U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for January 12, 2024

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BOARD DECISIONS

Appellant: Kristopher D. Kelly
Agency: Tennessee Valley Authority
Decision Number: 2024 MSPB 1
Docket Number: AT-0752-15-0064-A-1
Issuance Date: January 5, 2024
Appeal Type: Attorney Fee Petition

Attorney Fees

The appellant filed a Board appeal contesting his 2014 removal, and the administrative judge issued an initial decision reversing the action and finding that the agency discriminated against the appellant based on his disability. In September 2015, following the issuance of the initial decision, the appellant signed a retainer agreement, whereby he agreed to have his attorney and her associate represent him in the still-pending Board appeal. The agreement provided that the appellant would pay his attorney a discounted rate of $300 per hour and her associate a rate of $250 per hour. The agency subsequently filed a petition for review, to which the appellant filed a response, and on June 16, 2016, the

Board affirmed the initial decision reversing the appellant's removal.

On August 12, 2016, the appellant's attorney filed a motion for fees. The administrative judge granted the motion, finding that the appellant was the prevailing party, that he incurred fees pursuant to an existing attorney-client relationship, and that an award of fees is warranted in the interest of justice. Regarding the reasonableness of the fees, the administrative judge found that $350 per hour was the prevailing community rate for the appellant's attorney, and $250 for the associate. The administrative judge further found that the appellant's attorney spent 52.25 hours on the case, and the associate 50.80 hours, for a total $30,987.50 in recoverable fees. The administrative judge declined to consider the appellant's second supplement for attorney fees, finding that it was untimely filed after the close of the record below. She further found that the appellant was entitled to his requested costs, for a total award of $31,590.50. The agency petitioned for review.

Holding: The Board may award attorney fees under 5 U.S.C. § 7701(g)(2) based on current hourly rates at the time of the award, rather than historic rates.

1. In finding that a fee award was warranted, the administrative judge applied 5 U.S.C. § 7701(g)(1), which authorizes the award of fees under an interest of justice standard. However, in cases where prohibited discrimination under 5 U.S.C. § 2302(b)(1) has been found, the award of attorney fees is properly made under 5 U.S.C. § 7701(g)(2), which provides for payment of fees in accordance with the broader standard of 42 U.S.C. § 2000e-5(k), which entitles the prevailing party to fees absent special circumstances, and does not require the appellant to establish that a fee award is warranted in the interest of justice. Accordingly, the Board vacated the administrative judge's analysis on the interest of justice standard.
2. The Board found that the appellant remained the prevailing party, as the initial decision reversing his removal had since become final. The Board also found no special circumstances that weighed against exercising its discretion to award fees.

3. Turning to the reasonableness of the fees requested, the Board found that the appellant had successfully rebutted the presumption that the discounted rate he agreed to pay his attorney represented the maximum reasonable fee. The fee agreement provided that, if he should receive a monetary settlement or recovery, the appellant's attorney would reimburse the appellant for any fees that he paid, and she would seek payment for attorney fees from the agency at the "current market rate." The appellant prevailed, so under the terms of the retainer agreement, the fees sought would be at the current market rate rather than the discounted rate.
4. However, the Board observed that the work performed by the appellant's counsel occurred between 2015 and 2017, and there had been a significant delay in the adjudication of the attorney fee motion. Accordingly, the Board considered the question of whether it was appropriate to apply current, rather than historic, hourly rates. The Board noted that in *Missouri v. Jenkins ex rel. Agyei*, 491 U.S. 274 (1989), the Supreme Court held that an appropriate adjustment for delay in payment was within the contemplation of the Civil Rights Attorney's Fee Awards Act of 1976 (42 U.S.C. § 1988), which provided for "a reasonable attorney's fee as part of the costs." Subsequently, Congress amended § 114 of the Civil Rights Act of 1991 (42 U.S.C. § 2000e-16(d)) to explicitly provide that "the same interest to compensate for delay in payment shall be available [in actions brought by Federal employees] as in cases involving nonpublic parties." In addition to the controlling statutory authority, the Board noted that the Equal Employment Opportunity Commission has awarded enhanced attorney fee billing rates based on current, as opposed to historic rates.
5. Based on the foregoing, the Board concluded that the Board may award attorney fees under 5 U.S.C. § 7701(g)(2) based on current rates at the time of the award, rather than historic rates. Given the significant delay at issue in this case, the Board found it appropriate to award fees based on the current rate. Accordingly, the Board remanded the case for a finding on the appellant's attorney's current market rates, rather than the rates that were in effect when the services were performed.

6. The Board agreed with the appellant that the initial decision contained mathematical errors resulting in the duplicate reduction of 11.25 hours related to a compliance case, which the attorney had already voluntarily reduced. Thus, the correct amount of hours billed by the attorney was 63.50, not 52.25. The Board also modified the award for costs, finding that the administrative judge had inadvertently omitted $329.24 in hotel costs from her calculations.
7. Finally, the Board found that the administrative judge had correctly declined to consider the appellant's supplemental motion for fees, which was untimely filed without a showing of good cause for the delay.

