of Judgment (Motion) which argues that Complainant's action was in fact "founded in *reasonable* law and fact" and "was asserted in *reasonable* law and fact and in good faith" and which states that Respondent "doesn't merit any award of attorney fees. . . ." Motion, at 10. In cases arising under 8 U.S.C. §1324b, 28 C.F.R. §68.52(c)(4) permits the ALJ to correct errors or mistakes in a decision or order within sixty days after issuance. Complainant's Motion is not encompassed by this regulatory provision because it asks for more than correction of an error or mistake. Complainant requests "reconsideration" of the ALJ's decision, relief which is not authorized by statute or regulation. As stated in *Horne II*, 6 OCAHO 906, at 14, 1996 WL 131346, at *11, the review sought is only available in the Court of Appeals. *See* 8 U.S.C. §1324b(i)(1); 28 C.F.R. §68.53(b).

By the same token, even though 28 C.F.R. §68.1 permits the Federal Rules of Civil Procedure to "be used as a general guideline in any situation not provided for or controlled by [28 C.F.R. pt. 68], the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation," Complainant's Motion falls outside Fed. R. Civ. P. 52(b) (Amendment) or 59(e) (Motion to Alter or Amend Judgment) because Complainant clearly seeks review and reconsideration of the entire decision and order, not a mere correction or amendment. Finally, Complainant's Motion was not timely filed within "10 days after entry of the judgment" which is required by both Rules 52(b) and 59(e). In any event, the Motion is obviously only another iteration of the claim set forth in the Complaint.

[2]Although Respondent's Application, at 4, requests an award of $4,650 (and an award of "$4,6250 [sic]," Application, at 3), the total attorney's fees billed is $4,620. That sum, $4,620, is the cumulative total of $3,990 in fees for *Horne I* (Case No. 96B00050) and $630 in fees for *Horne II* (Case No. 96B00106). "Thus, the total amount billed in the two proceedings was $4,620." Application, at 4. A literal reading of the "Amount" column of Respondent's Application, Exhibit, at 1–4, shows an amount less than that requested for the hours billed. Because there is a logical nexus between the narrative and the rates recited, I adopt the rate of $150 per hour stated in the Application, at 4, consistent in total sum ($4,620) with Respondent's own calculation.

an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

1. *Town of Hampstead Is the Prevailing Party*

(a) *Horne I*

In the first *Horne* action, Horne voluntarily withdrew his complaint and requested that the case be dismissed. The August 9, 1996, Order Confirming Withdrawal of Complaint acknowledged Horne's "voluntary dismissal of the complaint without prejudice." *Horne v. Hampstead*, 6 OCAHO 884, at 6, 1996 WL 658405, at *5. "Where the plaintiff has voluntarily dismissed his or her action, a number of courts have held that the [respondent[3]] is the 'prevailing' or 'successful' party." 1 ROBERT L. ROSSI, ATTORNEYS' FEES 362 (2d ed. 1995) (footnote omitted).[4] The "term 'prevailing party' is applicable to a [respondent] against whom a voluntary dismissal is taken." *McKelvey v. Kismet, Inc.*, 430 So. 2d 919, 922 (Fla. Dist. Ct. App. 1983).[5]

[3]Respondent is inserted into the quotation to replace the term "defendant." Defendants and respondents are similarly situated in that they both have actions brought against them by a plaintiff or complainant, respectively, and are interchangeable for these definition purposes. Respondent "denotes the person upon whom an ordinary petition in the court . . . is served, and who is, as it were, a defendant thereto." BLACK'S LAW DICTIONARY 1546 (3d ed. 1933).

