UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MARION ALLEN v. UNITED STATES POSTAL SERVICE	Docket No. AT075299011

OPINION AND ORDER

This case concerns the findings necessary to Board adjudication of a removal under the Civil Service Reform Act (the Reform Act) at 5 U.S.C. § 7513(a) and the standards for award of attorney fees under the Reform Act at 5 U.S.C. § 7701(g)(1) (1978). The initial decision of the Board's presiding official, here reviewed on petition of the United States Postal Service (the agency), ordered the agency to cancel its removal of appellant Marion Allen, and further, found Allen to be entitled to reasonable attorney fees "because the appellant is the prevailing party." 2 MSPB 595 (1979) at 602.

We vacate the determination on attorney fees and remand for consideration in light of the standards set out in this opinion for ascertaining when such an award is "warranted in the interest of justice," as well as other standards for award under 5 U.S.C. § 7701(g)(1). As to the initial decision on the merits of the removal action, we deny the agency petition for review, reopen the initial decision on our own motion pursuant to 5 U.S.C. § 7701(e)(1)(B), and affirm that decision as modified by the findings and conclusions set forth in this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Effective April 10, 1979, appellant Allen, a supervisor of the mails with the Postal Service in Atlanta, Georgia, was removed from his position after 16 years service on charges of falsifying his time card on two successive dates, February 15 and 16, 1979. The agency specified that on February 15 he claimed on his time card that he had worked until 6:00 p.m. when actually he left "at 5:45 PM or approximately 5:50." The agency further alleged that on the 16th, Allen claimed ten hours of work on his time card, including two hours overtime, when actually he took four hours annual leave to attend a funeral and worked no overtime. Intentional falsification was inferred by the agency from the fact that the false entries involved consecutive days and that a similar incident allegedly had occurred some two months earlier.

Appellant admitted that he left ten minutes earlier than indicated on his time card for February 15, explaining without contradiction that, as was customary, he had made his time entry earlier in the day during a mid-afternoon break when the decision whether to call for overtime normally was made.

The presiding official found the charge relating to February 15 to be sustained by a preponderance of the evidence, but made no determination of whether the false entry for that date was intentional. At the same time, the presiding official found the "seriousness" of this charge to be "greatly reduced" because the time involved was minimal, appellant had no more work to do that day, this was the first incident of its kind, appellant had recently received two performance commendations, and appellant had no prior disciplinary record. *Id.* at 599.

With regard to the February 16 charge, appellant admitted the incorrect entries but denied any intentional falsification. Appellant's immediate supervisor corroborated his explanation that he had applied earlier that week for annual leave to attend a funeral on that date. Also, the time and attendance clerk corroborated appellant's testimony that he did not fill out the February 16 card until she called it to his attention on the following day; he then filled out the card under distracting circumstances while discussing with her the funeral he had attended during his leave. Both the clerk and appellant's supervisor testified that they believed that appellant had made an honest mistake. In view of these facts, and the presiding official's separate finding that the allegedly similar incident two months earlier was not substantiated, the presiding official found that the incorrect time card entry for the 16th was "not intentionally made."

The presiding official concluded that there was some evidence of negligence on appellant's part in completing the February 16 time card but that the negligence was not "of sufficient degree to warrant the penalty of removal that was imposed in this case even when coupled with the [February 15] charge previously discussed." *Id.* at 602. The presiding official ordered, therefore, that the agency removal action be cancelled, and found that "because the appellant is the prevailing party, he is entitled, in the interest of justice, to reasonable attorney fees under 5 U.S.C. section 7701(g)(1)." *Id.* at 602.

The agency filed a timely petition for review, contending that the initial decision was based on erroneous interpretation of statute or regulation with respect to both the removal action and the determination to award attorney fees. Appellant filed a response through the attorney who has represented him throughout this appeal. The Office of Personnel Management (OPM) thereafter in-

tervened pursuant to 5 U.S.C. § 7701(d)(1), filing a brief on the attorney fees issue.

II. BOARD FINDINGS ON THE MERITS

In accordance with the clear mandate of the Civil Service Reform Act, an employee may be removed under 5 U.S.C. § 7513(a) only for "such cause as will promote the efficiency of the service," established by a preponderance of the evidence before the Board, 5 U.S.C. § 7701(c)(1). Adjudication of an employee's appeal from such a removal thus requires two distinct determinations: (1) whether the conduct alleged by the agency has, in fact, occurred; and (2), if so, whether the disciplinary action taken against the employee will "promote the efficiency of the service." *Phillips* v. *Bergland*, 586 F.2d 1007, 1010–11 (4th Cir. 1978); *Young* v. *Hampton*, 568 F.2d 1253, 1257 (7th Cir. 1977).

Here the agency contended that appellant's removal does in fact promote the efficiency of the service,[1] but the initial decision never addressed that issue with respect to either of the two charges. Moreover, although the presiding official did apply the preponderance of the evidence standard in determining that the February 15 charge was "sustained" by evidence establishing that in fact those false entries were made, the initial decision includes no finding regarding whether the falsification on that occasion was intentional.[2]

Implicit in a charge of falsification of time records is the allegation that appellant falsified the records intentionally and with the purpose to defraud the Government. *See Tucker* v. *United States*, No. 206–78 (Ct. Cl. June 18, 1980) (Slip Op. at 6) (falsification of travel vouchers). A charge of falsification of government documents goes to the appellant's "reliability, veracity, trustworthiness, [and] ethical conduct. . . ." *Embrey* v. *Hampton*, 470 F.2d 146, 147 (4th Cir. 1972) (falsification of federal loan application), *quoting Rodriquez* v. *Seamans*, 463 F.2d 837, 843 (D.C. Cir. 1972) (falsification of federal employment application). The charges against appellant required as an element of proof that the falsifications be intentional, and the agency so treated the charges in seeking to infer such intent from

[1] Hearing Transcript at 110.

