

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

**2013 MSPB 30**

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Docket No. SF-0752-09-0804-A-1

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**David A. Brenner,**

**Appellant,**

**v.**

**Department of the Interior,**

**Agency.**

April 16, 2013

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Benjamin Zvenia, Esquire, Las Vegas, Nevada, for the appellant.

Kevin D. Mack, Esquire, Sacramento, California, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mark A. Robbins, Member

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review in this case asking us to reconsider the addendum initial decision issued by the administrative judge, which denied his application for attorney fees and associated costs. We DENY the petition for review and AFFIRM the addendum initial decision.<sup>1</sup>

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<sup>1</sup> Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

## BACKGROUND

¶2 The appellant, a Senior Law Enforcement Ranger, filed a Board appeal challenging his 30-day suspension for failure to be in proper and required uniform while on duty. Refiled Appeal File (RAF), Tab 1. The administrative judge sustained the charge but mitigated the penalty to a 3-day suspension. RAF, Tab 22. By final order dated June 22, 2011, the Board denied the agency's petition for review of the administrative judge's initial decision. *Brenner v. Department of the Interior*, MSPB Docket No. SF-0752-09-0804-I-2, Final Order (June 22, 2011).

¶3 The appellant, through his representative, Benjamin Zvenia, thereafter filed a motion requesting \$53,876.75 in attorney fees and \$8,645.48 in related expenses. Attorney Fees File (AFF), Tab 1 at 12-13. In support of the motion, the appellant did not claim that Zvenia was admitted to practice law before either the United States Supreme Court, or the highest court of any other state or the District of Columbia. Rather, he contended that Zvenia qualified as an attorney eligible for a fee award based on his tribal court admissions and voluntary bar association memberships. AFF, Tab 1 at 2-3.<sup>2</sup>

¶4 The administrative judge denied the appellant's motion, finding that only individuals admitted before the highest court of a state, territory, possession, or the District of Columbia are entitled to appear as attorneys before the Board, and that only when such individuals render legal services do appellants incur attorney fees under section 7701(g)(1). AFF, Tab 7, Initial Decision (ID) at 1, 5, 7. She concluded that, because Zvenia's tribal court admissions did not so qualify, he was not entitled to appear before the Board and practice as an attorney. ID at 7.

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<sup>2</sup> Zvenia has a Juris Doctor degree from a non-ABA-accredited law school and is admitted to practice before several tribal courts, including the Muscogee (Creek) Nation Supreme Court, the Nez Perce Tribal Court, and the Walker River Tribal Court. AFF, Tab 1 at 5, Tab 6 at 2, Exhibits B, C. He is also a member of several voluntary bar groups, such as the Federal Bar Association. *Id.*, Tab 1 at 19.

Although the administrative judge recognized that Zvenia is entitled to act as a non-attorney representative before the Board, she concluded that he is not eligible for attorney fees or associated expenses. ID at 7-8. The appellant has filed a petition for review of the initial decision, and the agency has filed a response in opposition. Petition for Review (PFR) File, Tabs 1, 3, 5-6.

### ANALYSIS

¶5 It is well settled that attorney fees cannot be awarded against the federal government unless specifically authorized by a statutory waiver of sovereign immunity. *Saldana v. Merit Systems Protection Board*, [766 F.2d 514](#), 516 (Fed. Cir. 1985). Such statutory authorization must be express and specific; it cannot be extended beyond the statute's literal terms and it cannot be implied. *Id.*

¶6 Here, the appellant relies on [5 U.S.C. § 7701\(g\)\(1\)](#) as the statutory authority for an award of attorney fees. 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. *Id.*; *Driscoll v. U.S. Postal Service*, [116 M.S.P.R. 662](#), ¶ 7 (2011). Attorney fees are incurred where an attorney-client relationship exists and counsel has rendered legal services on behalf of the appellant in an appeal before the Board. *Farrar v. Department of the Army*, [5 M.S.P.R. 26](#), 27 (1981); *see* [5 C.F.R. § 1201.203\(a\)](#). The appellant bears the burden of establishing his entitlement to an award of attorney fees. *See Parker v. Office of Personnel Management*, [75 M.S.P.R. 688](#), 691 (1997).

¶7 Section 7701(a)(2) of Title 5 provides, in relevant part, that an appellant shall have the right to be represented by an attorney or other representative. *See also* [5 C.F.R. § 1201.31\(b\)](#). The dispositive issue before the Board on review is whether Zvenia appeared before the Board as the appellant's attorney, or whether he did so as the appellant's non-attorney representative. The Board has long held that an attorney-client relationship does not exist between an appellant and his

non-attorney representative. *Vitanza v. U.S. Postal Service*, [94 M.S.P.R. 385](#), ¶ 14 (2003); *Sapp v. U.S. Postal Service*, [82 M.S.P.R. 411](#), ¶ 17 (1999). Therefore, only if the appellant's representative was appearing as an attorney would the appellant have incurred attorney fees under [5 U.S.C. § 7701\(g\)\(1\)](#).