[4]*See Cantrell v. International Bhd. of Elec. Workers, AFL-CIO 2021*, 69 F.3d 456, 458 (10th Cir. 1995) (en banc) (holding that defendant is the prevailing party when a plaintiff voluntarily dismisses his action whether dismissed with or without prejudice); *Western Coal & Mining Co. v. Petty*, 132 F. 603 (8th Cir. 1904) (concluding that defendant is the prevailing party entitled to "legal costs" when plaintiff abandoned and dismissed his action); *Uniflow Mfg. Co. v. Superflow Mfg. Corp.*, 10 F.R.D. 589 (N.D. Ohio 1950) (finding defendant is the prevailing party where plaintiff voluntarily dismissed action, but court only awarded defendant actual costs due to bad act of appropriating copyright).

[5]*See McKelvey*, 430 So. 2d at 922 n.3:

> *See e.g., Dolphin Towers Condominium Assoc., Inc. v. Del Bene*, 388 So. 2d 1268 (Fla. [Dist. Ct. App.] 1980) (term 'prevailing party' in statute allowing prevailing party in action by or against condominium association to recover reasonable attorney fees includes defendant against whom voluntary dismissal is taken); *MacBain v. Bowling*, 374 So. 2d 75 (Fla. [Dist. Ct. App.] 1979) (voluntary dismissal will authorize an award of attorney's fees under section 57.105 where trial court finds that there is a complete absence of a justiciable issue of either law or fact); *Gordon v. Warren Heating & Air Conditioning, Inc.*, 340 So. 2d 1234 (Fla. [Dist. Ct. App.] 1976) (where a mechanic's lien is voluntarily dismissed, party against whom claim was brought is the 'prevailing party' and is entitled to recover attorney's fees and costs).

Respondent's prevailing party status is supported by *Cantrell v. International Brotherhood of Electrical Workers, AFL-CIO, Local 2021*, 69 F.3d 456 (10th Cir. 1995), where the Tenth Circuit held that the defendant is the prevailing party "when, in circumstances not involving settlement, the plaintiff dismisses its case against the defendant, whether the dismissal is with or without prejudice." I conclude that Respondent is the prevailing party in *Horne I*.

(b) *Horne II*

That Respondent is the prevailing party in *Horne II* is made clear by relevant OCAHO and federal case law. "Title VII served as a point of departure in drafting what became [8 U.S.C. §1324b. . . . It is reasonable to conclude, therefore, that Title VII [of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*.,] case law with respect to award of attorneys' fees is an important springboard for discussion of attorneys' fees under [§1324b]." *Williamson v. Autorama*, 1 OCAHO 174, at 1173 (1990), 1990 WL 515872, at *5 (O.C.A.H.O.).[6] *See also Lee v. Airtouch Communications*, 7 OCAHO 926, at 2 (1997); *Banuelos v. Transportation Leasing Co.*, 1 OCAHO 255, at 1651–52 (1990), 1990 WL 512091, at *10–11 (O.C.A.H.O.).

Jasso v. Danbury Hilton & Towers, 3 OCAHO 566 (1993), 1993 WL 544051 (O.C.A.H.O.),[7] referenced *Christiansburg Garment Company v. EEOC*, 434 U.S. 412, 421 (1978), as establishing that an award of attorney's fees depends on a finding of respondent's prevailing party status and a lack of reasonableness on the part of the complainant in filing the underlying action. *Jasso* also relied upon the similarities between the attorney's fees provisions of IRCA and the Civil Rights Act:

> Title VII of the Civil Rights Act also illuminates the reasonableness test for fee shifting. Under Title VII the Supreme Court has held that a District Court may, in its discretion, award attorney's fees to a prevailing Defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable,

[6]Citations to OCAHO precedents printed in bound Volume 1, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES LAWS OF THE UNITED STATES, reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to specific pages, seriatim, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

[7]*Jasso v. Danbury Hilton & Towers*, 3 OCAHO 566, 1993 WL 544051 (finding respondent prevailing party, but denying award of attorney's fees because complainant was justified in bringing the action).

> groundless and without foundation, even though not brought in subjective bad faith.

Jasso, 3 OCAHO 566, at 6, 1993 WL 544051, at *10–11.

The Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983),[8] and *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 793 (1989),[9] defined the prevailing party as the one who succeeds or prevails "on a significant issue in the litigation" and achieves "some of the relief they sought. . . . In *Texas State Teachers*, the Court found that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." 489 U.S. at 792–93. Parties "who prevailed on a significant issue in the litigation and . . . obtained some of the relief sought . . . are thus 'prevailing parties' within the meaning of [the statute]." *Id.*, at 793.

Respondent "succeeded" on all of its significant claims as set forth in Respondent's affirmative defenses[10] which "afforded it some of the relief sought" when the action was dismissed. Respondent's legal relationship with Horne was "materially altered" when I dismissed Horne's Complaint for failure to state a cause of action cognizable by §1324b(g)(3) and for lack of subject matter jurisdiction. I find that Respondent meets the prevailing party test in *Texas State Teachers*, *i.e.*, (1) it prevailed on a significant issue in the litigation by demonstrating that the Complainant failed to state a cause of action, and (2) it obtained the relief it sought in its Answer when Horne's Complaint was dismissed. I conclude that the Respondent is clearly the prevailing party in *Horne II*.

In the context of summary dispositions of complaints, ALJs have not always been of one mind in resolving whether a respondent is a prevailing party. *Banuelos*, 1 OCAHO 255, at 1650 n.7, 1990 WL 512091, at *10, disagreed with *Williamson*, 1 OCAHO 174, 1990 WL 515872, with respect to the "view that a respondent is not a 'prevailing party' simply because [an] ALJ has rendered a decision which dismisses, on jurisdictional grounds, a Complaint as charged by a

[8]*Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (discussing fee awards under Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988).

[9]*Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (discussing fee awards under 42 U.S.C. §§1983, 1988).

[10]Answer, at 3–9.

pro se complainant. . . . [The *Banuelos* ALJ also] reject[ed] an interpretation . . . which would apply attorney fees analyses to 'all cases,' including, as [another ALJ] apparently sees it, to threshold dismissals for lack of jurisdiction against a pro se."[11]

However, the concerns raised in *Banuelos* regarding the award of attorney's fees to the prevailing party in actions dismissed on jurisdictional grounds need not be addressed in the context of the case at hand. This is so because the Complainant did *not* appear *pro se* in *Horne II*, but was represented by John B. Kotmair (Kotmair) and the National Worker's Rights Committee (Committee). To the extent that OCAHO rules permit representation by a non-bar member, Horne is represented by Kotmair and the Committee. By no means is Complainant *pro se*. Accordingly, I need not address the reservation by the *Banuelos* judge which would deny prevailing party status to successful respondents whose adversary is truly *pro se*.

Moreover, *Horne II* was dismissed with prejudice *not* only for lack of subject matter jurisdiction, but also for failure to state:

> (1) a citizenship status discrimination cause of action cognizable under §1324b(a)(1);
>
> (2) an over documentation cause of action cognizable under §1324b(a)(6) and §1324a(b); and
>
> (3) a cause of action cognizable under §1324b as further defined by §§1324b(b)(1),[12] 1324b(d)(2),[13] 28 C.F.R. §§44.301(b),[14] 44.303(a)–(c),[15] and 28 C.F.R. §68.4.[16]

Horne II, 6 OCAHO 906, at 4, 9, 11, 1996 WL 131346, at *3, *7, *8.

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[11]"The defendant has been held to be the prevailing party in cases involving a dismissal for want of jurisdiction." 1 ROBERT L. ROSSI, ATTORNEY'S FEES 363 (2d ed. 1995). *See Pritchard v. Fowler*, 40 So. 955 (Ala. 1906); *Thomas v. Thomas*, 56 A. 651 (Me. 1903).

[12]8 U.S.C. §1324b(b)(1) (requiring that a charge be filed first with the Special Counsel).

[13]8 U.S.C. §1324b(d)(2) (requiring that the Special Counsel determine not to file a complaint before an ALJ prior to permitting the filing of a private action by the person making the charge).

