[Cite as *Sims v. Nissan N. Am., Inc.*, 2013-Ohio-2662.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

William R. Sims et al.,	:	
Appellants-Appellants,	:	
v.	:	No. 12AP-833 (C.P.C. No. 12CVF-04-4310)
Nissan North America, Inc.,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	
Nissan North America, Inc.,	:	
Appellant-Appellant,	:	
v.	:	No. 12AP-835 (C.P.C. No. 12CVF-04-4683)
William R. Sims et al.,	:	(REGULAR CALENDAR)
Appellees-Appellees.	:	

D E C I S I O N

Rendered on June 25, 2013

Morganstern, MacAdams & DeVito Co., L.P.A., and *Christopher M. DeVito*, for appellants William R. Sims and Buick-GMC Truck, Inc.

Taft, Stettinius & Hollister LLP, Joseph C. Pickens and *Steven C. Fitch*; *Dorsey & Whitney LLP, Steven J. Wells* and *Rebecca Weisenberger*, for appellee Nissan North America, Inc.

Stockamp & Brown, LLC, David A. Brown, *Deanna L. Stockcamp* and *John C. Camillus*, for Amicus Curiae.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} This consolidated appeal originated as an administrative protest by Sims Buick GMC Nissan and William R. Sims ("Sims") against Nissan North America, Inc. ("Nissan") because Nissan sought to terminate Sims' new car dealership. Sims filed a protest with the Ohio Motor Vehicle Dealers Board ("Board") and prevailed at the administrative level. Sims was awarded attorney fees and costs, but in an amount less than requested by Sims' counsel.

{¶ 2} The Franklin County Court of Common Pleas affirmed the order of the Board sustaining the protest of Sims, affirmed the order not to award expert witness fees, affirmed the award of costs in the amount of $8, 447.80, and remanded the matter for an evidentiary hearing to support and justify the attorney fees of Sims' counsel.

{¶ 3} Sims has appealed the fee award, while Nissan has appealed the merits of the protest. Both the common pleas court and this court consolidated the appeals. In addition, the Ohio Automobile Dealers Association and the National Automobile Dealers Association conditionally filed a friend of the court brief and moved for leave to do so. We grant the motion.

I. BACKGROUND

{¶ 4} After Nissan provided notice to Sims that Nissan intended to terminate Sims' dealer agreement, Sims filed a protest with the Board under R.C. 4517.54(C) challenging Nissan's proposed termination. Nissan's reason for termination was Sims' failure to achieve Nissan's standard benchmark for sales performance, known as the regional sales effectiveness ("RSE"). Sims protested that the RSE formula was unreasonable and discriminatory under the unique circumstances of the case.

{¶ 5} The protest was heard by the Board's hearing examiner from October 18 through October 21, 2010. The primary issue in the protest was whether Nissan's use of the RSE sales penetration standard was reasonable under the unique circumstances of this case. The hearing examiner recommended that the Board sustain the protest, finding that Nissan had not met its burden of showing good cause for the termination. The Board approved the report and recommendation, and later granted in part Sims' request for attorney fees and costs.

II. ASSIGNMENTS OF ERROR

{¶ 6} In its appeal on the merits of the protest action, Nissan assigns the following as error:

> I. The Board and the Court erred as a matter of law by concluding that Nissan's sales performance standard, which Nissan uniformly applies to all of its dealers in Ohio and nationwide, was "unreasonable" pursuant to R.C. §§ 4517.55(A)(1),(7) and (B)(5) because it was not uniquely tailored to Sims' market, and by requiring Nissan to evaluate Sims using a sales performance standard different from that applied to all other Ohio Nissan dealers.
>
> II. The Board erred as a matter of law by concluding that the statutory "good cause" factors set forth in R.C. §§ 4517.55(A)(1) and (7) weighed in favor of Sims, and the Court erred as a matter of law by upholding those Board conclusions.
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> III. The Board erred as a matter of law when it filed to make any factual findings pursuant to R.C. §§ 4517.55(A)(1) and (7) regarding whether additional sales were available to Sims, despite its "conclusions of law" that these factors weighed in favor of Sims, and the Court erred as a matter of law by excusing the Board's failure.
>
> IV. The Court abused its discretion when it upheld the Board's conclusion that the "good cause" factors set forth in R.C. §§ 4517.55(A)(1) and (7) weighed in favor of Sims and that Nissan's sales performance standard was unreasonable.
>
> V. The Court erred by upholding the Board's conclusion that Sims' Protest should be sustained.

