UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 216

Docket No. AT-0432-08-0722-A-1

Anthony Shelton,

Appellant,

v.

Environmental Protection Agency,

Agency.

November 3, 2010

Joseph V. Kaplan, Esquire, Washington, D.C., for the appellant.

Karol S. Berrien, Esquire, and Robin B. Allen, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the addendum initial decision that denied his motion for an award of attorney fees relating to the appellant's petition for enforcement. For the reasons set forth below, we DENY the petition for failure to meet the Board's review criteria under 5 C.F.R. § 1201.115(d), REOPEN the appeal on the Board's own motion under 5 C.F.R. § 1201.118, and AFFIRM the initial decision as MODIFIED by this Opinion and Order.

BACKGROUND

¶2 On January 27, 2009, the parties entered into a settlement agreement regarding a removal appeal under chapter 43 of title 5 of the United States Code. Initial Appeal File (IAF), Tab 26. The agreement provided that the agency would:

> Pay [the appellant's representative] not more than $61,000 (sixty-one thousand) in documented attorneys fees and/or costs. Itemized documentation of said fees and costs must be provided to the **Agency's** Representative within fourteen calendar days of the effective date of this Agreement. In the event a dispute arises regarding such costs or fees, the parties will submit the dispute to the Administrative Judge for resolution.

Id. at 3. The settlement agreement further provided that "[t]he agency will endeavor to process all payments stipulated herein within 30 days or as soon as practicable." *Id*. The administrative judge dismissed the appeal as settled and entered the agreement into the record for enforcement purposes. IAF, Tab 28 at 1-3.

¶3 On March 27, 2009, the appellant filed a petition for enforcement, alleging that the agency had failed to pay the costs and attorney fees in accordance with the settlement agreement. Compliance File (CF), Tab 1 at 4-8. The administrative judge ordered the agency to file proof of compliance or good reason for noncompliance. CF, Tab 3 at 2. Subsequently, on or about April 17, 2009, the agency made the agreed payment. CF, Tab 4 at 1-2, 4, Tab 5 at 3. The administrative judge issued a compliance initial decision, dismissing the petition for enforcement as moot on the basis that the agency had complied with the settlement agreement during the pendency of the petition for enforcement. CF, Tab 6 at 1-3. The administrative judge advised the parties that, notwithstanding the disposition of the petition for enforcement, the appellant might still prove that he was the "prevailing party" in the compliance phase of the appeal so as to be entitled to an additional award of attorney fees relating to the petition for enforcement. *Id*. at 2.

¶4 The appellant filed a motion seeking an award of attorney fees totaling $6,793.95 incurred because of the agency's delay in complying with the settlement agreement. Attorney Fees File (AFF), Tabs 1, 6.[1] He argued that the agency breached the settlement agreement because the agency took significantly longer than the 30-day time period set by the settlement agreement to identify a source of funding for the $61,000 in costs and attorney fees, and longer still to actually make the payment. AFF, Tab 1 at 5-9, Tab 4 at 4-8. The agency opposed the appellant's motion, arguing that it did not breach the settlement agreement because the 30-day time period was not absolute and it made the payment within a reasonable time. AFF, Tabs 3, 7. The agency documented its efforts to expedite the payment. AFF, Tab 3, Agency Exhibits 1-3, Tab 7, Agency Exhibit 4.

¶5 The administrative judge issued an addendum initial decision denying the appellant's motion for attorney fees on the basis that the appellant was not the prevailing party in the petition for enforcement. AFF, Tab 8, Initial Decision (ID) at 1, 5. He found that, although the agency failed to pay the $61,000 in costs and attorney fees within 30 days, "the agency established that it endeavored to make the payment of these fees as soon as practicable and further established that it complied with the terms of the settlement agreement." ID at 4-5. Having found that the agency established its compliance with the terms of the settlement agreement, the administrative judge further found that "the appellant has failed to establish that he is a prevailing party for the purposes of an attorney fees award with respect to his petition for enforcement." ID at 5.

¶6 The appellant has filed a petition for review, arguing that the administrative judge erred in finding that the agency endeavored to pay the

---

[1] The appellant originally requested $3,384.02 in attorney fees related to the petition for enforcement. AFF, Tab 1 at 4, 17. The appellant later increased the requested amount to $6,793.95 to account for additional fees incurred during litigation of the attorney fees motion. AFF, Tab 6 at 6.