[14]28 C.F.R. §44.301(b) (stating that a charging party may file complaint before an ALJ "if the Special Counsel does not do so within 120 days of receipt of the charge").

[15]28 C.F.R. §§44.303(a)–(c) (outlining determination procedures when the Special Counsel decides not to file a complaint with an ALJ).

[16]28 C.F.R. §68.4 (outlining procedures related to charges and complaints for unfair immigration-related employment practices).

2. *Horne II's Complaint, Without Reasonable Foundation in Law and Fact, Is Frivolous*

Fee shifting ultimately turns on a determination that the prevailing party has established that "the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. §1324b(h). "Under 8 U.S.C. §1324b(h), the prevailing party obtains the benefit of fee shifting only upon a finding that the arguments of the opposing party were without reasonable foundation in law and fact." Jasso, 3 OCAHO 566, at 5, 1993 WL 544051, at *2 (citing Jones v. Dewitt Nursing Home, 1 OCAHO 1235, 1268 (1990)).

(a) *Horne I Distinguished*

As to the first *Horne* action, I must conclude that Respondent is not entitled to an award of attorney's fees, even though Respondent is the prevailing party. In *Horne I*, Horne voluntarily dismissed his Complaint without prejudice pursuant to FED. R. CIV. P. 41(a)(1)(i). "[A] dismissal without prejudice operates to leave the parties as if no action had been brought at all. . . ." *Mangir v. TRW, Inc.*, 4 OCAHO 672, at 3 (1994), 1994 WL 595802, at *1 (O.C.A.H.O.). Because Horne voluntarily dismissed his Complaint, I am unable to evaluate the case on its merits or to determine the reasonableness of Horne's arguments, precluding a determination as to reasonableness for fee shifting purposes. *See Monterey Development Corp. v. Lawyer's Title Insurance Corp.*, 4 F.3d 605, 608 (8th Cir. 1993) ("'The effect of a voluntary dismissal without prejudice is to render the proceedings a nullity and leave the parties as if the action had never been brought,' reasoning that a dismissal without prejudice does not comply with the requirement of a valid and final judgment. . . .") (citing *In re Piper Aircraft Dist. Sys. Antitrust Litig.*, 551 F.2d 213, 219–20 (8th Cir. 1977); *Szabo Foods Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1078 (7th Cir. 1987) (determining that voluntary dismissal "under 41(a)(1)(i) strips a court of 'jurisdiction.' The dismissal terminates the case by itself. There is nothing left to adjudicate. . . . 'It is as if the suit had never been brought.'") (quoting *Bryan v. Smith*, 174 F.2d 212, 214 (7th Cir. 1949)), *cert. dismissed*, 485 U.S. 901 (1988). Because I am unable to conclude that Complainant's arguments in *Horne I* are "without reasonable foundation in law and fact," so as to satisfy

the §1324b(h) test, I am unable to award Respondent attorney's fees allocable to *Horne I*.[17]

(b) *Horne II*

In addition to 8 U.S.C. §1324b(h), which sets forth the standard for award of attorney's fees in OCAHO cases, Title VII precedent establishes a case to be frivolous if without reasonable foundation in law or fact. "[A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Although the text of §1324b(h) differs from that of Title VII, the result is the same.

Christiansburg Garment Company v. EEOC is the seminal case which addressed fee-shifting. In *Christiansburg*, the Supreme Court applied the prevailing party standard to civil rights defendants, holding that a court "may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith." 434 U.S. at 421. Subsequently, in *Hensley v. Eckerhart*, the Court explained that "[a] prevailing defendant [in a 42 U.S.C. §1988 civil rights action] may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant. See H.R. Rep. No. 94–1558, p. 7 (1976)." 461 U.S. at 429 n.2.

