UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 221

Docket No. CH-0752-08-0238-A-1

Bryan D. Baldwin,
Appellant,
v.
Department of Veterans Affairs,
Agency.

November 10, 2010

Dale L. Ingram, Esquire, Kansas City, Missouri, for the appellant.

Michael E. Anfang, Esquire, Kansas City, Missouri, 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 dismissed his petition for attorney fees as premature. For the reasons discussed below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND the case for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 Although the lengthy background in this case is set forth in our decisions in *Baldwin v. Department of Veterans Affairs*, 109 M.S.P.R. 392 (2008) (*Baldwin I*)

and *Baldwin v. Department of Veterans Affairs*, 111 M.S.P.R. 586 (2009) (*Baldwin II*), we reiterate herein the facts and findings that are relevant to this attorney fees petition.

¶3 On November 27, 2007, the agency issued a notice of decision removing the appellant from his Maintenance Mechanic position for misconduct, effective December 3, 2007. *Baldwin II*, 111 M.S.P.R. 586, ¶ 2. On November 30, 2007, the appellant met with agency human resources (HR) specialists and expressed his desire to retire. *Id.*, ¶ 3. The agency generated a Standard Form 52 (SF-52) (Request for Personnel Action) and typed the word "Retirement" in the box titled "Nature of Action," and the appellant wrote "Constructive discharge" in the box titled "Reasons for Resignation/Retirement" and signed the form, which identified the effective date of the action as December 3, 2007. *Id.*, ¶ 5. The agency subsequently revised the SF-52 to indicate that the nature of the action was a "Resignation" rather than a retirement, and this document was approved by agency officials on December 7, 2007, four days after the appellant's separation became effective. *Id.*

¶4 On December 12, 2007, the appellant filed an appeal with the Board of his removal action. *Baldwin II*, 111 M.S.P.R. 586, ¶ 6. The administrative judge treated the appeal as an alleged involuntary retirement appeal, and, after the parties' initial pleadings showed that there was a dispute as to whether the appellant had resigned or retired, the administrative judge issued an order instructing the agency to "show the appellant did not retire, but rather resigned from employment" and the appellant to "show he retired and that his appeal is a removal within the Board's jurisdiction." *Id.*, ¶¶ 6-7. After the parties responded, the administrative judge issued a February 8, 2008 initial decision dismissing the appeal for lack of Board jurisdiction based on her findings that: the appellant failed to make a nonfrivolous allegation that his resignation was the result of agency coercion; and the Board lacks jurisdiction to review the appeal as an involuntary retirement. *Id.*, ¶ 9.

¶5 The appellant filed a petition for review of the initial decision, and the Board vacated the February 8, 2008 initial decision and remanded the case for a jurisdictional hearing on the issue of whether the appellant's resignation was the result of agency-supplied misinformation. *Baldwin I*, 109 M.S.P.R. 392, ¶¶ 1, 32-33. The Board found that, during the appellant's November 30, 2007 meeting with the agency's HR specialists, the appellant elected an unreduced-postponed retirement annuity, and the agency incorrectly informed him that he would be eligible to receive that annuity when he reached age sixty in February 2008. *Id.*, ¶¶ 28, 31. The Board further found that, by typing the word "Retirement" on the appellant's SF-52 and processing it for the appellant's signature, the agency may have "misled the appellant into reasonably believing that his separation was a retirement rather than a resignation." *Id.*, ¶ 28.

¶6 After holding a jurisdictional hearing, the administrative judge issued a February 4, 2009 remand initial decision finding that the appellant did not prove that his resignation was involuntary due to misinformation. *Baldwin II*, 111 M.S.P.R. 586, ¶ 13. The appellant petitioned for review, and the Board reversed the remand initial decision upon finding the appellant's resignation involuntary. *Id.*, ¶¶ 1, 48. The Board found that the right to appeal his removal was important to the appellant and that he deliberately waited to receive the removal decision notice in order to preserve that right. *Id.*, ¶ 42. The Board further found that, in discussing the appellant's retirement options with him, and given the "obviously important effect that resignation would have on the appellant's right to appeal the decided removal action . . . the agency had an obligation to inform the appellant that he would have to resign in order to obtain a postponed retirement annuity." *Id.*, ¶ 43. Thus, the Board found that, to the extent the appellant "decided" to resign, in lieu of being removed, by electing a postponed retirement annuity, that decision was involuntary because it was made without adequate information that he needed to make an informed decision, i.e., that such a separation would need to be recorded as a resignation and not as a retirement. *Id.*, ¶ 45. The Board

ordered the agency to "cancel the appellant's resignation and restore him retroactive to December 3, 2007." *Id.*, ¶ 48. In ordering the agency to restore the appellant to the status quo ante, the Board specifically found that the appellant is subject to the circumstances existing at the time of his involuntary resignation, i.e., the decided removal action, effective December 3, 2007. *Id.*, ¶ 47.

