

**CITY OF CHICAGO**  
**COMMISSION ON HUMAN RELATIONS**

**510 N. Peshtigo Court, 6th Floor**

**Chicago, IL 60611**

**(312) 744-4111 (Voice)**

**(312) 744-1088 (TDD)**

IN THE MATTER OF:	)	
G. Keith Richardson	)	
Complainant,	)	
	)	
v.	)	No. 92-E-80
	)	
Chicago Area Council of the	)	
Boy Scouts of America and	)	
Nelson L. Carter,	)	
Respondents.	)	

To: See Attached Service List

**FINAL RULING ON ATTORNEYS' FEES AND COSTS**

**I. INTRODUCTION**

On February 21, 1996, the Chicago Commission on Human Relations entered a ruling in favor of G. Keith Richardson, the Complainant in this case holding, *inter alia*, that the Chicago Area Council of the Boy Scouts of America's ("Respondent") employment policy prohibiting the employment of "known and avowed homosexuals" from certain positions within its organization constituted unlawful discrimination on the basis of sexual orientation, in violation of the Chicago Human Rights Ordinance ("CHRO"). Richardson v. Chicago Area Council of the Boy Scouts of America, CCHR No. 92-E-80 (Feb. 21, 1996) ("Richardson Ruling") at p. 2. The Commission rejected the

Respondent's affirmative defenses claiming a religious exemption and claiming that application of the CHRO violated its right to associational expression or free speech. The Commission awarded the Complainant damages of \$500.00 for his emotional injuries and embarrassment, granted reasonable attorney's fees and costs and fined the Respondent \$100.00. In addition, and not insignificantly, the Commission enjoined the Respondent "within the City of Chicago, from considering the sexual orientation of applicants for employment and from publishing any employment criteria which indicates a preference or limitation on the basis of sexual orientation." Richardson Ruling, at p. 85.

The Complainant has now filed a Petition for Attorney's Fees and Costs pursuant to Section 2-120-510(1) of the CHRO seeking \$699,888.25 in fees and \$50,477.01 in costs for work performed by nine attorneys, two paralegals and one librarian who worked on this case. Thankfully, the Complainant did not seek fees for the eighteen (18) other attorneys and paralegals who performed some services related to this case. See Letter from Charles H.R. Peters to Carla A. Kerr dated April 10, 1996.

The First Recommended Decision on Attorney's Fees was rendered on July 15, 1996. Both parties filed Objections and each filed a Response to the other's Objections. The Hearing Officer issued his Final Recommended Decision on Attorney's Fees on October 9, 1996.

## II. PROCEDURAL HISTORY

In this case, the Commission issued two major decisions on motions to dismiss before a hearing was ever held -- Richardson v. Chicago Area Council of the Boy Scouts of America, CCHR No. 92-E-80 (Oct. 30, 1992); Richardson v. Chicago Area Council of the Boy Scouts of America, CCHR No. 92-E-80 (Aug. 8, 1994) -- and other opinions on collateral issues. -- Richardson v. Chicago Area Council of the Boy Scouts of America, CCHR No. 92-E-80 (Apr. 20, 1993) (ruling on competency of witness affidavits); Richardson v. Chicago Area Council of the Boy Scouts of America, CCHR No. 92-E-80 (Sep. 27, 1993) (ruling on motion to strike affidavits).

The Administrative Hearing lasted seven days at which 23 witnesses gave testimony and several hundred exhibits were submitted containing thousands of pages of documents and videotapes. The parties, collectively, submitted hundreds of pages of post-hearing briefs.

In opposition to the Complainant's fee petition, which consisted of an 8-page motion with 250 pages of affidavits and attachments, the Respondent submitted a 28-page

Memorandum and commissioned a 60-page audit with 41 attached multiple-page exhibits. In response, the Complainant countered with a 36-page Reply Memorandum with another 100 pages of attachments.

The Respondent argues that Richardson is entitled only to a nominal fee of \$10,000.00 because of his bad faith and his nominal success. Alternatively, the Respondent suggests that a reasonable fee, after reductions for limited success, excessive hours and rates, overstaffing, blockbilling and various other objections would be \$72,214.10 plus \$12,619.25 in costs. The Complainant contends that he is entitled to the full amount sought or that, at most, a ten percent deduction could be made.

Having considered the pleadings, objections and arguments of the parties and the Hearing Officer's recommendations, the Commission makes the following findings and rulings.

### III. DISCUSSION

#### A. Lodestar Method of Calculating Fees

The Commission follows the lodestar method of calculating reasonable attorney's fees. That is, the Commission determines the number of hours which were reasonably expended on the case and multiplies that number by the customary hourly rate for attorneys with the level of experience of the complainant's attorney. E.g., Barnes v. Page, CCHR No. 92-E-1 (Jan. 20, 1994). There is no requirement that the amount of attorney's fees sought be proportional to the amount of damages received. Barnes, id.

#### B. The Appropriate Hourly Rates

The Complainant was represented by attorneys from Schiff Hardin & Waite and from the Roger Baldwin Foundation of the ACLU. The Complainant sought compensation for his various sets of attorneys based upon their actual firm billing rates. This results in attorneys with comparable experience seeking payment at different rates, with the attorneys from Schiff Hardin & Waite seeking higher compensation than their co-counsel at the ACLU. The Respondent does not contend that the rates set forth for the Schiff Hardin lawyers do not accurately reflect their actual billing rates. Nor does the Respondent contend that the Schiff rates are unreasonable for attorneys from a large Chicago law firm with the experience levels set forth in the affidavits of counsel. Rather, the Respondent argues that because the Schiff lawyers were volunteering their services on behalf of the ACLU (and have formally stated that they intend to donate any fees awarded to the ACLU), then the ACLU's lower rates should apply across-the-

board. The Respondent does not contest the reasonableness of the ACLU attorneys' billing rates.

The Complainant has submitted documentary evidence, which the Respondent has chosen not to refute by counter-affidavit, showing that the rates charged by the Schiff attorneys are well within the range of customary billing rates for both partners and associates of large Chicago law firms. (See Exhibits C and D to Complainant's Petition for Attorneys' Fees). The question then becomes whether a respondent should be required to pay higher billing rates for higher-priced attorneys when there is an equally experienced, lower-priced attorney also working on the same case.

Section 240.120(c)(ii) of the Commission's Regulations requires that, in support of a petition for attorneys' fees, documentation of the "hourly rate customarily charged by each individual for whom compensation is sought" be submitted. This must contemplate that billing rate differences will exist between attorneys based upon a variety of factors. Certainly, such factors as experience and expertise will play a role in determining the reasonableness of a billing rate. However, other factors such as the cost of overhead, office location, marketability, resources available and demand for a particular attorney also play a role in setting an attorney's rates. And what an attorney is "willing" to charge a paying client may vary depending upon both economic considerations as well as non-economic considerations. While the conclusion could be reached from the disparity between the ACLU's requested hourly rates and the Schiff rates that the Schiff attorneys' rates are unreasonably high, an equally possible deduction could be made that the ACLU rates are unreasonably low.

With the exception of the rates charged for paralegal Art Mitzel and librarian Melissa Mickey (see pages 9-10 *infra*), the Commission finds that the billing rates of the Schiff attorneys are their "customary hourly rates" and are reasonable rates within the Chicago legal community for attorneys with their level of expertise.<sup>(1)</sup> By co-counselling a case with a not-for-profit organization, private attorneys do not necessarily adopt that organization's lower rates. The Respondent argues, in effect, that the higher priced Schiff lawyers were not needed on this case because experienced ACLU lawyers were available at a lower price to handle the case. A similar argument was rejected by the Seventh Circuit Court of Appeals in In re: Continental Illinois Securities Litigation, 962 F.2d 566 (7th Cir. 1992), where the Seventh Circuit reversed the trial court's decision to cap hourly rates for all attorneys at \$175.00 on the theory that the most demanding work on the case had been done by a rather junior attorney.

In its Objections, the Respondent argues that the hourly rates awarded for the Schiff

Hardin attorneys are much higher than those awarded by the Commission to attorneys of comparable or greater experience. But the Respondent has not argued that the rates sought by the Schiff Hardin attorneys do not accurately reflect each attorney's actual market value. The fact that other attorneys may not command the same hourly rate as those sought by the Schiff Hardin lawyers is not determinative. In Gusman v. Unisys Corp., 986 F.2d 1146, 1150 (7th Cir. 1993), the court stated:

Recall that the objective is to find the reasonable fee for the work. When the lawyers sell their time in the market, the market provides the starting point: the lawyer's hourly rate. Eddleman v. Switchcraft, Inc., 965 F.2d 422, 424-25 (7th Cir. 1992). Lawyers do not come from cookie cutters. Some are fast studies and others require extra preparation. Some are more nimble on their feet and apt to achieve better results at trial. Some have deeper insight and in a few hours may find ways to prevail (or to curtail costly discovery) that will elude their colleagues. Clients are willing to pay more, per hour, for these better lawyers. A \$225 per hour lawyer may end up costing less than a \$150 lawyer for the same results or may produce better results for the same total bill. Markets recognize these truths; judges must too. Only an assumption that all lawyers are identical could support the averaging approach, under which all lawyers in a division of the court receive the same hourly fee.