III. STANDARD OF REVIEW

{¶ 7} As an initial matter, we address the appropriate standard of review. A party adversely affected by an order of an agency may appeal that order to the court of common pleas. That court must affirm the order of the agency if "it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. 119.12; *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). The court of

common pleas' "review of the administrative record is neither a trial de novo nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Veterinary Med. Bd.*, 2 Ohio App.3d 204, 207 (1st Dist.1981), quoting *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275, 280 (1955).

{¶ 8} The standard of review for a court of appeals in an administrative appeal is more limited than that of the court of common pleas. The court of appeals' review is limited to determining whether the court of common pleas abused its discretion. *Scheidler v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 04AP-584, 2005-Ohio-105, ¶ 10. " 'The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). On questions of whether the agency's order was in accordance with the law, this court's review is plenary. *Gralewski v. Ohio Bur. of Workers' Comp.*, 167 Ohio App.3d 468, 2006-Ohio-1529, ¶ 17.

{¶ 9} Here, a transcript of the proceedings was not part of the official record transmitted electronically to the court of common pleas on June 1, 2012. Although Nissan characterizes its arguments as questions of law, the failure to provide a transcript of the testimony of lay or expert witnesses does not allow us to review the factual determinations made on the basis of the testimony. We do not view selected excerpts submitted as part of an appendix as a substitute for a transcript. Therefore, we accept all factual determinations as true.

IV. NISSAN'S APPEAL OF THE BOARD'S DECISION ON THE PROTEST

{¶ 10} Nissan argues that the Board erred as a matter of law by requiring it to apply different sales performance criteria in a discriminatory manner contrary to statute. The Ohio Motor Vehicle Dealer Act, R.C. 4517.01 et seq., governs the termination of new motor vehicle franchises. R.C. 4517.54(A) requires that "good cause" be established before a franchisor can terminate a new motor vehicle franchise. In addition, R.C. 4517.55(A) states, in pertinent part: "In determining whether good cause has been established by the franchisor for terminating * * * a franchise, the motor vehicle dealers

board shall take into consideration the existing circumstances, including, but not limited to," and then the statute lists nine non-exclusive factors that may weigh for or against termination. One factor, in and of itself, can serve as a sufficient basis to establish good cause. If the Board does not find good cause, the franchisor may not terminate the franchise agreement. R.C. 4517.54(D). Moreover, R.C. 4517.55(B)(5) provides that "[f]ailure of the franchisee to achieve any unreasonable or discriminatory performance criteria" specifically does not constitute good cause to terminate a franchise. Here, the Board concluded that the performance criteria were unreasonable as applied to Sims.

{¶ 11} In addition, manufacturers are prohibited from "discriminating against a franchisee, as compared to a same line-make franchisee, with regard to * * * motor vehicle sales expectations, [and] motor vehicle market penetration. R.C. 4517.59(A)(15).

{¶ 12} According to the dealer agreement between Sims and Nissan, it is permissible for Nissan to measure the dealer's sales penetration in relation to the dealer's assigned primary market area ("PMA"). The hearing examiner found that:

> Sales penetration calculates a dealer's new vehicle sales (regardless of where they are registered) as a percentage of the registrations of all competitive makes in the dealer's PMA. To gauge sales penetration effectiveness, a dealer's sales penetration is then compared as a ratio to [Nissan's] sales penetration throughout the dealer's assigned region to determine whether the dealer being analyzed is penetrating its PMA below, at or above the average for all Nissan dealers in the region. * * * Expressed as a percentage, the resulting quotient calculates a dealer's "regional sales effectiveness" or "RSE."

Feb. 4, 2011 Report and Recommendation, at 7.

