

## BEFORE THE INDIAN CLAIMS COMMISSION

THE SUQUAMISH TRIBE OF INDIANS,	)	
	)	
Plaintiff,	)	
v.	)	Docket No. 132
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: July 31, 1974

OPINION ON ATTORNEY'S FEE AND EXPENSES

Kuykendall, Chairman, delivered the opinion of the Commission.

The Commission has before it a petition by Frederick W. Post, attorney of record for the Suquamish Tribe, for payment of compensation and reimbursement of litigation expenses. Mr. Post requests the award of an attorney fee in the amount of \$4,217.05, and the reimbursement of a total of \$1,329.49 in litigation expenses. In our findings of fact 9 and 10, entered herein today, we describe the legal services performed by Mr. Post, and conclude that he is entitled to an attorney fee in the amount of \$3,700.00--which represents 8.77 percent of the \$42,170.50 award to plaintiff in this docket<sup>\*/</sup>--less \$750, which has already been paid by plaintiff. In this opinion we will explain more fully why we are not awarding Mr. Post the full fee allowable under his contract and why we are denying certain of the litigation expenses claimed by Mr. Post. In addition, we will discuss one other question unique to this docket.

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<sup>\*/</sup> 24 Ind. Cl. Comm. 34 (1970), aff'd, 197 Ct. Cl. 775 (1972).

In finding of fact 7 we describe the circumstances surrounding the trip of two representatives of the Suquamish Tribe to Washington, D. C., in February 1973. In short, Mr. Post sent to the tribal chairman what appeared to be notification of a hearing on his fee petition to be held before the Commission on February 15, 1973. In response to this notice plaintiff sent two representatives to Washington to participate in the hearing. In fact, no hearing in this docket was scheduled before the Commission for February 15, 1973, or any other date. Mr. Post's "Notice of Hearing" was actually a response to the Commission's calendar conference order of January 19, 1973.

It is clear to the Commission that in sending his "Notice of Hearing" to the tribe Mr. Post did not intend to deceive the tribal members and did not expect that they would send representatives to Washington. On the other hand, it is equally clear that Mr. Post's choice of language in his notice was, to say the least, unwise. The words "Notice of Hearing," "Notice is hereby given," and "will come on for hearing. . . on February 15, 1973, at 10:00 a.m.," were quite susceptible of being interpreted as the plaintiff in fact interpreted them.

We are of the opinion that Mr. Post was substantially responsible for this failure of communication between himself and his client. This unfortunate misunderstanding caused his client to expend unnecessarily a large sum of money. The Commission concludes that in light of this failure of communications it is unable to award Mr. Post the maximum fee allowable under his contract. Accordingly, we are awarding him an attorney fee of \$3,700.00.

In paragraph 11 of his petition Mr. Post requests reimbursement for expenses incurred during two trips to Washington, D. C. In each instance he apportions the expenses equally between the plaintiff and the Lummi Tribe, plaintiff in Docket 110. For each of these trips Mr. Post claims an expenditure of \$50, which in one instance he designates as per diem expenses for 5 days, and in the other as meals for 5 days. Mr. Post does not submit any receipt or voucher to support these claimed expenditures.

Rule 34b of the Commission's Rules of Procedure, 25 C.F.R. §503.34b, provides that each claimed expense item must be supported by receipts or other evidence of payment. The Commission's Policy Statement §102 states that with respect to minor expenses, for which it is not practicable to obtain receipts, the Commission will accept as evidence of payment the sworn statement of the attorney that the expenditure was made. "However, such costs must be itemized and adequately explained." Policy Statement §102. In our opinion, designations such as per diem expenses for five days or meals for five days are not sufficiently itemized to satisfy the requirements of the policy statement. We must therefore deny these expenses.

In its response to the Commission's request for comment on Mr. Post's petition, which we have quoted in finding of fact 6, plaintiff stated that it is dissatisfied with the judgment in this docket, and that accordingly it does not intend to accept any award in this case. It further stated that, although it realizes that Mr. Post has a just claim for a full 10% of the amount of the award, he cannot be paid out

of the judgment in this case because the tribe is not accepting it.

At a hearing on Mr. Post's petition, held in Seattle, Washington, on August 7, 1973, Mr. Donald Bread, plaintiff's business manager, stated that

[t]he Suquamish Tribe also feels that the contract that was negotiated between Frederick Post and the Suquamish Tribe was a contract as between the tribe and the attorney and not between the tribe, the Indian Claims Commission and the attorney, and therefore payment of expenses and fees should be negotiated between the tribe and the attorney, and not between the Indian Claims Commission and the attorney, and therefore the tribe feels that the Indian Claims Commission has no right to take monies out of that judgment that they rendered to pay Mr. Post.... [Tr. p. 32.]

