UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EDWARD JOYCE, Appellant, v. DEPARTMENT OF THE AIR FORCE, Agency, and OFFICE OF PERSONNEL MANAGEMENT, Intervenor.	DOCKET NUMBER PH-0752-95-0085-B-1 DATE: October 5, 1999

M. Jefferson Euchler, Esquire, Virginia Beach, Virginia, for the appellant.

Phillip G. Tidmore, Esquire, Arlington, Virginia, for the agency.

Lorraine P. Lewis, Esquire, Steven E. Abow, Esquire, and Kimya I. Jones, Esquire, for the intervenor.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Chairman Erdreich issues a dissenting opinion.

OPINION AND ORDER

¶1 The agency has timely petitioned for review of a remand initial decision that awarded the appellant attorney fees, and the Director of the Office of Personnel Management (OPM), has filed a motion to intervene and a brief in support of her motion to intervene. The appellant has filed timely responses to the petition for

review and the brief. After full consideration, we DENY the agency's petition for review for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115. For the reasons set forth below, we GRANT the motion to intervene, REOPEN the appeal on our own motion, VACATE the remand initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 This attorney fee proceeding is before the Board after having been remanded in *Joyce v. Department of the Air Force*, 74 M.S.P.R. 112, 118 (1997). The Board found that where the agency unilaterally rescinded its alleged constructive suspension action before a jurisdictional determination could be made, and refused to concede in the attorney fee proceeding that the Board would have had jurisdiction over the appeal, the Board could award fees in the absence of a substantive finding of jurisdiction as long as the appellant set forth a prima facie case of jurisdiction. *Joyce*, 74 M.S.P.R. at 115. The Board also found that the appellant had made such a prima facie case, the appellant was a prevailing party, and there was a rebuttable presumption that fees were warranted in the interest of justice. *Id*. at 117-18. The Board remanded the appeal to afford the agency an opportunity to rebut this presumption. The Board ordered the administrative judge (AJ) to adjudicate the reasonableness of the attorney fees claimed if the agency failed to rebut the presumption. *Id*.

¶3 On remand, the AJ found that the agency did not rebut the presumption that attorney fees were warranted in the interest of justice because "the agency initiated certain actions, such as hiring a personal assistant [for the appellant], in order to get the appellant back to work, and it has not demonstrated that it could not have made such arrangements prior to the appellant's absence from work." Remand Appeal File (RAF), Tab 11 at 6. The AJ also found that the hourly rate requested by the appellant's attorney was reasonable, the billable hours requested

by the appellant's attorney were reasonable, and with one exception the expenses claimed by the appellant's representatives were allowable. *Id*. at 7-9.

ANALYSIS

OPM's motion to intervene is granted

¶4 In any case under 5 U.S.C. § 7701 before the Board in which the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of OPM is at issue, and in which the Director of OPM is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of OPM, the Director may, as a matter of right, intervene. 5 U.S.C. § 7701(d). If the Director exercises the right to participate in a proceeding before the Board, the Director shall do so as early in the proceeding as practicable. *Id*.

¶5 Despite the appellant's arguments to the contrary, *see* Petition for Review File (PFRF), Tab 10 at 2-4, OPM may intervene in this proceeding even though it is challenging the Board's determinations in *Joyce*, and not the AJ's findings on remand. *See, e.g., Martin v. Department of the Air Force*, 79 M.S.P.R. 380, 382-83 (1998) (granting the Director's request to intervene and challenge the full Board's remand decision after a petition for review had been filed challenging the remand initial decision), *reversed on other grounds, Martin v. Department of the Air Force*, 184 F.3d 1366 (Fed. Cir. 1999); *Abbott v. Department of Veterans Affairs*, 67 M.S.P.R. 124, 127 (1995) (the Board considered the Director's brief on intervention that requested that the Board reconsider its holding in *Dennis v. Department of Veterans Affairs*, 62 M.S.P.R. 462 (1994)). The law of the case doctrine does not bind OPM, which was not a party in the prior proceeding and did not have the opportunity to submit argument to the full Board on the *Joyce* rulings until the agency petitioned for review from the remand initial decision. *See Griffin v. Office of Personnel Management*, 75 M.S.P.R. 263, 270-71 (1997). The notice of intervention was filed within the regulatory time limits. *See* 5

C.F.R. § 1201.114(g)(1). The Director could not have filed a petition for reconsideration from the Board's decision in *Joyce* because that decision was not a final decision. *See* 5 C.F.R. § 1201.119(a)-(b).

¶6 We also find that OPM's right to intervene is not circumscribed by the nature of the issues in dispute. The Board has limited authority to question the Director of OPM's opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of OPM. *Cf. White v. Department of the Air Force*, 71 M.S.P.R. 607, 617 n.5 (1996) (implicitly assuming that the provisions of the Whistleblower Protection Act constituted a civil service law, rule, or regulation under the jurisdiction of OPM), *remanded*, 116 F.3d 1497 (Fed. Cir. 1997) (Table); *Davis v. U.S. Postal Service*, 64 M.S.P.R. 652, 655 n.4 (1994) (granting the Director of OPM's motion to intervene, in light of *Newman v. Lynch*, 897 F.2d 1144, 1146-47 (Fed. Cir. 1990) (finding that the Board did not have the authority to review OPM's determination of substantial impact under 5 U.S.C. § 7703(d), even though the Board stated that the Postal Reorganization Act was not a civil service law under the jurisdiction of OPM). Thus, we consider OPM's brief on its merits.