[2] Also, while the February 16 false entries were found not to have been made intentionally, the initial decision does not reveal whether this led the presiding official to conclude that the charge could not be sustained without such intent, or that the charge was sustained but the absence of wrongful intent warranted mitigating the penalty, or that the charge was sustained as a factual matter but removal would not promote the efficiency of the service. In all of these respects, the initial decision fails to comply with the provisions of 5 C.F.R. § 1201.111(b), which require full articulation of all necessary findings of fact and conclusions of law. *See Spithaler* v. *OPM*, 2 MSPB 2 (1980); *Parker* v. *Logistics Agency*, 1 MSPB 489, 497 (1980).

the consecutive dates involved and the allegedly similar earlier incident.

Although the presiding official did not so specify, we find that the agency failed to prove by a preponderance of the evidence that the February 15 false entry was made intentionally. It is not disputed that appellant, in the customary way, made the entry on his time card several hours prior to his scheduled departure time. There is not a scintilla of evidence to suggest that he did so with the intent to obtain 10 or 15 minutes worth of undeserved pay. Moreover, it is also undisputed that appellant took steps on his own initiative to correct his time records for both the 15th and 16th as soon as he was informed of the incorrect entries, so that he was never paid for time he did not work.[3] Concluding as we have that intentional falsification was an essential element of the charge, and finding as we do that such element was not proved by the agency, we must reverse the presiding official's determination which sustained the February 15 charge.

In its petition for review on the merits, the agency has not alleged error in the presiding official's finding that the February 16 false entry was not intentional, but only in his conclusion that appellant's removal was not warranted on the facts found in the initial decision. Thus, since the agency has not established intentional falsification with respect to either charge levelled against appellant, the conduct alleged by the agency has not been shown to have in fact occurred. Under these circumstances it is unnecessary for us to reach the further but now hypothetical question of whether, if the alleged conduct had been proved by the agency, appellant's removal would promote the efficiency of the service.

III. STANDARDS FOR AWARD OF ATTORNEY FEES

With respect to federal employee appeals in which there is no finding of prohibited discrimination,[4] as here, the Reform Act provides in pertinent part at 5 U.S.C. § 7701(g)(1):

> [T]he Board, or an administrative law judge or other employee of the Board designated to hear a case, *may* require payment by the agency involved of *reasonable attorney fees incurred* by an employee. . .if the employee. . .is the *prevailing party* and the Board, administrative law judge, or other employee, as the case may be, determines that payment by the agency is *warranted in the interest of justice*, including any case in which a prohibited personnel practice was engaged in by the

[3] Hearing Transcript at 106–07, 124–25.

[4] 5 U.S.C. § 7701(g)(2) provides for different standards for award of attorney fees when discrimination prohibited under 5 U.S.C. § 2302(b)(1) is found. Since no such discrimination has been found in this case, those standards need not be considered here.

agency or in any case in which the agency's action was clearly without merit. [Emphasis supplied.]

The Board's interim regulations on this subject, applicable at the time of this appeal, essentially repeated the statutory language. 5 C.F.R. § 1201.37(a) (1979).[5]

As in all matters of statutory construction, we must commence with a close textual examination,[6] considering the meaning of each word or phrase,[7] and giving effect to all parts of the provision if at all possible.[8] Thus, in awarding attorney fees that have been "incurred"[9] in appeals under § 7701(g)(1), the statutory language demands that each of the following requirements be met:

1. The appellant must be the "prevailing party";
2. The award of attorney fees must be "warranted in the interest of justice"; and
3. The fees awarded must be "reasonable."

Just as specific findings are necessary in deciding the merits of an appeal, they also are necessary with respect to the elements required to support a ruling upon a motion for attorney fees under Board regulations. 5 C.F.R. § 1201.37(a)(2). Because each of the first two statutory requirements must be satisfied to sustain any award of fees, if either is not met the motion may be denied without consideration of the other prerequisite and without reaching the reasonable amount determination. Such motions are now to be decided in an addendum to the initial decision, 5 C.F.R. § 1201.37(a)(2) (1979), rather than in the initial decision itself as done here under the Board's interim regulations. Nonetheless, specific findings supporting the presiding official's conclusion on each of the pertinent statutory requirements must also be included in the addendum decision, which effectively supplements the initial decision. *See* 5 C.F.R. § 1201.111(b)(1) (1979).

In this appeal, none of the agency's charges has been sustained on the merits, necessitating reversal of appellant's removal. Conse-

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[5] The Board's final regulation of the same section number relating to award of attorney fees also reiterates the statutory language. 5 C.F.R. § 1201.37(a) (1979).

[6] *Alabama Power Co.* v. *Costle*, 78–1006 (D.C. Cir., Dec. 14, 1979 (Robinson, J., Slip Op. at 12); *Bird* v. *United States*, 187 U.S. 118 (1902).

[7] *See Zeigler Coal Co.* v. *Kleppe*, 536 F.2d 398 (D.C. Cir. 1976); *United States* v. *Johnson*, 462 F.2d 423 (3rd Cir. 1972), *cert. denied*, 410 U.S. 937 (1973). *See also United States* v. *Menasche*, 348 U.S. 528 (1975).

[8] *Administrator, Federal Aviation Administration* v. *Robertson*, 422 U.S. 255, 261 (1975), *quoting Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973).

[9] For purposes of § 7701(g)(1), the Board will consider fees to have been "incurred" upon a showing by the appellant that an attorney-client relationship exists pursuant to which counsel rendered legal services on appellant's behalf in connection with appellant's appeal before the Board. *See* the Board's Opinion issued today in *O'Donnell* v. *Department of the Interior*, 2 MSPB 604 (1980).

quently, there is no need for discussion here of whether appellant has "prevailed" and thereby met the first requirement for an award of fees.

The third requirement, that any fees awarded be "reasonable," is not before us because no determination of amount has yet been made. If that question is reached on remand, it must be evaluated under the guidelines set forth in our opinion today in *Kling* v. *Department of Justice,* MSPB Docket No. AT075299048 2 MSPB 620 (1980).

This leaves for consideration the requirement that payment by the agency of fees for appellant's attorney be "warranted in the interest of justice."