Appellant: Sergio Luna
Agency: Department of Homeland Security
Decision Number: 2024 MSPB 2
Docket Number: DA-0752-15-0498-I-1
Issuance Date: January 10, 2024
Appeal Type: Removal

Constitutional Issues - Fifth Amendment (Self-Incrimination)

In 2014, the agency's Office of Professional Responsibility (OPR) investigated the appellant, an Immigration Enforcement Agent, concerning allegations of disreputable associations and illicit activities. As part of the investigation, the agency directed the appellant to appear for an OPR interview. Prior to the interview, the agency notified the appellant that he would be required to cooperate fully with the OPR investigator and answer all relevant and material questions, and that failure to cooperate could result in disciplinary action, up to and including removal. The agency further represented to the appellant that neither the answers he gave to the interviewer's questions nor any information gathered by reason of those answers could be used against him in a criminal prosecution, except that the appellant could be prosecuted for any false answers that he might give.

Following the interview, the agency removed the appellant based on a charge of failure to cooperate in an investigation. Specifically, the agency alleged that (1) the appellant refused to candidly answer questions about an incident with law

enforcement in Mexico; and (2) the appellant and his representative abruptly terminated the interview and walked out before the interview had concluded.

On appeal to the Board, the appellant argued, among other things, that the agency could not discipline him for failing to answer questions with criminal implications absent a "declination to prosecute" from the Department of Justice (DOJ), which the agency failed to provide. The administrative judge sustained the removal, finding that the appellant failed to cooperate, as charged, and that the agency was not required to obtain assurance of immunity directly from DOJ before compelling the appellant to answer questions. She further found that the removal penalty was reasonable, and that the appellant did not prove any of his affirmative defenses. The appellant petitioned for review.

Holding: The agency's assurance of immunity was adequate under *Kalkines v. United States*, 200 Ct. Cl. 570 (1973), and did not require assent, written or otherwise, from DOJ. Thus, the ensuing removal action did not violate the appellant's constitutional rights.

1. The Board agreed with the administrative judge that the appellant refused to cooperate in the OPR investigation, as alleged. However, a Federal agency's authority to discipline an employee for failure to cooperate in an investigation is circumscribed by the Fifth Amendment, which provides in relevant part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." For the same reason the Government may not support a criminal proceeding with statements that it obtained from a public employee under threat of removal from office, *see Garrity v. New Jersey*, 385 U.S. 493 (1967), the Government may not remove an employee from public office for refusing to give statements that could subsequently be used against him in a criminal proceeding.
2. Nevertheless, a public employee subjects himself to dismissal if he refuses to account for his performance of his public trust, after proper proceedings which do not involve an attempt to coerce him to relinquish his constitutional rights. The Government may accomplish this by giving the employee adequate notice both that he is subject to discharge for not answering and that his replies (and their

fruits) cannot be employed against him in a criminal case. Thus, an employee may be removed for not answering questions posed by his employing agency if he is adequately informed both that he is subject to discharge for not answering and that his replies and their fruits cannot be used against him in a criminal case. *Kalkines v. United States*, 200 Ct. Cl. 570 (1973).

3. The Board agreed with the administrative judge that the notices of immunity the agency provided the appellant were sufficient under *Kalkines* and held that adequate assurance of immunity does not require assent, written or otherwise, from DOJ. First, the Board observed that it was not free to impose additional requirements beyond those set forth in *Kalkines*, which is binding precedent in the Federal Circuit. Second, the Board agreed with the administrative judge that, under Supreme Court precedent, the assurance of immunity the appellant received was binding on the Government even absent the explicit assent of DOJ. Consistent with that precedent, the Federal Circuit has held that when an employee is prospectively granted immunity through the *Garrity* exclusion rule, he may be removed for failure to cooperate with an agency investigation.
4. The Board noted that there are some situations in which a prospective grant of immunity under *Garrity* is not sufficient to compel testimony. Specifically, Title II of the Organized Crime Control Act of 1970, codified at 18 U.S.C. chapter 601, sets forth procedural requirements the Government must follow to compel testimony in various judicial, administrative, and congressional proceedings. Under this section, a formal grant of immunity can only be given by the Attorney General.
5. However, the Board found that the investigative interview at issue here was not a proceeding covered by 18 U.S.C. chapter 601. Specifically, 18 U.S.C. § 6001(3) defines a covered proceeding as "any proceeding before such an agency with respect to which it is authorized to issue subpoenas and to take testimony or receive other information from witnesses under oath." There is no indication in this case that the agency had such authority, and the Board noted that it was unaware of any Federal agency that would be authorized to issue a subpoena in an employment-related investigation of one of its employees.

6. In sum, the appellant was not required to surrender his constitutional immunity; instead, he was informed of that immunity and of the administrative discipline that he would face if he chose to remain silent. This notice was sufficient under *Kalkines*, and nothing more was required. Because the appellant refused to answer the agency's questions despite having received adequate notice under *Kalkines*, the ensuing removal action did not violate his constitutional rights.