¶7 OPM asserts that the Board in *Joyce* made three determinations that are contrary to law: (1) Holding that a jurisdictional finding was not necessary in order to find the authority to award attorney fees; (2) improperly applying the legal standard for determining who is a prevailing party; and (3) enunciating a new standard of proof that created a rebuttable presumption that attorney fees are warranted in the interest of justice where an agency returns an appellant to the status quo ante, and the appellant sets forth a prima facie case of jurisdiction and incurs attorney fees. PFRF, Tab 9 at 3. Each of these contentions is addressed below.

A substantive jurisdictional finding is required in order to award attorney fees

¶8 Under 5 U.S.C. § 1204(a)(1), the Board shall "hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, chapter 43 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter." Under 5 U.S.C. § 1204(a)(2), the Board shall "order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order." Further, under 5 U.S.C. § 7701(g)(1), the Board "may require payment by the agency involved of reasonable attorney fees incurred by an employee ... if the employee ... is the prevailing party and the Board ... determines that payment by the agency is warranted in the interest of justice, including 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."

¶9 In *Shaw v. Department of the Navy*, 39 M.S.P.R. 586, 589-93 (1989), the Board held that there is no basis for an award of attorney fees in cases where it is not clear that the Board has jurisdiction over the underlying subject matter of the appeal. *Shaw* reasoned that, although 5 U.S.C. § 7701(g) did not specify that the authority to award attorney fees was limited to cases over which the Board had jurisdiction, such a limitation was a "necessary concomitant" to the cited authorities. Because the Board could only act or designate an employee to act for it in accordance with its statutory authority under 5 U.S.C. § 1204(a)(1), the Board found no significance to the absence of an express limitation on the award of attorney fees to those cases over which the Board has jurisdiction. *Shaw*, 39 M.S.P.R. at 589. *Shaw* also held that judicial precedent in connection with other statutory authorities provided no basis for Board awards of attorney fees in the absence of a determination of jurisdiction. *Id*. at 591-93.

¶10 In *Joyce*, 74 M.S.P.R. at 115-16, the Board overruled *Shaw*, rejecting *Shaw's* determination that limiting the award of attorney fees to cases over which the Board had jurisdiction was "implicit" in 5 U.S.C. § 7701(g). The Board in *Joyce* essentially found that: (1) Contrary to *Shaw*, the Board does "act" in cases where it is ultimately found that the Board lacks jurisdiction over the appeal; (2) 5 U.S.C. § 1204(a)(1) merely empowers the Board to hear and adjudicate *on the merits* those matters that are within its jurisdiction; and (3) the plain language of 5 U.S.C. § 7701(g) does not require a finding of Board jurisdiction in order to establish the authority to grant attorney fees. The Board found no persuasive reason for the Board and its AJs to build a record and engage in a significant expenditure of analytical resources merely for the purpose of determining whether the agency should be spared the expense of attorney fees expended by the appellant in fighting agency practices or policies that the agency ultimately rescinded or modified to the satisfaction of the appellant. *Id*. at 116.

¶11 OPM argues that the first finding set forth above is an inappropriate basis on which to overrule *Shaw* because each adjudicatory body has the inherent authority to determine whether it has jurisdiction over the case before it. PFRF, Tab 9 at 7; *see Martin v. Department of Health & Human Services*, 62 F.3d 1403, 1406 (Fed. Cir. 1995) ("Every court has jurisdiction to determine the limits of its jurisdiction in a particular case."). Thus, OPM asserts that whether the Board "acts" in cases in which it is ultimately found that it lacks jurisdiction is irrelevant to the issue of attorney fees, because in order to act on the merits of a case the Board must make a preliminary determination of jurisdiction. *Id*. (every tribunal has the responsibility to determine whether it has jurisdiction). Although we are reluctant to overrule recent precedent, we agree.

¶12 OPM also asserts that the second and third findings set forth above run afoul of the principle that the United States, in the absence of its consent, is immune from suit, and that the specific terms of its consent to be sued define an

adjudicative body's jurisdiction to entertain the suit. PFRF, Tab 9 at 6 (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)). Thus, OPM contends that a waiver of sovereign immunity cannot be implied, but must be unequivocally expressed, and that here, there is no explicit language in section 7701(g) that permits the granting of attorney fees in cases in which only a prima facie case of jurisdiction has been alleged. *Id*.

