UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2008 MSPB 23

Docket No. DA-0831-06-0436-A-1

Don A. Mynard,

Appellant,

v.

Office of Personnel Management,

Agency.

OPM Claim No. CSA 3 506 398

January 31, 2008

Larry R. Boyd, McKinney, Texas, for the appellant.

Karla W. Yeakle, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member
Chairman McPhie issues a separate dissenting opinion.

OPINION AND ORDER

¶1 The appellant petitions for review of the June 14, 2007 addendum initial decision (AID) dismissing his motion for attorney fees relating to the merits phase of his retirement appeal as untimely filed and denying his motion for attorney fees relating to the compliance phase of his appeal on the basis that the appellant's petition for enforcement (PFE) did not result in the issuance of an enforceable judgment. We DENY the appellant's petition for failure to meet the review criteria under 5 C.F.R. § 1201.115(d). For the reasons set forth below,

however, we REOPEN the attorney fees proceedings on our own motion pursuant to 5 C.F.R. § 1201.118, VACATE the AID, and REMAND the appellant's motion for attorney fees to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 When the appellant turned 62, the Office of Personnel Management (OPM) recomputed his Civil Service Retirement System annuity to eliminate service credit for the appellant's post-1956 military service for which the appellant had not paid a deposit prior to his separation from his civilian position with the Department of the Army. The appellant filed an appeal, and, on August 28, 2006, the administrative judge (AJ) issued an initial decision in which she found that the appellant established that he failed to make a pre-separation deposit for his post-1956 military service due to administrative errors committed by his former employing agency. Accordingly, the AJ reversed OPM's decision and ordered OPM, within 20 days after the initial decision became final, to set a time limit during which the appellant could make the appropriate deposit. Initial Appeal File (IAF), Tab 11, Merits Initial Decision (MID) at 1, 8-9. The initial decision specifically advised the parties that it would become final on October 2, 2006, unless either party filed a petition for review or the Board reopened the appeal on its own motion, and it further advised the appellant that he could seek payment of his attorney fees "no later than 60 calendar days after the date this initial decision becomes final." MID at 10, 12. Neither party filed a petition for review.

¶3 On November 15, 2006, the regional office received the appellant's PFE,[1] in which the appellant alleged, "It has been over 10 days past your ordered date of performance and OPM has not contacted me or my attorney concerning the

[1] A handwritten notation on the document indicates, "faxed 1400 3 Nov 06," but the document does not contain a certificate of service and it is unclear why the regional office did not receive the document until November 15, 2006. Compliance File, Tab 1.

computation of my deposit or the amount of time I would have to make the deposit." Compliance File (CF), Tab 1. The appellant also stated, "My annuity has not been reinstated, I have not been reimbursed for all the funds not paid nor have my legal fees been paid as prescribed by policy." *Id.* The AJ issued an order requiring OPM to prove that it complied with the Board's order or to show good cause for its noncompliance, CF, Tab 2, and, in response, the OPM representative stated that OPM was awaiting a response from the Defense Finance and Accounting Service regarding the appellant's military pay so that OPM could compute the amount of the deposit due, CF, Tab 3. On January 8, 2007, OPM sent the appellant a letter notifying him of the amount of the deposit due and affording him a period of 30 days from his receipt of the letter to notify OPM of his election regarding the deposit.[2] CF, Tab 7. After reviewing OPM's letter, the AJ issued an order requiring the appellant to show cause why the AJ should not find the agency in compliance and deny his PFE. CF, Tab 8. When the appellant

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[2] When he retired, the appellant elected to receive the Alternative Form of Annuity (AFA), which allows an annuitant to receive a lump-sum refund of his retirement contributions and a reduced annuity. *See* 5 C.F.R. § 8343a. Accordingly, if the appellant had made the deposit for his post-1956 military service prior to his retirement, OPM would have refunded this deposit to the appellant as part of his lump-sum refund in accordance with the terms of the AFA. In the letter OPM sent to the appellant, it informed him that, if it deemed the deposit made and refunded to the appellant, such an action would increase his reduced annuity from $888.00/month to $2,001.00/month. OPM also informed the appellant, however, that this action would result in his being liable to OPM for an annuity overpayment in the amount of $5,824.30 that OPM paid to the appellant from the commencing date of his annuity (April 30, 1994) through the date the appellant's annuity was reduced by eliminating civilian service credit for his post-1956 military service (April 30, 2006). OPM explained that the overpayment would result due to the fact that the reduction in the appellant's monthly annuity was based on an actuarial figure which was determined by the appellant's age at the time of retirement and the amount of the lump-sum payment the appellant received (which would increase if the appellant elected to have OPM deem the appellant as having paid, and OPM as having refunded, the military service deposit). CF, Tab 7. It is unclear from the record whether the appellant elected to have the deposit deemed paid, but the appellant has not contested the existence or the amount of the overpayment that would result from such an election.

failed to respond, the AJ issued an initial decision dated January 25, 2007, dismissing the appellant's PFE as moot. CF, Tab 9, Compliance Initial Decision (CID). The CID informed the parties that it would become final on March 1, 2007, unless either party filed a petition for review or the Board reopened the case on its own motion, but it did not advise the appellant that he could seek attorney fees with respect to the compliance proceeding. *Id.* Again, neither party filed a petition for review.