¶7 On September 8, 2009, the appellant filed a petition for attorney fees in the amount of $150,267.00 and $1,018.55 in costs. Attorney Fees File (AFF), Tab 1 at 13, 15, Tab 7 at 14 n.7.[1] In his petition, the appellant argues that the agency's errors, which led to his involuntary resignation, constitute "gross procedural errors of commission and omission that significantly and materially burdened [him]." AFF, Tab 1 at 11. The agency responded in opposition to the appellant's attorney fees petition. AFF, Tab 5.

¶8 The administrative judge issued an addendum initial decision that dismissed the attorney fees petition based on her finding that it is premature to conclude that the Board's order in *Baldwin II* has resulted in a material alteration of the relationship between the parties which would make the appellant a prevailing party for purposes of awarding attorney fees. AAF, Tab 8, Addendum Initial Decision (AID) at 1-2, 4. The administrative judge found that, prior to *Baldwin II*, the appellant was a retiree, and subsequent to *Baldwin II*, the appellant has been removed. AID at 4. The administrative judge found that, although the Board's order in *Baldwin II* requiring the agency to cancel the involuntary resignation action resulted in the reinstatement of the appellant's removal from employment for misconduct, giving the appellant standing to challenge his separation under 5 U.S.C. chapter 75, the appellant has not yet realized any benefit from this advantage. AID at 3-4.

---

[1] The appellant amended his petition for attorney fees to include the 12.75 hours spent drafting a reply to the agency's response to his attorney fee petition. *See* AFF, Tab 7 at 14 n.7

¶9 The appellant has filed a petition for review of the addendum initial decision, to which the agency responded in opposition. Petition for Review File (PFR File), Tabs 1, 3. In his petition, the appellant asserts, inter alia, that the administrative judge erred in finding that he was not a "prevailing party" because the Board's order in *Baldwin II* instructed the agency to cancel the involuntary resignation and reinstate him, which results in a material alteration between the parties. PFR File, Tab 1 at 8-12.

ANALYSIS

¶10 Under 5 U.S.C. § 7701(g)(1), the Board may require payment by the agency of 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, including any case in which the agency's action was clearly without merit. *Allen v. U.S. Postal Service*, 2 M.S.P.R. 420, 426 (1980). Thus, to establish entitlement to an award of attorney fees, an appellant has the burden of proving that: (1) he was the prevailing party; (2) he incurred attorney fees pursuant to an existing attorney-client relationship; (3) an award of fees is warranted in the interest of justice; and (4) the amount of fees claimed is reasonable. 5 U.S.C. § 7701(g)(1); *Social Security Administration v. Price*, 94 M.S.P.R. 337, ¶ 8 (2003), *aff'd*, 398 F.3d 1322 (Fed. Cir. 2005). Here, there is no dispute that an attorney-client relationship existed and that the appellant incurred fees in connection with his appeal.

The appellant is a prevailing party.

¶11 The determination of an award of attorney fees is based upon the final decision of the Board and whether, by the final decision, the appellant is a prevailing party. *Del Prete v. U.S. Postal Service*, 104 M.S.P.R. 429, ¶ 6 (2007). Thus, in attorney fee motions arising, as here, under 5 U.S.C. § 7701(g)(1), the Board has expressly adopted the standard set forth by the U.S. Supreme Court that an appellant is considered to have prevailed in a case and to be entitled to

attorney fees only if he obtains an "enforceable order" resulting in a "material alteration of the legal relationship of the parties." *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 604 (2001); *McKenna v. Department of the Navy*, 104 M.S.P.R. 22, ¶ 6 (2006); *Cole v. Department of Justice*, 90 M.S.P.R. 627, ¶¶ 6-7 (2001). A plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. *Alexander v. Department of the Army*, 80 M.S.P.R. 350, ¶ 5 (1998); *see, e.g., Del Prete*, 104 M.S.P.R. 429, ¶¶ 3, 6 (the appellant was a prevailing party where the Board mitigated his removal to a 60-day suspension). The extent of relief that an appellant receives on his claim does not affect whether the appellant is a prevailing party but, instead, should be considered in the analysis of whether attorney fees are warranted in the interest of justice. *See, e.g., Garcia v. U.S. Postal Service*, 83 M.S.P.R. 458, ¶¶ 2-4 (1999) (an appellant who obtained an additional $12.66 in costs for long-distance telephone calls on petition for review of an addendum initial decision was a "prevailing party" for purpose of an additional award of attorney fees).