COURT DECISIONS

NONPRECEDENTIAL:

Brooks v. Department of the Treasury, No. 2023-1788 (Fed. Cir. Jan. 9, 2024) (MSPB No. SF-0752-16-0430-I-1)

Prior to her removal, Brooks was a Tax Compliance Officer with the Internal Revenue Service (IRS). In 2008, the IRS selected Brooks's own 2006 return for an audit, which was later expanded to cover her returns from 2005 and 2007. In 2011, the IRS determined that Brooks had underreported her income in 2005, 2006, and 2007, and imposed penalties. Brooks petitioned the United States Tax Court for a redetermination of her tax liability for those years. In June 2013, the Tax Court ruled that the IRS had properly disallowed several of her claimed exceptions and deductions: for 2005, a $16,088 casualty-loss deduction and a $3,500 charitable-contribution deduction; for 2006, a dependency exemption for her son and a $5,173 charitable-contribution deduction; and for 2007, a dependency exemption for her son, a $3,129 casualty-loss deduction, a $5,200 charitable-contribution deduction, and a $23,000 deduction for state and local taxes.

In December 2015, the director of the IRS's Field Examination Southwest Area Unit determined that Brooks's understatement of her tax liability from 2005 to 2007 violated § 1203(b)(9) of the Internal Revenue Service Restructuring and Reform Act of 1998, which mandates termination of any IRS employee who has made a "willful understatement of Federal tax liability, unless such understatement is due to reasonable cause and not to willful neglect." Under the 1998 Act, the mandatory removal penalty applies unless the IRS Commissioner exercises discretion to mitigate the penalty. The

December 2015 determination was forwarded to the Section 1203 Review Board to advise the IRS Commissioner whether to exercise such discretion, and the Review Board decided that a recommendation of mitigation was not warranted. Accordingly, Brooks was removed in March 2016.

Brooks then appealed her removal to the Board. The administrative judge assigned to the case affirmed the removal action, finding that the agency had proven that Brooks had willfully understated her tax liability. The Board denied Brooks's petition for review, and she appealed to the Federal Circuit.

The court found that, contrary to Brooks's arguments, the Board properly applied § 1203(b)(9) and did not incorrectly impose a negligence standard. The court further found that the Board did not err in applying the doctrine of collateral estoppel to the issues adjudicated by the Tax Court. Although the Tax Court did not decide the ultimate issue before the Board, i.e., whether Brooks's understatements were willful, it had decided relevant subsidiary issues, specifically, whether she understated her tax liability and whether any understatements were attributable to reasonable cause. The court also found that Brooks had a full and fair opportunity to litigate the issues decided by the Tax Court, even though she was proceeding pro se following the death of the certified public accountant she had retained to represent her. The court then considered in detail Brooks's challenges to the factual findings underpinning the Board's willfulness determination and concluded that the Board's findings were supported by substantial evidence. Finally, the court found that Brooks's arguments concerning the removal penalty were unavailing, as the Board lacked authority to review or mitigate the mandatory penalty imposed under the statute.

Manning v. Merit Systems Protection Board, No. 2023-1963 (Fed. Cir. Jan. 9, 2024) (MSPB No. PH-0831-17-0200-I-1)

Following nearly 40 years of service with the Social Security Administration (SSA), Manning retired from her GS-5 position under the Civil Service Retirement System (CSRS), effective December 31, 1993. In December 2015, Manning sent a letter to the Office of Personnel Management (OPM), asserting that she had been eligible to retire under the 1979 voluntary early retirement authority (VERA) program, and requesting a declaration to that effect because she believed it

would assist her in obtaining Social Security benefits. In February 2017, OPM issued a reconsideration decision finding that Manning was ineligible for the 1979 VERA because she did not meet the grade level requirement of GS-12. Manning appealed to the Board, arguing that she was eligible for the 1979 VERA, and the administrative judge issued an initial decision reversing OPM's reconsideration decision. On petition for review, however, the Board vacated the initial decision and dismissed the appeal for lack of jurisdiction, finding that Manning failed to show that OPM's reconsideration decision implicated her rights or interests under CSRS.

Manning appealed to the Federal Circuit, arguing that her alleged entitlement to the 1979 VERA is a right or interest under CSRS, and thus within the Board's jurisdiction under 5 U.S.C. § 8347(d)(1). The court disagreed, noting that Manning did not actually apply for VERA and was not seeking to alter her annuity in any way. Rather, she was only asking for OPM to issue an opinion on her VERA eligibility, which she could then use to potentially influence the SSA to obtain favorable Social Security benefits for which she had not yet applied. A decision by the Board on that matter, without an actual claim for retirement benefits, would amount to an improper advisory opinion under 5 U.S.C. § 1204(h). Accordingly, the court affirmed the Board's decision.

Saunders v. Merit Systems Protection Board, No. 2024-1059 (Fed. Cir. Jan. 5, 2024) (MSPB No. PH-0752-23-0331-I-1)

The court dismissed the petition for failure to prosecute in accordance with the rules, based on the petitioner's failure to file a compliant Statement Concerning Discrimination.