Horne's Complaint was summarily dismissed for lack of subject matter jurisdiction *and* for failure to state a claim upon which relief could be granted. "[T]he *Christiansburg* standard is . . . likely to have been met where **the plaintiff's case is dismissed for failure to**

[17]It is implicit in counsels' submission of a modest 4.2 hours expended for *Horne II* that they expended 26.6 hours for *Horne I*. Obviously, counsel benefitted from the *Horne I* experience, candidly allocating a substantially smaller portion of their time to *Horne II*. I am unable, however, to reallocate the time credited to *Horne I* toward the *Horne II* submission.

[18]1 Court Awarded Attorney Fees (MB) ¶10.04, at 10–77—10–78 (May 1997) (footnote omitted) (emphasis added). *See, e.g., Patton v. County of Kings*, 857 F.2d 1379 (9th Cir. 1988) (upholding attorney's fees awarded to prevailing defendant where action dismissed for plaintiff's failure to state a cause of action and where plaintiff's action found frivolous); *Harbulak v. County of Suffolk*, 654 F.2d 194, 197 (2d Cir. 1981) (reversing and remanding for award of attorney's fees to defendant after finding "no basis whatsoever for a suit against" the defendant and plaintiff's claim "unreasonable and groundless, if not frivolous."); *Riviera Carbana v. Cruz*, 588 F. Supp 80 (D.P.R. 1980) (holding that plaintiff failed to allege or state a cause of action and stating that even if plaintiff had stated a cause of action, "'federal courts are without power to entertain claims if they are so attenuated and unsubstantial as to be absolutely devoid of merit' or if they are obviously, as in the instant case, frivolous") (citation omitted), *aff'd sub nom. Carbana v. Cruz*, 767 F.2d 905 (1st Cir. 1985) (unpublished table decision).

state a claim on which relief could be granted. . . ."[18] Horne maintains that his employer discriminated against him by refusing to accept his self-styled, gratuitously tendered documents,[19] subjecting him to the universal demands of the Internal Revenue Code and the Social Security Act, the legality of which are undisputed and long-settled.[20] Respondent, however, is statutorily mandated to withhold income taxes[21] and social security contributions[22] and is immunized from legal liability for withholding by 26 U.S.C. §3102(b),[23] 26 U.S.C. §3403,[24] and the Anti-Injunction Act, 26 U.S.C. §7421(a),[25] which has been interpreted to prohibit suits against employers who withhold taxes. *See United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974). "[T]o take a position which indicates a desire to impede the administration of tax laws is a legally frivolous action." *McKee v. United States*, 781 F.2d 1043, 1047 (4th Cir.), *cert. denied*, 477 U.S. 905 (1986).

Where an employer is statutorily immunized from liability, an action brought against the employer for the performance of that duty is frivolous *per se*. "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory. . . ." *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). "A claim is based upon an indisputably meritless legal theory if the defendants are immune from suit." *Graves v. Hampton*, 1 F.3d 315, 317 (5th Cir. 1993) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)); *Austin v. Jitney-Jungle Stores, Inc.*, 6 OCAHO 923, at 22 (1997), 1997 WL 235918, at *17 (O.C.A.H.O.) (citing *Neitzke*, 490 U.S. at 325, *cited in Graves*, 1 F.3d at 317). Because Respondent, "an employer who in compliance with statutory obligations . . . deducts withholding tax and social security

[19]*See* Complaint, at ¶16a (identifying the documents which Respondent refused to accept as "Statement of Citizenship" and "Affidavit of Constructive Notice" which Horne presented "so that the U.S. Citizen is given 100% of his payment for his labor unencumbered by any Congressiona[l] Act.").

[20]All employees residing in the United States are subject to withholding taxes and social security (FICA) contributions, which employers must collect "at the source"—i.e., in the workplace, through payroll deductions. 26 U.S.C. §§3101, 3102, 3402(a)(1), 3403. *See Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

[21]26 U.S.C. §3402(a).

[22]26 U.S.C. §3102(a).

[23]26 U.S.C. §3102(b) ("Every employer . . . shall be indemnified against the claims and demands of any person. . . . ").