In sum, it is plaintiff's position that Mr. Post cannot be paid out of the monies appropriated to satisfy the judgment in this docket, because plaintiff is not accepting the money, and that in any event it is improper for the Commission to determine the amount of Mr. Post's compensation. Both of these views ignore the responsibilities placed upon this Commission by the Indian Claims Commission Act and by the contract entered into between plaintiff and Mr. Post.

Section 15 of the Indian Claims Commission Act, 25 U.S.C. §70n (1970), directs the Commission to fix the attorney fee and determine the extent of reimbursable expenses in all cases where the amount of the fee is not specified in the attorney contract. Because Congress used the word "shall" rather than "may" in drafting this section of the act, we are not free to refuse to exercise this portion of our jurisdiction.

The contract between Mr. Post and the Suquamish Tribe contains the following provision with respect to fees:

. . . [I]n the event [the claim] is submitted to said court or tribunal, then [the attorneys shall receive] such sum as may be determined by said court or tribunal equitably to be due for the services theretofore rendered under this contract. . . .

It is therefore clear that both Mr. Post and the plaintiff understood and agreed that the Commission would set Mr. Post's fee in this case.

Section 15 of the Indian Claims Commission Act, supra, also provides that the fee set by the Commission "shall not exceed 10 per centum of the amount recovered in any case." The attorney contract provides that compensation is to be "contingent upon a recovery for the Tribe," and that the amount of the compensation shall not "exceed ten per centum of any and all sums recovered or procured . . . ."

We assume that because both the act and the contract speak in terms of recovery by the tribe, plaintiff's position is that since it will not accept the award in this docket it has not recovered, and therefore Mr. Post cannot be paid his fee. This position is based on a misunderstanding of the term recovery. Once the Commission has entered final judgment in favor of a plaintiff, and Congress has appropriated monies to satisfy that judgment, that plaintiff must be considered to have recovered. This follows from the provision in Section 22 of the act that such judgment and appropriation constitutes a full discharge of the United States from any liability arising from a plaintiff's claim. 25 U.S.C. §70u. Clearly a tribe cannot defeat its attorney's fee claim by refusing to accept the judgment he has obtained for it.

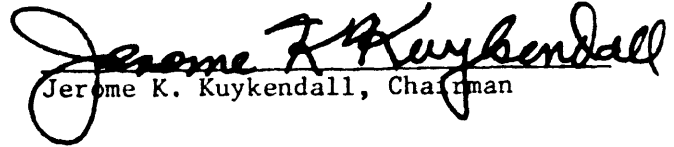
The question whether Mr. Post should be paid from the judgment

monies in this case or from other monies that the tribe may have is not within the Commission's power to determine. Section 15 of the act, supra, grants us jurisdiction to fix the fees of attorneys. It does not grant us jurisdiction to specify whether those fees are to be paid out of any particular fund.

The Commission is aware of the possible interest of the heirs of Mr. Kenneth L. R. Simmons in the attorney fee being awarded today. Mr. Simmons was one of four attorneys who contracted with plaintiff to present its claim to the Commission, and, along with Mr. Post, retained his interest in the contract when the petition was filed in this docket. Mr. Simmons died during May 1953.

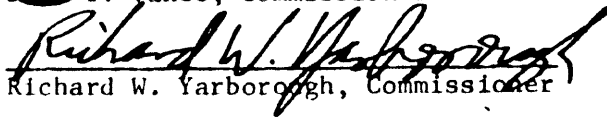
Mr. Post has not alleged, nor do the records of the Bureau of Indian Affairs indicate, that Mr. Simmons formally assigned his interest in the contract to Mr. Post prior to his death. However, the record does indicate that on February 3, 1953, Mr. Simmons transferred to Mr. Post a portion of the advance fee that had been paid him by the plaintiff. The Commission is of the opinion that this fact creates the presumption, unrebutted in the record, that Mr. Simmons and Mr. Post resolved the issue of Mr. Simmon's interest in the contract with plaintiff before his death. Nonetheless, to protect any possible interest of Mr. Simmon's heirs in the attorney fee being

awarded in this docket, the Commission will direct its Clerk to forward a copy of the decision to those heirs.

  
Jerome K. Kuykendall, Chairman

Concurring:

  
John F. Vance, Commissioner

  
Richard W. Yarborough, Commissioner

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Margaret H. Pierce, Commissioner

  
Brantley Blue, Commissioner