The statutory context of § 7701(g)(1) itself provides some perimeters for application of the "interest of justice" standard. At one extreme, it is apparent that this standard cannot be coextensive with the "prevailing party" requirement, as the presiding official erroneously assumed in this case. Such a construction would accord no distinct meaning to the "interest of justice" standard, effectively treating that vital restriction as mere excess verbiage and a nullity, a result proscribed both by common sense and basic precepts of statutory construction.[10] At the other extreme, it is equally apparent that the statutory examples of cases involving prohibited personnel practices or agency actions "clearly without merit" do not exhaust the circumstances in which an award of fees may be warranted, for the statute plainly authorizes such awards in cases "including"—but not limited to—those examples.[11]

For elucidation we must turn to the legislative history, which shows the language to have evolved as a balanced compromise. The original Administration proposal called for a narrow standard, authorizing fee awards only when "warranted on the grounds that the agency's action was wholly without basis in fact or law."[12] After witnesses before the Senate Committee on Governmental Affairs and the House Committee on Post Office and Civil Service criticized that standard as overly restrictive,[13] both committes broadened it.

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[10] *See* notes 7–8 *supra*.

[11] When a statutory phase expressly "includes" named examples, it does not imply that other categories fall outside its range. *Highway & City Freight Drivers* v. *Gordon Transports, Inc.*, 576 F.2d 1285, 1289 (8th Cir. 1978) and cases cited therein.

[12] Section 205 of S. 2640 and H.R. 11280 as introduced March 3, 1978, 95th Cong., 2d Sess., *reprinted* in House Comm. on Post Office and Civil Service, 95th Cong., 1st Sess., *Legislative History of the Civil Service Reform Act*, at 22 (Comm. Print No. 96–2, 1979) [hereinafter cited as *Legislative History*].

[13] *See Hearings on S. 2640 Before Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 924, 995–96, 1011, 1127 (1978); *Hearings on H.R. 11280 Before House Comm. on Post Office and Civil Service*, 95th Cong., 2d Sess. 169, 215, 264, 302, 565, 908 (1978).

The House Committee reported, and the full House passed, a bill authorizing fee awards when "warranted," without qualification.[14] The Senate Committee reported, and the full Senate passed, a bill authorizing such awards when "warranted on the grounds that the agency's action was taken in bad faith."[15] The report accompanying the Senate bill explained:[16]

> Employees whose agencies have taken *unfounded* actions against them may spend a considerable amount of money defending themselves against these actions, they cannot be reimbursed for attorney fees upon prevailing in their appeals to the [Civil Service] Commission. Instead, they must file civil actions against the Government in order to obtain a review of their requests for reimbursement.
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> The legislation remedies this problem by authorizing the Board members and hearing officials to require payment, by agencies which are losing parties to proceedings before the Board, of attorney fees to the employees who prevailed. Payment is only required when it is warranted on the grounds that the agency's action was taken *in bad faith*. This may occur, for example, when the action brought is *wholly unfounded*. Or when there is evidence the agency brought the action *to harass* the employee or *to exert improper pressure* on the employee to act in certain ways. The circumstances justifying the award of attorney's fees is left to the *discretion of the Board to develop in light of its experience. The award of attorney's fees should not become, however, the ordinary practice in cases which the employee wins.*

The difference between the open-ended House version and the narrower Senate "bad faith" version was resolved in conference, producing section 7701(g)(1) as enacted, which authorizes award of attorney fees whenever "warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit." The Conference Committee offered only a brief comment on the final standard:[17]

> The conference substitutes (sections 7701(g) and 5596(b)(1)(A)(ii)) authorizes attorneys' fees in cases where employee prevails on the merits and the deciding official deter-

[14] *Legislative History, supra* note 12, at 1174. The report accompanying the House bill contained no further discussion of this standard. H.R. Rep No. 95–1403, 95th Cong., 2d Sess, 23 (1978), *reprinted in Legislative History*, supra note 12, at 660.

[15] *Legislative History, supra note* 12, at 1762.

[16] S. Rep. No. 95–969, 95th Cong. 2d Sess. 60–61 (1978), *reprinted in Legislative History, supra* note 12, at 1524–25. [Emphasis supplied.]

[17] H.R. Rep. No. 95–1717, 95th Cong., 2d Sess. 142 (1978), *reprinted in Legislative History, supra* note 12, at 1984. [Emphasis supplied.]

mines that attorneys' fees are warranted in the interest of justice, including a case involving a prohibited personnel practice or where agency's action was clearly without merit. The references to these two types of cases is *illustrative only and does not limit the official from awarding attorneys' fees in other kinds of cases.*

The conference compromise was offered by Representative Udall as a "middle ground" between the two alternatives of "bad faith" and simply "warranted."[18] Despite the expressed desire of some legislators for a more precise definition of the "interest of justice,"[19] none was subsequently offered.

Some further explication, however, is provided by the statements of Senator Mathias, who originally proposed a bare "warranted in the interest of justice" standard. The Senate Committee elected not to adopt that standard when reporting the bill. In the absence of any other legislative elucidation, however, the early statements of Senator Mathias, as the originator of the standard, and as a member of the Conference Committee which subsequently adopted it, are entitled to some weight. In explaining this proposal at the Senate Committee mark-up session, Senator Mathias stated:[20]

> The standard doesn't mean that it requires the agency to pay attorney fees for an employee who wins an adverse action case but, rather, this is an attempt to allow the court or the board the discretion to choose cases *where the employee has been dragged through a lengthy and costly legal proceeding while in fact he was innocent of the charges when it was some procedural error or where the agency knew or should have known it would not prevail on the merits.*

Asked by Senator Percy to be more specific, Senator Mathias elaborated:[21]

> Number one, *where he is substantially innocent of the charges that are leveled against him, or where the agency acted in bad faith, or where there was some gross procedural error, or where the agency knew or should have known that it couldn't prevail on the merits when it brought the proceeding.* I think when elements of that sort exist, then I think the question of acting in the interest of justice would be appropriate.

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[18] Transcript of House-Senate Conference Committee's Mark-up Session on S. 2640, 95th Cong. 2d Sess. 50–51 (September 27, 1978), and 11, 30 (September 28, 1978).

[19] *Id.* At 39–41 (September 28, 1978). *See also* Transcript of Senate Committee on Governmental Affairs' Mark-up Session on S. 2640, 95th Cong., 2d Sess. (hereinafter cited as *Senate Mark-up*) 124, 128 (1978).