$61,000 as soon as practicable because the delay in payment was not due to processing difficulties, but was rather due to the agency's failure to locate a source of funding. Petition for Review File (PFR File), Tab 1 at 12-16. The appellant also argues that the agency's delay in making the payment was unreasonable and constituted a breach of the settlement agreement under Board precedent. *Id*. at 16-18. The agency has filed a response, addressing the appellant's arguments on review and arguing the petition should be denied for failure to meet the Board's review criteria. PFR File, Tab 3, Agency Response at 6-13.

ANALYSIS

¶7 The Board may require an agency to pay reasonable attorney fees incurred by an employee if the employee is the prevailing party and the Board determines that payment is warranted in the interest of justice. 5 U.S.C. § 7701(g). Such an award of attorney fees may include fees incurred during litigation of a petition for enforcement, even if the Board has not issued an order finding the agency to be in noncompliance. *McKenna v. Department of the Navy*, 108 M.S.P.R. 404, ¶ 17 (2008).

¶8 In his addendum initial decision, the administrative judge explained the parties' burdens of proof as follows:

> [A]t a minimum, the appellant must show that the agency was not in compliance with a material term of the settlement agreement to be deemed a "prevailing party" with respect to the petition for enforcement. *See Mynard* [*v. Office of Personnel Management*, 108 M.S.P.R. 58, ¶ 12 (2008)]. Nevertheless, for an attorney fees motion based upon counsel's services in connection with a [petition for enforcement], the burden of proof is upon the agency to prove its compliance, rather than upon the appellant to prove what the agency would not have done in the absence of the [petition for enforcement]. *See Whaley v. U.S. Postal Service*, 61 M.S.P.R. 340, 346 (1994).

ID at 2. Although the administrative judge correctly recited the holdings of these relevant cases, the case law itself is inconsistent. That is, *Mynard* states that the

appellant bears the burden of proving that the agency breached the settlement agreement, whereas *Whaley* states that the agency bears the burden of proving that it did not breach the settlement agreement. For the following reasons, we find that the Board's decision in *Mynard* is correct, and to the extent that *Whaley*, *Thompson v. Department of the Navy*, 83 M.S.P.R. 509, ¶ 5 (1999), *Capehart v. U.S. Postal Service*, 83 M.S.P.R. 385, ¶ 4 (1999), *Del Balzo v. Department of the Interior*, 72 M.S.P.R. 55, 59 (1996), *Neal v. Department of Justice*, 65 M.S.P.R. 207, 212 (1994), *Olson v. U.S. Postal Service*, 62 M.S.P.R. 261, 265-66 (1994), *Coon v. U.S. Postal Service*, 62 M.S.P.R. 180, 185 (1994), or any other Board decisions are inconsistent with this Opinion and Order, they are hereby overruled.

¶9 The rule as set forth in *Whaley* arises from an attempt to interpret *Garstkiewicz v. U.S. Postal Service*, 981 F.2d 528, 530 (Fed. Cir. 1992). In *Garstkiewicz*, the agency failed to pay the appellant back pay under a Board order, the appellant filed a petition for enforcement, the agency made the payments, and the Board dismissed the petition for enforcement as moot. 981 F.2d at 529. The appellant filed a motion for attorney fees related to the petition for enforcement, and the Board denied the motion on the basis that the appellant was not the prevailing party because he failed to establish that the agency would not have paid him absent the petition for enforcement. *Id*. at 529-30. The court reversed, finding that the appellant was the prevailing party because it was undisputed that the agency failed to pay the appellant by the deadline set in the Board's order or the filing of the petition for enforcement. *Id*. at 530. The court stated that, in order to be deemed the prevailing party, the appellant did not also have to prove that the agency's eventual compliance was causally related to the petition for enforcement:

> The statute does not place on the petitioner the burden of proving what the agency would not have done, when the passing of the Board's deadline had already established noncompliance by the agency. The burden of compliance with the Board's Order was not upon Mr. Garstkiewicz, but upon the Postal Service. It is undisputed

> that payment was not made as the Board's order required, and that the other provisions of the Board's Order were not complied with.

Id. Thus, *Garstkiewicz* held that, in order to establish prevailing party status in the compliance phase of an appeal, an appellant is not required to show that the agency would not have complied but for the petition for enforcement. *Id*. Because the agency's noncompliance in *Garstkiewicz* was undisputed, the court had no occasion to place the burden of proving compliance on one party or the other.