{¶ 13} Sims belonged to Nissan's Midwest Region, a region consisting of 13 states, including Ohio. His PMA was the Warren, Ohio/Trumbull County area. Warren, Ohio has an exceptionally large GM market share because of the presence of the Lordstown GM facility. Employees of the plant, their families, and retirees are loyal to the GM brand. Because of this "Lordstown effect," almost all import sales, including Honda and Toyota, were depressed. Sims requested that Nissan take into consideration GM's presence in the Warren PMA, but Nissan did not.

{¶ 14} Nissan argues that to do so with Sims' dealership is tantamount to violating R.C. 4517.59(A)(15) that prohibits discriminatory evaluations. Nissan believes that its RSE must be applied uniformly to Ohio dealers as a group to avoid discriminating against other dealers.

{¶ 15} However, Nissan's own dealer contract with Sims sets forth additional criteria to be considered in evaluating a dealer's sales performance. Specifically, "any special local marketing conditions" are to be taken into account where appropriate.

{¶ 16} The hearing examiner determined that the unique circumstances of Sims' PMA should be taken into account as part of the "existing circumstances" of the case as set forth in R.C. 4517.55(A). He said:

> The existing circumstances demonstrate that, in the Warren PMA, GM holds a competitive advantage over every other manufacturer, including [Nissan]. The influence of the GM Lordstown manufacturing facility upon the sales of GM vehicles in the Warren PMA creates a difficult environment for [Sims] to sell Nissan vehicles. The evidence adduced at hearing supports the conclusion that the presence of the Lordstown plant in this economically depressed geographic area was a substantial factor in preventing [Sims] from meeting the RSE standard. [Nissan's] failure to consider GM's influence on [Sims'] ability to make sales of Nissan products to achieve the RSE score renders its Notice of Termination unreasonable.

(Footnote omitted.) Feb. 4, 2011 Report and Recommendation, at 27.

{¶ 17} Nissan argues that the Board erred by requiring Nissan to use an individual performance standard for Sims that would be discriminatory in that it treated Sims differently than other Ohio Nissan dealers. Nissan states that a subjective standard that is adjusted for local market conditions of every dealer is, in reality, no standard at all.

{¶ 18} The Board did not say that Nissan could not use the RSE to terminate dealers. Rather, limited to the facts of this case, the existing circumstances, and other R.C. 4517.55(A) factors, Nissan could not meet its burden of showing good cause for the termination. The hearing examiner stated that under certain circumstances, a smaller geographic area in which to consider performance might be appropriate, and that this case presented those circumstances. The hearing officer devoted several pages to

carefully detailing the facts that led him to the conclusion that the Warren PMA was one such situation. He found that Nissan did not consider GM's presence in Warren in evaluating Sims' performance. Therefore, he concluded that use of the RSE without taking into consideration the local market condition rendered the normal measure of performance unreasonable.

{¶ 19} To the extent Nissan is arguing that the hearing examiner's factual findings were wrong, unsupported, or internally inconsistent, the absence of a transcript defeats any such claim. There were conflicting expert opinions, and the trial court properly deferred to the Board's resolution of the battle of the experts. We will not substitute our judgment for that of the hearing examiner as to any factual determinations.

{¶ 20} R.C. 4517.55(A) is clear on its face. In determining whether good cause exists to terminate a dealer's franchise, the Board is required to take into consideration "existing circumstances." Nor is it discriminatory to utilize a reasonable performance standard, one that takes into account "existing circumstances." Here, there was a great deal of evidence about local market conditions that Nissan failed to take into account. This factor loomed large in the decision to find a strict adherence to the RSE to be unreasonable. Therefore, rigid adherence to the RSE was not a reasonable standard.

{¶ 21} We find no abuse of discretion in the court of common pleas affirming these facts and conclusions. Nissan's five assignments of error are overruled.

V. SIMS' APPEAL ON ATTORNEY FEES AND COSTS

{¶ 22} In its appeal on the issue of attorney fees and costs, Sims assigns the following as error:

> I. The Board and Common Pleas court erred as a matter of law by denying reimbursement of expert witness fees and other litigation expenses incurred, which are enumerated and required to be paid pursuant to the plain reading of R.C. 4517.65(C), in order to make the prevailing dealer whole in an administrative proceeding seeking injunctive relief.
>
> II. The Board and Common Pleas court erred as a matter of law by denying the reasonable attorney fees requested, which was supported by an affidavit, an itemized billing, and <u>un</u>controverted by any evidence in the Board record.