The Seventh Circuit Court of Appeals recently set forth the methodology to be employed to determine the "reasonable hourly rate" of an attorney in a given civil rights case -- a methodology we hereby adopt. See People Who Care v. Rockford Board of Education, 90 F.3d 1307 (7th Cir. 1996). The starting point must be the attorney's "actual billing rate for comparable work" which is "presumptively appropriate to use as the market rate." People Who Care, at 1310. If the court is unable to determine the attorney's true billing rate because he or she maintains a contingent fee or public interest practice, then the court should look to the rates charged by lawyers in the community of reasonably comparable skill, experience and reputation. Once an attorney provides evidence of his/her billing rate, the burden is on the respondent to present evidence establishing a good reason why a lower rate is essential. A respondent's failure to do so is essentially a concession that the attorney's billing rate is reasonable and should be awarded. People Who Care, 90 F.3d at 1313.

Here, the Complainant's counsel have adequately proved that the rates requested for the Schiff attorneys are their actual billing rates. The Respondent has not come forward with any evidence by way of counter-affidavit or otherwise which establishes a good reason why a lower rate is essential. Accordingly, the hourly rates for the purpose of calculating a lodestar fee will be as follows:

Schiff, Hardin & Waite

Ann Rae Heitland, J.D. 1975 \$270.00 \$150.00(2)

Charles Peters, J.D. 1986 \$225.00

Lisa Leib, J.D. 1990 \$175.00

Heather Sawyer, J.D. 1991 \$155.00

Jody L. Rudman, J.D. (3) \$140.00

ACLU

John Hammell, J.D. 1982 \$190.00

Geoffrey Kors, J.D. 1986 \$175.00

Roger Leishman, J.D. 1990 \$160.00

Harvey Grossman, J.D. 1973 \$240.00

The difference between rates at Schiff and at the ACLU for paralegals and librarians, however, is too great to ignore. The rate of \$85.00 per hour sought by Schiff, Hardin for its paralegal Art Mitzel and its librarian Melissa Mickey is more than double that of the ACLU law clerk Michelle Bachhus (\$40.00 per hour). Schiff's rates for attorneys with comparable experience ranged between 12% - 27% higher than the ACLU's rates. The difference in para-professional rates is too great to ignore. The Commission has previously awarded fees for paralegals at rates between \$30.00 per hour and \$50.00 per hour. In Nash/Demby v. Sallas Realty, CCHR No. 92-H-128 (Nov. 23, 1995), the Commission found requested rates of \$35.00 per hour for paralegal time and \$50.00 per hour for law student time to be reasonable. See Shorter v. Valley Bank and Trust Co., 678 F. Supp. 714 (N.D. Ill. 1988) (\$40.00 per hour for paralegal's time is reasonable).

Complainant's own Exhibit C shows that in 1995, Schiff Hardin billed \$95.00 per hour for its "Low Associates." The Billing Rate survey attached to the Complainant's Petition as Ex. D shows that the market rate for legal assistants in the Chicago area during 1995 ranged between \$25.00 and \$125.00 per hour. The Affidavit submitted by attorney Carolyn Rosenberg in support of Complainant's Petition for Fees with respect to the ACLU's clerk states that the hourly rate of \$40.00 for a law clerk is fair and reasonable

and "within the usual and customary range of rates charged by law firms in this locale." ¶ 6. No facts were submitted by affidavit which establish that Mr. Mitzel or Ms. Mickey possess the level of experience and expertise which would dictate a high market rate for paralegals. Therefore, the Commission reduces the rates charged by Schiff for its paraprofessionals to \$70.00 per hour. See Covington v. District of Columbia, 57 F.3d 1101, 1105 (D.C. Cir. 1995) (\$70.00 found to be the prevailing market rate in the Washington D.C. area for paralegals and law clerks under the U.S. Attorney's Office matrix).

### C. The Reasonableness of the Hours Expended

#### 1. Unsuccessful Claims

Respondent argues that Richardson is entitled to only \$10,000.00 as nominal attorney's fees because of his "bad faith" and "nominal success" or, alternatively, the lodestar fee should be reduced by 75% as a result of his limited success.

Courts have held that attorney's fees should not be awarded when "special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). Even a complainant who formally "prevails" for the purpose of invoking a fee shifting statute may not be entitled to an award of fees when he recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief. Farrar v. Hobby, 506 U.S. 103, 115 (1992).

The Commission's decisions have recognized that a fee award will be reduced where the complainant achieves only limited success. See Diaz v. Prairie Builders/ Marzec, CCHR No. 91-E-204 (Jan. 27, 1993) and Osswald v. Yvette Wintergarden Restaurant et al., CCHR No. 93-E-93 (Jan. 10, 1996).

The Respondent takes the position that the Complainant should only be entitled to nominal fees because he acted in bad faith by claiming to be a *bona fide* job seeker when in fact he was merely seeking to challenge the discriminatory employment policy of the Respondent. It argues that this case would have been very different "had Richardson acknowledged his tester status from the start -- rather than cloaking himself in the mantle of a genuine job applicant... ." (Respondent's Memorandum at p. 10).

However, the Commission finds that this case would not have been materially different had Mr. Richardson contended that he was not actually seeking employment. The Respondent's affirmative defenses, which consumed the bulk of this case, would have been litigated in the same manner as they were ultimately litigated. The same legal

issues would have been presented in the pre-hearing motions, with the addition of that concerning tester standing. While several hours may have been saved related to issues of "back pay," the Complainant's claims for emotional injury damages and punitive damages could have proceeded. See United States v. Baliestrieri, 981 F.2d 916, 930 (7th Cir. 1992), *cert. denied*, 114 S.Ct. 58 (1993) and City of Chicago v. Matchmaker Real Estate Sales Ctr. Inc., 982 F.2d 1086 (7th Cir. 1992).

In its Objections, the Respondent argues that if Richardson had acknowledged that he was a "tester," he would have had no basis for seeking to hold the Respondent liable for any alleged emotional distress caused by his alleged financial difficulties due to not being hired. Having examined the record, the Commission is convinced that the time saved by excluding any testimony related to that aspect of emotional distress damages would have been *de minimus*, if any.

The Respondent also claims that there should be a reduction in the lodestar due to Richardson's "limited success" (as opposed to his alleged "bad faith"). If we judge whether the Complainant prevailed solely by virtue of the remedy which was obtained, (injunctive relief, \$500.00 in damages and a \$100.00 fine), we might conclude that the Complainant's success was minimal to moderate at best. However, it is evident that this case was litigated so intensely for many intangible reasons unrelated to the monetary recovery to Mr. Richardson. Indeed, the Commission's decision on the merits recognizes this by stating that: "The instant case concerns the legality, under the Chicago Human Rights Ordinance ("CHRO") of the Chicago Area Council of the Boy Scouts of America's ("CAC") employment policy prohibiting the employment of 'known and avowed homosexuals' from certain positions within its organization." Richardson Ruling, at p. 2.

At least 75% of the time spent on the motions to dismiss, the pre-hearing preparation, the hearing and the post-hearing briefs was devoted to the Respondent's constitutional defenses and its claim for an exemption as a religious organization. The Complainant fully prevailed in overcoming those defenses. The Complainant was successful in obtaining an injunction prohibiting the CAC from using sexual orientation as a factor in employment decisions.

At all times relevant to this case, it was evident that the primary goal of the Complainant was to establish that the written policy of the Chicago Area Council of the Boy Scouts of America discriminated against persons on the basis of their sexual orientation and that the CHRO could legally be enforced against the Respondent. In this regard, the Complainant fully prevailed in the same manner that the complainant in

Brewington v. Department of Corrections, 513 N.E.2d 1056 (Ill. App. 1st Dist. 1987), prevailed.

In Brewington, a female employee challenged a policy which restricted the number of women who could work certain shifts. She claimed that she was forced to quit ("constructively discharged") as a result of the respondent's discriminatory policy and sued for reinstatement, back pay and damages. The Illinois Human Rights Commission ("IHRC") rejected her claim for constructive discharge and denied her reinstatement, back pay or any monetary damages. However, the IHRC held that the Respondent's employment policy constituted unlawful discrimination based upon sex and, though it denied any specific relief to the complainant, it entered a cease and desist order prohibiting further discrimination against women in its shift change policy. Brewington, 513 N.E.2d at 1065.