¶4 On February 13, 2007, the appellant filed a motion for attorney fees.[3] Attorney Fees File (AFF), Tab 1. OPM opposed the motion for attorney fees, arguing that the motion was untimely filed with respect to the merits decision, that the appellant was not the prevailing party with respect to the compliance proceeding because the AJ found OPM in compliance and dismissed the PFE as moot, and that the appellant failed to establish that an award of fees was warranted in the interest of justice. AFF, Tab 4. The AJ issued an order requiring the appellant to show cause why the AJ should not dismiss his motion for fees relating to the merits decision as untimely filed. To the extent that the motion relating to work the appellant's attorney performed with respect to the PFE, the AJ referred to *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), and *Mulero-Echevarria v. Office of Personnel Management*, 93 M.S.P.R. 154, ¶ 6 (2002), and advised the appellant that attorney fees were no longer available in situations in which the Board dismisses a PFE as moot "since there is no enforceable judgment on the merits for purposes of a request for attorney fees." The AJ therefore required the appellant to address his entitlement to fees for work his attorney performed with respect to the PFE. AFF, Tab 5.

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[3] The cover letter accompanying the appellant's motion referred to the docket number associated with the decision on the merits, but the activities included in the itemized bill attached to his request for attorney fees appear to relate exclusively to the compliance proceeding. Attorney Fees File, Tab 1.

¶5 The appellant, through his attorney, filed a response in which he argued that the delay in filing the motion for fees as it related to the merits decision was justified by OPM's delay in complying with the Board's order. The appellant also stated that he understood that the 60-day period to file his motion began "from the Final Settlement and not the Final Ruling." AFF, Tab 6. The appellant also noted that he addressed the issue of attorney fees in his PFE. *Id.*; *see* ¶ 3, *supra* ("nor have my legal fees been paid as prescribed by policy"). The appellant's response did not address his entitlement to attorney fees relating to the PFE.

¶6 On June 14, 2007, the AJ issued an addendum decision in which she dismissed the appellant's motion for attorney fees relating to the merits decision as untimely filed without good cause shown for the delay and denied the appellant's motion for attorney fees relating to the PFE on the grounds that the compliance proceeding did not result in an enforceable judgment. AFF, Tab 7, AID at 7, 9. The appellant filed a timely petition for review (PFR) arguing that the AJ should have afforded him an extension in which to file his motion for attorney fees regarding the merits phase of his appeal because the AJ afforded OPM an extension in which to prove its compliance with the Board's order. Petition For Review File (PFRF), Tab 1. He also argues, for the first time, that he relied on the advice of a "Court Paralegal" regarding how and when to file his motion for attorney fees. *Id.* OPM filed a short response maintaining that the Board should deny the PFR for failure to meet the review criteria. PFRF, Tab 3.

ANALYSIS

¶7 Consistent with the notice the AJ provided to the appellant in the initial decision addressing the merits of his appeal, the Board's regulations provide that a motion for attorney fees must be filed no later than 60 days after the date on which a decision becomes final. 5 C.F.R. § 1201.203(d). The Board may waive this time limit if the appellant establishes good cause for his untimeliness, 5

C.F.R. § 1201.12, and, in determining whether good cause exists with respect to an untimely motion for attorney fees, the Board applies the factors articulated in *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980), i.e., due diligence or ordinary prudence under the particular circumstances of the case. *See, e.g.*, *Pfaehler v. Merit Systems Protection Board*, 783 F.2d 187, 189 (Fed. Cir. 1986); *Small v. Department of the Navy*, 6 M.S.P.R. 366, 367 (1981).

¶8 Because the merits initial decision became final on October 2, 2006, in order to be timely, the appellant was required to file his motion for attorney fees regarding the merits phase of his appeal by no later than December 1, 2006. The appellant did not file his request for attorney fees until February 13, 2007, more than 2 months beyond the filing deadline.[4] AFF, Tab 1. In his PFR, the appellant merely argues that the AJ should have granted him an extension in which to file his motion for attorney fees because the AJ granted OPM an extension in which to establish that it complied with the Board's remedial order. PFRF, Tab 1. However, OPM's failure to meet the time limits set forth in the Board's order is

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[4] While the attorney fees motion was pending before the AJ, the appellant argued that the AJ should treat his PFE as a motion for attorney fees because the PFE "addressed the issue of attorney's fees." AFF, Tab 6. The appellant's PFR, however, does not argue that the AJ erred in finding that the appellant filed his motion for attorney fees on February 13, 2007, rather than on November 15, 2006, the date the regional office received the appellant's PFE. *See* 5 C.F.R. § 1201.115(a) (a PFR must state objections to the initial decision that are supported by references to applicable laws or regulations and by specific references to the record). Thus, the appellant's PFR provides no basis to reverse the AJ's findings on this point. In any event, we note that the merits initial decision specifically advised the appellant that a motion for attorney fees "must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H." MID at 12. This subpart states, "A request for attorney fees must be made by motion, must state why the appellant or respondent believes he or she is entitled to an award under the applicable statutory standard, and must be supported by evidence substantiating the amount of the request." 5 C.F.R. § 1201.203. Although the appellant's PFE "mentioned" the topic of attorney fees, it did not otherwise comply with the Board's regulations concerning the form and content of a motion for attorney fees. Accordingly, we discern no error in the AJ's failure to construe the appellant's PFE as a motion for attorney fees.