¶8 Neither Title 5 nor the Board's regulations expressly define the term "attorney." The ordinary meaning of the term "attorney" in fee-shifting statutes is someone licensed by the government to practice law generally. *Cook v. Brown*, [68 F.3d 447](#), 451 (Fed. Cir. 1995) (interpreting the Equal Access to Justice Act). As the administrative judge recognized, whether an individual is licensed to practice as an attorney at law before the Board is governed by federal law. ID at 4; see *Augustine v. Department of Veterans Affairs*, [429 F.3d 1334](#), 1340-41 (Fed. Cir. 2005). Thus, under [5 U.S.C. § 500\(b\)](#), an "individual who is a member in good standing of the bar of the highest court of a State" may provide legal representation before any federal agency, including the Board. "State," as defined in [5 U.S.C. § 500\(a\)\(2\)](#), means "a State, a territory or possession of the United States including a Commonwealth, or the District of Columbia." [5 U.S.C. § 500\(a\)\(2\)](#). It is undisputed that Zvenia is not a member in good standing of the bar of the highest court of one of the 50 states or the District of Columbia. Therefore, Zvenia could practice as an attorney at law before the Board and incur attorney fees within the meaning of section 7701(g)(1) only if one or more of the tribes in whose court Zvenia is authorized to practice qualifies as "a territory or possession of the United States."

¶9 Courts that have considered the status of tribal courts for purposes of attorney admissions and practice have found that tribes are not territories or possessions of the United States. The U.S. Court of Appeals for the Ninth Circuit has held that an attorney's license to practice before the High Court of the Trust Territory of the Pacific Islands did not entitle him to admission to practice before the Ninth Circuit because the Trust Territory is not a "Territory or Insular Possession of the United States." *In re Rothstein*, [884 F.2d 490](#), 491 (9th Cir.

1989). In addition, the Court of Appeals for Veterans Claims, interpreting language almost identical to [5 U.S.C. § 500](#), has held that a tribe does not qualify as a “territory of the United States” for purposes of admission to the bar of that court. *In re Application for Admission of Gere Unger*, 16 Vet. App. 205, 208 (2002) (holding that the applicant’s certificate of good standing from the Mashantucket Pequot Tribal Nation did not represent an admission to “the Supreme Court of the United States, or the highest court of any state, the District of Columbia or a territory, possession, or commonwealth of the United States.”).

¶10 Based on the foregoing, and absent any indication in the legislative history or elsewhere to the contrary, we agree with the administrative judge that Zvenia’s tribal court admissions do not constitute admission to the highest court of a territory or possession of the United States. [5 U.S.C. § 500](#); *see generally* H.R. Rep. No. 89-1141 (1965), *reprinted in* 1965 U.S.C.C.A.N. 4170, 4171. The authority on which the appellant primarily relies—a Department of Labor regulation governing practice before the Employees’ Compensation Appeals Board (ECAB)—is inapposite. *See* AFF, Tab 1 at 3-5, 8, Tab 6 at 4-5, 9. That regulation allows a claimant to be represented before the ECAB by “any individual or an attorney who has been admitted to practice and who is in good standing with any court of competent jurisdiction.” [20 C.F.R. § 501.1\(h\)](#). The issue in this case, however, is not whether Zvenia may appear as a “representative” before the Board, it is whether he appeared as an attorney-representative and the appellant incurred attorney fees under [5 U.S.C. § 7701\(g\)\(1\)](#). There is no clear indication, however, that in enacting section 7701(g)(1), Congress intended to cover fee awards for members of tribal courts practicing before the Board. In the absence of an express and specific statutory authorization, the Board cannot extend the statutory waiver of sovereign immunity in section 7701(g)(1) beyond its literal terms, and such a waiver cannot be implied. *Saldana*, 766 F.2d at 516.

¶11 Because the appellant’s representative is not licensed to practice law in the “highest court of a State, territory or possession of the United States, including a Commonwealth, or the District of Columbia,” we agree with the administrative judge that he is ineligible to practice before the Board as an attorney-representative. Therefore, the appellant is ineligible to receive attorney fees for his representative’s services. *See Metsopulos v. U.S. Postal Service*, [35 M.S.P.R. 496](#), 498 (1987).

### ORDER

¶12 This is the final decision of the Merit Systems Protection Board in this appeal. 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 review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date of this order. *See* [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff.

Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://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:

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