> III. The Board erred as a matter of law by reducing the amount of the uncontroverted attorney fees requested (1) without a hearing and (2) denying discovery requested, which violates constitutional due process rights.
>
> IV. The Common Pleas court erred as a matter of law by substituting its judgment for that of the Board, ignoring the undisputed amount of attorney fees requested, and failing to review and determine assignments of error presented for review.

VI. EXPERT WITNESS FEES AND COSTS

{¶ 23} In Sims' first assignment of error, we must decide whether the court of common pleas erred as a matter of law in affirming the hearing officer's decision not to allow an award of expert witness fees and other litigation expenses. On June 1, 2011, the hearing officer issued an order that disallowed expert witness fees and allowed only the costs to which officers, witnesses, and others were entitled in a civil action.

{¶ 24} In compliance with the request of the hearing examiner, Sims' counsel then prepared and submitted an affidavit in support of the requested attorney fees. Sims' counsel requested attorney fees of $411,623.32 (including a lodestar multiplier of 2), expert witness fees of $57,700.03, and itemized litigation costs of $13,982.94. Counsel also requested a hearing and discovery as to Nissan's fees and costs. Nissan did not submit any evidence in opposition to refute the requested fees. Instead, Nissan argued that the requested attorney fees were too high, certain itemized attorney entries should be excluded, and that expert witness fees and other litigation expenses were not recoverable.

{¶ 25} In the meantime, the Board appointed a new hearing examiner who had not heard testimony or presided over the protest. The new hearing examiner found Sims' uncontested hourly rate to be reasonable, denied Sims' request for discovery of Nissan's fees and costs, and denied Sims' request for a hearing. The hearing examiner then reduced the amount of attorney fees and costs by approximately $30,000, and rejected the lodestar multiplier x 2 thereby bringing the total fees and costs to a total of $175,324.99 in a report and recommendation dated March 1, 2012.

VII. FEE SHIFTING STATUTE

{¶ 26} The question before us is a matter of law and one of statutory interpretation. R.C. 4517.65(C) governs entitlement to fees in a protest action and provides as follows:

> The franchisor shall be liable to the franchisee or prospective transferee for reasonable attorney fees, witness fees, and any other costs incurred by the franchisee or prospective transferee in any protest filed under section 4517.50, 4517.53, 4517.54, or 4517.56 of the Revised Code in which the motor vehicle dealers board finds in favor of the protesting franchisee or prospective transferee.

{¶ 27} Because the Board found in favor of Sims in the matter of the protest, there is no doubt that Sims is entitled to its "reasonable attorney fees, witness fees, and any other costs" incurred in the action. Sims takes the position that the statutory language is broad, and must be construed in order to give effect to the spirit and intent of the statutory provision. Nissan takes the position that a body of case law has developed around the terms witness fees and costs, and that case law supports its interpretation of the statute.

{¶ 28} Prior cases have established the remedial nature of the fee shifting statute and the policy behind it. The statute is designed to make whole the dealer who successfully protests a termination.

{¶ 29} In *Lally v. Am. Isuzu Motors Inc.*, 10th Dist. No. 05AP-1137, 2006-Ohio-3315, ¶ 48, this court stated:

> We agree that R.C. Chapter 4517 is remedial in nature. See *Earl Evans Chevrolet, Inc. v. Gen. Motors Corp.* (1991), 74 Ohio App.3d 266, 276. We further agree that the attorney fees provision in R.C. 4517.65 "has the remedial purpose of deterring manufacturers from using their vast resources to outspend opponents." *Hall Artz Lincoln-Mercury*. Lastly, we agree that, when OMVDB finds in favor of a protesting franchisee or prospective transferee in a protest filed under R.C. 4517.50, 4517.53, 4517.54 or 4517.56, an award of attorney fees is mandatory.