irrelevant to the question of whether the appellant acted diligently and prudently with respect to his request for attorney fees. *See Ballentine v. Department of Justice*, 33 M.S.P.R. 28 (1987) ("Further the date on which the agency fully complies with the Board order is irrelevant to a determination of whether a motion for an award of attorney fees was timely filed."), *aff'd*, 845 F.2d 1033 (Fed. Cir. 1988) (Table); *Naviello v. Office of Personnel Management*, 15 M.S.P.R. 396, 397 (1983) (the fact that OPM did not serve the appellant with proof of compliance on or before the date the ID became final did not affect the finality of the Board's decision).

¶9 In his response to the AJ's show-cause order regarding the timeliness of the motion for attorney fees, the appellant's attorney also argued that the appellant understood that "all procedural and response time protocols were waived and/or extended" during the course of the compliance proceeding and that he could file a motion for attorney fees "after the Final Settlement." AFF, Tab 6. The appellant did not submit any evidence to support his attorney's statements, *see Hendricks v. Department of the Navy*, 69 M.S.P.R. 163, 168 (1995) (the statements of a party's representative in a pleading do not constitute evidence), nor explain why any such understanding would have been reasonable under the circumstances. Furthermore, the Board has stated that attorneys have an affirmative obligation to familiarize themselves with the Board's regulations and to be cognizant of all provisions of law affecting their clients' rights, and neither an appellant's failure to read the material provided him nor counsel's failure to carefully read the initial decision establishes good cause to waive the time limit for filing a motion for attorney fees. *See Ballentine*, 33 M.S.P.R. at 30 (citing *McDermott v. Government of the District of Columbia*, 20 M.S.P.R. 534, 535 (1984)); *Naviello*, 15 M.S.P.R. at 397; *Small*, 6 M.S.P.R. at 367-68. The AJ therefore properly determined that the appellant failed to establish good cause to waive the time limit to file the appellant's motion for attorney fees regarding the merits phase of

his appeal,[5] and, in issuing a new initial decision on remand, the administrative judge may adopt her previous findings regarding this matter.

¶10 With respect to the appellant's motion for an award of attorney fees he incurred with respect to his PFE, however, we conclude, for the reasons set forth below, that the fact that the AJ did not issue an enforceable judgment during the compliance phase of this appeal did not preclude an award of attorney fees to the appellant for work his attorney performed during that phase of the appeal. In ruling to the contrary, the AJ relied on two cases, *Buckhannon* and *Mulero-Echevarria*. AID at 8. In *Buckhannon*, the U.S. Supreme Court interpreted the "prevailing party" standard contained in the attorney fees provisions of the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990 to allow an award of fees only when a party has been awarded some relief by the Court. *Buckhannon*, 532 U.S. at 604. The Court stated, "[E]nforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Id.* at 1840 (quoting *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792-93 (1989)). The Court specifically rejected the "catalyst theory," whereby a party could be found to have prevailed based on the opposing party's voluntary change of conduct after the filing of a lawsuit, as a viable basis to award attorney fees, reasoning as follows:

> A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term "prevailing

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[5] In reaching this conclusion, we have not considered the appellant's argument that his alleged reliance on the advice of an unnamed "Court Paralegal" established good cause for his untimely filing. The Board need not consider this argument because it is one the appellant raises for the first time in his PFR, and he has not established that it is based on new and material evidence not previously available despite his due diligence. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980).

> party" authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.

Id. In *Mulero-Echevarria*, 93 M.S.P.R. 154, ¶¶ 5-6, the Board applied *Buckhannon* to find that an appellant could not qualify as a "prevailing party" for the purposes of an award of attorney fees under 5 U.S.C. § 7701(g)(1)[6] where OPM reversed its earlier decision to deny the appellant's disability retirement application after the appellant filed his appeal, and the administrative judge dismissed the appeal as moot without issuing a decision on the merits. The Board stated, "Because OPM's reversal of its decision lacks the 'judicial imprimatur' necessary to find the appellant is a prevailing party, there is no basis upon which to award attorney fees to her under 5 U.S.C. § 7701(g)(1)." *Mulero-Echevarria*, 93 M.S.P.R. 154, ¶ 6.

¶11 However, both *Buckhannon* and *Mulero-Echevarria* involved requests for attorney fees relating to the merits phase of those cases, and the question presented by the instant case is whether the same "prevailing party" standard applicable to an award of attorney fees relating to the merits phase of a Board appeal is equally applicable to an award of attorney fees relating to the compliance phase of a Board appeal. As an initial matter, we note that the Board derives its authority to award attorney fees in retirement cases, such as the instant case, from 5 U.S.C. § 7701(g)(1). *See Simmons v. Merit Systems Protection Board*, 768 F.2d 323, 325-26 (Fed. Cir. 1985); *Mulero-Echevarria*, 93 M.S.P.R. 154, ¶ 3. We also note that the Board derives its authority to award attorney fees with respect to the compliance phase of a Board appeal from the same provision that authorizes the Board to award attorney fees with respect to the merits phase, again, 5 U.S.C. § 7701(g)(1). *See Garstkiewicz v. U.S. Postal Service*, 981 F.2d

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[6] This provision authorizes the Board and its administrative judges to require an agency to pay attorney fees where the appellant is the prevailing party and the Board or the AJ determines that payment by the agency is warranted in the interest of justice. 5 U.S.C. § 7701(g)(1).