[20] *Senate Mark-up, supra* note 19, at 123. [Emphasis supplied.]

[21] *Id.* at 124–25. [Emphasis supplied.]

> . . .I think *a gross procedural error would be one which prolonged the proceeding, one which severely prejudiced the employee.* It wouldn't be just a misspelling of a name, something of that sort.
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> A gross procedural error in a totally different context, but the kind of thing I would have in mind is where the. . .police put a suspected shoplifter's picture on the police flier among known shoplifters warning all of the merchants. . .against this person who was later tried in the. . .courts and found to be innocent, and under circumstances so compelling he couldn't possibly have been involved. That is gross procedural error it seems to me.

In addition to guidance from the legislative context of the Reform Act itself, we may also glean light from the common usage of the phrase "interest of justice" elsewhere in the law relating to attorney fee awards. While we approach such related uses with caution, it is well-established that Congress is presumed to act with knowledge of existing law.[22] We find little assistance from other statutory enactments,[23] but outside of statutory authorization the federal courts have developed pertinent criteria in exercising their equitable discretion to award attorney fees to successful litigants in exceptional cases "when the interests of justice so require." *Hall* v. *Cole*, 412 U.S. 1, 5 (1973). *See also Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967) ("overriding considerations of justice"); *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F.2d 473, 481 (4th Cir. 1951) ("essential to the doing of justice"); *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 573 (1946) ("dominating reasons of justice"), *quoting Sprague* v. *Taconic National Bank*, 307 U.S. 161 (1939).

Among the exceptions recognized by the federal courts as warranting departure from the normal rule requiring each party to bear its own attorney fees, the "bad faith" exception allows for award of fees when "the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 258–59 (1975), *quoting F.D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S.

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[22] *See Georgia* v. *United States*, 411 U.S. 526 (1973); *United States* v. *Smith*, 521 F.2d 957 (D.C. Cir. 1975); *see also* 2A Sands, *Sutherland Statutory Construction* §§ 49.09, 501.01, 50.03 (4th ed. 1973).

[23] Only two other statutes contain the identical "warranted in the interest of justice" standard for awarding attorney fees, the Consumer Product Safety Commission Improvement Act of 1976, 15 U.S.C. §§ 2059(e)(4), 2060(c), 2072(a), 2073 (1976), and the Natural Gas Pipeline Safety Act of 1976, 49 U.S.C. § 1686(e) (1976). However, their general purpose to advance the public health and safety is clearly different from that of the Civil Service Reform Act, and in any event, the standard in neither of those statutes seems to have been construed or applied by published regulation or reported decision.

116, 129 (1974).[24] Bad faith includes such circumstances as a party's obstinate refusal to act rightfully when its duties under the law are clear,[25] abusive conduct or attempts to harass or embarrass the other party,[26] intentional failure to perform a fiduciary duty,[27] and dilatory or obdurate conduct groundlessly prolonging litigation.[28] Such bad faith warranting an award of attorney fees may be found either in the actions that led to the litigation or in the conduct of the litigation itself. *Roadway Express, Inc.* v. *Piper*, 48 U.S.L.W. 4836, 4840 (June 23, 1980); *Hall* v. *Cole*, 412 U.S. at 15.

Several conclusions emerge rather clearly from our review of the statutory context of the "interest of justice" standard, its legislative history, and related case law:

First, the enacted standard was intended to be broader than that provided by the Senate bill, which would have limited awards to cases involving agency bad faith. This is clear from the conference action which was designed to compromise the Senate's bill with the more open-ended House version.[29]

Second, the statutory examples of cases involving a prohibited personnel practice or where the agency's action was "clearly without merit" reflect a clear Congressional expectation that Board discretion to award attorney fees will normally be exercised in such cases. Conversely, of course, that discretion permits the Board to deny fees even where such circumstances are present.

Third, the Board is accorded substantial discretion in determining when an award is warranted. This appears not only from the permissive term "may" in section 7701(g)(1) and the Conference Committee's emphasis on the fact that the two statutory examples are "illustrative only,"[30] but also from the Senate Report which explained that even under the Senate's more limited bad faith standard, "[t]he circumstances justifying the award of attorney's fees is

[24] *See generally* Note, *Attorney's Fees and the Federal Bad Faith Exception*, 29 *Hast. L.J.* 319, 323–31 (1977); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 *U. Pa. L. Rev.* 636, 660, 689 (1974); *Annot.*, 31 ALR Fed. 833, 842–55 (1977).

[25] *E.g.*, *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962); *United Steelworkers, AFL–CIO* v. *Butler Mfg. Co.*, 439 F.2d 1110 (8th Cir. 1971); *Bell* v. *School Board*, 321 F.2d 494 (4th Cir. 1963); *Lewis* v. *Texaco, Inc.*, 418 F. Supp. 27 (S.D.N.Y. 1976).

[26] *See Burgess v. Hampton*, 73 F.R.D. 540, 543–44 (D.D.C. 1977); *U.S. Steel Corp.* v. *United States*, 519 F.2d 359, 364 (3d Cir. 1975).

[27] E.g., *Richardson* v. *Communications Workers, AFL–CIO*, 530 F.2d 126, 132–33 (8th Cir. 1976); *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F.2d at 481.

[28] *E.g.*, *Local No. 149, UAW* v. *American Brake Shoe Co.*, 298 F.2d 212, 214–15 (4th Cir.), *cert. denied*, 369 U.S. 873 (1962); *Baas* v. *Elliot*, 71 F.R.D. 693 (E.D.N.Y. 1976); *Red School House, Inc.* v. *Office of Economic Opportunity*, 385 F. Supp. 1177 (D. Minn. 1974).

[29] *See* note 18 *supra* and accompanying text.

[30] *See* note 17 *supra* and accompanying text.