VIII. PROTEST ACTION V. CIVIL ACTION

{¶ 30} In an administrative protest governed by R.C. 4517.65(C), money damages are not available to a successful protestant. However, in a civil action brought under R.C. 4517.65(A), money damages, specifically double damages, are prescribed. The remedies in a civil action under the statute are double damages, reasonable attorney fees, and court costs. This language is at variance with the provision cited above for an administrative protest. Under R.C. 4517.65(C), double damages are not allowed, the word "court" is not used in connection with the word "costs," and the phrase "any other costs" is present but does not appear in R.C. 4517.65(A).

{¶ 31} We infer from the difference in the language that the General Assembly made a distinction between the civil action, which provides for double monetary damages, court costs, and reasonable attorney fees, and the administrative action in which a successful protestant is to receive injunctive relief, reasonable attorney fees, witness fees, and any other costs incurred.

{¶ 32} It is a cardinal rule of statutory interpretation that we look to the language of the statute itself in determining legislative intent. *State ex rel. Van Dyke v. Pub. Emp. Retirement Bd.*, 99 Ohio St.3d 430, 2003-Ohio-4123. If statutes relate to one another they should be read together with the differences in language carefully compared. *See Chrysler Corp. v. Bowshier*, 10th Dist. No. 01AP-921 (Mar. 28, 2002) ("R.C. 4517.65(A) and (B) relate to one another and must be read together. Indeed, R.C. 1.42 states that words and phrases shall be read in context and construed according to the rules of grammar and common usage."). Because the legislature created both civil and administrative remedies, we cannot overlook the plain language of the statute that uses different language to describe different relief.

{¶ 33} We note that the term "witness fees" is not even present in what is recoverable in a civil action, presumably because R.C. 2335.06(A)(1) sets forth the fees and mileage in civil cases, to wit: "Twelve dollars for each full day's attendance and six dollars for each half day's attendance at a court of record * * * to be taxed in the bill of costs." Additionally, the board of county commissioners sets the reimbursement rate for mileage.

{¶ 34} Nissan is correct in stating that a body of law has developed around the terms "witness fees" and "costs." However, we note that many statutes dealing with the issue are concerned about expenditure of public funds by the state agency that is paying witness fees and mileage. *See* 1999 Ohio Atty.Gen.Ops. No. 99-011, (discussing agency responsibility for payment of witness fees in proceedings before state agencies). In many, but not all situations, lay witnesses are entitled to receive the witness fees and mileage set forth in R.C. 2335.05 or 2335.06. *Id.* For example, R.C. 4517.32 deals with the rule-making powers of the Board, hearings, and witnesses. In pertinent part, the statute states:

> The board may, through its secretary, issue a subpoena for any witness * * * directed to the sheriff of the county where such witness resides or is found, which subpoena shall be served and returned in the same manner as a subpoena in a criminal case.
>
> [T]he fees of the sheriff shall be the same as that allowed in the court of common pleas in criminal cases. Witnesses shall be paid the fees and mileage provided for under section 119.094 of the Revised Code. The fees and mileage shall be paid in the same manner as other expenses of the board.

{¶ 35} This statute, contained in the same chapter of the Revised Code as the statute we are construing, uses specific language for witness fees that are to be paid by the Board, and that they are to be paid in accordance with fees in the court of common pleas. However, in the instant case, we are not dealing with the expenditure of public funds. Instead, R.C. 4517.67(C) is a *fee shifting* statute that shifts the fees from the dealer to the manufacturer in a successful protest. Thus, we are not persuaded that the use of the terms "witness fees and any other costs incurred by the franchisee" is as restrictive as the court of common pleas found them to be.

{¶ 36} The phrase "any other" with respect to costs is both more generous and more inclusive than the phrase "court costs." The cases cited by Nissan are appropriate to civil actions pursuant to R.C. 4517.65(A). It appears the legislature intended that double damages, reasonable attorney fees, and court costs (including witness fees), were sufficient compensation in a civil action.

{¶ 37} However, in a protest action brought under R.C. 4517.65(C) and decided by the Board, the language is targeted to make a dealer whole without the availability of money damages. By not allowing expert fees as part of the "any other costs incurred by the franchisee," the remedial purpose of the statute is defeated. The effect on dealers who wage a successful protest is that they must absorb the cost of experts and other litigation costs even though expert testimony and the costs associated therein may be critical to their success.