¶10 To the extent that *Stewart v. Department of the Army*, 102 M.S.P.R. 656, ¶ 12 (2006), *Thomas v. U.S. Postal Service*, 87 M.S.P.R. 331, ¶ 9 (2000), or any other Board cases state that an appellant must prove that the agency's eventual compliance was causally related to the petition for enforcement, they are inconsistent with *Garstkiewicz* and are hereby overruled. An appellant may prove that he was the prevailing party by establishing such a causal relationship, *e.g.*, *Cuthbertson v. Merit Systems Protection Board*, 784 F.2d 370, 372-73 (Fed. Cir. 1986), *abrogated in part on other grounds by Sacco v. United States*, 452 F.3d 1305 (Fed. Cir. 2006); *Foley v. U.S. Postal Service*, 59 M.S.P.R. 413, 418-20 (1993), but his failure to establish a causal relationship does not necessarily entail a finding that he was not the prevailing party.

¶11 Although *Garstkiewicz* stated merely that "[t]he burden of compliance" is upon the agency, 981 F.2d at 530, the Board in *Whaley* cited *Garstkiewicz* for the proposition that "the burden of *proof* is upon the agency to *prove* its compliance," 61 M.S.P.R. at 346 (emphasis added). Thus, the Board in *Whaley* misinterpreted *Garstkiewicz*, and the cases that rely on *Whaley* for this erroneous proposition are contrary to Board and Federal Circuit case law clearly stating that, in a motion for attorney fees, the appellant bears the burden of proving he is the prevailing party. *E.g.*, *Sterner v. Department of the Army*, 711 F.2d 1563, 1565-66 (Fed.

Cir. 1983); *Krape v. Department of Defense*, 97 M.S.P.R. 430, ¶ 5 (2004).[2] There is no reason that the burden on this matter should shift to the agency merely because the attorney fees motion arises in the context of a petition for enforcement. *See Vaughn v. U.S. Postal Service*, 97 M.S.P.R. 97, ¶ 7 (2004) (the ultimate burden in a petition for enforcement is upon the party seeking enforcement).

¶12 Accordingly, we find that the burdens of proof in a motion for attorney fees arising out of a petition for enforcement are as follows. An appellant bears the burden of proving his entitlement to attorney fees by showing that: (1) An attorney-client relationship existed and fees were incurred; (2) he is the prevailing party; (3) an award of fees is warranted in the interest of justice; and (4) the fees are reasonable. *Krape*, 97 M.S.P.R. 430, ¶ 5. In order to show that he is the prevailing party in the compliance phase of the proceedings, an appellant must establish that the agency materially breached the Board enforceable order or settlement agreement at issue. *Olson*, 62 M.S.P.R. at 266. In cases where the agency complies with the settlement agreement during the pendency of the petition for enforcement, the appellant is not required to establish that the agency's eventual compliance was causally related to his petition for enforcement in order to establish that he is the prevailing party. *Garstkiewicz*, 981 F.2d at 530. Although the appellant bears the ultimate burden of proving the agency's noncompliance, the agency bears the burden of producing relevant, material, and credible evidence of its compliance. *See Vaughn*, 97 M.S.P.R. 97, ¶ 7; 5 C.F.R. § 1201.183(a)(1). If a settlement agreement sets no

---

[2] To the extent that the court in *Mynard v. Office of Personnel Management*, 348 F. App'x 582, 586 (Fed. Cir. 2009), interpreted *Garstkiewicz* as holding that the agency has the burden of proving compliance, we note that the court identified that decision as nonprecedential. Such nonprecedential decisions are not binding precedent. *See Weed v. Social Security Administration*, 110 M.S.P.R. 468, ¶ 11 (2009).

time for performance, a reasonable time under the circumstances will be presumed. *Eagleheart v. U.S. Postal Service*, 110 M.S.P.R. 642, ¶ 11 (2009).

¶13 We find it unnecessary to remand the appeal for further adjudication under this clarified standard because there is no dispute of material fact and the administrative judge correctly found that the agency put on sufficient evidence to affirmatively prove that it did not breach the settlement agreement. ID at 5; *see Lary v. U.S. Postal Service*, 472 F.3d 1363, 1367 (Fed. Cir. 2006) (where the facts are undisputed the determination of whether there has been material non-compliance with the terms of a contract necessarily reduces to a question of law). In other words, the appellant's substantive rights were not prejudiced by any lack of clarity on his burden of proof because he would not have prevailed under either standard.