¶12 We find that the administrative judge erred in finding the appellant's attorney fees petition premature because the appellant, at the time the initial decision was issued, had not yet prevailed in his separate Board appeal for the removal action based on misconduct.[2] The appeal giving rise to this attorney fees

---

[2] On July 14, 2009, the agency informed the appellant that, pursuant to the Board's order in *Baldwin II*, it cancelled his resignation and removed him from federal service, effective December 3, 2007. AFF, Tab 5 at 3. Thereafter, the appellant filed a July 31, 2009 petition for enforcement asserting that: the agency's actions failed to comply with the Board's final order because it refused to cancel or postpone his removal for misconduct, which was scheduled to become effective December 3, 2007; and he should be restored retroactive to December 3, 2007, and receive back pay until the agency determines if it wants to act on the proposed removal letter. The administrative judge issued a compliance initial decision dismissing the appellant's petition for enforcement, which became the final order of the Board on April 9, 2010, when the Board denied the appellant's petition for review of the compliance initial decision. *Baldwin v.*

motion concerned whether the appellant's resignation, in lieu of removal, was involuntary as a result of agency misinformation. Therefore, whether the appellant ultimately prevails in his appeal of his removal for misconduct is a separate matter that is not relevant in determining whether he is a prevailing party in this involuntary resignation appeal.

¶13 The Board's final order in this appeal found the appellant's resignation involuntary and instructed the agency to cancel the resignation and restore the appellant to the status quo ante. *See Baldwin II*, 111 M.S.P.R. 586, ¶¶ 45-47. In ordering the agency to restore the appellant to the status quo ante, the Board specifically found that the appellant is subject to the circumstances existing at the time of his involuntary resignation, i.e., the decided removal action, effective December 3, 2007. *Id.*, ¶ 47. In complying with the Board's order, the agency: cancelled the appellant's involuntary resignation; reinstated him to the status quo ante; and retroactively effected the decided removal action. Thus, the result of the Board's final order in *Baldwin II* was that the agency changed the appellant's separation from a resignation to a removal. In light of this end result, the agency argued below that an attorney fees award is not warranted because its action of changing the appellant's status from "resigned to removed," pursuant to the Board's final order in *Baldwin II*, is "hardly beneficial to the Appellant." AFF, Tab 5 at 6.

Department of Veterans Affairs, MSPB Docket No. CH-0752-08-0238-C-1 (Initial decision, Oct. 13, 2009); *Baldwin v. Department of Veterans Affairs*, 113 M.S.P.R. 468 (Table). The appellant's petition for review of the compliance initial decision is currently pending in the U.S. Court of Appeals for the Federal Circuit.

The appellant also filed an August 13, 2009 appeal of his removal for misconduct, which was affirmed by the administrative judge and is currently pending before the Board on petition for review. *Baldwin v. Department of Veterans Affairs*, MSPB Docket No. CH-0752-09-0843-I-1 (Initial Decision, Feb. 10, 2010).

¶14 We do not find the agency's argument persuasive because the record shows that the appellant directly benefited as a result of the agency's action of cancelling his involuntary resignation action. In *Baldwin II*, we found that the agency provided the appellant with incorrect information concerning his ability to retire in lieu of being removed and the appellant reasonably relied on this misinformation. *Baldwin II*, 111 M.S.P.R. 586, ¶¶ 43-44. Because of this misinformation, the Board found that the appellant was not informed that selecting a deferred annuity would require his separation to be processed as a resignation and not as a retirement. *Id.*, ¶ 44. The Board concluded that:

> This was incorrect information that the appellant reasonably relied on and we find that the agency should have known that the appellant was acting under the erroneous impression that he would be separating from the agency with retiree status. For this reason, and because of the obviously important effect that resignation would have on the appellant's right to appeal the decided removal action, we find that the agency had an obligation to inform the appellant that he would have to resign in order to obtain a postponed retirement annuity.

Id., ¶ 43. Clearly, the legal effect of whether the appellant's separation was recorded as a resignation or retirement was of significant importance to the appellant, as illustrated by the record evidence in *Baldwin II* that the appellant wanted to retain his statutory right, as a tenured employee, to file a Board appeal of the underlying removal action for misconduct. *Baldwin II*, 111 M.S.P.R. 586, ¶¶ 41-42; *see Mays v. Department of Transportation*, 27 F.3d 1577, 1579-81 (Fed. Cir. 1994) (the Board does not lose jurisdiction over an employee's adverse action appeal when the effective dates of the adverse action and the retirement are the same); *see, e.g.*, *Alexander*, 80 M.S.P.R. 350, ¶ 6 (the appellant was a prevailing party because although he was not reinstated, the agency agreed to remove three misconduct charges from his personnel records, which were significant issues in the appeal and were resolved in a manner that directly benefitted the appellant).

