

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

72 M.S.P.R. 55

Docket Number SF-0752-90-0042-A-1

**ROBERT L. DEL BALZO, Appellant,**

**v.**

**DEPARTMENT OF THE INTERIOR, Agency.**

Date: OCT 4, 1996

Peter B. Broida, Esquire, Arlington, Virginia, for the appellant.

Clementine Berger, Esquire, Sacramento, California, for the agency.

**BEFORE**

Ben L. Erdreich, Chairman  
Beth S. Slavet, Vice Chair  
Antonio C. Amador, Member

**OPINION AND ORDER**

The appellant petitions for review of the November 21, 1995 initial decision denying his motion for attorney fees in conjunction with two petitions he had filed for enforcement of a settlement agreement. For the reasons set forth below, we GRANT the petition, VACATE the initial decision, and REMAND the appeal for a determination of the proper amount of the fees.

**BACKGROUND**

In *Del Balzo v. Department of the Interior*, 60 M.S.P.R. 659 (1994), the Board found that the agency violated a settlement agreement with the appellant when it disclosed information about him to another agency. Accordingly, the Board rescinded the agreement, and ordered the administrative judge to reinstate the appellant's original appeal. See *Del Balzo*, 60 M.S.P.R. at 665. On remand, the parties entered into a new settlement agreement, which provided that the agency would:

Pay to appellant wages pursuant to the Back Pay Act (5 U.S.C. § 5596) at the rate of GS-7, step 2, from October 12, 1989 to the date of appellant's return to duty offset by all taxes, deductible retirement contributions, earnings, unemployment compensation, and wages already paid by the agency to appellant pursuant to the January 29, 1990, settlement agreement negotiated in this matter. The agency agrees to initiate processing of payment under this paragraph within ten (10) working days of receipt from

appellant of all documents required by the agency to verify the amount of appellant's entitlement under this paragraph.

. . . .

Pay reasonable attorney fees, subject to proof, to appellant's attorney of record in these proceedings, Peter B. Broida. The agency agrees to initiate processing of payment due under this paragraph within fifteen (15) working days of receipt by the agency of Mr. Broida's complete, adequately documented billing statement.

Appeal File for Docket No. SF-0752-90-0042-I-2, Vol. I, Tab 16.

The parties signed the agreement on June 10, 1994. On September 6, 1994, the appellant filed a petition for enforcement claiming that the appellant had not yet received back pay and his attorney had not yet received his fees. See Compliance File, Docket No. SF-0752-90-0042-C-2, Vol. I, Tab 1. After the appellant received a check for back pay in September 1994, the petition was amended to include a request for a full accounting, and for premium pay, interest, and other amounts to which the appellant might be entitled. See C-2 File, Vol. I, Tab 5. The appellant also raised the issue of whether the agency had made the proper contribution to the appellant's Thrift Savings Plan (TSP) account. See C-2 File, Vol. I, Tab 7. The appellant's attorney received his check for fees as of October 14, 1994. See C-2 File, Vol. I, Tab 6. In a December 19, 1994 telephone conference, the agency's representative stated that she would provide a memorandum to the agency's Inspector General (IG) authorizing the payment of interest, and that the agency would also determine the amount of its contribution to the appellant's TSP and the amount of any appreciation or depreciation. See C-2 File, Vol. I, Tab 9.

In his initial decision, the administrative judge found that the issues remaining were the interest and TSP contributions, to which the appellant was not entitled under the settlement agreement. He further found that, in any event, the agency had agreed to pay interest, and was continuing its efforts to clarify the appellant's proper contributions and earnings in the TSP. See C-2 File, Vol. I, Tab 11.

The appellant filed a petition for review with the Board, which found that the only remaining issue was the TSP, inasmuch as the agency had provided the interest. The Board found that an accounting of the TSP contributions appeared to be imminent, and that, if the appellant did not receive an accounting with which he could agree, he could refile a petition for enforcement. See C-2 File, Vol. II, Tab 11.