¶14 The administrative judge found that, although the settlement agreement mentioned a 30-day time period for processing the agreed-upon payments, 30 days was not a firm deadline because the agreement provided that if the agency did not make the payments within that time period, it would endeavor to do so "as soon as practicable." ID at 3; IAF, Tab 26 at 3. Thus, the agency would be in compliance with the settlement agreement if "it endeavored to make the attorney fees payment within 30 days or as soon as practicable." ID at 3. Based on the agency's documented efforts to fund and process the $61,000 in costs and attorney fees, the administrative judge found that the agency "took timely and appropriate steps" to make the payment, and that the agency therefore endeavored to make the payment "as soon as practicable." ID at 3-5; AFF, Tab 3, Agency Exhibit 1, Tab 7, Agency Exhibit 4. He therefore found the agency in compliance with the settlement agreement. ID at 5.

¶15 The appellant argues that the agency breached the settlement agreement because the agreement provided that the agency would endeavor to "process" the payment as soon as practicable, but the bulk of the agency's delay was caused not by processing the payment but by securing funding for the payment. PFR File,

Tab 1 at 12-16. He argues that the "intra-agency squabbling" over the proper source for the $61,000 is not the type of delay contemplated in the settlement agreement, and that if the Board were to excuse such delays, an agency could defer performance indefinitely as long as agency officials continue to discuss the matter among themselves. *Id*. at 15-16. He argues that this would render a timely payment obligation such as the one at issue here illusory. *Id*. at 16.

¶16 The appellant's argument provides no basis to disturb the addendum initial decision because he has not adequately explained why the "processing" delays contemplated in the settlement agreement should exclude delays in securing a source of funding for the payment. We disagree with the appellant's argument that "processing" would ordinarily mean only "the implementation of the paperwork necessary to 'cut the check,'" or "to perform the machinations necessary for a payment to be made electronically." *Id*. at 13. The dictionary definition of "process," i.e., "to subject to or handle through an established usu. routine set of procedures," would appear to include delays in funding the payment as well. *Merriam-Webster's Collegiate Dictionary* 927 (10th ed. 2002). Moreover, even if funding the payment did not constitute "processing" within the meaning of the settlement agreement, nothing in the agreement prohibits delays due to legitimate matters other than "processing." IAF, Tab 26.

¶17 Furthermore, the appellant mischaracterizes the nature of the agency's difficulty in securing a funding source. PFR File, Tab 1 at 15-16. The affidavits that the agency presented do not reflect delays due to fighting between departments that did not want to be responsible for the payment; they reflect delays due to uncertainty over the proper source for funding the payment within the agency's financial structure. AFF, Tab 3, Agency Exhibit 1, Tab 7, Agency Exhibit 4. The agency's undisputed evidence shows that there were genuine legal and administrative concerns underlying the delay in funding the payment. AFF, Tab 3, Agency Exhibit 1, Tab 7, Agency Exhibit 4. In addition, the appellant's argument that the initial decision gives license for an agency to delay payment

indefinitely based on interdepartmental disputes is unfounded. The administrative judge correctly found the reasonableness of the delay depends on the particular circumstances of each case, and under the particular circumstances of this case, the delay in payment was neither indefinite, nor caused by interdepartmental disputes. PFR File, Tab 1 at 15-16; ID at 4-5.

¶18 The appellant also argues that the agency breached the settlement agreement because it failed to pay the $61,000 in costs and attorney fees within a reasonable period of time. PFR File, Tab 1 at 16-18. He concedes that the settlement agreement set no firm deadline for compliance. *Id*. at 18. He argues, however, that the addendum initial decision is contrary to the Board's decisions in *Capehart*, 83 M.S.P.R. 385, and *Del Balzo*, 72 M.S.P.R. 55, where the Board found, under similar circumstances, that the agency's delay in performance was unreasonable and that the appellant was therefore the prevailing party in the compliance phase of the appeals. PFR File, Tab 1 at 16-18.

¶19 What constitutes a "reasonable delay" in complying with a settlement agreement depends on the facts and circumstances of a particular case. *See Eagleheart*, 110 M.S.P.R. 642, ¶ 11; *Ortega v. U.S. Postal Service*, 85 M.S.P.R. 422, ¶ 7 (2000). As the administrative judge correctly stated, what constitutes payment "as soon as practicable" under the settlement agreement also depends on the circumstances of a particular case. ID at 4-5; IAF, Tab 26 at 3; *cf. Bartel v. Federal Aviation Administration*, 14 M.S.P.R. 24, 30 n.3 (1982) ("The statutory guideline 'as early in the proceeding as practicable' is one designed to vary according to the circumstances.") (quoting 5 U.S.C. § 7701(d)(1), which concerns the Office of Personnel Management's right to intervene in Board proceedings), *aff'd as modified*, 30 M.S.P.R. 451 (1986).