Thus, as a direct result of *Baldwin II*, the appellant now has the right to appeal his removal to the Board.

¶15 In sum, because *Baldwin II* required the agency to cancel the appellant's resignation, through which the appellant regained his right to appeal his removal for misconduct, we find that *Baldwin II* resulted in a "material alteration of the legal relationship of the parties" that directly benefited the appellant. *See Alexander*, 80 M.S.P.R. 350, ¶ 5. Thus, we find that the appellant is a prevailing party for purposes of attorney fees in this involuntary resignation appeal.

An attorney fees award is in the interest of justice.

¶16 The Board's reviewing court, the U.S. Court of Appeals for the Federal Circuit, has held that "[t]he attorney fee provision of the Back Pay Act is not a penalty designed to increase the agency's liability: it is a reimbursement statute, to facilitate making whole the wronged employee." *Naekel v. Department of Transportation*, 845 F.2d 976, 980 (Fed. Cir. 1988). Thus, to prove entitlement to an attorney fees award, an appellant who is a prevailing party must also show that an attorney fees award is in the interest of justice. *Id*. An award of attorney fees may be warranted in the interest of justice when: (1) the agency engaged in a prohibited personnel practice; (2) the agency action was clearly without merit or wholly unfounded, or the employee is substantially innocent of the charges; (3) the agency initiated the action in bad faith; (4) the agency committed a gross procedural error that prolonged the proceeding or severely prejudiced the employee; or (5) the agency knew or should have known that it would not prevail on the merits when it brought the proceeding. *Allen*, 2 M.S.P.R. at 434-35; *see also Dunn v. Department of Veterans Affairs*, 98 F.3d 1308, 1311-12 (Fed. Cir. 1996); *Stewart v. Department of the Army*, 102 M.S.P.R. 656, ¶ 13 (2006).

¶17 We find that an award of attorney fees is in the interest of justice because the appellant's involuntary resignation is the result of the agency's gross procedural error. The Board has held that in determining whether a gross procedural error occurred warranting an award of attorney fees, a balance is

struck between the nature of and any excuse for the agency's error and the prejudice and burden that error caused the appellant. *Thomas v. U.S. Postal Service*, 77 M.S.P.R. 502, 506-07 (1998); *Woodall v. Federal Energy Regulatory Commission*, 33 M.S.P.R. 127, 132-34 (1987). If, in the balance, the prejudice and burden to the appellant predominates, gross procedural error exists and the appellant is entitled to a fee award. *Woodall*, 33 M.S.P.R. at 132.

¶18 In *Woodall*, the Board considered whether attorney fees were justified where an agency failed to provide an appellant with her entitled adverse action rights before placing her on enforced leave. *Id*. at 130, 132. Noting the more than 3-year delay between when the appellant filed her appeal and the Board's decision reversing the action, the Board found that the agency's failure to provide the appellant with any adverse action appeal rights constituted gross procedural error. *Id*. at 134. The Board explained that the agency's action severely prejudiced the appellant and prolonged the proceeding. *Id*. In *Peasley v. Department of the Army*, 25 M.S.P.R. 137, 138-39 (1984), the Board upheld an award of attorney fees under the gross procedural error standard upon finding that the agency's deception, which led to the appellant's involuntary resignation, "unnecessarily subjected [the] appellant to substantial burden and expense." Similarly, in *Swanson v. Defense Logistics Agency*, 35 M.S.P.R. 115, 118 (1987), the Board found that attorney fees were warranted under the gross procedural error standard where the agency separated an employee, without any adverse action procedures, due to abandonment of her position. The Board found that the agency's reasoning for its action – its reliance on and interpretation of the Federal Personnel Manual - did not "outweigh the prejudice and burden that the error caused the appellant." *Id*.