In another petition for enforcement, filed while the petition for review on his earlier petition for enforcement was pending, the appellant contended that the agency failed to make payments to the Social Security Administration on the appellant's behalf. See Docket No. SF-0752-90-0042-C-3, Vol. I, Tab 1. He further argued that it appeared that the information to be submitted to the SSA was untimely under a certain IRS publication. See *id.*, Tab 4. In his initial decision, the administrative judge found that the agency had shown that it made the required SSA payments, and that the appellant was not entitled to a copy of the report that the agency was required to prepare pursuant to the IRS publication. See C-3 File, Tab 5. He denied the appellant's petition for enforcement.

The appellant now seeks attorney fees for the compliance proceedings. In his initial decision, the administrative judge found that the appellant was not entitled to fees, because he was not the prevailing party and had not shown that fees would be in the interest of justice. The administrative judge noted that the appellant's petitions for enforcement had been denied, and found that the agency had complied with the settlement agreement. He further found that the agency had shown "exceptional good faith" in attempting to satisfy the appellant's "demands" in areas such as interest, TSP contributions and SSA payments, which were not specifically mentioned in the settlement agreement. See Attorney Fee File, Vol. I, Tab 7 at 4-5.

On petition for review, the appellant argues that the administrative judge erred in finding that the appellant was not a prevailing party, and that attorney fees were not in the interest of justice. He further contends that he is entitled to fees under the settlement agreement. The agency has responded to the petition for review.

### ANALYSIS

*The appellant was the prevailing party in the first enforcement petition.*

In seeking an award of attorney fees, an appellant must show that an attorney-client relationship existed and that fees were incurred. An appellant must also show that he is the prevailing party and that fees are warranted in the interest of justice. Finally, he must show that the amount of the fees requested was reasonable. See *Coon v. U.S. Postal Service*, 62 M.S.P.R. 180, 185 (1994). Here, the administrative judge did not address whether an attorney-client relationship existed or whether fees were incurred; based on the record, we find that such a relationship did exist and that fees were incurred. See Attorney Fee File, Tab 1.

In finding that the appellant was not a prevailing party, the administrative judge erroneously placed the burden of proof on the appellant. In attorney fee motions based upon petitions for enforcement, the burden of proof is upon the agency to prove its compliance, rather than on the appellant to prove what the agency would not have done in the absence of his petition for enforcement. See *Neal v. Department of Justice*, 65 M.S.P.R. 207, 212 (1994); *Whaley v. U.S. Postal Service*, 61 M.S.P.R. 340, 346 (1994), see also *Garstkiewicz v. U.S. Postal Service*, 981 F.2d 528, 530 (Fed. Cir. 1992).

Here, when the appellant filed his petition for enforcement, the agency had not yet provided the appellant with his back pay or the attorney with his fee payment for the underlying action. Although the settlement agreement set forth only a deadline by when the agency was to initiate the processing of these payments, and did not set a date by which the payment had to be made, the Board has found that when a settlement agreement does not set a time limit for compliance, the Board has the authority to impose a reasonable time limit. See *Hicks v. U.S. Postal Service*, 52 M.S.P.R. 561, 564 (1992) (when an agreement is silent as to the time or duration of performance, a reasonable time under the circumstances will be presumed); *Graff v. Department of the Air Force*, 39 M.S.P.R. 639, 643 (1989). Here, the appellant was not paid the back pay until more than three months after the settlement agreement was signed. Further, the attorney did not receive a fee check until more than four months after the agreement was signed. Clearly, although the agreement specified only a date by which the agency

had to initiate processing of these checks, the point of the agreement was to promptly provide the appellant with the pay, and his attorney with the fees. The fact that the parties set short deadlines for the agency to initiate the processing of these checks after it received the necessary material from the appellant and his attorney leads to the conclusion that they did not contemplate that it would take three and four months respectively to accomplish these goals. We find that, particularly in light of the agreement's requiring the prompt initiation of the processing of these payments, the delay in actually making the payments was unreasonable.

Further, when the appellant received the back pay, it did not include interest. Although the settlement agreement did not specifically mention the word "interest," it did provide that wages were to be paid to the appellant in accordance with the Back Pay Act at 5 U.S.C. § 5596. Because the Back Pay Act requires that wages paid pursuant to the Act shall be paid with interest, see 5 U.S.C. § 5596(b)(2)(A), the appellant was entitled to interest on the back pay he received pursuant to the settlement agreement. Further, the agency did not dispute that the appellant was entitled to interest. Nevertheless, by the time the appellant received the interest, almost seven months had passed since the agreement was signed. This delay was unreasonable. Moreover, prior to the filing of the petition for enforcement, the agency had not taken any action to provide the appellant the interest to which he was entitled.