{¶ 38} It is reasonable that "any other costs of the action" include expert witness fees because many if not most protest actions require expert testimony. This case, for example, involved expert witnesses for both Nissan and Sims. In order to make a successful protestant whole, expert witness fees, if shown to be necessary and reasonable to the protest, are a necessary component of making the dealer whole. Thus, "witness fees and any other costs incurred by the franchisee" in this context has a broader meaning than the statutory amount authorized in civil or criminal actions by R.C. 2335.05 and 2335.06. Limiting witness fees and costs to those available in civil actions is not appropriate where, as here, a statute provides an expressly broader definition for the reimbursement of costs incurred by the dealer.[1]

{¶ 39} Based on the plain language of the statute, particularly when the administrative action is compared to civil court proceedings, and based on the legislative intent expressed in court cases interpreting the statute, we conclude that the Board has the authority to allow expert witness fees and litigation costs in an action brought under R.C. 4517.65(C). We do not read R.C. 4517.65(C) as giving the Board unrestrained discretion to tax costs to reimburse a successful protestant for every expense he or his attorney has seen fit to incur in the conduct of his case. Items proposed by prevailing dealers as costs should always be given careful scrutiny.

{¶ 40} Therefore, Sims' first assignment of error is sustained in part and remanded to the Board to award expert witness fees and any other costs after a determination of the reasonableness of the expert fees and costs submitted by Sims' counsel.

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[1] Counsel for Sims represented at oral argument that it is common practice to award expert fees in dealer protests.

IX. ATTORNEY FEES

{¶ 41} Sims' remaining assignments of error concern the amount of attorney fees awarded in the action. The undisputed evidence demonstrates that Sims' counsel submitted an affidavit showing 446.95 hours of legal services billed between $200 - $500 per hour, for a total fee of $205,811.66. Counsel for Sims asserted that considering the novelty and difficulty of the questions presented, the professional skill required, the reputation of the attorneys, and the results obtained, the Board should multiply the lodestar amount of attorney fees billed by a multiplier of two for a total attorney fee award of $411,623.60.

{¶ 42} Sims requested discovery of Nissan's attorney fees and costs in the matter. Nissan did not object to the reasonableness of time expended or the hourly rate charged. Because Nissan did not attack the reasonableness of the claimed attorney fees by opposing affidavit or any other evidence, the Board determined that Sims was not entitled to discovery of Nissan's attorney fees and costs. Instead, Nissan argued that time spent on unsuccessful claims should be excluded, and that expert witness fees and other litigation expenses should not be recoverable.

{¶ 43} The hearing officer and the Board accepted the hourly rate but rejected the lodestar multiplier and excluded approximately $30,000 of attorney services related to the unsuccessful argument about expert witness fees, other time not associated with the protest, and a re-argument of certain unsuccessful claims under R.C. 4517.59. As previously noted, this reduced the Board's total award to $175,324.99.

{¶ 44} The court of common pleas found the billing statement provided by counsel to be inadequate. The court found that Sims failed to produce evidence that its hourly rate was reasonable. Even so, the court presumed that the hearing examiner had sufficient information to make a determination of customary rates. The court also took issue with the incremental billing reflected on the statement. The court took note that the customary norm in Franklin County for incremental billing is .10 of an hour or six-minute increments. The court found that Sims' counsel billed in .17 of an hour or 10-minute increments. The court declined to speculate on whether the use of such an increment inflated the bill unreasonably.

{¶ 45} The court's chief concern was the use of "block billing," which is the practice of stating a number of legal tasks in a paragraph followed by an amount of time that does not individually reflect what time was spent on what task. The court stated that the use of such a practice requires a tribunal to speculate as to what task was performed, how long it took to complete the task, and the specific nature of the task. The court then remanded the matter to the Board for an evidentiary hearing where Sims would have the right to present competent evidence in support of the fee request and to justify its counsel's fee.