[sic] left to the discretion of the Board to develop in light of its experience."[31]

Fourth, circumstances comparable to those found by the federal courts to warrant award of fees under the "bad faith" exception for such awards in federal litigation may warrant an award by the Board under section 7701(g)(1). This conclusion follows from the reasonable presumption that Congress, in adopting the "interest of justice" standard and including agency bad faith among the circumstances warranting such awards,[32] did so with knowledge of the federal law implementing the same bad faith criterion for ascertaining the "interests of justice" for similar purposes in the federal courts. Indeed, given the caution with which equitable exceptions to the normal rule against fee awards have been allowed by the federal courts,[33] and the clear legislative intent that the Board's award authority not be limited to cases involving agency bad faith, the Board's discretion under section 7701(g)(1) appears to be considerably broader than the equitable discretion typically exercised by the courts.

The principal constraint upon the Board's section 7701(g)(1) discretion to determine when an award is warranted arises from the Board's duty to exercise that discretion reasonably, which necessarily includes the duty to articulate a rational explanation for each award. We do not believe it advisable to expound further at this early stage of implementing the award provision. Particular applications can best be determined by the Board on a case by case basis, with the benefit of a full record and the insights and reasoning of the presiding official who heard the evidence in each case. Such self-restraint is both appropriate to the Board's quasi-judicial functions and in accord with the expectation of Congress that the Board will allow more particular criteria for fee awards to "develop in light of its experience."[34]

We do, nonetheless, believe we can provide prospective guidance by summarizing here circumstances as extracted from the legislative history of the Reform Act, which may warrant fee awards. While some of the examples mentioned in the course of the deliberations on the Reform Act may overlap in concept, or might be covered as well by the two statutory illustrations in section 7701(g)(1) as enacted, the examples as originally expressed provide

[31] *See* note 16 *supra* and accompanying text.

[32] *See* text accompanying note 16 *supra* (Senate Report); text accompanying note 21 *supra* (Statement of Sen. Mathias).

[33] *See Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. at 247, 257, 263–71; *F.D. Rich Co.* v. *United States ex rel. Indus. Lumber Co.*, 417 U.S. at 129–32; *Fleishman Distilling Corp.* v. *Maier Brewing Co.*, 3 6 U.S. at 717–20; *Straub* v. *Vaisman & Co.*, 540 F.2d 591, 599–600 (3d Cir. 1976); *Cordeco Development Corp.* v. *Santiago Vasques*, 539 F.2d 256, 263 (1st Cir. 1976).

[34] *See* note 16 *supra*.

a useful indication of circumstances considered to reflect "the interest of justice":

1. Where the agency engaged in a "prohibited personnel practice" (§ 7701(g)(1));

2. Where the agency's action was "clearly without merit" (§ 7701(g)(1)), or was "wholly unfounded," or the employee is "substantially innocent" of the charges brought by the agency;[35]

3. Where the agency initiated the action against the employee in "bad faith," including:

   a. Where the agency's action was brought to "harass" the employee;

   b. Where the agency's action was brought to "exert improper pressure on the employee to act in certain ways";

4. Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced" the employee;[36]

5. Where the agency "knew or should have known that it would not prevail on the merits" when it brought the proceeding.[37]

We emphasize that the foregoing summary is not exhaustive, but illustrative.[38] Nor is it a catalogue of litmus paper tests for award or denial of attorney fees. Rather, these examples should serve primarily as directional markers toward "the interest of justice"—a destination which, at best, can only be approximate. Divination of that elusive objective must, in the most rigorous but still fallible last analysis, rely upon an impartial and rational sense

[35] Any such determination should be based on the record established before the Board on the merits of the agency's action, without holding a separate hearing on this question. In making such determination, the presiding official should examine the degree of fault on the employee's part and the existence of any reasonable basis for the agency's action.

[36] This is not simply "harmful" procedural error such as suffices to require reversal of the agency action, 5 U.S.C. § 7701(c)(2)(A). *See Parker* v. *Defense Logistic Agency*, 1 MSPB 489, 492 (1980); *but compare id* at 496 n. 9. This criterion requires weighing the nature of and any excuse for the error against the prejudice and burden resulting for the employee.

[37] This may include circumstances in which the agency prepared or presented its case so negligently as to make it a foregone conclusion that the action could not be sustained on the record established before the Board.

[38] While the examples offered by Senator Mathias in describing his original proposal to the Senate Committee are highly pertinent to the proper exercise of the Board's discretion, virtually all of those examples could be subsumed under the two statutory examples ultimately enacted. Nevertheless, the Conference Committee emphasized that the statutory reference to those examples is "illustrative only and does not limit the official from awarding attorneys' fees in other kinds of cases." *See* Report quoted at note 17 *supra*.

of fairness constrained by practicality.[39] The Board's presiding officials, therefore, at this early stage in applying the standards of section 7701(g)(1), should exercise their best judgment in ruling upon motions for fee awards, providing such judgment is fully articulated in a reasoned addendum decision affording an adequate basis for review. Only by this means can the Board be assured of adequate opportunity to develop more particular guidelines "in the light of its experience."[40]

Since the Board's regulations specify that a request for award of attorney fees must be made by motion, with the agency having an opportunity to file a responsive pleading, 5 C.F.R. § 1201.37(a)(2), the burden of establishing entitlement to such an award reposes, as usual, on the moving party—here necessarily the appellant. A memorandum in support of such a motion should, therefore, set forth all considerations relied upon to demonstrate that the statutory requirements for an award have been met, substantiated by affidavits or other documentary evidence wherever there is a question of fact to be resolved (other than those already litigated on the merits). Affidavits are a particularly appropriate means of establishing the reasonableness of the amount of fees claimed. *See Kling* v. *Department of Justice,* 2 MSPB 620 (1980). The agency should likewise set forth in its response all considerations relied upon in opposition to an award, including affidavits relating to contested facts pertinent to the motion (other than those already adjudicated on the merits) or to the reasonableness of the amount claimed.

We remand to the presiding official in the instant case for an articulated determination of whether attorney fees are "warranted in the interest of justice," and any consequent determinations which may be required under 5 U.S.C. § 7701(g)(1). The potential subtleties of an "interest of justice" determination, not always apparent to the remote reviewer, call for reasonable opportunity for the parties' presentations and for the presiding official's reasoned assessment on that issue in light of the entire record. Furthermore, if the presiding official adheres to his view that an award is warranted, there would remain the determination of a reasonable fee. Under our current regulation, that is to be resolved in an addendum decision simultaneously with the "interest of justice" determination and would require factual information not included in the present record.