¶19 Here, the Board found that the agency provided the appellant with incorrect information concerning his ability to retire in lieu of being removed and that the appellant reasonably relied on this misinformation. *Baldwin II*, 111 M.S.P.R. 586, ¶¶ 43-44. Because of this misinformation, the appellant was not informed

that selecting a deferred annuity would require his separation to be processed as a resignation and not as a retirement. As we stated above, this distinction was important to the appellant, as the record showed in *Baldwin II*, because the appellant wanted to retain his statutory right, as a tenured employee, to file a Board appeal of the underlying removal action for misconduct. *See Mays*, 27 F.3d at 1579-81. Thus, as a result of the agency's misinformation, which resulted in processing the appellant's separation as a resignation, the appellant had to file an appeal with the Board to have that resignation deemed involuntary and reversed so that his statutory right under 5 U.S.C. § 7513(d) to appeal his removal for misconduct to the Board would be restored. Although the appellant was ultimately successful, the appeal process that required the agency to cancel his involuntary resignation took over 1.5 years. Thus, but for the agency's error, the appellant would have had the opportunity to appeal his removal for misconduct without the significant delay that consequently followed from the agency's actions.

¶20 We also find persuasive that, although the agency realized shortly after the appellant's December 3, 2007 separation that it had incorrectly processed his separation as a retirement, it did not take steps to inform the appellant that it had processed a new SF-52 showing that his separation would be recorded as a resignation. *Baldwin II*, 111 M.S.P.R. 586, ¶¶ 5, 11, 41. Instead, it was not until after the effective date of the appellant's separation that he learned that a new SF-52 was processed, showing his separation as a resignation, not a retirement. *Id.*, ¶ 41 n.2. Thus, when the appellant attempted to appeal the underlying removal for misconduct to the Board, the agency filed a motion with the administrative judge to dismiss the appeal because the Board does not have jurisdiction over voluntary actions, such as resignations. *Id.*, ¶¶ 6-7; *see generally Neice v. Department of Homeland Security*, 105 M.S.P.R. 211, ¶ 7 (2007) (an employee-initiated action, such as a resignation, is presumed to be voluntary, and as such, is not appealable to the Board, unless the employee can establish that the

resignation was the product of duress or coercion or shows that a reasonable person would have been misled by the agency). The record further shows that the agency did not take any action to correct its wrongdoing once the discrepancy regarding the manner of the appellant's separation became clear to him, *see generally Baldwin I and II*, and, therefore, the appellant's only option to effect the cancellation of his involuntary resignation was to pursue this matter before the Board. *See Swanson*, 35 M.S.P.R. at 118 (in awarding attorney fees as a result of gross procedural error, the Board considered the agency's refusal to reverse its action as well as its continued defense of the action even after the administrative judge raised the possibility of a procedural error).

¶21 The appellant prevailed in his involuntary resignation appeal when the Board ordered the agency to cancel his resignation and reinstate him to the status quo ante. Although the agency retroactively reinstated the appellant and then removed him pursuant to its previously-decided removal action, the appellant regained his statutory right, under 5 U.S.C. § 7513(d), to appeal the underlying removal action, which appears to be the primary benefit he sought through this involuntary resignation appeal. The agency's error required, however, that the appellant spend over 1.5 years adjudicating the involuntary resignation action before the Board, thereby significantly prolonging his attempt to appeal the underlying removal action. *See Powell v. Department of the Treasury*, 8 M.S.P.R. 322, 325 (1981) (finding gross procedural error warranting an award of attorney fees because the agency, which did not permit the appellant to withdraw his resignation request, subjected an appellant both to an involuntary separation without procedural due process and to the burden of prosecuting an appeal of his separation).

¶22 In sum, the Board previously found that the agency gave the appellant misinformation which led to its error in wrongly processing the appellant's separation as a resignation. We now find that the agency's error significantly prejudiced the appellant by requiring that he pursue an appeal before the Board to

have the involuntary resignation reversed and prolonging his ability to exercise his statutory rights under 5 U.S.C. § 7513(d) to file a Board appeal of the underlying removal action. Thus, we find that the agency has committed gross procedural error and an award of attorney fees is warranted in the interest of justice.

The attorney fees petition must be remanded for a determination of whether the requested fees are reasonable.

¶23 We conclude that the appellant is thus entitled to an award of attorney fees because he is a prevailing party and an award of fees is warranted in the interest of justice. The issue of the reasonableness of the amount of the requested attorney fees and costs thus remains to be determined. Generally, the administrative judge who decided an appeal on the merits is in the best position to evaluate the documentation submitted by counsel to determine whether the amount of fees requested is reasonable and to evaluate the quality of the representation afforded by counsel. *Thomas*, 77 M.S.P.R. at 507-08; *Whaley v. U.S. Postal Service*, 61 M.S.P.R. 340, 347 (1994). Therefore, we remand this petition for attorney fees to issue a new addendum initial decision addressing the reasonableness of the attorney fees requested by the appellant. *See, e.g., Thomas*, 77 M.S.P.R. at 508.

ORDER

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

FOR THE BOARD:

_____

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