In opposing fees, the respondent in Brewington made the same arguments with regard to fees as are being advanced by the Respondent here. The Court of Appeals rejected the argument that the complainant had not prevailed on a significant issue to her benefit stating:

...we believe the cease and desist order entered against the D.O.C. as a result of plaintiff's complaint alone justifies the fee awarded plaintiff. We cannot say that the relief won by plaintiff, although significant, is limited in comparison to the scope of the litigation as a whole and that, therefore, a reduced fee award is appropriate. *Citation omitted*. Rather, given the public policies behind the ... Illinois Human Rights Act, we agree with the Commission that the results plaintiff obtained were excellent, *if not for her, at least for all women employed by the D.O.C.* In such a case, Hensley directs the allowance of a fully compensatory fee.

Brewington, 513 N.E.2d at 1065 (emphasis added).<sup>(4)</sup> It also noted that to withhold fees would be to ignore "the explicit recognition by the drafters of the fee provisions in civil rights laws that in some cases the vindication of civil rights will not produce a large pecuniary award and that attorney's fee awards not be reduced because the rights are non-pecuniary in nature." Brewington, 513 N.E.2d at 1064.

The similarities between Brewington and the case at bar are striking. In both cases, the complainant succeeded in obtaining broad injunctive relief with regard to an employment practice which did not personally benefit the litigant. In both cases, the discrimination agencies rejected a contention of the complainant that he or she was entitled to back pay and job reinstatement.

The injunctive relief which was ordered by the Commission was far-reaching and constituted success on a "significant issue" in the case. The fact that complaint in this case did not specifically request injunctive relief does not minimize the degree to which this relief constituted an important victory to the Complainant. The Respondent argues that Richardson did not modify the Respondent's behavior in a way that "directly benefits" him and thereby, under Farrar v. Hobby, 506 U.S. 103 (1992), he has not prevailed. As a preliminary matter, it should be noted that Richardson did obtain a monetary award for his emotional injury damages and thus did personally benefit from the decision in this case. Because fees need not be proportional to the monetary recovery, see, e.g., Rushing v. Jasniowski, CCHR No. 92-H-127 (Jan. 18, 1995) and Fulgern v. Pence, CCHR No. 91-FHO-65 (April 21, 1993), the amount of the recovery should not be a factor unless the entirety of the result was *de minimus*. This is not a case such as Rhodes v. Stewart, 488 US. 1 (1988), where it was held that the plaintiffs could not possibly benefit from declaratory judgment affecting prison conditions since one plaintiff was dead and the other not in prison. Richardson did obtain a monetary judgment, albeit a modest one, and thus benefitted.

More importantly, to look solely to the monetary recovery here is to ignore the facially apparent reasons why this case was fought so vigorously by both sides. This was a "principle" case. Richardson, as a proponent of "Forgotten Scouts," was clearly attempting to right a perceived wrong and to establish a principle that the Boy Scouts cannot legally refuse to hire homosexual individuals. In litigating this case, he attempted to confront and debunk many of the myths concerning gay men as role models for young boys. In like manner, the Chicago Area Council of the BSA and its parent organization fought to maintain its previously steadfast policy that homosexuality and employment by the Boy Scouts were incompatible. Mr. Richardson fully prevailed in this regard. And, like the Illinois Human Rights Act, the primary purpose of the Chicago Human Rights Ordinance is the vindication of the anti-discrimination policy of the Ordinance. See CHRO, §2-160-010 and Brewington, 513 N.E.2d at 1064-65.

What affect, then, is the fact that Richardson did not succeed in his efforts to portray himself as a *bona fide* job seeker? Clearly, some time was spent on the part of both parties dealing with the damage issues related to whether or not Richardson was "qualified" for employment as a District Director based upon his prior work record. The Commission believes that Richardson's lack of success concerning his *bona fide* applicant "status," as well as his lack of candor regarding his resume and qualifications, justifies a downward adjustment. Accordingly, using Brewington as a guidepost, the Commission reduces the total lodestar 10% to account for this conduct as well as for the lack of success with regard to reinstatement and back pay. The Commission believes that this deduction is also reasonably related to the amount of wasted time spent by all parties to this case dealing with these issues.

## 2. Overstaffing

Respondent's audit contends that 21% of the 2,516 total task descriptions in the Fee Petition refer to intra-office conferences and 6% to inter-firm conferences. See Legal Audit at 43, 44). In addition, 19% of the total task descriptions refer to the review by one of Complainant's counsel of another attorney's work product. Thus, Respondent argues, at least 46% of the time spent on this case was duplicative or unnecessary.

It is evident from a review of the Fee Petition that this case was overstaffed, overworked and as a result overbilled. Several examples bear mention:

a. Legal Research

1,061.40 hours of legal research were billed with 963.81 hours being spent by Schiff Hardin & Waite. It is true that there were numerous legal issues of constitutional proportion which were involved in this case. However, the legal issues which were briefed in the two motions to dismiss and in the post-hearing memoranda were substantially similar. It appears that little, if any, billing judgment was exercised by Complainant's counsel when decided when to rely on past research and when to reinvent the wheel. The amount of time spent on legal research was excessive.

b. Post-Hearing Briefs

801.47 hours were billed by Complainant's counsel for post-hearing briefs seeking a total of \$139,349.83. Two motions to dismiss had already been briefed prior to the Hearing, which raised many of the legal issues presented in the briefs. In his Objections, the Complainant argued that, to the extent the Hearing Officer compared his own 200 hours spent in reviewing and researching the parties' post-hearing briefs, excerpting the transcript and drafting a decision, a 4:1 ratio between counsel's time and the Hearing Officers was reasonable. The Commission agrees with the Final Recommendation's view that there are too many differences between the work performed by a party's legal team and that performed by a fact-finder to draw any meaningful conclusions regarding the reasonableness of the hours spent by using that comparison.

A more appropriate ratio to consider is the ratio of trial time to post-trial briefs. The actual testimony consumed under 60 hours of hearing time. Given the amount of legal research, preparation and drafting which had already taken place prior to the Hearing, there was simply no reason for the post-hearing briefs to have been billed at this amount. And this remains so regardless of the amount of time the Respondent's counsel may have spent on their post-hearing briefs.

c. Intra-Firm Conferences

Intra-firm conferences consumed 451.95 hours of time. See Respondent's

Exhibit H-1. That is 11.5% of all time requested. The example set forth by Complainant's counsel at page 4 of their memorandum is illustrative of the amount of time which was unnecessarily billed (as opposed to unnecessarily spent) in this case. Complainant states:

For example, in the second sample period, April 10, 1994 to April 17, 1994, attorneys Heitland, Hammel and Peters spent a combined 5.2 hours reviewing the Curran decision to provide input to Ms. Leib, who took primary responsibility for drafting Richardson's response to Respondent's motion to cite the Curran decision in this case. After receiving this input, Ms. Leib drafted the response and distributed the draft to the other attorneys. Attorneys Heitland, Hammel and Peters then spent a combined total of 3 hours reviewing the draft and suggesting revisions. Accordingly only a total of 8.2 hours were potentially duplicative and, therefore, an overall reduction of one-third of all the time (28.15 after including Ms. Leib's time) is unwarranted.

The above hours, including the conferences, were all related to the Complainant's response to the Respondent's motion for leave to cite to this California state court decision. It was a long decision. But it did not take the billable time of four attorneys to oppose (unsuccessfully) this motion. Indeed, one could argue that had this case been litigated in the marketplace of paying clients, the most reasonable approach (and the most economical) would have been not to oppose the motion.

#### d. General Overstaffing and Duplication

9 lawyers, 2 paralegals and a librarian billed time on this case. The Complainant's counsel point the finger at the Respondent's staffing of conferences and public hearings with multiple attorneys as evidence that their own conduct was reasonable. In addition, the Complainant argues that the Commission has recognized that "[f]requently two heads are better than one." Huezo v. St. James Properties/Janco Realty, CCHR No. 90-E-44 (Oct. 9, 1991). While two heads may be better than one, the Complainant has turned this case into a veritable Hydra, with strategies being discussed and pleadings being drafted, reviewed and supervised by multiple layers of counsel.

A substantial reduction in the hours spent by all counsel in this case is justified due to overstaffing. In complex class action litigation with thousands of hours of billing statements being submitted, courts have endorsed the use of a "sampling" procedure to determine the reasonableness of a fee request to avoid the need to scrutinize every entry on a lawyer's billing sheet. See, e.g., In re: Continental Illinois Securities Litigation, 962 F.2d 566, 570 (7th Cir. 1992) and Evans v. City of Evanston, 941 F.2d 473, 476-77 (7th Cir. 1991).