528, 530 (Fed. Cir. 1992); *Greco v. Department of the Army*, 852 F.2d 558, 561 (Fed. Cir. 1988) ("[A] compliance proceeding is a continuation of the original action."); [7] *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 732 (Fed. Cir. 1984) (a compliance proceeding is not an original personnel action); *Stewart v. Department of the Army*, 102 M.S.P.R. 656, ¶ 9 (2006); *O'Brien v. Office of Personnel Management*, 26 M.S.P.R. 432, 433 & n.2 (1985) (a compliance proceeding is not an independent action, but a continuation of the original action filed with the Board); *cf. King v. Reid*, 59 F.3d 1215, 1218-19 (Fed. Cir. 1995) (no statute, rule, or regulation expressly makes a PFE appealable to the Board; therefore, the Board's authority to enforce such a settlement agreement is derived from its authority under 5 U.S.C. § 1204(a)(2) to enforce compliance with its orders rather than from its authority under 5 U.S.C. § 1204(a)(1) to hear and adjudicate all matters within its jurisdiction). Furthermore, because 5 U.S.C. § 7701(g)(1) includes a "prevailing party" requirement, the Board has generally required appellants to establish that they have "prevailed" with respect to a compliance matter in order to be eligible for an award of fees for work their attorneys performed with respect to the compliance phase of Board appeals. *See, e.g., Garstkiewicz*, 981 F.2d at 530; *Stewart*, 102 M.S.P.R. 656, ¶¶ 9, 11; *Thomas v. U.S. Postal Service*, 87 M.S.P.R. 331, ¶ 9 (2000); *Thompson v. Department of the Navy*, 83 M.S.P.R. 509, ¶ 11 (1999); *Del Balzo v. Department of the Interior*, 72 M.S.P.R. 55, 61 (1996); *Ray v. Department of Health & Human Services*, 64 M.S.P.R. 100, 105-06 (1994); *Whaley v. U.S. Postal Service*, 61 M.S.P.R. 340, 347 (1994).

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[7] In *Greco*, the court stated, "Respondent cannot be forced to pay attorney fees for those of petitioner's claims which were unjustified. . . . Recovery of attorney fees is limited to those areas where respondent has been found in noncompliance." 852 F.2d at 561. However, the court specifically stated that it was deciding the case on the basis of the terms of the parties' settlement agreement, in which the agency had agreed to pay the appellant's reasonable attorney fees and expenses, and did not reach "the merits of the petitioner's 5 U.S.C. § 7701(g) claim." 852 F.2d at 561.

¶12 Prior to *Buckhannon*, however, the Board generally did not require an appellant to establish that the Board had entered an enforceable compliance decision that altered the legal relationship of the parties[8] in order to establish that he was a "prevailing party" who qualified for an award of attorney fees relating to the compliance proceeding; rather, in order to be deemed a "prevailing party" in a compliance proceeding, the Board generally required appellants to show that the agency was not in compliance with a material term of the Board's order or the enforceable settlement agreement and that the relief as to the compliance matter at issue was causally related to the initiation of enforcement proceedings before the Board. *Thomas*, 87 M.S.P.R. 331, ¶ 9; *see also Stewart*, 102 M.S.P.R. 656, ¶ 11 (the Board applied the "prevailing party" standard set forth in *Thomas* to a post-*Buckhannon* case, but it did not address *Buckhannon*); *Harris v. Department of Agriculture*, 40 M.S.P.R. 604, 609-10 (1989) (the fact that the Board ultimately found the agency in compliance and dismissed the PFE as moot did not alter the fact that the appellant prevailed with respect to the PFE)[9], *abrograted on other*

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[8] In fact, from a conceptual standpoint, the type of decisions the Board and its administrative judges may issue during the compliance phase of an appeal are not themselves enforceable decisions that alter the legal relationships of the parties; rather, the Board's role in the compliance phase of an appeal is to determine whether the parties' actions are in compliance with a Board order or a settlement agreement that altered the legal relationship of the parties during the merits phase of the appeal. *See, e.g., Kerr*, 726 F.2d at 732-33 (Congress expressly granted the Board special power to enforce compliance with its orders, and the Board should order corrective action in cases of noncompliance with such orders). The Board ultimately resolves virtually all of the compliance matters that come before it either by denying the petition for enforcement or by issuing an order dismissing the petition for enforcement as moot after the agency has demonstrated that it has complied with the Board's order or the settlement agreement at issue. *See, e.g., Welch v. Department of Justice*, 106 M.S.P.R. 107, ¶¶ 6-7 (2007).