[24]26 U.S.C. §3403 ("The employer . . . shall not be liable to any person. . . . ")

[25]26 U.S.C. §7421(a) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . .).

contributions, . . . is statutorily immunized from suit[,]" Horne's action is frivolous and meritless. *Austin*, 6 OCAHO 923, at 22, 1997 WL 235918, at *17.

Therefore, I find that there is "no legal or factual basis for any of [Horne's] allegations," and I award Respondent $630 in attorney's fees. *Lee v. Airtouch Communications*, 7 OCAHO 926, at 6. Respondent's prevailing party status and Horne's action against an employer legally immunized from liability satisfy the threshold requirements of the 8 U.S.C. §1324b(h) two-part test for award of attorney's fees.

B. *Reasonableness of Attorney's Fees Request*

"In any complaint respecting an unfair immigration-related employment practice, an [ALJ], in the judge's discretion, may allow a prevailing party. . . a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. §1324b(h). "Any application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed." 28 C.F.R. §68.52(c)(2)(v). In *Horne II*, counsel supplies the following figures to support its $630 attorney's fees request: 4.2 hours expended on the litigation[26] at a rate of $150 per hour.[27] The reasonableness of this $630 "lodestar" amount must be assessed.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley*, 461 U.S. at 433. This calculation, set forth in *Hensley*, is the "lodestar" amount. "The courts may then adjust this lodestar calculation by other factors. . . . [I]n *Hensley* and in subsequent cases, [the Supreme Court has] adopted the lodestar approach as the centerpiece of attorney's fee awards." *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989).

[26]Application, Exhibit, at 4. Even though Respondent's counsel actually expended 4.7 hours, only 4.2 hours are billed or included in calculating the lodestar amount because counsel decided not to bill 0.50 hours to Respondent which Thomas J. Gisriel spent reviewing, correcting and conferencing related to the case. Application, at 4; Application, Exhibit, at 4.

[27]*See* note 2, *supra*.

"The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U.S. at 434. "The district court also may consider other factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–719 ([5th Cir.] 1974), though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley*, 461 U.S. at 434 n.9. "The *Johnson* factors may be relevant in adjusting the lodestar amount, but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." *Blanchard*, 489 U.S. at 94. "The amount of the fee, of course, must be determined on the facts of each case. On this issue the House Report simply refers to twelve factors set forth in *Johnson*. . . . The Senate Report cites to *Johnson* as well. . . ." *Hensley,* 461 U.S. at 430.

"A number of circuits, following the lead of the Fifth Circuit in *Johnson v. Georgia Highway Express*, . . . have announced that their district courts are to consider and make detailed findings with regard to twelve factors relevant to the determination of reasonable attorneys' fees. . . ." *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978).[28] These twelve factors are:

> (1) The time and labor required. . . . (2) The novelty and difficulty of the questions. Cases of first impression generally require more time and effort on the attorney's part. . . . (3) The skill requisite to perform the legal service properly. . . . (4) The preclusion of other employment by the attorney due to acceptance of the case. . . . (5) The customary fee. . . . (6) Whether the fee is fixed or contingent. [*But see Blanchard v. Bergeron*, 489 U.S. 87 (1989)]. . . . (7) Time limitations imposed by the client or the circumstances. . . . (8) The amount involved and the results obtained. . . . (9) The experience, reputation, and ability of the attorneys. . . . (10) The 'undesirability' of the case. . . . (11) The nature and length of the professional relationship with the client. . . . (12) Awards in similar cases.

Johnson, 488 F.2d at 717–19. The Fourth Circuit held that to award attorney's fees, a "court must first apply the *Johnson* factors in ini-

[28] *See Barber*, 577 F.2d at 226:

> We agree that these factors must be considered by district courts in this circuit in arriving at a determination of reasonable attorneys' fees in any case where such determination is necessary; and in order to make review by us effective, we hold that any award must be accompanied by detailed findings of fact with regard to the factors considered.

tially calculating the reasonable hourly rate and the reasonable number of hours expended by the attorney; the resulting 'lodestar' fee, which is based on the reasonable rate and hours calculation, is presumed to be fully compensatory without producing a windfall."[29] *Trimper v. City of Norfolk, Va.*, 58 F.3d 68, 73 (4th Cir.) (referencing *Daly v. Hill*, 790 F.2d 1071, 1078 (4th Cir. 1986)), *cert. denied*, 116 S. Ct. 535 (1995).