We have examined selected weeks during 1993-1995 to determine whether the number of attorneys utilized by Complainant in this case resulted in an

unreasonable number of attorney hours being expended. The sampling evaluated is as follows: [\(5\)](#)

**Sample period #1: January 23, 1993 - January 30, 1993**

Date Attorney Hours Description

1/23/93 Heitland 6.0 Study defendant's motion to dismiss and supporting affidavit, outline work to be done in response, TT Wildman re info on positions of churches

1/24/93 Heitland 4.5 Work on response to defendant's motion to dismiss

1/25/93 Heitland 0.50 Distribute outline of response brief; TFC Hammell; OTC Leib and note to Leib

1/25/93 Leib 2.0 Review BSA brief and affidavit; Review ARH Memo; telephone conference ARH re same

1/26/93 Heitland 1.5 Meeting with Hammell, CHRP, LEL/Prep and followup

1/26/93 Hammell 5.5 Review Motion to Dismiss and Supporting

materials; Read Appellate brief in Curran; Prepare

for meeting at Schiff; Meet at Schiff re Motion to dismiss. Travel to and from

1/26/93 Peters 4.0 Review brief in support of motion to dismiss and supporting materials; OTC HRO re: public decision; OCW, ARH, JH and LCL re: response

1/26/93 Leib 3.25 Research cases for brief; Review ARH memo in preparation for meeting with John Hammell

1/27/93 Peters 0.5 Review Moran Affidavit

1/28/93 Leib 2.0 Telephone conference with Keith et. cet. Meeting with CHRP et. cet.

1/29/93 Leib 1.0 Begin research affidavit issue

**Sample period #2: April 10, 1994 - April 17, 1994**

4/10/94 Hammell 1.5 Read two new California decisions re BSA

4/11/94 Heitland 1.25 Read Randall and Curran appeal decisions, notes

for response to CBSA motion

4/11/94 Leib 1.0 Review 100-page Curran opinion

4/12/94 Heitland 0.75 Office conference CHRP, telephone conference

Hammell, office conference CHRP and LCL

4/12/94 Hammell 0.20 TCW/Heitland re BSA Motion on Curran, other

new California cases

4/12/94 Peters 1.5 Review Curran and Randle decisions et. cet.

4/12/94 Leib 8.75 Review Curran I, Curran II and Randall opinions;

Office conference with ARH and CHRP regarding same. draft response brief; et. cet.

4/13/94 Peters 1.5 Review Curran II and edit response to Scouts M for leave to file decision instanter

4/13/94 Heitland 0.75 Review and revise response to motion, reviewed

Curran I

4/13/94 Leib 7.75 Draft response brief in opposition to Respondent's motion instanter.

4/14/94 Heitland 0.50 Revise and brief after review of CHRP comments, further revision after hearing Hammell's comments, voice message to Leib office conference CHRP

4/14/94 Hammell 0.20 Review draft response to BSA's Motion to cite Curran; Give comments to Schiff

4/14/94 Leib 2.5 Telephone conference with John Hammell regarding draft response; review ARH comments and re-visions; Office conference with CHRP regarding same et. cet.

**Sample period #3: March 16, 1995 - March 23, 1995**

3/16/95 Heitland 11.0 Prepare for hearing.

3/16/95 Peters 10.0 Trial prep et. cet.

3/16/95 Kors 2.30 Telephone conferences w/A. Heitland.(.2) Telephone conference w/C. Peters.(.25) telephone conference w/G.Herek(expert)(.3) Review commission decisions (.30); Prepare outline for experts (1.25)

3/16/95 Sawyer 15.0 Review of documents for index et. cet.

3/16/95 Rudman 1.0 OCW ARH CHRP re research to be done re punitive damages, et. cet.

3/16/95 Mitzel 11.0 File research et. cet.

3/17/95 Heitland 10.0 Telephone conference Kors re: budget and prep; prep for hearing; further prep for hearing, including supervision of Sawyer, Rudman, Mitzel and OCS CHRP; TCW and other ACLU and Lambda lawyers re coordination of cases re: BSA

3/17/95 Peters 7.25 Dictate letter to Ybarra re: pre-trial order et. cet.

3/17/95 Kors 2.20 Conference call w/other counsel involved in similar

Boy Scout discrimination litigation (1.5); Telephone conference w/A.Heitland re: experts and review resumes of experts (.70)

3/17/95 Sawyer 11.5 Review of docs for exhibit list et. cet.

3/17/95 Rudman .75 TCW ARH re research on punitive damages et. cet.

3/17/95 Mitzel 10.5 Review/analysis videos produced by BSA et. cet.

3/18/95 Sawyer 5.0 Research re: motions in limine et. cet.

3/18/95 Peters 7.67 Trial prep including...pretrial order et. cet.

3/18/95 Kors 0.50 Review memo re expert witnesses and fees from

Heitland (.25); telephone conference with H.Grossman re same (.15) telephone conference w/C.Peters (.1)

3/18/95 Heitland 9.0 2 letters to opposing counsel (disclose our expert, ask for update resume of theirs), assist CHRP with his correspondence and with pre hearing memo et. cet.

3/18/95 Mitzel 8.0 Review analysis of videos et. cet.

3/19/95 Peters 2.5 Trial prep et. cet.

3/19/95 Sawyer 3.0 Draft motion in limine

3/19/95 Mitzel 2.5 Review of exhibit list

3/20/95 Peters 10.0 Trial prep including work on exhibit list; TCW Kors et. cet.

3/20/95 Sawyer 10.25 Revisions to motion in limine. research et. cet.

3/20/95 Rudman .5 Researching awards on punitives et. cet.

3/20/95 Mitzel 9.75 Status meeting with CHP and HS re exhibits

et. cet.

3/21/95 Heitland 10.5 Office conference CHRP re: status, witness assignments; hearing prep including work on prehearing memo, telephone conference Kors and CHRP et. cet.

3/21/95 Peters 12.0 Review correspondence; draft response...trial prep et. cet.

3/21/95 Sawyer 7.5 Revisions to motion in limine et. cet.

3/21/95 Rudman 1.5 Researching punitive damages, piercing corporate

veil et. cet.

3/21/95 Mitzel 9.0 Witness file screening et. cet.

3/22/95 Heitland 10.0 Office conference JLR re; her research on punitive damages and compelling witness attendance. Work on joint prehearing memo and motions in limine. Supervise work of Sawyer and Mitzel. Telephone conferences Kors et. cet.

3/22/95 Peters 10.5 Trial prep et. cet.

3/22/95 Kors 0.45 Telephone conference w/C.Daube (.25); telephone

conference w/A. Heitland and C. Peters (.20)

3/22/95 Sawyer 6.0 Research re: former testimony admissibility et. cet.

3/22/95 Rudman 3.0 Researching punitive damages et. cet.

3/22/95 Mitzel 10.25 Assistance to attorneys with regard to filing et. cet.

3/23/95 Heitland 10.0 TTC Chiola re: testimony prep; conference with WCG; draft 4 motions for filing today, office conference  
CHRP et. cet.

3/23/95 Kors 1.20 Review motion to amend complaint, telephone

conference w/ A. Heitland re same (.40); prepare questions for witnesses (.65) telephone conference with A. Heitland re same (.1)

3/23/95 Peters 12.0 Trial prep et. cet.

3/23/95 Sawyer 10.0 Meeting with CHRP re: damages requested. research et. cet.

3/23/95 Mitzel 10.0 File research et. cet

3/30/95 Mickey 22.0 Research background information et. cet.

**Sample Period #4: July 21, 1995 - July 28, 1995**

7/21/95 Peters 7.5 Work on reply brief

7/21/95 Sawyer 5.25 Research burden of proving qualifications et. cet.

7/22/95 Peters 3.0 Work on reply.

7/23/95 Heitland 3.0 Read transcripts for corrections and citations for reply brief

7/23/95 Sawyer 6.0 Research use of testers et. cet.

7/24/95 Heitland 1.2 Telephone from and spoke with CHRP; complete review of transcripts; compose comments for transcripts and  
revisions to brief to CHRP

7/24/95 Peters 5.0 Review proposed revisions to hearing transcript et. cet.

7/24/95 Peters 5.25 TCW Ybarra and M. Pickus. Work on reply; OCW HCS re: same

7/24/95 Sawyer 15.5 Draft employment section of reply brief

7/25/95 Sawyer 4.0 Review draft reply

7/26/95 Peters 4.0 Work on reply brief

7/27/95 Heitland 0.2 Telephone from and spoke with CHRP re; transcript changes

7/27/95 Peters 5.5 TCW Ybarra re: modifications of hearing transcript et. cet.

7/28/95 Heitland 0.1 Telephone message et. cet.

