

Court of Claims of Ohio Victims of Crime Division

The Ohio Judicial Center
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IN RE: JOSEPH A. FLETCHER

JOSEPH A. FLETCHER

Applicant

Case No. V2006-20836

Commissioners:

Lloyd Pierre-Louis, Presiding

Gregory P. Barwell

Karl C. Kerschner

COMMISSIONER PANEL

{¶1} The appeal before this panel involves whether costs incurred by the applicant's attorney, Jack Carney DeBord, are reimbursable expenses from the reparations fund. As a threshold issue, this panel finds pursuant to the statutory authority contained in R.C. 2743.53(A) and 2743.55(A) the panel is vested with the authority and jurisdiction to review decisions rendered by the Attorney General concerning R.C. 2743.51 to 2743.72. Therefore, the subject appeal is properly before this panel for review. R.C. 2743.65 is, however, silent with respect to the recovery of administrative costs incurred by an applicant's attorney in processing a claim before the court. Accordingly, we find that such costs are not a compensable element of attorney fees as defined in R.C. 2743.65. Thus the applicant's request of costs for copying expenses and long distance telephone calls to the applicant are denied.

I. Procedural History

{¶2} On May 18, 2007, a panel of commissioners issued an order reversing the Final Decision of the Attorney General in this claim. The panel found that the applicant was a victim of criminally injurious conduct and that the Attorney General had failed to prove the applicant either engaged in contributory misconduct or failed to fully cooperate with law enforcement during the investigation of the incident. Accordingly,

the claim was remanded to the Attorney General's office for calculation of economic loss.

{¶3} On July 6, 2007, the Attorney General issued a finding of fact and decision granting the applicant an award of reparations in the amount of \$11,262.37.

{¶4} On May 22, 2007, the applicant's Attorney Jack Carney DeBord submitted an invoice for legal services rendered from September 11, 2006 through May 22, 2007. Mr. Carney DeBord's invoice sought legal fees in the amount of \$1,449.00 and costs for copying expenses in the amount of \$36.75. On October 23, 2007, Attorney Carney DeBord submitted a second invoice for work performed from September 11, 2006 through August 16, 2007. This invoice sought legal fees in the amount of \$1,527.00 plus \$36.75 for copying costs incurred. On November 20, 2007, Attorney Carney DeBord filed a request for costs incurred processing the applicant's claim. These costs included the copying expenses incurred at the Court of Claims of Ohio as well as long distance telephone charges for communication with his client.

{¶5} On December 3, 2007, the Attorney General sent correspondence to Mr. Carney DeBord indicating that attorney fees would be granted in the amount of \$1,020.00, the maximum pursuant to R.C. 2743.65(A)(2). It appears this amount was calculated based upon Mr. Carney DeBord's fee petition of May 22, 2007. Neither the invoice of October 23, 2007 nor the November 20, 2007 request for costs appears to have been taken into consideration.

{¶6} On February 1, 2008, Attorney Carney DeBord submitted a request for reconsideration. On February 14, 2008, the Attorney General's office issued a letter informing counsel that his request for costs in the amount of \$78.00 would be denied since "statutory max of \$1,020 already awarded in this case."

{¶7} On March 27, 2008, Attorney Carney DeBord filed a notice of appeal from the Attorney General's letter of February 14, 2008. Mr. Carney DeBord stated that the sole issue on appeal was \$78.00 in costs he incurred representing the applicant.

{¶8} On June 16, 2008, the Attorney General rendered a Final Decision regarding attorney fees. The Attorney General reasoned that Mr. Carney DeBord failed to show that obtaining a copy of the claim file from the Court of Claims was reasonable in lieu of submitting a public records request for a copy of the claim file from the Attorney General's office, which customarily is provided free of charge. Furthermore, it appeared to the Attorney General that the \$78.00 in costs concerned telephone calls made to the applicant on August 3, 2007, August 6, 2007, and August 16, 2007, not the copy costs incurred at the Court of Claims. The Attorney General concluded, regardless of the origin of the expenses, reimbursement would be denied since the maximum award of \$1,020.00 had been reached and insufficient evidence had been provided that "reasonably demonstrat[ed] that the expenditure of an amount in excess of the maximum award was required in this claim." Hence a hearing was held before this panel of three commissioners on June 25, 2008 at 10:20 A.M.

II. Hearing

{¶9} Attorney Carney DeBord, representing the applicant and Assistant Attorney General Amy O'Grady, representing the State of Ohio appeared at the hearing. Prior to any oral arguments in the matter, the state submitted a motion to dismiss this matter for lack of jurisdiction. The state asserted that pursuant to R.C. 2743.65(B)(2), a determination by the Attorney General based on a request for reconsideration is final. The panel held in abeyance any ruling on the motion to dismiss and allowed the hearing to proceed on its merits.

