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

**2013 MSPB 43**

Docket No. CB-1216-09-0010-A-1

**Special Counsel,**

**Petitioner,**

**v.**

**Cruz Salas,**

**Respondent.**

June 14, 2013

Ana Galindo-Marrone, Esquire, and Carolyn S. Martorana, Esquire, Washington, D.C., for the petitioner.

Robert F. Hermann, Esquire, Westfield, New Jersey, for the respondent.

**BEFORE**

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

## OPINION AND ORDER

¶1 The respondent has filed a petition for review in this case asking us to reconsider the addendum initial decision issued by the administrative law judge, who denied her motion for attorney fees after she settled a disciplinary proceeding brought under the Hatch Act. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were

not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed.* *See* Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. Except as expressly modified by this Opinion and Order, we AFFIRM the initial decision issued by the administrative law judge.

## BACKGROUND

¶2 In March 2009, the Office of Special Counsel (OSC) issued a complaint against the respondent alleging that she violated the Hatch Act when she forwarded a political email from her government computer to six individuals, two of whom were her subordinate team members, while on duty in a federal workplace. MSPB Docket No. CB-1216-09-0010-T-1, Initial Appeal File (IAF) (T-1), Tab 1; *see* 5 U.S.C. §§ 7323, 7324; 5 C.F.R. §§ 734.302, .306. After the respondent failed to answer, the administrative law judge deemed the allegations as admitted and ordered her removal. IAF (T-1), Tab 6. The respondent secured representation and filed a petition for review. Petition for Review (PFR) File (T-1), Tab 4. The Board set aside the judgment and remanded the complaint for a hearing and decision on the merits. PFR File (T-1), Tab 8. Before a hearing took place, however, the parties reached a settlement agreement. MSPB Docket No. CB-1216-09-0010-B-1, IAF (B-1), Tab 5. The respondent accepted a 30-day

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* 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.

suspension. *Id.* at 7. In her subsequent motion for attorney fees, she requested $65,601.56 in attorney fees for the proceedings leading to the settlement agreement. MSPB Docket No. CB-1216-09-0010-A-1, IAF (A-1), Tab 1 at 14. She later requested an additional $31,552.16 in fees incurred during the attorney fee litigation. IAF (A-1), Tab 14 at 17. The administrative law judge denied the respondent's petition for attorney fees because she was not the prevailing party in the proceeding. IAF (A-1), Tab 18, Addendum Initial Decision (AID). The respondent timely filed a petition for review of the addendum initial decision, arguing that she was the prevailing party and therefore was entitled to an attorney fee award.

## ANALYSIS

¶3 We disagree with the administrative law judge's analysis regarding whether the respondent is the prevailing party. We conclude, however, that an award of attorney fees would not be warranted in the interest of justice, and we affirm the addendum initial decision accordingly. Under 5 U.S.C. § 1204(m)(1), an involved agency may be required to pay reasonable attorney fees that an employee or applicant incurs if that employee or applicant is the prevailing party and the Board or adjudicating official "determines that payment by the agency is warranted in the interest of justice . . . ." The Board has held that an employee is the "prevailing party" if she obtains an enforceable judgment against the agency or enforceable relief through a settlement agreement. *Santella v. Special Counsel*, 86 M.S.P.R. 48, ¶¶ 20-21 (2000) (construing "prevailing party" standard under 5 U.S.C. § 1204(m)(1) to be the same as the standard applied under 5 U.S.C. § 7701(g)(1)), *aff'd*, 328 F.3d 1374 (Fed. Cir. 2003). The prevailing party need only "succeed on any issue in the litigation which achieves some of the benefit he sought in bringing the action." *Ray v. Department of Health & Human Services*, 64 M.S.P.R. 100, 104 (1994) (citing *Texas State*

*Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989)).

¶4 The respondent asserted that she was the prevailing party here because she successfully petitioned the Board for review of the decision ordering her removal and the parties then reached a settlement agreement under which she served a 30-day suspension, a significant reduction in penalty. IAF (A-1), Tab 1 at 15-17. Citing *Ray*, the administrative law judge instead found that the respondent could not be the prevailing party because she did not initiate the litigation, and OSC initiated it instead. AID at 5-7; *see Ray*, 64 M.S.P.R. at 104 (to be a prevailing party, a party must "succeed on any issue in the litigation which achieves some of the benefit that [s]he sought in bringing the action sufficient to change the legal relationship between the parties"). He distinguished the cases that the respondent had cited wherein appellants received attorney fees after their appeals were settled, resulting in more favorable terms for separation, or after their removal penalties were mitigated or canceled. AID at 6-7.

¶5 Although the administrative law judge cited *Santella* for the proposition that prevailing party analysis in appellate and original jurisdiction cases does not differ, AID at 5, his reasoning here is inconsistent with the Board's analysis in *Santella*. In *Santella*, OSC initiated the litigation as it did here by bringing a complaint. *See Special Counsel v. Santella*, 77 M.S.P.R. 672, 673 (1998). The Board nevertheless found that the employees who were charged with a prohibited personnel practice were entitled to attorney fees. *Santella*, 86 M.S.P.R. 48, ¶¶ 36-40.