[9] Although *Stewart* did not discuss whether *Buckhannon* was applicable to the compliance phase of a Board appeal, we note that the Board issued an Opinion and Order during the compliance phase of that case finding that the agency was not in compliance with the parties' settlement agreement, *Stewart v. Department of the Army*, 98 M.S.P.R. 170 (2004), prior to issuing the order that ultimately dismissed Stewart's

grounds by Whaley v. U.S. Postal Service, 61 M.S.P.R. 340, 346 n.2 (1994)). *But cf. Ray*, 64 M.S.P.R. at 105 (the appellant was not a prevailing party with respect to a compliance proceeding where he did not obtain an enforceable judgment against the agency and the settlement agreement through which the parties settled the PFE did not benefit the appellant nor materially alter the legal relationship of the parties). In other cases, the Board has stated or suggested that an appellant may be a prevailing party with respect to a compliance proceeding by merely showing that the agency was not in compliance with a material term of the Board order or the settlement agreement, without requiring the appellant to additionally establish that the relief as to the matter was causally related to the initiation of the compliance proceeding. *See, e.g.*, *Thompson*, 83 M.S.P.R. 509, ¶ 11 (finding that the administrative judge erred in concluding that the appellant had to demonstrate that his relief as to the matter at issue was causally related to the initiation of the compliance proceeding to be deemed a "prevailing party" with respect to his PFE); *Del Balzo*, 72 M.S.P.R. at 61; *Whaley*, 61 M.S.P.R. at 347 ("Inasmuch as the appellant demonstrated below the agency's noncompliance with a material term of the parties' contractual agreement, he was the prevailing party in this case."); *cf. Garstkiewicz*, 981 F.2d at 530 ("The interest of justice is served by the award of attorney fees when the agency delays its compliance beyond the date set by order of the Board.").

¶13 In any event, neither the Board nor its reviewing court, the U.S. Court of Appeals for the Federal Circuit, has issued a precedential decision which specifically addresses the question at issue in this case, i.e., whether, for the purposes of awarding attorney fees for the compliance phase of a Board appeal, *Buckhannon* applies to preclude such an award where the appellant's compliance efforts do not result in an enforceable order or a Board-approved settlement

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PFE as moot after the agency complied, *Stewart v. Department of the Army*, 100 M.S.P.R. 64 (2005) (Table). *See Stewart*, 102 M.S.P.R. 656, ¶ 5.

agreement that materially alters the legal relationship of the parties. In considering fees-shifting statutes similar to 5 U.S.C. § 7701(g)(1), however, other federal courts have addressed the question, and the majority of those courts have concluded that the "prevailing party" standard announced in *Buckhannon* either does not apply to the compliance phase of a proceeding or does not apply to the compliance phase in the same manner that it applies to the merits phase. *See Johnson v. City of Tulsa*, 489 F.3d 1089, 1108 (10th Cir. 2007) (the court, relying on *Pennsylvania v. Delaware Valley Citizens' Council for Clear Air*, 478 U.S. 546 (1986),[10] *supplemented by* 483 U.S. 711 (1987), rejected the notion that *Buckhannon* precludes an award of fees for the post-decree efforts of counsel for the party who prevailed during the merits phase of the case unless such post-decree efforts result in a judicially sanctioned change in the parties' legal

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[10] In *Delaware Valley*, the plaintiffs brought suit to compel the Commonwealth of Pennsylvania to implement a vehicle emission inspection and maintenance program as required by the Clean Air Act. The litigation resulted in a consent decree whereby the Commonwealth agreed to establish such a program for 10 counties in the Philadelphia and Pittsburgh areas by August 1, 1980. *Delaware Valley*, 478 U.S. at 549. Following entry of the decree, counsel for *Delaware Valley* participated in several judicial, legislative, and administrative matters regarding enforcement of the consent decree and Delaware Valley ultimately sought attorney fees and costs for work its counsel performed after entry of the decree. 478 U.S. at 549-53. The U.S. District Court decision awarding fees was affirmed by the U.S. Court of Appeals for the Third Circuit, and the U.S. Supreme Court granted the Commonwealth's petition for certiorari. 478 U.S. at 553-57. The Court ultimately affirmed much of the District Court's award, stating, "In a case of this kind, measures necessary to enforce the remedy ordered by the District Court cannot be divorced from the matters upon which Delaware Valley prevailed in securing the consent decree," and further noting that several courts had held that "post-judgment monitoring of a consent decree is a compensable activity for which counsel is entitled to a reasonable fee" in the civil rights context. 478 U.S. at 558-59. With respect to counsel's participation in various administrative proceedings, the Court agreed with the District Court that counsel's participation "was crucial to the vindication of Delaware Valley's rights under the consent decree and [found] that compensation for these activities was entirely proper and well within the 'zone of discretion' afforded the District Court" under the fee-shifting provisions of the Clean Air Act. 478 U.S. at 561. We note, however, that the fee-shifting statute at issue in *Delaware Valley*, 42 U.S.C. § 7604(d), does not include a "prevailing party" requirement.