{¶10} Applicant argued two issues for the court's consideration. First, the applicant asserted the Attorney General lacked authority or reasonable basis to deny counsel's claim for copying costs of the claim file incurred at the Court of Claims. Second, applicant asserted the Attorney General could not refuse to award attorney fees in excess of \$1,020.00 pursuant to R.C. 2743.65(G).

{¶11} With respect to the costs issue, applicant stated that he should have access to the same claim file that the Attorney General's office provided to the panel of

commissioners pursuant to L.C.C.R. 24(A)(4). Counsel asserted that the applicant should not have to file a public records request as recommended by the Attorney General, without assurance that applicant has received a copy of the entire file. With respect to attorney fee issue, applicant argues that the maximum attorney fees set forth in R.C. 2743.65(A) effectively controls the total award of fees and costs an attorney can receive, and what costs an attorney may incur. Consequently, it can have a chilling effect on the representation of a client. An attorney should not have to balance the time expended versus the amount of costs incurred when the maximum attorney fees limit the total award an attorney can receive. Applicant further argues that R.C. 2743.65(G) can be interpreted not only to allow for consideration of excess attorney fees but also the costs associated with a claim. The language of R.C. 2743.65(G) does not specifically mention hours expended but addresses the “expenditure of an amount in excess of that allowed.” Finally, applicant contended that costs should be considered separate from fees and when the panel orders costs to be assumed by the crime victims fund, those costs should also include the costs incurred in this case. Applicant also contended based on the factual complexities and the variety of legal issues involved in the applicant’s victims of crime compensation case an additional award of attorney fees above the maximum provided in R.C. 2743.65(A)(2) would be warranted.

{¶12} Furthermore, applicant opposed the Attorney General’s motion to dismiss and urged this panel to follow the case precedent established in *In re Hogan*, V2001-32071tc 12-14-01, affirmed jud (6-3-02). Furthermore, applicant argued that allowing the Attorney General to determine his counsel’s attorney fees is unconstitutional, unfair and a conflict of interest.

{¶13} The Attorney General asserted that there were two issues before the panel. First, the Attorney General argues that this panel lacks jurisdiction to hear the appeal. Second, the Attorney General asserts that applicant’s attorney fees should be capped at \$1,020.00.

{¶14}The Attorney General called opposing counsel as a witness. Counsel's testimony revealed that there were two continuances, at his request, and multiple attorney client telephone calls to Cleveland. Counsel testified that the continuances and numerous telephone calls to coordinate matters concerning this claim with his client were necessary due to the distance between his client's location in Cleveland, and counsel's office in Central Ohio. While counsel conducted case research, he did not file a brief because doing so would likely cause him to exceed the attorney fee maximum. Ms. O'Grady concluded her examination by questioning Mr. Carney DeBord about his experience with filing public record requests. Whereupon the testimony of Mr. Carney DeBord was concluded.

{¶15}In closing argument, Mr. Carney DeBord articulated his view that his examination by Assistant Attorney General O'Grady exemplifies the problem with the current attorney fee situation, insofar as the current statutory scheme requires applicant's counsel to justify the reasonableness of his fees to his legal adversary. Ms. O'Grady countered that without the testimony of Mr. Carney DeBord's co-counsel or an expert witness her only means of inquiring into the reasonableness of the fees for the protection of the reparations funds was the direct examination of Mr. Carney DeBord. Ms. O'Grady concluded that the proper forum to discuss changing the attorney fee process was before the General Assembly and not this panel of commissioners. Finally, Ms. O'Grady stated that there is no statutory authority pursuant to R.C. 2743.65 to grant costs incurred in the processing of the claim.

{¶16}Upon questioning by the panel concerning whether R.C. 2743.55(A) controls the panel's jurisdiction in this matter, the Attorney General did concede that attorney fees and costs issues are matters "relating to" a claim for reparations. The Attorney General also acknowledged opposing counsel should have the same opportunity to contact expert witnesses and to counter the Attorney General's experts, and asserted that matters of this nature would be considered on a case-by-case basis and the reasonableness of the expert fee would be taken into consideration. The

Attorney General conceded that the Attorney General's expert witness would be paid by the reparations fund or some other mechanism in the Attorney General's office. The Attorney General also conceded that in numerous prior cases costs were approved by a panel of commissioners with acquiescence from the Attorney General's office.

III. Controlling Law and Precedent

{¶17}R.C. 2743.53(A) states:

“A court of claims panel of commissioners shall hear and determine all matters relating to appeals from decisions of the attorney general pursuant to sections 2743.51 to 2743.72 of the Revised Code.”