During the first week studied, the Complainant's counsel had received the Respondent's Motion to Dismiss. 30.25 hours were spent that week by attorneys on the case. Of those hours, approximately 8.5 hours were billed as a result of meetings among the four attorneys. Each of the attorneys billed substantial time for reviewing the Respondent's brief in anticipation of a meeting to discuss the response. Heitland billed 11 hours for her review and the commencement of a response; Hammell billed 5 hours for his review; Leib billed 4.25 hours and Peters billed 2.5 hours. All to review and respond to the same Motion to Dismiss. There was no need for four attorneys to bill for reviewing the same material and for meeting to discuss these materials. Excluding Mr. Peter's hours, (6) because it appears from the time records that Ms. Heitland was primarily responsible for responding to this motion, would reduce the time spent by approximately 15%.

During the second sample period, the Complainant's counsel received a motion from Respondent for leave to submit the *Curran II* opinion instanter in support of its Motion to Dismiss. Four attorneys spent 28.15 hours of work that week in conjunction with that motion. Each of the four attorneys billed time simply to review the *Curran II* decision: Hammell billed 2.25 hours; Heitland billed 1.25 hours; Peters billed 3.0 hours and Leib, who drafted the response to the motion, billed 17.5 hours. An additional 3.95 hours was billed in conferences or discussions among counsel. The Commission finds that this amount of time was both excessive and duplicative. Allowing only Peters' and Leib's time as reasonably spent, with an additional 2 hours in conferences (a one-hour meeting between two attorneys) reduces the time by 19.3%. The Commission would further reduce the time spent by Ms. Leib in preparing the response from 17.5 hours to a generous 10.00 hours. This would

reduce the total time reasonably billed for this sample period by 46%.

Sample period #3 took place in the week preceding the Pre-Hearing Conference in the case. A total of 285 attorney and paralegal hours were spent by Complainant's counsel in preparation for the Pre-Hearing Conference and the upcoming Administrative Hearing. Attorneys Heitland and Peters, along with their associates and paralegals, were billing over 40 hours of time collectively during some of those days. On March 16, 1995, attorney Heitland billed 11 hours. During this sample period, at least 33.35 hours were spent either directly or indirectly on supervision of other attorneys. If Mr. Peters' time was excluded on the theory that three attorneys, a paralegal and a research librarian were more than reasonable, the total time expended would be reduced by 26.6%.

During sample period number 4, three lawyers spent over 60 hours working on the post-hearing reply brief. With the exception of Ms. Sawyer, who details the portion of the brief she worked on, there is no way of knowing whether the work done by these attorneys was duplicative. However, having reviewed the brief, and in light of the fact that many of the factual and legal issues had been thoroughly explored in the two motions to dismiss as well as in the comprehensive initial post-hearing memoranda, the Commission is left with the distinct impression that two attorneys could have accomplished the same task in between three-fourths and two-thirds of the time that was spent.

The Commission agrees to follow the recommendation of the Hearing Officer who, having monitored this litigation through the various prehearing motions, the Administrative Hearing and the post-hearing briefs, recommended that this case could have easily been handled by one partner, one associate and one paralegal from Schiff and one liaison attorney from the ACLU. The sample periods evaluated shows that at various times, between 15% and 46% of the total

time billed by the various attorneys working on the case was duplicative or unreasonably excessive.

In the First Recommended Decision on Liability and Damages, the Hearing Officer recommended the reduction of compensable time of all attorneys and paralegals representing the Complainant in this case by a factor of one-third for duplication and excessive time which resulted from overstaffing. The Commission agrees to reject the Respondent's Objection that the reduction should be more substantial. While it is true that in two of the sample periods, the excessive and duplicative time was "at least" one-third, a more detailed examination of the time records show a range of between 15% and 46%, depending upon which hours are excluded.

In initially arriving at a 33.3% reduction for excessive hours (in the First Recommendation), one of the guideposts the Hearing Officer used was the amount of hours spent on the case by one partner, one associate and one paralegal from Schiff plus one attorney from the ACLU in relationship to the total amount of time billed by all attorneys and paraprofessionals. The Complainant, however, is correct that the First Recommended Decision neglected to add the hours of Ms. Leib to those of Ms. Sawyer (her successor) in evaluating the amount of time spent by one partner, one associate and one paralegal from Schiff Hardin. Adding Ms. Leib's time to this equation provides a total of 2,728.25 hours out of 3,574.47, or 76% of all the time billed by Schiff Hardin. The Commission, therefore, agrees with the Final Recommended Decision that all hours spent by all Complainant's counsel and their professional staff be reduced by 25%. [\(7\)](#)

An examination of numerous individual as well as class action Title VII and ADA cases fully litigated through trial provides further support for this conclusion. In Phillip v. ANR Freight System Inc., 61 F.3d 669 (8th Cir. 1995), a court award of \$190,492.00 in attorney's fees was

affirmed in an age discrimination case after an unsuccessful jury trial, a reversal on appeal, the filing and consolidation of a related case and a second, this time successful, jury verdict for the plaintiff. The plaintiff employed four attorneys and one paralegal during the litigation. The court reduced the plaintiff's fee request by over 55% as a result of unreasonable and excessive hours. [\(8\)](#)

In Hatley v. Store Kraft Mfg. Co., 859 F. Supp. 1257 (D. Neb. 1994), a fee petition seeking compensation for 173.61 hours was submitted after a four-day jury trial in a sexual harassment case where two sets of interrogatories and four depositions had taken place during discovery. In Martin v. Cavalier Hotel Corp., 67 FEP Cases 301 (4th Cir. 1995), a fee award of approximately \$100,000.00 was affirmed after a successful jury trial. The court reduced the requested fees by 50% having found that compensation for three lead counsel was excessive. In Selgas v. American Airlines, 858 F. Supp. 316 (D. P.R. 1994), fees of \$213,709.00 were awarded after a successful three-week jury trial was handled by four attorneys. There, the court reduced the requested hours totalling 2,969.3 down to 1,684.6 (a 44% reduction). In Thomlinson v. City of Omaha, 63 F.3d 786 (8th Cir. 1995), the attorneys for the plaintiff sought compensation for 355.95 hours of time in successfully trying a Rehabilitation Act and § 1983 jury trial. In Shipes v. Trinity Industries, 987 F.2d 311 (5th Cir. 1993), 1,306 hours of compensable time was sought by the attorneys for the plaintiffs in successfully trying to verdict a class action race discrimination in employment case. In Hutchinson v. Amateur Electronic Supply, 42 F.3d 1037 (7th Cir. 1994), the plaintiff's fee petition for a sexual harassment jury trial requested compensation for 843.75 of time. The court held that the district court judge had not adequately explained his reduction of those hours down to 536.2 and remanded the case for further explanation. And in McNabola v. Chicago Transit Authority, 10 F.3d 501 (7th Cir. 1993), the court affirmed fees in the amount of

\$185,653 for the successful prosecution of a race discrimination case through jury verdict.

What the above cases have in common is the fact that the amount of time spent litigating those discrimination cases through jury trial (and in some cases, appeal and remand) did not approach the level of fees claimed in this case.

e. Block Billing

Respondent objects that a large percentage of the billing entries submitted by the Complainant are "block billed." That is, numerous distinct entries are lumped together under a single claim for hours such that it cannot be determined how much time was allocated to each item. According to the Respondent's legal audit, 2,609.81 hours of Schiff Hardin's time (\$484,150.00) and 186.85 hours of ACLU time (\$30,485.00) were billed in block entries. (See Respondent's Legal Audit at p. 31).

There is authority to allow a fact finder to substantially discount or even exclude time that is block billed. See, e.g., Drake v. Perrin, 593 F. Supp. 1176, 1178 (E.D. Pa. 1984); Bovey v. City of Lafayette, 638 F. Supp. 640, 646 (N.D. Ind. 1986).

Having reviewed the Complainant's time entries in detail, the Commission agrees with the Respondent that it is virtually impossible to tell how much time was spent on which items within those block bills. Block billing may be appropriate for short periods of time. For example, it would not be unreasonable for an attorney to spend 1.5 hours continuously on one case, performing several tasks, without taking the time to independently record each different task. At some point, the economic cost of making separate entries, in relation to the total time spent, is not justified. See, e.g., 1/03/95 entry by Heitland:

Read brief on appeal by respondents from denial of their motion to disqualify; meeting with HCS and CHRP re:

response 1.5 hrs

However, when an attorney is spending a substantial portion of her/his day on a matter and is seeking over \$1,000.00 for that day's work, it is incumbent upon the attorney to detail her/his time in a manner sufficient to allow a finder of fact to determine whether that time is reasonable when a fee petition is being filed. See, e.g., 02/06/96 entry by Heitland:

Voice message from CHRP re: order, read memos from Kors' office, read order and gave comments to CHRP, telephone call to (left message for) counsel in Dale case, telephone call to (left message for) George Chauncey; office telephone conference with Sawyer re: historical research; begin review of Curran opinion for proof ideas, memo re: same; telephone conference Duncan Harris re: mayor's testimony 4.25 hrs.