¶6 The administrative law judge also found that the respondent did not prevail on any of her claims but OSC prevailed because the respondent did not entirely avoid a penalty. He further found that OSC, and not the respondent, obtained a "material alteration of the legal relationship between the parties" because she had "to alter her behavior to OSC's benefit." AID at 8; *see Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532

U.S. 598, 603-04 (2001). Although *Santella* differs from the appeal now before Board because the underlying complaint was decided on the merits in the respondents' favor, *see Santella*, 86 M.S.P.R. 48, ¶ 2, the fact that an employee negotiates for, or the Board imposes, a lesser penalty rather than none at all does not preclude an award of attorney fees. AID at 6-7; *see, e.g.*, *Miller v. Department of the Army*, 106 M.S.P.R. 547, ¶ 2 (2007) (removal mitigated to 60-day suspension); *Griffith v. Department of Agriculture*, 96 M.S.P.R. 251, ¶ 3 (2004) (settlement agreement changed the basis of the appellant's removal from misconduct to "medical inability to perform the duties of his position"). Further, the administrative law judge cited no authority from which we might conclude that a purpose of Hatch Act proceedings is to secure behavioral charges that benefit *OSC*. *See* AID at 8. Via the settlement agreement here, the respondent obtained a significant alteration in her relationship with OSC, that is, she retained her job. *See* IAF (B-1), Tab 5, Exhibit (Ex.) A at 1-2. Accordingly, the respondent was the prevailing party in this litigation.

¶7 We nevertheless reach the same result as the administrative law judge because we cannot find that an award of attorney fees is warranted in the interest of justice. In *Allen v. U.S. Postal Service*, 2 M.S.P.R. 420, 434-35 (1980), the Board set forth the following examples of situations where an award of attorney fees would be warranted in the interest of justice under 5 U.S.C. § 7701(g): (1) Where the agency engaged in a "prohibited personnel practice"; (2) where the agency's action was "clearly without merit," or was "wholly unfounded," or the employee is "substantially innocent" of the charges; (3) where the agency initiated the action against the employee in "bad faith"; (4) where the agency committed a "gross procedural error" that "prolonged the proceeding" or "severely prejudiced" the employee; or (5) where the agency "knew or should have known that it would not prevail on the merits" when it brought the action. *See* 5 U.S.C. § 1204(m)(1) (situations where attorney fees are warranted by the interests of justice include "any case in which a prohibited personnel practice was

engaged in by the agency or any case in which the agency's action was clearly without merit"); *Santella*, 86 M.S.P.R. 48, ¶ 24 (applying analysis of section 7701(g)(1) to petitions brought under section 1204(m)(1)). The examples cited in the statute are "illustrative only" and do not preclude the award of attorney fees in other meritorious situations. *Allen*, 2 M.S.P.R. at 435 n.38.

¶8 The respondent has not argued that OSC engaged in a prohibited personnel practice. Although she argues that her conduct was "an aberration," she has not shown that OSC's charges were "clearly without merit" or "wholly unfounded," or that she was "substantially innocent" of the charges. *See* IAF (A-1), Tab 1 at 17. An employee is substantially innocent of the charges against him, for attorney fee purposes, if he is innocent of the primary or major charges or of the more important and greater part of the original charges. *Santella*, 86 M.S.P.R. 48, ¶ 35. Here, the respondent admitted in the settlement agreement that she engaged in the conduct underlying the charges, and the agency's email records also establish that it took place. IAF (B-1), Tab 5, Ex. 2 at 1-2, Tab 10, Ex. 4; *see, e.g.*, *Sims v. Department of the Navy*, 711 F.2d 1578, 1582 (Fed. Cir. 1983) (attorney fees warranted because charged conduct took place even if no prohibited personnel practice occurred). The respondent agreed that her actions warranted the minimum statutory penalty under the Hatch Act. IAF (B-1), Tab 5, Ex. 2 at 3. Although she claims that she did not understand the significance of her actions at the time and did not intend to engage in political activity or influence election results, she has not shown that her violation was an inadvertent or technical error. *See* IAF (A-1), Tab 1 at 6-7; *cf. Van Fossen v. Merit Systems Protection Board*, 788 F.2d 748, 750 (Fed. Cir. 1986) (the appellant made a good faith effort to follow regulations and reasonably relied on past approvals). The record shows that the respondent was a capable employee who informally supervised other clerical employees and who had received Hatch Act training during the month before she forwarded the email message. IAF (A-1), Tab 10, Exs. 1, 2, 3, 6, 7.

¶9 We also cannot conclude that OSC acted in bad faith when it initiated the charges, unreasonably perpetuated litigation against the respondent, or knew or should have known that it would not prevail on the merits when it brought the charges. OSC conducted a full investigation. IAF (A-1), Tab 10, Exs. 5, 6, 7. OSC notified the respondent that a complaint had been filed and that she had a right to file an answer. *Id.*, Ex. 6, ¶¶ 6-9; *id.*, Ex. 8. The respondent admitted that she had received the complaint. *Id.*, Ex. 8. OSC did not assert in the complaint that that removal was the only appropriate penalty and instead left the penalty determination to the Board's discretion. IAF (T-1), Tab 1 at 5. Within weeks after the Board vacated the default judgment and remanded the complaint to the administrative law judge for a decision on the merits, the parties reached a settlement consistent with Board precedent. *See* IAF (B-1), Tab 5; *see also Special Counsel v. Mark*, 114 M.S.P.R. 516, ¶¶ 11-24 (2010). Accordingly, the respondent did not establish her entitlement to attorney fees.

## ORDER

¶10 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 RESPONDENT 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. 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.