{¶18}R.C. 2743.55(A) in pertinent part states:

“[a] court of claims panel of commissioners, or a judge of the court of claims shall determine all matters relating to claims for an award of reparations.”

{¶19}R.C. 2743.61(B) in pertinent part states:

“A claimant may appeal an award of reparations, the amount of an award of reparations, or the denial of a claim for an award of reparations that is made by a final decision of the attorney general after any reconsideration. If the final decision of the attorney general with respect to any claim for an award of reparations is appealed, a court of claims panel of commissioners, within ninety days of receiving the notice of appeal, shall schedule and conduct a hearing on the appeal.

{¶20}R.C. 2743.65 in pertinent part states:

“(A) The attorney general shall determine, and the state shall pay, in accordance with this section attorney's fees, commensurate with services rendered, to the attorney representing a claimant under sections 2743.51 to

2743.72 of the Revised Code. The attorney shall submit on an application form an itemized fee bill at the rate of sixty dollars per hour upon receipt of the final decision on the claim. Attorney's fees paid pursuant to this section are subject to the following maximum amounts:

“(2) A maximum of one thousand twenty dollars for claims in which an appeal to the panel of commissioners is filed . . .

“(C)(2) The attorney general shall forward a copy of this section to the attorney with the application form for attorney’s fees. The attorney shall file the application form with the attorney general. The attorney general’s decision with respect to an award of attorney’s fees is final ten days after the attorney general renders the decision and mails a copy of the decision to the attorney at the address provided by the attorney. The attorney may request reconsideration of the decision on grounds that it is insufficient or calculated incorrectly. The attorney general’s decision on the request for reconsideration is final.

“(G) The attorney general may determine that a lesser number of hours should have been required in a given case. Additional reimbursement may be made where the attorney demonstrates to the attorney general that the nature of the particular claim required the expenditure of an amount in excess of that allowed.”

{¶24}The Tenth District Court of Appeals in construing former R.C. 2743.65(A), held that a single commissioner or panel of commissioners must award reasonable attorney fees commensurate with the services rendered. An attorney cannot contract with his client or anyone for a larger fee, and a reduction in the requested attorney fee amount must be supported by evidence. *State, ex. rel. Graves v. State* (1983), 9 Ohio App. 3d 260, 9 OBR 473 , 459 N.E. 2d 913.

{¶25}In *In re Hogan*, V2001-32071tc (12-14-01), a panel of commissioners determined pursuant to former R.C. 2743.55(A) a panel of commissioners was required to hear and determine attorney fee appeals since attorney fee issues stem from matters relating to awards of reparations. Furthermore, that panel determined in accordance with the holding in *Graves* a hearing should be held before a reduction or denial of attorney fees is finally rendered since due process requires such and an attorney’s property rights are at stake. A judge of the Court of Claims affirmed the panel’s decision on June 3, 2002.

IV. Panel’s Determination

{¶26} We are presented with two issues in the case. First, whether this panel has the jurisdiction to hear a claim involving a dispute over costs associated with an attorney's representation of his client and second, whether the costs claimed by Attorney Carney DeBord in this case should be reimbursed from the Fund.

A. Jurisdiction

{¶27} We find with respect to the issue of costs this panel does have jurisdiction to hear this case. It has been a long-standing practice for this panel to pay for costs incurred for the representation of an applicant, whether these costs are for depositions, medical tests, or other matters relevant to a determination in a claim. Furthermore, the Attorney General conceded that the applicant should have the same opportunity to present its case as the Attorney General. The Attorney General also noted all expert witnesses and other litigation costs are paid from the reparations account. Fairness dictates that the applicant should possess the same opportunity as the Attorney General. A judge of the Court of Claims in *In re Hampton*, V81-61501jud (4-23-84) not only determined the court had the jurisdiction to hear this issue pursuant to former R.C. 2743.55, but succinctly stated:

{¶28} "It is clearly the policy of the Victims' Reparations Awards Act that the victim not be burdened with the expenses of establishing his or her right to receive such an award. All the victim must do is file in due form a claim for reparations. R.C. 2743.56. Thereafter, the Attorney General assembles the evidence, R.C. 2743.59(A), and in obtaining that evidence may depose any witness, R.C. 2743.59(B), with all expenses in connection therewith being paid by the state, R.C. 2743.191. If the claimant employs an attorney, the commissioners 'award reasonable attorney fees, commensurate with the services rendered,' and the attorney is denied any right to 'contract for or receive any larger sum than the amount allowed,' R.C. 2743.65(A). To require an applicant to assume the expenses of a deposition of significance in the just determination of the claim would be a denial of this well conceived policy, regardless of whether the Attorney

General or the applicant arranged for the deposition, and regardless of whether the Attorney General certified these expenses as a cost of investigation.”