¶20 The appellant is correct that there are similarities between *Capehart*, *Del Balzo*, and the instant appeal. Both *Capehart* and *Del Balzo* are procedurally similar to the instant appeal, as both cases involved motions for attorney fees relating to the compliance stage of the appeals. *Capehart*, 83 M.S.P.R. 385, ¶ 1;

Del Balzo, 72 M.S.P.R. at 57. *Capehart* and *Del Balzo* both involved settlement agreements in which the agency agreed to make certain payments, but there was no specific deadline for compliance. *Capehart*, 83 M.S.P.R. 385, ¶ 2; *Del Balzo*, 72 M.S.P.R. at 60. They also involved delays in payment comparable to the alleged 78-day delay at issue here. *Capehart*, 83 M.S.P.R. 385, ¶ 5 (delay of "almost three months" in paying attorney fees); *Del Balzo*, 72 M.S.P.R. at 60 (delay of "more than three months" in paying back pay, and delay of "more than four months" in paying attorney fees).

¶21 However, in this case, the agreement itself contained an additional term acknowledging that additional time might be required under the circumstances to process the payments. IAF, Tab 26 at 3 (providing that the agency would "endeavor" to make the required payments within 30 days or "as soon as practicable"). The agreements in *Capehart* and *Del Balzo* did not contain similar terms. *Capehart*, 83 M.S.P.R. 385, ¶ 2; *Del Balzo*, 72 M.S.P.R. at 57-58. Further, in finding that the agencies in *Capehart* and *Del Balzo* failed to make the payments in a reasonable time, the Board considered facts that are not present in the instant appeal. In *Capehart*, the Board noted that "the agency's Human Resources department failed to act upon the agency's initial order to remit attorney fees to the appellant and . . . the agency did not respond to the appellant's . . . letter regarding payment of the attorney fees." 83 M.S.P.R. 385, ¶ 5. The Board therefore found that the agency's eventual compliance was a direct result of the appellant filing his petition for enforcement. *Id*. In the instant appeal, however, it is undisputed that the agency continually acted upon the payment at issue beginning 4 days after the appellant's counsel submitted the required documentation, and that the agency responded to the appellant's counsel's requests regarding the status of the payment. AFF, Tab 1 at 6-7, Tab 7, Agency Exhibit 4. Thus, there is no basis in the instant appeal for finding that the agency's eventual compliance was causally related to the filing of the petition for enforcement.

¶22 In *Del Balzo*, the Board found that, in light of the short deadline for the agency to begin processing the payments, the delay of more than 3 months in paying the back pay, and the delay of more than 4 months in paying the attorney fees was unreasonable because it was not what the parties contemplated. 72 M.S.P.R. at 60. In the instant appeal, however, the agency took only 78 days to fully comply with the settlement agreement. IAF, Tab 26 at 4; CF, Tab 4 at 1, Tab 5 at 3. Furthermore, although the settlement agreement's 30-day benchmark for making the payment suggests that the parties here, like in *Del Balzo*, contemplated prompter payment, the agency in the instant appeal bargained for an additional provision to account for delays. IAF, Tab 26 at 3; AFF, Tab 7, Agency Exhibit 4, ¶ 3; *cf. Whaley*, 61 M.S.P.R. at 347 ("[T]he agency could have contracted for some provision to protect itself against delays in processing the claim for backpay . . . but it did not do so and the Board will not do so for it."). Moreover, the agency in *Del Balzo* still owed the appellant interest and Thrift Savings Plan contributions a full 7 months after entering into the settlement agreement. 72 M.S.P.R. at 60-61. The appellant in the instant appeal does not allege that the agency still had outstanding obligations after it made the $61,000 payment.

¶23 For the reasons explained above, the agency did not breach the settlement agreement by paying the $61,000 in costs and attorney fees 78 days after entering into the agreement. ID at 3-5. Because the appellant failed to establish that the agency breached the settlement agreement, he failed to establish that he was the prevailing party in the compliance phase of the proceedings. Accordingly, he has failed to establish that he is eligible for payment for attorney fees incurred during that phase of the proceedings. *See Smith v. Department of the Army*, 45 M.S.P.R. 240, 243 (1990).

ORDER

¶24 This is the final decision of the Merit Systems Protection Board in this matter. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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