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[39] *See* J. Rawls, *A Theory of Justice* (1971); R. Dworkin, *Taking Rights Seriously* 150–83 (1979). *Compare* R. Nozick, *Anarchy, State, and Utopia* 149–64, 183–231 (1974). In these as in all other determinations under the Reform Act, the Board must be guided where appropriate by the purposes of the Act, sec. 3, 92 Stat. 1112, 5 U.S.C. § 1101 note, and by the merit principles enacted by the Act, 5 U.S.C. § 2310(b).

[40] *See* text accompanying note 16 *supra* (Senate Report).

IV. CONCLUSION

The initial decision in this case, though correct in its result, applied an erroneous standard to the charges on the merits under 5 U.S.C. § 7513(a), and erroneously determined that appellant is entitled to attorney fees without making the findings required by 5 C.F.R. § 1201.37(a). On remand, the presiding official should allow both parties the time permitted by 5 C.F.R. § 1201.37(a)(2) for a motion and response with respect to award of attorney fees, before issuing a suitable addendum decision on any such motion.

Accordingly, the agency's petition for review of the initial decision on the merits is DENIED; that decision on the merits is hereby REOPENED pursuant to 5 U.S.C. § 7701(e)(1)(B), and is AFFIRMED AS MODIFIED by the findings and conclusions set forth herein. The agency is hereby ORDERED to cancel its removal of appellant. In addition, the petition for review of the attorney fees award determination contained in the initial decision is GRANTED, and that determination is hereby VACATED and REMANDED to the presiding official for further proceedings consistent with the foregoing opinion.

RUTH T. PROKOP,
Chairwoman.
ERSA H. POSTON,
Vice Chair.
RONALD P. WERTHEIM,
Member.

July 22, 1980.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Atlanta Field Office

MARION ALLEN
v.
U.S. POSTAL SERVICE

Initial Decision Number: AT075299011

June 15, 1979

I INTRODUCTION

By petition dated April 2, 1979, Mr. Marion Allen, through counsel, appealed to this office from a March 20, 1979 decision to remove him from the position of Supervisor, Mails, Level 15, U.S.

Postal Service, Atlanta Bulk Mail Center, Atlanta, Georgia, effective April 10, 1979. The action was based upon two counts of making false entries on a time card.

II. JURISDICTION

The appellant was a preference eligible in the U.S. Postal Service who had completed one year of current continuous service in the same or similar position at the time of his removal. In view of the above, and because this petition was timely filed, the matter was accepted for adjudication under 5 U.S.C. § 7513(d).

The appellant requested a hearing in connection with his appeal, and such a hearing was conducted on May 10, 1979. Both parties were present at this hearing, and a verbatim transcript of the proceeding has been made a part of the record in this case.

III. FINDINGS OF FACT AND CONCLUSIONS

The March 5, 1979 notice of proposed removal charges the appellant with falsifying his time card as follows:

> 1. On February 16, 1979, you made entries on your time card indicated that you began your tour of duty at 0750, that you went to lunch at 1150; returned from lunch at 1200 and ended your tour of duty at 1800. These entries represented ten hours work. Further, the time card indicates that in the overtime column you entered two hours overtime. You initialed the time card which certified the entry. When I reviewed your time card on February 17, 1979, I noted a discrepancy in the entries in that you told me on February 16, 1979, that you had four hours annual leave that day to attend a funeral. I made a request to have the matter investigated. You were interviewed on February 18, 1979 by Director, Mail Processing, John H. Hayes, and you gave him a written statement that you made an error in completing your time card for that date. Your explanation is not accepted. Accordingly, you are charged with making false entries on your time card for February 16, 1979.
>
> 2. On February 15, 1979, you made entries on your time card indicating that you began your tour of duty at 0750, that you went to lunch at 1150; returned from lunch at 1200 and ended your tour of duty at 1800. These entries represented ten hours work. Further, the time card indicates that in the overtime column you entered two hours overtime. You initialed the time card which certified the entry. An investigation revealed that actually you did not make two hours overtime as you indicated on your time card, in that by your own admission, you left the building at 5:45 PM or approximately 5:50. Accordingly, you

are charged with making false entries on your time card on February 15, 1979.

The two counts of making false entries on a time card will be discussed in chronological order. It should also be noted that the references for the time of day in the advance notice are based upon a 24-hour clock with each hour having one hundred units. Thus, 6:00 p.m. is 1800 and 11:30 a.m. is 1150.

As the advance notice reflects, the appellant acknowledged that he left the building at approximately 5:45 or 5:50 p.m. on February 15, 1979 even though his time card indicated that he worked until 6:00 p.m. The appellant also testified at the hearing that he left the building at approximately 5:50 p.m. (hearing transcript page 104; hereafter Tr. 104).

In further support of the charge, I note that the record contains the statements of Mr. Jack M. Mitchell and Ms. Judy J. Jones, two supervisors employed by the agency. In addition, Mr. Mitchell testified at the hearing which was held on May 10, 1979. Ms. Jones was requested as a witness by the appellant's counsel and was approved to appear as a witness. However, Ms. Jones did not appear because of alleged health problems and another commitment.

At the close of the hearing, the agency was given the opportunity to present evidence to establish the unavailability of Ms. Jones, and such representations were received on May 16, 1979. This material was served on the appellant's counsel by the agency and he was granted until May 21, 1979 to submit a response thereto. No response has been received to date. For the reasons discussed below, I have determined that Ms. Jones' statement should not be considered in the adjudication of the instant appeal and thus it has been excluded under section 1201.43(a)(4) of the Board's interim regulations.

With respect to Ms. Jones' alleged health problems, the record contains a statement, signed by Ms. Jones, dated May 11, 1979 which indicates that she must immediately undergo tests "to determine how serious my health problem is. . ."In further explanation of her condition, Ms. Jones noted that she was now emotionally upset and did not desire to be subjected to additional emotional strain. As to her other commitment on May 10, 1979, Ms. Jones stated that this was her off day and that she was required to appear before the board of education. In this regard, the record contains a May 7, 1979 notice issued by the DeKalb County School System informing her of a hearing involving her son which would be conducted by the Student Evidentiary Hearing Committee on May 10, 1979 at 1:15 p.m.