{¶ 46} Where a tribunal is empowered to award attorney fees by statute, the amount of such fees is within the sound discretion of the tribunal hearing the matter. *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.*, 23 Ohio App.3d 85, 91 (12th Dist.1985). In determining an amount of fees to award, the tribunal must first compute the "lodestar" figure, the number of hours expended multiplied by a reasonable hourly rate. *Bittner v. Tri-County Toyota, Inc.* 58 Ohio St.3d 143, 145. Once a tribunal calculates the lodestar figure, the tribunal may modify that calculation by the factors set forth in the Ohio Rules of Prof.Cond.R. 1.5(a) which provides, in pertinent part:

> The factors to be considered in determining the reasonableness of a fee include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;

> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent.

{¶ 47} An application for attorney fees must present sufficient documentation of the hours worked and the work performed to permit a determination regarding the merits of the application. *Miller v. Leesburg*, 10th Dist. No. 97APE10-1379 (Dec. 1, 1998), citing *Natl. Assn. of Concerned Veterans v. Secy. of Defense*, 675 F.2d 1319, 1327 (C.A.D.C.1982). The burden of proving that the time was fairly and properly used and the reasonableness of the hours expended rests upon the attorney. *Climaco, Seminatore, Delligatti & Hollenbaugh v. Carter*, 100 Ohio App.3d 313, 323 (10th Dist.1995). The tribunal must base its determination of reasonable attorney fees upon the actual services performed, and there must be some evidence that supports the tribunal's determination. *Id.*

{¶ 48} In *Earl Evans Chevrolet, Inc. v. Gen. Motors Corp.*, 74 Ohio App.3d 266 (11th Dist.1991) the argument was rejected that claims of counsel alone were insufficient evidence upon which reasonable attorney fees could be awarded. The court found that when an attorney's recapitulation of his fees is accepted as evidence and is uncontradicted by opposing counsel, it is, standing alone, sufficient to maintain the motion for fees. *Earl Id.* at 286. Such is the case here.

{¶ 49} The court of common pleas, acting as an appellate court, must determine whether there is reliable, probative, and substantial evidence in support of an award of attorney fees. R.C. 119.12. The court of common pleas substituted its judgment for that of the hearing officer and the Board with regard to the determination of the fees. The Board had before it some evidence of the reasonableness of the attorney fees, and in the absence of any evidence to the contrary, it was not an abuse of discretion to award the requested attorney fees. Furthermore, the attorney fees disallowed with respect to arguing expert witness fees should be reinstated given our determination that such fees are allowable as a matter of law.

X. LODESTAR MULTIPLIER X 2

{¶ 50} Neither the Board nor the court of common pleas found that an upward deviation from the lodestar was warranted. Sims contends that since R.C. 4517.65(A) authorizes double damages for a prevailing dealer, then double actual attorney fees should be awarded in a successful protest. We disagree. Double attorney fees are never mentioned in R.C. 4517.65(C). There is no evidence in the record that this case was especially difficult or required exceptional professional skill other than Sims' counsel's assertion that he was entitled to an upward deviation from the lodestar.

{¶ 51} Given our disposition of the attorney fee issue, there is no need to address Sims' due process argument regarding the necessity of a hearing.

XI. CONCLUSION

{¶ 52} For the reasons stated above, Nissan's five assignments of error are overruled. Sims' first assignment of error is sustained in part and overruled in part and remanded to the Board for a determination of the reasonableness of the expert fees and any other costs originally submitted by Sims and denied by the hearing officer. Sims' second assignment of error is sustained in part and the matter remanded to the Board for reinstatement of the uncontroverted amount of attorney fees requested ($205,811.66) minus any attorney fees not associated with the protest including time spent on claims under R.C. 4517.59(A) and (M). Sims' second assignment of error is overruled as to any lodestar multiplier. Sims third assignment of error is overruled in part with respect to a lodestar multiplier, rendered moot with respect to the constitutional due process claim, and sustained in part with respect to reinstating the attorney fees for the recovery of expert fees. Sims' fourth assignment of error is sustained. The matter is remanded to the Board for further proceedings in accordance with this decision.

Motion for leave to file a friend of the court brief is granted;
judgment affirmed in part and reversed in part;
remanded for further proceedings.

BROWN and DORRIAN, JJ., concur.