Similarly, the agency did not contest the appellant's entitlement to contributions to the Thrift Savings Plan (TSP). Indeed, such contributions are required to be made in conjunction with back pay awards and other retroactive pay adjustments. See 5 C.F.R. § 1606.4. Yet, as of January 3, 1995, almost seven months after the initiation of the settlement agreement, the agency stated that it was in the process of crediting the appellant's TSP account with his lost earnings. See C-2 File, Tab 13 at 4. Further, in the Board's decision on the appellant's petition for review on this petition for enforcement, the Board implied that the appellant was entitled to an accounting of the TSP contributions. See *Del Balzo v. Department of the Interior*, 68 M.S.P.R. 77 (1995) (Table); C-2 File, Vol. II, Tab 11. Because the appellant has shown that the agency was in noncompliance with material terms of the agreement, he was a prevailing party in the enforcement proceedings. See *Whaley*, 61 M.S.P.R. at 347. We note that because we have found that the appellant prevailed regarding all of the major issues in his petition, we need not further consider the remaining, minor issues that were resolved fairly easily.

*The appellant is also the prevailing party on his petition for enforcement regarding payments to the Social Security Administration (SSA).*

In this petition for enforcement, the appellant claimed that the agency had failed to make required payments to the Social Security Administration (SSA) on his behalf for the period in which he received back pay. C-3 File, Tab 1. In its May 4, 1995 response, the agency stated that for the pay period ending September 17, 1994, it made the appropriate deductions from the back pay award given to the appellant, and that on September 27, 1994, it transmitted the money to the SSA. The agency stated that it needed to accomplish only the "final step" of notifying the SSA to credit the appellant's individual Social Security employment history record, which it anticipated doing by May 12, 1995. See C-3 File, Tab 3. The agency did not dispute that it was obligated to do

this under the agreement. Further, when mandatory payments such as those to Social Security are deducted from a back pay award, having those payments credited to the appellant's account is of great importance. While the agency was careful to deduct the Social Security payments from its already-delayed back pay award, it waited more than seven months afterwards to see that the appellant's account was properly credited. In short, the agency excessively delayed what appears to be the simple, easily accomplished step of notifying the Social Security Administration. In this regard, we note that the appellant's petition for enforcement was dated April 11, 1995, and that one month after that date, the agency still had not completed its compliance. The agency has presented no evidence that it had fully met its obligation, and we find that the appellant was the prevailing party in this enforcement petition.

*An award of attorney fees is in the interest of justice.*

When an agency delays its compliance beyond a date set by a Board order or a settlement agreement, the U.S. Court of Appeals for the Federal Circuit and the Board have found that the interest of justice is served by the award of attorney fees. See *Garstkiewicz*, 981 F.2d at 530 (Board order); *Whaley*, 61 M.S.P.R. at 340. Here, we have found that the settlement agreement required that the agency perform its obligations under the agreement within a reasonable period of time, and that the agency failed to meet this requirement. Accordingly, we find that an award of attorney fees for the attorney's time on the enforcement petitions is in the interest of justice. Because we have determined that fees should be awarded under 5 U.S.C. § 7701(g)(1), we need not consider the appellant's argument that language in the settlement agreement requires that fees be awarded.

*We remand the appeal for a determination of the appropriate amount of the fees.*

Generally, the administrative judge who decided an appeal on the merits is in the best position to evaluate the documentation submitted by counsel to determine whether the amount of fees submitted is reasonable and to evaluate the quality of the representation afforded by counsel. See *Whaley*, 61 M.S.P.R. at 347. The administrative judge is most familiar with the documentary record and with the quality and efficiency of the attorney's representation below. See *id.* Further, the administrative judge should consider the appellant's supplemental fee petition. See Attorney Fee File, Tab 6.

## **ORDER**

Accordingly, we remand this matter for further adjudication of the appellant's motion for attorney fees consistent with this Opinion and Order.

For the Board  
Robert E. Taylor, Clerk  
Washington, D.C.