relationship); *Cody v. Hillard*, 304 F.3d 767, 775 (8th Cir. 2002) (finding that a district court may award fees to a prevailing party for reasonable post-judgment monitoring of a consent decree, that work done to defend a remedy for a constitutional violation is inextricably intertwined with the litigation that yielded the remedy, that the fact that the plaintiffs did not prevail before the District Court in opposing a motion to vacate a consent decree did not deprive them of attorney fees, and "that as long as a plaintiff's litigation to protect a remedy does not rise to the level of overkill, 'even largely unsuccessful defensive efforts may be compensable.'" (quoting *Association for Retarded Citizens of North Dakota v. Schafer*, 83 F.3d 1008, 1011-12 (8th Cir. 1996))); *San Francisco NAACP v. San Francisco Unified School District*, 284 F.3d 1163, 1164 (9th Cir. 2002) (although the court did not discuss *Buckhannon*, it found that a civil rights plaintiff, based solely on the plaintiff's status as a prevailing party in the merits phase, may be eligible to recover attorney fees under 42 U.S.C. § 1988 for defending its consent decree from a collateral attack brought by a third party); *Grier v. Goetz*, 421 F. Supp. 2d 1061, 1071 (M.D. Tenn. 2006) ("*Buckhannon* does not discuss post-judgment or post-consent-decree litigation."); *Blackman v. District of Columbia*, 328 F. Supp. 2d 36 (D.D.C. 2004) (although the court denied the individual class members' motions for immediate injunctive relief, it determined that the class members were eligible for awards of attorney fees because the process through which a Special Master appointed by the court facilitated the settlement of individual claims provided sufficient court oversight to ensure that the concerns expressed in *Buckhannon* regarding requisite judicial imprimatur were met), *appeal dismissed*, 456 F.3d 167 (D.C. Cir. 2006); *Rolland v. Romney*, 292 F. Supp. 2d 268, 273 (D. Mass. 2003) ("*Buckhannon* does not control the compensability of post-judgment monitoring efforts."); *cf. Roberson v. Giuliani*, 346 F.3d 75, 81 (2nd Cir. 2003) ("We . . . join the majority of courts to have considered the issue since *Buckhannon* in concluding that judicial action other than a judgment on the merits or a consent decree can support an award of

attorney's fees, so long as such action carries with it sufficient judicial imprimatur."). *But see Alliance to End Repression v. City of Chicago*, 356 F.3d 767 (7th Cir. 2004) (although the court noted two classes of cases in which plaintiffs who had obtained no relief in post-decree proceedings had been awarded attorney fees for those proceedings, the court stated that such cases were inconsistent with the U.S. Supreme Court's rejection of the catalyst theory in *Buckhannon*); *cf. Gautreaux v. Chicago Housing Authority*, 491 F.3d 649, 659, 662 (7th Cir. 2007) (awarding attorney fees for post-decree work performed by class counsel in a public housing discrimination and segregation case and distinguishing *Alliance* on the basis that the plaintiffs in *Gautreaux*, unlike the plaintiffs in *Alliance*, were, at times, expected to be the enforcers of the decree and were prevailing parties with respect to the post-decree proceedings by virtue of the fact that the defendant had to negotiate with the plaintiffs and change its position in order to win the plaintiffs' approval for court-approved waivers of the consent decree's terms).

¶14 Although the Board is not bound by any of the decisions cited in the preceding paragraph, *see Fairall v. Veterans Administration*, 33 M.S.P.R. 33, 39 (1987) (decisions of the U.S. Court of Appeals for the Federal Circuit are controlling authority for the Board, whereas other circuit courts' decisions are persuasive, but not controlling, authority), *aff'd*, 844 F.2d 775 (Fed. Cir. 1987); *see also Walker v. Department of the Army*, 104 M.S.P.R. 96, ¶ 11 n.2 (2006) (decisions of U.S. district courts are not binding on the Board, but the Board may follow such decisions if it is persuaded by their reasoning), we consider their reasoning instructive in analyzing the question presented by this case. First, because the Board adjudicates a PFE as a continuation of the original appeal rather than as a separately appealable matter, we would be tempted to agree with *Johnson* and *Cody* to the extent that those decisions suggest that the "prevailing party" status a party achieves in the merits phase of a case can carry over to the compliance phase of that case to justify an award of attorney fees for reasonable

efforts to enforce or defend the relief ordered during the merits phase were it not for the fact that the Board and the Federal Circuit have generally required appellants to separately establish that they have "prevailed" with respect to a compliance matter in order to establish their eligibility for an award of attorney fees relating to the compliance phase of their appeals. *See* ¶ 11, *supra*.[11] Furthermore, because the Board awards attorney fees relating to the compliance phase of an appeal under 5 U.S.C. § 7701(g)(1), i.e., the same statute with the same "prevailing party" requirement under which it awards attorney fees relating to the merits phase, we reject the suggestion expressed in *Grier* and *Rolland* that *Buckhannon* does not apply to eligibility for an award of attorney fees relating to the compliance phase of a case.

¶15 Nevertheless, we are persuaded by the reasoning set forth in cases such as *Roberson* and *Blackman* that a party may achieve "prevailing party" status for the purposes of qualifying for an award of attorney fees under a fee-shifting statute without obtaining an enforceable judgment on the merits or a court-ordered consent decree so long as the relief the party achieves carries with it sufficient judicial or, in this case, Board imprimatur. As the Second Circuit pointed out in *Roberson*:

> It seems clear from even the majority opinion in *Buckhannon* that the Court intended its statements about judgments on the merits and court-ordered consent decrees as merely "examples" of the type of judicial action that could convey prevailing party status.

Roberson, 346 F.3d at 81 (citing *Buckhannon*, 532 U.S. at 605).