In my view, the reasons offered for Ms. Jones' unavailability as a witness at the hearing conducted in connection with the instant appeal on May 10, 1979 are not justified. Concerning Ms. Jones'

medical problem, I note that the seriousness of the illness is apparently not known at the present time. And, in view of the fact that Ms. Jones continues to be employed with the agency and was apparently able to attend another hearing on the same date, it also appears that any medical reason for her unavailability must have been due to her fear of additional emotional strain. However, in the absence of a doctor's certificate or other medical documentation, I find insufficient evidence to establish Ms. Jones' unavailability for these reasons on May 10, 1979. As to the hearing before the DeKalb County School System, I find that no conflict actually existed. For, the hearing which I conducted convened at approximately 9:14 a.m. and concluded at approximately 12:30 p.m. As previously noted, the hearing before the school system was not scheduled to begin until 1:15 p.m. Under these circumstances, arrangements would have been made to obtain Ms. Jones' testimony as early as possible once the hearing convened so as to allow her to be present at both hearings.

Concerning the charge relating to the appellant's attendance on February 15, 1979, Mr. Mitchell testified that, "just after 4 o'clock," Ms. Jones handed him the appellant's time card (Tr. 10–11). The time card indicated that the appellant had worked ten hours that day (Tr. 11). According to his testimony, Mr. Mitchell then accompanied Ms. Jones to the front of the building and questioned the security officer who was on duty as to the appellant's whereabouts (Tr. 11). According to Mr. Mitchell, the security officer responded that the appellant had left some time before (Tr. 11). This conversation between Mr. Mitchell and the security officer took place at 4:50 p.m. (Tr. 14).

Mr. Mitchell also testified that he observed the appellant getting his coat or sweater from the rack and walking toward the front of the building at approximately 4:20 p.m. (Tr. 13). However, he stated that he did not see the appellant actually leave the building (Tr. 13).

While the testimony of Mr. Mitchell goes to support a conclusion that the appellant left the building prior to 5:45 p.m. on February 15, 1979, the charge of making false entries on the time card for that date does not involve a time period prior to 5:45 p.m. Therefore, I find it unnecessary to determine the exact time of the appellant's departure.

In view of the charge, the appellant's admission, and the testimony of Mr. Mitchell, I find this portion of the charge, as set forth in the advance notice, to be sustained by a preponderance of the evidence.

As to the weight to be given to the sustained charge, the uncontroverted evidence of record reflects that the appellant was assigned to supervise overtime for approximately eight to ten employees from 4:00 p.m. to 6:00 p.m. on February 15, 1979. It is

also uncontroverted that the appellant dismissed these employees at 5:50 p.m. as he was required to do so as to allow them ten minutes to return to their regular duty location, wash up, and clock out. The appellant admits that he left the building after dismissing the employees at 5:50 p.m. (Tr. 104). However, he states as his reason for doing so the fact that he had "no production going on" and had already "closed out my production papers" (Tr. 103).

The fact that an employee completes his/her work does not authorize that individual to leave early and be paid for any portion of the time when he/she is not present. However, when, as in this case, the amount of time is minimal, there is no evidence that other appropriate work was available for the appellant to perform, the incident is the first of its kind, the employee has recently received two commendations for his performance and has no prior disciplinary record, the seriousness of the charge is greatly reduced. It is also noted that Mr. Mitchell and Ms. Jones spent at least ten minutes walking to and from the front of the building while conducting an "investigation" into a matter that was not within the scope of their responsibility (Tr. 12, 19).

In support of the charge as it relates to the appellant's attendance on February 16, 1979, Mr. Jack R. Watkins, General Supervisor, testified that the appellant's scheduled hours of work were from 7:30 a.m. to 4:00 p.m. (Tr. 22). Mr. Watkins further testified that the appellant stopped work at 11:30 a.m. to attend a funeral (Tr. 22) and that he (Watkins) made arrangements for another employee to serve as acting supervisor of the appellant's operation beginning at 11:30 a.m. (Tr. 23). In a statement dated February 17, 1979, Mr. Watkins indicated that he did not see the appellant until the following day. He noted, however, that while reviewing the appellant's time card, he saw that it showed ten hours' work for February 16, 1979 and that there was no indication that leave had been taken. He also stated that he could not locate a request for leave (form 3971) covering the appellant's absence on that date.

The appellant acknowledged that he left work at 11:30 a.m. on February 16, 1979 to attend a funderal. He also testified that he did not fill out his time card on February 16, 1979 because time cards are not normally filled out until 2:00 p.m. when the decision to call or not to call overtime is made (Tr. 105). The appellant further testified that he realized that he had not filled out his time card on the following morning when Ms. Gloria A. Reese, a time and attendance clerk, told him that he had a day missing (Tr. 105). The appellant does not deny that the entries which he made on his time card for February 16, 1979 were incorrect as set forth in the advance notice. However, he asserts that his actions were not in any way deliberate or intentional.

As previously noted, the appellant filled out his time card for February 16, 1979 on Saturday, February 17, 1979. According to Ms. Reese, the room in which the appellant was located when he filled out the time card was crowded (Tr. 81) and a confusing atmosphere existed therein (Tr. 82). Specifically, she stated that during this time she was trying to total the time cards accurately, was reviewing the form 3971's which had been turned in untimely, and was responding to telephone calls from employees requesting leave (Tr. 91). In addition, there were supervisors present who were checking the overtime marked on their employees' time cards (Tr. 91).

During the confusion on February 17, 1979, Ms. Reese testified that she noticed that the appellant's time card was not marked for February 16, 1979. And, because February 17, 1979 was the day that the time cards are totalled for payment, she instructed the appellant to mark his time card (Tr. 82). Ms. Reese further testified that prior to this request, and also during the time that the appellant was filling out his time card, he was engaged in a conversation concerning the funeral which he had attended (Tr. 82–83). She did not, however, realize that the funeral had taken place on the previous day, for this would have put her on notice that the appellant's time card entries for February 16, 1979 were in error, and she would have pointed out this mistake to the appellant (Tr. 85).

