

7182.
DECISION



J. Shimamura
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-139763

DATE: July 31, 1978

MATTER OF: Attorneys Fees - Federal Trade Commission

DIGEST:

The Federal Trade Commission has discretion to determine eligibility for reimbursement of costs of participation in its rulemaking proceedings, including "reasonable attorneys fees" under 15 U.S.C. § 57a(h)(1)(1976). However, payment of an amount in excess of the costs actually incurred for legal services is not authorized, even though the participant utilized "house counsel" whose rate of pay is lower than prevailing rates.

The Federal Trade Commission (FTC) has requested an opinion on whether § 18(h)(1) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 57a(h)(1)(1976) (the Act) authorizes compensation of persons eligible for "reasonable attorneys fees" under that section in amounts equal to the reasonable value of their services even if a lower fee is actually incurred.

Section 18(h)(1) reads, in pertinent part, as follows:

"(h) Compensation for attorney fees, expert witness fees, etc., incurred by persons in rulemaking proceedings; aggregate amount payable in any fiscal year

"(1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding

because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding "

According to the Commission, when a person or group, meeting the above criteria for financial assistance has outside counsel, it is compensated for the reasonable value of the attorney's services. However, when a person or group has a salary arrangement with an attorney, compensation is provided only for the pro rata portion of the attorney's salary devoted to the Commission's rule-making activities. According to the submission--

"* * * Because eligible groups in Commission rule-making proceedings are most often public interest groups, the salaries paid to their in-house attorneys are invariably lower than the fees charged by outside counsel.

"In order to avoid this growing inequity whereby the rate of compensation of attorneys is dependent not on the substance of their work but on the form of their organization, the Commission is considering compensating all eligible persons for reasonable attorneys' fees even if a lower fee is actually incurred."

The legislative history of the above provision indicates that the FTC was authorized to provide compensation for reasonable attorneys and expert witness fees and other costs of participating in rulemaking proceedings in order "to provide to the extent possible that all affected interests be represented in rule-making proceedings so that rules adopted thereunder best serve the public interest." H.R. Rep. No. 1606, 93rd Cong., 2nd Sess. 36 (1974). The prerequisite for such compensation is a determination by the Commission that a person or group:

"(1) has or represents an interest which would not otherwise be adequately represented in such proceeding, and

"(2) representation of the interest is necessary for a fair determination of the proceeding taken as a whole and

"(3) who but for the compensation would be unable effectively to participate in such proceeding because such person would otherwise not be able to afford the cost of such participation." Id. (Emphasis added.)

The legislative history of the section is silent with regard to what constitutes "reasonable attorneys fees." However, in reading the section and history, it is clear that Congress was concerned with providing compensation for "costs" to groups or persons, representing necessary interests, who would otherwise be unable to participate in rulemaking proceedings. The term "cost" as used above appears to refer to the value (purchase price) of services used. Sec. 21, Office of Management and Budget Circular No. A-34, "Instruction on Budget Execution" (1978). Using that definition, it is difficult to interpret the above section as authorizing compensation over and above the cost of attorneys' fees actually incurred. However, in cases where attorneys do not have a salary arrangement with a group or person, and the amount of compensation is unknown, the Commission has broad discretion to determine what constitutes "reasonable attorneys fees" pursuant to rules prescribed by it. In such cases, assuming a person or group meets the criteria set forth in § 18(h)(1) of the Act, supra, the Commission has discretion to provide compensation at such rates as it determines to be reasonable under the circumstances.

Additionally, we note that none of the cases cited in the submission appear to be directly applicable here. In Consumers Union of United States, Inc. v. Board of Governors of the Federal Reserve System, 410 F. Supp. 63 (D.C., 1976), the court held that it had the authority to award attorney's fees based on the actual value of services rendered even though counsel served an organization for far less than fair market compensation. While the holding appears to lend support to the FTC's position, we think that there is a significant difference between participation in a judicial proceeding, in which an unsuccessful adversary may be required to pay the litigation costs of his opponent, including attorney's fees, and voluntary participation in an administrative proceeding, where none of the actual parties to the proceeding are charged with the costs of an intervenor. Moreover, under the FTC Act, Congress was primarily concerned with providing compensation for "costs" and not with the equalization of attorneys' fees. If Congress had intended to provide compensation at the fair market rate for all attorneys, it would have so defined the term "reasonable attorneys fees." In section 2(a) of Senate Bill 270, which

is presently before Congress, it is specifically provided that reasonable attorneys' fees be based upon prevailing market rates. However, even Senate Bill 270 is concerned with "costs of participation incurred by eligible persons * * *." We believe that the reasonable attorneys fees definition is meant to be utilized when a participant has to hire an outside attorney to represent his interests. It is intended to assure that the participant will be able to obtain competent legal assistance without burdening the agency with the costs of high priced lawyers whose fees far exceed the usual market price for the services rendered.

In National Treasury Employees Union v. Nixon, 521 F.2d 317 (D.C. Cir., 1975), the court held that plaintiff was entitled to reimbursement for attorney's fees and expenses under the "common benefit" exception to the general rule barring such award. Under that exception

"federal courts have permitted 'a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorney's fees, from the fund or property itself or directly from the other parties enjoying the benefit.'" Id. at 320.

The "common benefit" exception does not appear relevant in this case because we are concerned with the question of whether the FTC can award attorneys fees in excess of the fee actually incurred rather than with the reimbursement of such fees from a fund or property that benefits a group.

Lastly, in the case of Tillman v. Wheaton-Haven Recreation Association, Inc., 517 F.2d 1141 (4th Cir., 1975), the court held that when an allowance for attorneys' fees is justified, it should be measured by the reasonable value of the lawyer's services and "should not be diminished because the attorney has agreed to contribute the money, in whole or in part, to a civil rights organization whose aims have stimulated him to work voluntarily." As stated previously, the FTC Act does not define "reasonable attorneys fees" to mean reasonable value. Since the Act appears to be concerned with providing reimbursement for costs incurred in order to allow all necessary interests to participate in proceedings, we believe that the FTC is without authority to increase an attorney's compensation above the fee actually incurred. Such an increase would represent a Federal subsidy to an interest group, and the Commission may not use its appropriations for such a purpose without statutory authority. 31 U.S.C. § 628 (1970).

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Accordingly, while the determination of eligibility for compensation and the definition of what constitutes "reasonable attorneys fees" are matters within the Commission's discretion, the Commission is without authority to pay an amount in excess of the expense actually incurred.

R. G. Killian
Acting Comptroller General
of the United States