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[11] In addition to the cases cited in ¶ 11, the Federal Circuit has issued several non-precedential decisions in which it has affirmed the Board's denial of attorney fees with respect to the compliance phase of an appeal on the grounds that the agency's compliance did not result from the appellant's petition for enforcement. *See, e.g.*, *Box v. Department of the Navy*, 250 F.3d 757 (Fed. Cir. 2000) (Table); *Greene v. U.S. Postal Service*, 230 F.3d 1383 (Fed. Cir. 2000) (Table); *Stein v. U.S. Postal Service*, 41 F.3d 1521 (Fed. Cir. 1994) (Table).

¶16 Furthermore, in *Blackman*, the U.S. District Court for the District of Columbia considered the applicability of *Buckhannon* in the context of a post-judgment procedure that closely resembled the procedure by which the Board considers petitions for enforcement. *Blackman* involved a class action lawsuit under 42 U.S.C. § 1983 to enforce the rights of the plaintiff class under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973. The court granted the class's motion for summary judgment as to liability and eventually appointed a Special Master "for the limited purpose of assisting the Court in resolving the requests for immediate injunctive relief" with respect to the claims of individual class members. *Blackman*, 328 F. Supp. 2d at 38-39. The court entrusted the Special Master "with the dual function of facilitating a mutually satisfactory resolution of each such individual claim, and, in the absence of a mutually acceptable resolution, providing the Court with a report and recommendation with respect to whether any particular plaintiff is entitled to preliminary injunctive relief." *Id.* at 39. With respect to each of the three individual class members whose attorney fees motions the court addressed in the decision, the defendants complied with a previously executed settlement agreement after the individual class members filed the motion for a preliminary injunction, the Special Master filed a report recommending that the court deny the class members' motion, and the court accepted the Special Master's recommendation and denied the motion. *Id.* at 39-40. In determining that the class members were entitled to an award of attorney fees under 42 U.S.C. § 1988 despite the fact that the court had denied their motions for a preliminary injunction, the court noted that it was undisputed that the class achieved broad success in the case and continued to secure the defendants' compliance with the IDEA "through their efforts to gain appropriate relief." *Id.* at 44. The court also stated, "Such an effort to secure a remedy through Court-established procedures is – and must be – inextricably intertwined with the Court's conclusion that the violation existed in the first place." *Id.* at

45. With respect to *Buckhannon* and its applicability to the award of fees, the court explained as follows:

> At the core of *Buckhannon* is the requirement that there must be a change in the legal relationship between the parties in order [to be] awarded fees, and that change must be judicially sanctioned in some way. In this instance, the legal relationship between the parties changed upon the Court's finding of liability, and that change is actualized, practically speaking, in the preliminary injunctions entered and in the settlement agreements reached as a result of the efforts of the Special Master and the Order of Reference mechanism. As the Court's agent, expressly appointed to the task of resolving requests for immediate injunctive relief pursuant to the Order of Reference, the Special Master provides the process with sufficient Court oversight to ensure that the concerns expressed in *Buckhannon* regarding requisite judicial *imprimatur* of settlements are met. Plaintiffs are "prevailing parties" under *Buckhannon* and 42 U.S.C. § 1988.

Id. at 45 (internal citation and footnote omitted).

¶17 Like the Special Master in *Blackman*, the Board's administrative judges, in considering a PFE, have the authority to oversee the parties' compliance efforts, to determine whether the parties are acting in compliance with either the Board's final order on the merits or the parties' Board-approved settlement agreement, and to issue a compliance decision recommending that the Board find a party in noncompliance. *See* 5 C.F.R. § 1201.183. In addition, it is clear that the Board has express authority to order corrective action in a case where it determines that one of the parties has failed to comply with a Board order. *See Kerr*, 726 F.2d at 732-33 (Congress expressly granted the Board special power to enforce compliance with its orders, and the Board should order corrective action in cases of noncompliance with such orders). Thus, as the District Court concluded in *Blackman*, we conclude that the Board's oversight of the parties' compliance efforts provides the PFE process with sufficient Board imprimatur to allow an appellant to qualify as a "prevailing party" under 5 U.S.C. § 7701(g)(1) even in the absence of a Board order finding the agency in noncompliance or an

agreement executed by the parties to settle compliance matters. Because the AJ's decision to deny the appellant's motion for attorney fees relating to the compliance phase of his appeal on the grounds that his PFE did not result in an enforceable judgment is contrary to this conclusion, we are remanding this case to the regional office for further adjudication of the appellant's motion for attorney fees relating to the compliance phase of this appeal.[12]

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[12] The current record is insufficient to allow the Board to rule on the appellant's motion without a remand to the regional office for further adjudication. The appellant's motion did not include all of the information required by the Board's regulations, such as a copy of the fee agreement and a statement of the attorney's customary billing rate for similar work, *see* 5 C.F.R. § 1201.203(a)(2), (3), but before an AJ decides to reject claims in a deficient attorney fees application, the AJ should communicate her concerns to the appellant and allow him an opportunity to correct the specific deficiencies identified, *Wilson v. Department of Health & Human Services*, 834 F.2d 1011, 1012 (Fed. Cir. 1987); *Martinez v. U.S. Postal Service*, 89 M.S.P.R. 152, ¶ 16 (2001). In addition, if the AJ ultimately determines that the appellant is entitled to an award of attorney fees, the AJ would be in the best position to gauge the reasonableness of attorney fees awarded for legal services rendered before the AJ. *See, e.g.*, *Diehl v. U.S. Postal Service*, 88 M.S.P.R. 104, ¶ 15 (2001).