The question then becomes what sanction, if any, should be imposed upon the Complainant's fee petition as a result of the block billing. The Respondent suggests that, after other items are totally excluded (or reduced for other reasons), the balance of the time, which it calculates as 1,713.95 hours in blocked-billed entries, should be reduced by one-third thereby eliminating 571.32 hours of time. Alternatively, one could assess a downward multiplier to be applied across the board to account for the lack of specificity contained within the fee petition.

73% of Schiff's time was contained in block billing as was 54% of the ACLU's time. (See Respondent's Legal Audit Exhibits S1 and S2). The Respondent does not argue that the time listed in the block bills was not reasonably spent solely by reference to the fact that it is contained in a block bill. Rather, the Respondent argues, and the Commission agrees, that we do not know whether the time was reasonably spent. The Commission believes that the proper solution is to apply an overall negative multiplier to the

lodestar related solely to the fact that the time entries were contained in block bills. The factor will be as follows:

Schiff Hardin 18.25%

ACLU 13.5%

These percentage reductions were determined by discounting 25% of the overall percentage of hours which were block billed for each firm (i.e., 25% of 73% for Schiff and 25% of 54% for ACLU).[\(9\)](#)

#### f. Press Activities

The Respondent contends that activities relating to hours spent dealing with the press are not compensable, citing Desisto College, Inc. v. Town of Howey-in-the-Hills, 718 F. Supp. 906, 923 (M.D. Fla. 1989), aff'd sub nom, Desisto College, Inc. v. Line, 914 F.2d 267 (11th Cir. 1990) and Huntington Branch NAACP v. Town of Huntington, 749 F. Supp. 62, 65 (E.D.N.Y. 1990), vacated in part on other grounds, 961 F.2d 1048 (2d Cir. 1992). The Respondent's audit calculates that this involves 2.89 hours of counsels' time at fees of \$530.29. This time will be disallowed.

#### g. Duplicative Billing Entries

The Respondent asserts that 24 hours of Schiff Hardin's time was double billed. (Respondent's Exhibit T-1). The Commission agrees that there does not appear to be any double billing. Therefore, this objection is denied.

#### h. Clerical Activities Performed by Paralegals

The Respondent claims that 280.04 hours of time billed by paralegals in this matter were actually "purely clerical or secretarial tasks" which should not be billed at paralegal rates. See Missouri v. Jenkins, 491 U.S. 274, 288 n.10 (1989). This totals \$23,803.54 at the Complainant's

requested rates. Among the activities which the Respondent identifies as purely clerical are "typing or data entry; assembly of documents; making photocopies; checking court dockets; mailing or delivering documents; organizing or updating files; filing or retrieving documents from files; proofreading for spelling errors and numbering or labeling documents."

In Missouri v. Jenkins, 491 U.S. 274 (1989), the Supreme Court, in interpreting the Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988, stated:

where ... the prevailing practice is to bill paralegal work at market rates, treating civil rights lawyers' fee requests in the same way is not only permitted by §1988, but also makes economic sense. By encouraging the use of lower-cost paralegals, rather than attorneys whenever possible, permitting market-rate billing of paralegal hours "encourages cost-effective delivery of legal services and by reducing the spiral cost of civil rights litigation, furthers the policies underlying civil rights statutes." Cameo Convalescent Center, Inc. v. Senn, 738 F.2d 836, 846, *cert. denied*, 469 U.S. 1106 (1985).

Jenkins, 491 U.S. at 276.

The appropriate test, therefore, is whether the tasks performed by the paralegals for which recovery is sought are customarily billed to paying clients. Nash/Demby v. Sallas Realty, CCHR No. 92-H-128 (Nov. 23, 1995). All of the tasks objected to, such as "File Organization," "File Research" and "document preparation" seem typical of tasks customarily performed by paralegals. Nowhere in Exhibit Y to the Respondent's Audit are there entries for Mr. Mitzel or Ms. Mickey which indicate that they were performing clerical-type typing, proofreading or copying. Litigation paralegals are typically called upon, as are more junior attorneys at times, to organize files, prepare exhibits and file documents. The Respondent's objection in this regard

is denied.

i. Administrative Activities Performed by Attorneys

The Respondent also argues that 69.43 hours of attorney time were spent on "Administrative Tasks" which should not be billed by the attorneys at their hourly rates.

(Respondent's Legal Audit, Ex. V1, V2). This time includes communications between attorneys and support staff, review of pleadings prior to filing and internal scheduling matters. It is unreasonable to restrict attorneys billing to those tasks which require a law school education. Attorneys routinely organize their own files, deal with their support staff and, if necessary, chauffeur a witness to trial as part of the services that they provide to a client.

Also included under the items identified as "administrative" by the Respondent's audit is time spent by senior attorneys supervising the work of more junior attorneys. These items are more properly considered under the Overstaffing section of this opinion. Therefore, the Respondent's objections to the time listed in its Exhibits V1 and V2 are denied.

j. Inadequate Billing Records

The Respondent accurately states the general rule that time entries must identify the amount of time spent on an activity with sufficient specificity so the reader can understand what was done and determine whether the time spent was reasonable. Ordon v. Al-Rahman Animal Hospital, CCHR No. 92-E-139 (Nov. 24, 1993); Nash/ Demby v. Sallas Realty, CCHR No. 92-H-128 (Nov. 16, 1995).

Many of the Complainant's counsel's time records identify a "TC" (telephone call), and "OC" (office conference) or a "Memo" without detailing the nature of the call, the conference or the memo. While this may be customary practice for lawyers who are billing paying clients, it

renders all but impossible the job of reviewing the time records to determine their "reasonableness" or to determine whether the time was related to a prevailing claim.

Like the issue of "block billing," a downward adjustment of fees to account for this practice is justifiable.

Respondent has identified 258.73 hours of attorney time from Schiff Hardin and 16.16 hours of attorney time from the ACLU which it believes to be impermissible and vague. Respondent's audit, however, does no better job in identifying which entries are vague and which are sufficiently detailed than did the Complainant's counsel in determining when to include the subject matter of a conversation or meeting and when to omit this information. For example, for entries dated 5/21/93, the audit identifies "TC Hammell" as vague but not "TC CHRP" or "OC Leib." The fees related to time identified by the Respondent as vague totals \$45,304.95.

The Commission agrees that the lack of detail on these items renders review extremely difficult. It is neither unreasonable nor burdensome to require that time entries be self-explanatory. On the basis of the sampling of time entries, see § C(2)(d) *supra*, the Commission finds that at least 7% of all fees sought are insufficiently detailed making review impossible. Therefore, an overall reduction of 7% of the requested hours will be assessed for this reason. [\(10\)](#)

#### k. Clearly Excessive Time

Respondent has identified (at Exhibit X-1 and X-2) 206.75 combined hours which it believes is "questionable" simply because they were listed on days when more than 10 hours were billed by an attorney or paralegal. Respondent argues that billing long days without any pressing deadline calls into question the exercise of billing judgment. The Commission fails to see the logic of this reasoning. There mere fact that these hours were spent on one long day,

instead of two average days or five short days, lends no support one way or the other to whether the time spent was reasonable. This objection is denied.

#### 1. Summarizing Hearing Transcripts

The Respondent contests the 48.69 hours spent by Schiff paralegal Arthur Mitzel and associate Heather Sawyer summarizing hearing transcripts. The Respondent's auditors could locate no reference to the review of these summaries. However, there are numerous references to review of the "transcripts." The Respondent's speculation that the time spent summarizing hearing transcripts were of "questionable utility," without more, does not establish that the time spent was not reasonable. Presumably, the references to the "transcript" were in fact references to the summary of the transcript. This objection is denied.

#### D. Costs

The Complainant seeks reimbursement for alleged costs in the amount of \$50,477.01. With the exception of expert witness expenses for time and travel, the Commission finds the amount sought to be outrageously high and inadequately documented. See Huezo v. St. James Properties/Janco Realty, CCHR No. 90-E-44 at p. 13 (Oct. 9, 1991) (disallowing 75% of requested costs due to lack of specificity in the request). [\(11\)](#)

Schiff Hardin is seeking costs totalling \$22,264.82 for "duplicating and binding." Its fee petition provides little detail as to what documents were duplicated, for what purpose and at what cost per page. On April 27-28, 1995, it appears that over \$11,486.00 in invoices were paid for duplication services. In-house duplication and binding expenses total \$5,676.90, according to Complainant's fee petition. How many pages of documents does this reflect? What page rate is the law firm billing at? Until the filing of Complainant's Objections, we did not know the answers to

any of these questions. While there were undoubtedly thousands of documents which this case generated, documentation of these expenses is entirely lacking and even if it was thoroughly detailed, this expenditure for copying expenses is grossly excessive.