One of the functions that Ms. Reese was performing on February 17, 1979, was reviewing form 3971's which had been turned in late. Approved requests for leave, if available, are reviewed before the time cards are submitted for payment. In the instant case, Mr. Elisha V. Lester, Jr., the appellant's first-line supervisor, testified that, on February 13, 1979, the appellant submitted an application for leave (Tr. 66). In his application, the appellant requested annual leave on February 16, 1979 and this request was granted (Tr. 67). Mr. Lester further testified that he followed the normal procedure for assuring that the form 3971 would be received by the timekeeper (Tr. 67).

In view of Ms. Reese's testimony, it is apparent that had she received the appellant's form 3971 for February 16, 1979, she would have informed the appellant of his error when she reviewed his time card. The record reflects, however, that the form was not received by the timekeeper. And, there is no evidence that the appellant was responsible for the disappearance of the form. In fact, Mr. Lester noted that a lost form was not unusual in that he was aware of more than ten other occasions when a form 3971 did not reach the time and attendance clerk (Tr. 78–79).

In addition to the appellant's testimony, Mr. Lester testified that the appellant's entry for February 16, 1979 was an honest mistake (Tr. 78). Also, Ms. Reese testified that she did not think the ap-

pellant's actions were deliberate (Tr. 86). The agency, on the other hand, inferred intent based upon the fact that the two false entries involved consecutive days and that a similar incident occurred on December 17, 1978.

I do not find persuasive the agency's argument that because the false entries involved consecutive days, the appellant intentionally made these entries on his time card. If fact, under the circumstances as set forth herein, I find very little connection between the two incidents.

With respect to the appellant's time card entries on December 17, 1978, Mr. Watkins testified that the appellant was on off-day overtime, was not seen between 11:30 a.m. and 5:00 p.m., yet indicated on his time card that he worked ten hours from 7:30 a.m. until 6:00 p.m. (Tr. 450 and agency exhibit 10. Mr. John H. Hayes, Director of Mail Processing, also testified concerning the incident on December 17, 1978. Mr. Hayes, stated that, "around the 17th of December," the appellant had a medical problem which required that he leave the building (Tr. 49). He further testified that the appellant remained away from the building long enough to apply for annual leave but failed to do so (Tr. 49). As a result, he informed the appellant that he would have to apply for annual leave for the duration of his absence (Tr. 49). It is noted, however, that Mr. Hayes later testified that an employee cannot be granted annual leave or sick leave on an overtime basis (Tr. 50). And, as already noted, Mr. Watkins testified that the appellant was on off-day overtime on the date in question.

The appellant testified that the date in question was December 10, 1978 and not December 17, 1978 (Tr. 109). In this regard, he noted that he slipped and injured his knee on December 10, 1978 and had to leave the building in order to get a shot of blood thinner for his phlebitis (Tr. 109). He stated that he left the agency at approximately 3:00 p.m. and returned at approximately 5:00 p.m. (Tr. 109). He was later instructed by Mr. Hayes to reflect eight hours of work on that date (Tr. 110). The appellant asserts that his time card entries for December 17, 1978 are correct (Tr. 111).

Based upon my review of the record, I find that the preponderance of the evidence does not support a conclusion that the appellant made false time card entries for December 17, 1978. And, while the appellant acknowledged that he was asked to reduce his time to reflect eight hours of work on December 10, 1978, this does not establish that he made a false time card entry for that date. Nevertheless, even if the appellant's time card for December 10, 1978 at one time reflected ten hours' work, the fact remains that, in order to be accurate, it was necessary that he indicate the actual time that he began and ended his tour of duty. Because he had to go to the doctor in the middle of his off-day overtime schedule, and

because sick leave is not authorized for overtime hours, the situtation appears to have been somewhat unusual. Therefore, assuming that a false entry was made, it is excusable under the circumstances outlined above.

In view of the uncontroverted evidence that the appellant requested annual leave, in advance, for February 16, 1979; that both his first- and second-line supervisors were aware of this leave and the fact that it had been approved; that the appellant was discussing the funeral for which purpose he requested the leave at the time he was incorrectly filling out his time card; and in the absence of any credible evidence to the contrary, I find that the incorrect time card entries for February 16, 1979 were not intentionally made. While there is some evidence that the appellant was negligent in filling out his time card as evidenced by the time and place where he chose to complete this act, the negligence is not, in my view, of sufficient degree to warrant the penalty of removal that was imposed in this case even when coupled with the charge previously discussed. For, it is uncontroverted that the appellant has worked for the agency for sixteen years, has received two commendations for his performance within the past year, and has no previous disciplinary record.

IV. DECISION

The appeal is sustained.

Under the provisions of 5 U.S.C. § 1205(a)(2), the agency is hereby ordered to cancel the removal action in this case. Copies of the personnel action form effecting the corrective action should be furnished to the Atlanta Field Office, Merit Systems Protection Board, within thirty calendar days of the agency's receipt of this decision unless a petition for review is filed by the agency during this period. Furthermore, because the appellant is the prevailing party, he is entitled, in the interest of justice, to reasonable attorney fees under 5 U.S.C. § 7701.(g)(1).

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on July 8, 1979 unless a petition for review is filed with the Board within thirty (30) calendar days after the petitioner's receipt of this decision.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this decision with the Merit Systems Protection Board. The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable law, rule, or regulation.

The petition for review must be received by the Secretary to the Merit Systems Protection Board, Washington, D.C. 20419, no later than thirty (30) calendar days after receipt of this decision. A copy

of the petition must be served on all parties and intervenors to this appeal.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the decision of the presiding official was issued; or

(2) The decision of the presiding official is based upon an erroneous interpretation of law, rule, or regulation, or a misapplication of established policy; or

(3) The decision of the presiding official is of a precedential nature involving new or unreviewed policy considerations that may have a substantial impact on a civil service law, rule, or regulation, or a more government-wide policy directive.

Under 5 U.S.C. § 7703(b)(1) the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any *final* decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:

RICHARD P. KLEIN,
Presiding Official.