ORDER

¶18 For the reasons set forth above, we VACATE the AID and REMAND this case to the regional office for further adjudication consistent with this Opinion and Order, including the issuance of a new AID.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.

DISSENTING OPINION OF NEIL A. G. MCPHIE

in

Don A. Mynard v. Office of Personnel Management

MSPB Docket No. DA-0831-06-0436-A-1

¶1 This case involves the appellant's motion for attorney fees incurred in both the merits phase and the enforcement phase of his retirement appeal. In the majority opinion, my colleagues agree with the administrative judge that the appellant failed to establish good cause to waive the time limit for filing his motion for fees regarding the merits phase, and they disagree with the administrative judge's denying fees as to the enforcement phase simply because the compliance proceeding did not result in the issuance of an enforceable judgment. I respectfully disagree on both counts.

Merits phase:

¶2 The finality date of the initial decision reversing OPM's reconsideration decision on the merits was October 2, 2006. On November 15, 2006, the regional office received the appellant's petition for enforcement, filed pro se, in which, besides alleging that OPM had not complied with the Board's order, he indicated that his legal fees had not been paid. Although November 15, 2006 was within the time period during which the appellant could have filed a timely motion for attorney fees regarding the merits phase of his appeal, the administrative judge did not acknowledge the appellant's reference to fees he had incurred during that phase. She adjudicated the petition for enforcement and issued an initial decision dismissing it as moot on January 25, 2007. The appellant filed a motion for fees on February 13, 2007.

¶3 The appellant's November 15, 2006 pleading was inartfully drafted, and it did not comply with the Board's regulatory requirements for attorney fees requests. The Board has held, however, that, when an appellant submits a timely but defective motion for attorney fees, an administrative judge should provide

notice that the motion is defective and afford him an opportunity to correct any deficiencies. *See Wilson v. Department of Health & Human Services*, 834 F.2d 1011, 1012 (Fed. Cir. 1987); *Ruble v. Office of Personnel Management*, 96 M.S.P.R. 44, ¶ 8 (2004). The administrative judge here did not advise the appellant that his request was defective, and did not afford him an opportunity to correct those deficiencies. Her failure to do so, in my view, constitutes good cause for the appellant's delay in filing. I note further that the appellant's attorney's belief that he was not required to file formally for fees until 60 days after the "Final Settlement" of the appeal, though incorrect, is understandable, given that his efforts on the appellant's behalf did not cease on the date the initial decision became final, but rather continued throughout the next few months until OPM provided the appellant the relief the Board ordered.

¶4 Under these circumstances, I would reverse the initial decision as to its dismissing as untimely filed the appellant's request for fees incurred during the merits phase of the case, find that he established good cause for the delay, and remand that matter for further adjudication.

Compliance phase:

¶5 As set forth in my concurring opinion in *Jaussaud v. Department of the Navy*, MSPB Docket No. SF-0752-05-0140-A-1 (January 31, 2008), I agree with the majority's view that *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) does not preclude an award for attorney fees incurred during a compliance case that is dismissed as moot without issuance of an enforceable judgment or a Board-approved settlement of the compliance issues. In *Jaussaud*, I explained that I agreed with the administrative judge that that appellant had otherwise established that she was a prevailing party because she showed that the relief she obtained

was causally related to the initiation of compliance proceedings before the Board. Because that appellant showed that she was a prevailing partying in the compliance proceeding, and because the fact that her petition for enforcement was dismissed as moot does not preclude an award of attorney fees under *Buckhannon*, I agreed with the administrative judge's decision to grant fees, reducing the overall amount to reflect that the appellant had not prevailed on all issues.

¶6 The instant case differs from *Jaussaud*. Here, in reversing OPM's reconsideration decision, the administrative judge ordered OPM to set a time limit for the appellant to make a belated deposit for his post-1956 military service. The administrative judge ordered OPM to do so within 20 days of October 2, 2006, when the initial decision became final. That date would have been October 23, 2006. The appellant's petition for enforcement was received in the regional office on November 15, 2006. On October 4, 2006, however, according to OPM, it sent the appropriate form to the Defense Finance Accounting Service (DFAS) so that it could determine the amount of the deposit due. As such, OPM was already in the process of complying with the Board's order when the appellant filed his petition for enforcement. Any delay in OPM's compliance was caused by DFAS's delay in certifying the appellant's earnings and providing that certification to OPM. That occurred on December 21, 2006, just 2 months after the date by which the Board ordered compliance, and OPM promptly communicated with the appellant, enabling the administrative judge to find OPM in compliance. There is no suggestion that OPM's actions were other than voluntary or that the relief the appellant obtained was causally related to his initiation of enforcement proceedings before the Board. Therefore, notwithstanding the fact that *Buckhannon* does not preclude such an award, in my

view, the appellant has not shown that he is a prevailing party in the compliance phase of this proceeding and is not entitled to an award of attorney fees for that effort.

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Neil A. G. McPhie
Chairman