Complainant has attempted to provide, by the additional affidavit of Mr. Peters attached to his Objections, the details concerning costs which the First Recommended Decision Regarding Attorney's Fees found lacking. New evidence not presented at hearing or, in the case of a post-hearing fee petition, in the Petition or in any Reply in support of the Petition, will not be considered when presented as part of a party's Objections, unless substantial injustice would result. Pryor v. Carbonara, CCHR No. 93-H-29 (May 18, 1995). Otherwise, parties would be free to supplement the record *ad infinitum* in response to a first recommended decision. The Complainant had ample opportunity in its Fee Petition to provide sufficient detail which would have allowed the Commission to determine the reasonableness of any of the copying and binding expenses. He failed to do so. This defect cannot be cured through the late submission of evidence which has always been in the Complainant's possession. Therefore, *all* the copying expenses as a whole are found to be unreasonable and are disallowed.

Other items of expense claimed by Schiff suffer from the same lack of specificity and documentation. \$886.06 in facsimile charges are sought by Schiff. Is the Respondent being billed at "Currency Exchange rates" of \$1.00 per page? Who knows. This item is disallowed.

The Commission finds the requested Courier charges of \$1,446.28 to be unreasonable and insufficiently documented and so discounts it by 50%. The Complainant's petition does not allow a determination as to at what rate, or for what purpose the trips were taken. The Complainant objects that each of the out-of-town deliveries is identified by the

reference "Air Bill." By way of example, the entries recorded for June 30, 1995 read as follows:

6/30/95 Courier Services

Invoice Number: 3777-144 \$20.00

USER DEFINED 1: 3777-144

6/30/95 Courier Services

Invoice Number: 3777-144 \$20.00

USER DEFINED 1: 3777-144

6/30/95 Courier Services \$26.70

Air Bill: 003522164082

City: NEW YORK CITY

State: NY

Zip Code: 10004

With this small level of detail, the Respondent is being charged with \$66.70 in costs. Yet there is no possible way for a fact-finder to determine that these expenses were even reasonably related to this case let alone "reasonable." The Commission agrees to reduce this by 50%.

In contrast to the above, the Commission finds the following expenses of Schiff Hardin to be reasonable and sufficiently documented:

Travel Expenses: \$3,373.00

On-line Data Research: \$1,239.42

Court Reporter Charges: \$3,477.80

Total expenses allowed for Schiff Hardin: \$8,813.36

The ACLU seeks reimbursement for \$15,304.80. These expenses include \$177.39 in courier charges; \$11,812.18 in expert witness expenses; \$51.89 for long distance FAX charges; \$13.00 for Federal Express charges; \$22.50 for parking expenses; \$614.56 for copying documents; \$139.86 for Westlaw research and \$2,208.27 in additional copying expenses. With the exception of Mr. Kors' cab fare and the administrative expenses related to Ms. Heitland's office relocation, the Commission finds that these costs are reasonable and are sufficiently documented. [\(12\)](#)

Mr. Kors incurred \$110.00 in cab expenses travelling to and from his office to Schiff or to and from the hearing. The Commission will not here award costs for the intra-city travel of counsel. This is especially true where it cannot be determined whether Mr. Kors also billed for the time spent while in transit. But see Hall v. Becovic, CCHR No. 94-H-39 (Jan. 11, 1996) (authorizing counsel to bill for cab costs normally billed to clients as well as travel time).

Also, \$220.00 was charged by the ACLU for secretarial and other administrative expenses incurred by Ann Heitland which are directly related to her move to Flagstaff, Arizona. The Commission does not believe that the Respondent should bear the cost of the increased expenses relating to that move. In like manner, \$31.90 of copying expenses for Ms. Heitland were submitted. These items are disallowed.

While the ACLU's charges for copying expenses are not any more detailed than that sought by Schiff, the amounts sought are sufficiently reasonable so that more detailed documentation is not necessary. In addition to \$1,692.77 of copying charges incurred in New York during document production (and fully allowed herein), yearly copying expenses were:

1992 \$29.20

1993 \$166.40

1994 \$151.00

1995 \$ 92.60

1996 \$ 44.40

Total expenses allowed for the ACLU: \$14,942.90.

Therefore, the Commission awards total fees of \$23,756.26.

**E. The Method of Calculating the Downward Deduction**

In his Objections, the Complainant argues that by aggregating the percentage reductions assessed for overstaffing, block billing, inadequate documentation and lack of success on the merits, the same attorney time is being "eliminated" multiple times. Complainant argues that the case Spanish Action Commission of Chicago v. City of Chicago, 811 F.2d 1129, 1137 (7th Cir. 1987), instructs that the discount factor must be applied only to hours not previously discounted.

In Spanish Action, the court initially reduced the number of attorney's hours claimed from approximately 1,000 to 500 to account for the simplicity of the case and the plaintiff's limited success. It then further reduced the result by 191.25 hours to eliminate those hours that were either inadequately documented or not reasonably expended. Spanish Action, 811 F.2d at 1137. While the court did comment that the same hours should not be eliminated twice, it did not mandate a uniform method for applying percentage reductions.

Application of a specific reduction depends upon the purpose the reduction is trying to accomplish. In this case, the first reduction of 25% for excessive hours is

intended to result in a total number of hours which were reasonably necessary for the successful prosecution of this case, given the issues presented and the tasks performed.

Assume, for example, that a successful litigant submitted a bill for one day of pre-hearing work as follows:

10/8/96 Attorney A Prep witnesses for trial 4.0

10/8/96 Attorney A Draft Trial brief 2.0

10/8/96 Attorney A Meet with Atty B to

prepare cross-exam 1.0

10/8/96 Attorney A Sharpen pencils 1.0

10/8/96 Attorney B Meet with Attorney A

to prepare cross 1.0

10/8/96 Attorney B Draft Motion in Limine 3.0 10/8/96

Attorney B Attend séance with dead

witnesses 4.0

Total hours: 16.0

Most reasonable fact finders would disallow the four hours spent by attorney B attending the séance as unreasonable as well as the one hour A spent sharpening pencils. If we knew that 25% of the firm's time throughout the case was spent communicating with ghosts, we could safely discount 25% of the total time sought in the fee petition, including that time which would be disallowed for other reasons.

Suppose, however, that the above time was recorded differently by the same firm:

10/8/96 Attorney A Prep witnesses. Draft trial brief.

Meet with B. Work on case. 8.0

10/8/96 Attorney B Prep for trial 8.0

In this example, we are presented with several distinct problems. First, because we are aware that this firm spends 25% of its time acting as ghostbusters, we must reduce the total time by 25% -- despite the fact that we cannot isolate the four hours of séance time on this date. Next, we cannot tell whether Attorney A's time was spent reasonably on 10/8/96 because she has block-billed all time. Did she prep witnesses for 15 minutes, work on a trial brief for 3/4th of an hour and meet with B for 7 hours? In like manner, Attorney B's time is so vague that we cannot tell with any level of confidence what has been done. By billing in this fashion, the firm has effectively hidden all the time spent on séances and other clearly noncompensable time such as the pencil sharpening.

The remedy, assuming we have chosen not to disallow all fees, is to impose percentage reductions as a sanction and to estimate the amount of time which we assume would have been found noncompensable had sufficient detail been included. The estimates must be based upon some factual evidence, such as a representational sampling of time records. The reduction for ghost-related activities must come off the top since it is intended to eliminate those hours from consideration altogether. The reductions for block-billing and vagueness are a sanction for having hidden the improper hours. The crucial question is, should the sanction be applied to the improper hours as well? We answer that question in the affirmative.

Here, we calculated our percentage reductions using total time billed by the Complainant's counsel as a base and determining what percentage of the whole was impermissibly vague and what percentage of the whole was disallowed as contained in block-billed entries. In the above example, we would disallow 6.25% of the whole for noncompensable pencil

sharpening and 25% for unreasonable ghost-related activities. Were we to reduce the time records across-the-board by these percentages, a 6.25% downward reduction would result in the loss of one hour on October 8, 1996, thus accomplishing the intended goal. However, if we first reduced the whole by 25% and then reduced the result by 6.25%, we would be disallowing only 3/4ths of an hour on October 8th. The complainant would thus be compensated for fifteen (15) minutes of pencil sharpening.

Additionally, by applying the sanction only to nonexcessive hours, we are allowing the petitioner to benefit from his or her vague, block-billed fee petition. Perhaps our reduction underestimates the amount of time which we otherwise would have found to be noncompensable. By omitting detail from the fee petition, the complainant is betting that he will get paid for some part of his pencil sharpening time. Applying the sanction to the overall time is thus meant to discourage petitioners from taking this gamble.