{¶29} Furthermore, the cases of *Hogan* and *Graves* afford this panel with the jurisdiction to hear this matter. Conversely, the Attorney General contends those cases were based on interpretation of the statute prior to its amendment on July 1, 2000. Accordingly, the Attorney General now argues that this panel’s jurisdiction is limited by R.C. 2743.61(B), which provides that the panel should be limited to hearing appeals for claimant’s awards of reparations. However, such a position ignores the clear language contained in R.C. 2743.53(A) and R.C. 2743.55(A). Those statutory provisions were also amended on July 1, 2000 and R.C. 2743.53(A) still provides that “[a] court of claims panel of commissioners shall hear and determine all matters relating to appeals from decisions of the attorney general pursuant to sections 2743.51 to 2743.72 of the Revised Code,” while R.C. 2743.55(A) reads “a court of claims panel of commissioners...shall determine all matters relating to claims for an award of reparations.” Therefore, even without reliance on the holdings of *Hogan* and *Graves* the clear statutory language of current R.C. 2743.53(A) and 2743.55(A) provides this panel ample authority to hear the cost issue presented.

{¶30} Finally, there is the issue of fairness.

{¶31} R.C. 2743.191(A)(1)(d) and (f) provides:

“(A)(1) There is hereby created in the state treasury the reparations fund, which shall be used only for the following purposes:

“(d) other administrative costs of hearing and determining claims for an award of reparations by the attorney general;

“(f) The costs of investigation and decision-making as certified by the attorney general.”

{¶35} Therefore, the Attorney General can obtain any report, expert opinions or any other discovery resource the office believes is necessary to satisfy its statutory mandate to fully investigate a claim pursuant to R.C. 2743.59 and have the cost paid

out of the reparations fund while, if the Attorney General's position were upheld in this matter, the applicant would be denied the same opportunity. This panel cannot permit such an inequitable result.

{¶36} We believe in order to serve the interests of justice the playing field must be level with both sides having the opportunity to present their strongest case. The panel of commissioners has the inherent duty to control the proceedings before it to ensure a decision is rendered after a fair and full review of all the evidence. Furthermore, the Attorney General in the past has never disputed, and has routinely acquiesced to, the panel's authority to grant motions to expend funds from the reparations fund for tests, depositions or other matters beyond the purview of what is contained in the claim file if the interests of justice are served. See, e.g., *In re Painter*, V91-27381tc (5-27-93) (\$500 deposition fee); *In re Butler*, V89-83822tc (8-10-93) (\$4,000 work loss expert fee); *In re Tucker*, V2001-32445tc (10-11-02) (\$330 expert medical witness fees); and *In re Prescott*, V2004-61225tc (5-19-06), (9-5-06), (4-20-07), and (8-31-07) (forensic tests of decedent's hair samples at \$300, \$350 and \$375). All of these factors substantially undermine the Attorney General's position in this matter. Accordingly, for the above stated reasons this panel finds it has jurisdiction to hear this matter.

B. Authority

{¶37} The second issue we must address is whether R.C. 2743.65 provides the authority to pay administrative costs incurred for the presentation of an applicant's case. A clear reading of this statutory provision reveals that there is no provision for the payment of administrative costs, with the exception of witness fees which are provided in R.C. 2743.65(J). Therefore, administrative costs are not an appropriate matter to consider with respect to R.C. 2743.65. Accordingly, applicant's argument that costs should be paid pursuant to R.C. 2743.65 is misplaced. We find that in order to have administrative costs considered for reimbursement applicant's counsel should petition the panel setting forth the reason for incurring the expense as well as its amount. The panel may then review the applicant's attorney's request for relevancy and

reasonableness, and if satisfied may direct the Attorney General's office to pay the expense in accordance with this panel's order. However, in the case at bar no motion was filed and therefore the request for reimbursement of costs is denied.

{¶38}In the event applicant wishes to file such a petition, the petition must be filed within 30 days of the order.

LLOYD PIERRE-LOUIS
Presiding Commissioner

GREGORY P. BARWELL
Commissioner

KARL C. KERSCHNER
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ORDER OF A THREE
COMMISSIONER PANEL

IT IS THEREFORE ORDERED THAT

{¶39}1) The Attorney General's decision of June 16, 2008 is AFFIRMED in accordance with the opinion issued concurrently with this order;

{¶40}2) This claim is DENIED and judgment is entered for the state of Ohio;

{¶41}3) Costs are assumed by the court of claims victims of crime fund.

LLOYD PIERRE-LOUIS
Presiding Commissioner

GREGORY P. BARWELL
Commissioner

KARL C. KERSCHNER
Commissioner

Case No. V2006-20836

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ORDER

Filed 2-9-09

Jr. Vol. 2271, Pg. 57

To S.C. Reporter 7-13-11