Employing the twelve *Johnson* factors, Respondent's Application is a reasonable request for attorney's fees. For *Horne II*, counsel billed Respondent 4.2 hours for drafting and finalizing Respondent's Answer, Affirmative Defenses, and Notice of Appearance, and for conducting related reviews and telephone calls. Application, Exhibit, at 4. The time claimed is reasonable.

Counsel worked at a reduced rate for Respondent and discounted the total billings charged from $851 to $630. The discounted hourly rate of $150 is reasonable and customary for the work of both Carl S. Silverman, a partner, and Steven B. Schwartzman, an associate, at the Towson, Maryland, office of Hodes, Ulman, Pessin & Katz, P.A..[30] The discounted hourly rate of $150 is reasonable, especially in light of recent OCAHO case law in which ALJs awarded attorney's fees ranging from $75 per hour to $275 per hour: *Werline v. Public Service Electric & Gas Company*, 7 OCAHO 955 (1997) (awarding $512.50 in attorney's fees at $125 per hour for work by an associate attorney general for respondent in Cedarville, NJ); *Jarvis v. AK Steel*, 7 OCAHO 952 (1997) (awarding "legal fees" in the amount of $1,833.75 with compensation for attorneys in Pittsburgh, PA, at rates of $275 per hour and $240 per hour); *Lee v. Airtouch*, 7 OCAHO 926 (1997) (awarding $7,531.26 for attorney's fees including $15.70 in costs billed for the San Diego, CA, market at rates of $155 per hour for in-house counsel and $216.75 per hour for outside counsel); and *Wije v. Barton Springs/Edwards Aquifer Conservation District*, 5 OCAHO 785 (1995), 1995 WL 626204 (O.C.A.H.O.) (awarding

[29]"In determining a 'reasonable' attorney's fee . . . this Court has long held that a district court's discretion must be guided strictly by the factors enumerated by the Fifth Circuit in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). *See Daly v. Hill*, 790 F.2d 1071, 1077 (4th Cir. 1986). . . . *Daly*, 790 F.2d at 1075 n.2 (noting that the Johnson approach has been approved by Congress and by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 . . . (1983))." *Trimper v. City of Norfolk, Va.*, 58 F.3d 68, 73 (4th Cir. 1995).

[30]Silverman customarily bills at an hourly rate of $220, and Schwartzman customarily bills at an hourly rate of $170. Towson, MD, is a suburb of Baltimore, MD.

"legal fees" of $51,530.34 in the Austin, TX, market at the rate of $185 per hour for a partner and the rates of $120 per hour and $75 per hour for associate attorneys).[31]

Finally, the lodestar figure of $630 for *Horne II* is reasonable because it is the product of 4.2 hours, a reasonable number of hours expended by counsel on the proceedings, multiplied by $150, a reasonable hourly rate for counsel.

III. *Conclusion*

Fee shifting is unavailable as to *Horne I* because the voluntary dismissal precludes the conclusion that the Complaint lacks legal or factual foundation. As to *Horne II*, I conclude that Respondent is the prevailing party and that the Complaint is without reasonable foundation in law and fact.

Complainant is directed to pay to Respondent the amount of $630 for attorney's fees.

SO ORDERED.

Dated and entered this 20th day of August, 1997.

MARVIN H. MORSE
Administrative Law Judge

[31]As this is not a fee award under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504, I am not bound by the generally applicable EAJA statutory limit of $125 per hour. 5 U.S.C. §504(b)(1)(A)(ii) ("attorney or agent fees shall not be awarded in excess of $125 per hour. . . . ").