The Complainant is correct, however, with regard to the deduction for limited success. This percentage reduction must come off of the amount which has been determined to have been reasonably expended on the claims. This deduction is a downward reduction of those hours which were reasonably, though unsuccessfully, spent. Therefore, the 10% reduction for limited success will be applied to the figure which results after the aggregate reductions related to overstaffing, inadequate documentation and block billing.

## **CONCLUSION**

The attorneys fees requested by the Complainant are reduced by one-fourth (25%) as a result of overstaffing resulting in duplication of effort and unnecessary time expenditures. An additional eighteen and one-quarter percent (18.25%) and thirteen and one-half percent (13.5%) reduction are applied

to Schiff Hardin's time and the the ACLU's time, respectively, due to block billing which made it close to impossible to determine whether many of the hours submitted were reasonable or unreasonable. The total time is reduced another seven percent (7%) to account for inadequate billing records.

The resulting hours are then further reduced by ten percent (10%) to account for Complainant's failure to prevail with regard to back pay, reinstatement and because of his unsuccessful effort to portray himself as a *bona fide* job seeker, resulting in wasted and unnecessary litigation time.

The hourly rates submitted by all counsel are found to be reasonable for attorneys practicing in the Chicago area with their experience, with the exception of Schiff Hardin's paralegal and librarian rates which were reduced from eighty-five dollars (\$85.00) per hour to seventy dollars (\$70.00) per hour.

Finally, \$26,720.75 in requested costs are disallowed as unreasonable.

In summary, the following attorney's fees and costs are awarded in favor of the Complainant to be paid by the Respondent:

Hourly Total 25% 7% 18.25% Less 10% for

Rate Hrs. Claimed Excessive Vague Blocked Total Limited Success Fee

Schiff Hardin & Waite

Ann Heitland (IL) \$270.00 519.60 129.9 36.3 94.8 258.6 232.7 \$62,839.80

Ann Heitland (AZ) \$150.00 188.57 47.1 13.2 34.3 93.8 84.5 12,672.45

Charles Peters \$225.00 904.00 226.0 63.3 165.0 449.7 404.7 91,057.50

Lisa Leib \$175.00 347.25 86.8 24.3 63.4 172.7 155.5 27,212.50

Heather Sawyer \$155.00 989.00 247.25 69.2 180.5 492.1 442.9 68,649.50

Jody Rudman \$140.00 109.00 27.2 7.6 19.9 54.3 48.9 6,846.00

Art Mitzel \$ 70.00 488.75 122.2 34.2 89.2 243.1 218.8 15,318.00

Melissa Mickey \$ 70.00 31.00 7.8 2.2 5.7 15.3 33.770 963.90

Totals 3577.17 1779.6 \$285,559.65

**Roger Baldwin Foundation of the ACLU**

Hourly Total 25% 7% 13.50% Less 10% for

Rate Hrs. Claimed Excessive Vague Blocked Total Limited Success Fee

John Hammell \$190.00 82.10 20.5 5.7 11.0 44.9 40.4 \$7,676.00

Geoffrey Kors \$175.00 151.35 37.8 10.6 20.4 82.5 74.3 13,002.50

Roger Leishman \$160.00 60.20 15.0 4.2 8.1 32.9 29.6 4,736.00

Harvey Grossman \$240.00 7.00 1.7 .5 .9 3.9 3.5 840.00

Michelle Bacchus \$ 40.00 43.50 10.8 3.0 5.9 19.7 17.7 708.00

Totals 344.15 183.9 \$26,962.50

Misc. Reduction for Press Related Fees: (\$ 530.29)

**COSTS REQUESTED COSTS AWARDED**

\$50,477.01 \$23,756.26

**TOTAL FEES REQUESTED TOTAL FEES AWARDED**

\$699,888.25 \$311,991.86

**TOTAL FEES AND COSTS AWARDED: \$335,748.12**

**For: CHICAGO COMMISSION ON HUMAN RELATIONS**

**By: \_**

Rouhy Shalabi

Member, Board of Commissioners

Dated: November 20, 1996

## SERVICE LIST

Anne Rae Heitland, Esq.

Bank of America Building

121 East Birch Avenue

Suite 408

Flagstaff, Arizona 86001

Charles H.R. Peters, Esq.

Schiff Hardin & Waite

7200 Sears Tower

Chicago, IL 60606

Roger Leishman, Esq.

The Roger Baldwin Foundation of

ACLU, Inc.

203 N. LaSalle St.

Suite 1405

Chicago, IL 60601

John A. Ybarra, Esq.

Louis P. Vitullo, Esq.

Wildman, Harrold, Allen & Dixon

225 W. Wacker Dr. Suite 250

Chicago, IL 60606

George A. Davidson, Esq.

Carla A. Kerr, Esq.

Hughes Hubbard & Reed

One Battery Park Plaza

New York, New York 10004

1. <sup>1</sup>The Commission has awarded fees at the rate of \$250.00 per hour to an attorney with 19 years of experience as a civil rights lawyer. Nash/Demby v. Sallas Realty, CCHR No. 92-H-128 (Nov. 16, 1995); Walters/Leadership Council for Metropolitan Open Communities v. Koumbis, CCHR No. 93-H-25 (Oct. 19, 1994). The requested rates are comparable to fees awarded by the Commission to other experienced attorneys. See Reed v. Strange, CCHR No. 92-H-139 (Mar. 15, 1995) (hourly rate of \$225.00 per hour awarded to attorney with 19 years experience).

2. <sup>2</sup>Ms. Heitland's rate was reduced from \$270.00 per hour to \$150.00 per hour when she left Schiff Hardin & Waite and entered private practice in Flagstaff, Arizona.

3. <sup>3</sup>The Complainant did not provide the year in which Ms. Rudman graduated law school.

4. <sup>4</sup>In Brewington, the complainant's fee was reduced by 10% to account for the fact that the complainant did not prevail with respect to her claims for back pay and reinstatement. That fact has been considered in arriving at the percentage reductions later in this ruling

5. <sup>5</sup>Some of the items in the longer, blockbilled entries have been abbreviated. Where an entry has been abbreviated, it is indicated such by adding the words "et cet.". It should be noted that Complainant's counsel submitted their time entries itemized by attorney rather than listing all

work done by each attorney on a given date. This is not a procedure which we endorse since it makes it difficult to determine whether work was being duplicated without reconfiguring the information as tried here.

6. <sup>6</sup>The Commission excludes Mr. Peter's hours for the purpose of this analysis because it appears unreasonable to have more than one partner from each firm review the Motion to Dismiss and discuss it with the associate who would be assisting on the response to it.

7. <sup>7</sup>This takes into consideration the 24% reduction which results by excluding the hours of excessive counsel at Schiff Hardin and the 22.3% reduction which would result by allowing only one attorney from the ACLU (Hammell and his successor, Kors) to bill his time. This calculation reaches 22.3% by excluding the 67 hours spent by attorneys Leishman and Grossman from the 300 attorney hours sought by the ACLU.

8. <sup>8</sup>For example, the court in Phillip stated that it was unnecessary to employ three attorneys to try a discrimination case and therefore disallowed the time spent by the third counsel at trial as unnecessary.

9. <sup>9</sup>In his Objections, the Complainant erroneously references the Hearing Officer's "25%" reduction due to block billing. As shown above, the reduction is actually 18.25% and 13.5% of all hours billed respectively for Schiff and the ACLU. This was arrived at by excluding 25% of all hours which were contained in block billed entries on the theory that while the work was actually done, there is no way to know which of those hours were excessive. Because the percentages were calculated as a ratio of excluded block-billed entries to total hours sought, the downward deduction will be applied to the entire amount of hours claimed.

10. <sup>10</sup>As with block billing, the percentage calculation of vague entries was determined based on the ratio of vague entries to total time billed. Therefore, this deduction, too, must be made from the total time claimed. See fn. 8 *supra*.

11. <sup>11</sup>A court (or administrative tribunal) is well within its discretion to deny a fee petition, or any part thereof, when an amount is requested which is "outrageously unreasonable." Environmental Defense Fund, Inc. v. Reilly, 1 F.3d 1254, 1257 (D.C. Cir. 1993); Fair Housing Counsel of Greater Washington v. Landow, 999 F.2d

92, 96 (4th Cir. 1993).

12. <sup>12</sup> In contrast to Schiff's expense billing statement, the affidavit of Roger Leishman provides sufficient information to determine where a particular messenger was being sent, for what purpose a taxi was being taken and for what purpose a parking fee was being taxed as a cost. In addition, counsel attached the billing statements of their expert witnesses in support of those expenses.