¶13 Here, too, we agree, despite our misgivings about overruling recent precedent. As OPM points out, section 7701(g) contains no substantive grant of jurisdictional authority. Rather, substantive authority to adjudicate and "take final action" on appeals is derived from 5 U.S.C. § 1204(a)(1), which the Board is not free to expand at will. *See King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (the Board's authority is limited to what Congress has expressly given it, and this grant of jurisdiction must be strictly construed). Thus, there is no unequivocal expression by Congress that attorney fees may be awarded against the United States in the absence of Board jurisdiction. As in *Martin*, 62 F.3d at 1406, the statute at issue "says nothing about jurisdiction," but "simply authorizes fee awards in cases already within the jurisdiction" of the Board.

¶14 Moreover, it is fundamental that a section of a statute should not be read in isolation from the context of the whole act, and that a court, in interpreting legislation, must not be guided by a single sentence or part of a sentence, but should look to the provisions of the whole law, and to its object and policy. *Richards v. United States*, 369 U.S. 1, 11 (1962). Here, we find that *Joyce* improperly read section 7701(g) in isolation from the other provisions of the statute. Reading the relevant provisions as a whole, we find that the Board may award attorney fees only in those cases over which it has jurisdiction. It would be unreasonable, for example, to have required Congress to repeat in section 7701(g) that the Board must have jurisdiction in order to award attorney fees, when it had already set forth in section 1204(a)(1) that the Board could only hear, adjudicate,

or "take final action" on those matters within its jurisdiction. We also note that the Board is only authorized to order and enforce the compliance of orders that were issued under its jurisdiction. *See* 5 U.S.C. § 1204(a)(2); *Murdock-Doughty v. Department of the Air Force*, 74 M.S.P.R. 244, 249 (1997). Thus, if the jurisdictional determination in *Joyce* were allowed to stand, the Board could be in the position of ordering and enforcing orders granting attorney fees on the basis of decisions that were not "issued by the Board under the authority granted under paragraph (1) of this subsection," i.e., decisions that were not issued by the Board based on an adjudication of a matter within the jurisdiction of the Board.

¶15 Even when read alone, the language of section 7701(g) suggests that a finding of jurisdiction is required in order to award attorney fees. The statute allows for an award of attorney fees when warranted in the interest of justice, "including 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." While these two examples are illustrative, and not exhaustive, *see Allen v. U.S. Postal Service*, 2 M.S.P.R. 420, 433-35 (1980), they do describe situations in which the Board normally would have jurisdiction over the merits of the appeal. *See Farrero v. Office of Personnel Management*, 35 M.S.P.R. 630, 634 (1987) (in general, the "clearly without merit" criterion focuses on the result of the case before the Board); *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980) (5 U.S.C. § 2302(b) is not an independent source of Board jurisdiction), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982). Under an established principle of statutory construction - *ejusdem generis* - general words are construed to describe only objects similar in nature to those objects enumerated. *See, e.g., Caddell v. Department of Justice*, 52 M.S.P.R. 529, 532 (1992). Thus, a catchall phrase, such as "warranted in the interest of justice," should be read as applying only to categories similar to those specifically enumerated, i.e., other situations in which the Board normally has

jurisdiction over the merits of the appeal. Section 7701(g) should, therefore, be read as authorizing attorney fees where a finding of jurisdiction has been made.

¶16 Finally, OPM asserts that in an attorney fee proceeding the Board cannot rely on the convenience of avoiding, where possible, the necessity of determining whether it has jurisdiction over an appeal where an appellant has been restored to the status quo ante. PFRF, Tab 9 at 7. OPM asserts that such an argument of convenience was rejected by the Supreme Court in *Testan*, 424 U.S. at 400, where the Court declined to circumvent the specificity requirement for a waiver of the doctrine of sovereign immunity merely because to do so might seem "responsive to a particular conception of enlightened governmental policy." *See also Commissioner v. Lundy*, 516 U.S. 235, 252-53 (1996) ("We are bound by the language of the statute as it is written," and if the plain language might not accord with what one party may think is "'good policy,'" "we are not at liberty 'to rewrite [the] statute because [we] might deem its effects susceptible of improvement.'").

¶17 We agree with OPM that the policy set forth in *Joyce* of preserving the Board's analytical resources may not be used to circumvent a statutorily-required jurisdictional finding. We also note that the policy may be less compelling than originally anticipated. In this case, for example, the AJ held several status conferences, afforded the parties an opportunity on remand to submit evidence and argument on the issue of whether the agency could rebut the presumption that fees were warranted in the interest of justice, and issued an initial decision. RAF, Tabs 3, 5, 9, and 11. The full Board has reviewed the AJ's initial decision. These adjudicatory resources could have been expended in a jurisdictional hearing.

¶18 We further agree with the determination in *Shaw* that the civil rights attorney fees cases cited therein as examples do not support by analogy Board awards of attorney fees in the absence of a determination of jurisdiction. As explained in *Shaw*, 39 M.S.P.R. at 592-93, those cases do not hold that attorney fees may be awarded in the absence of a finding of jurisdiction. Rather, they merely find that

an award of fees may be granted in the absence of a specific determination that the plaintiff was discriminated against, after jurisdiction has been established. *See Maher v. Gagne*, 448 U.S. 122, 130-31 (1980) (respondent alleged violations of her Fourteenth Amendment due process and equal protection rights, which the District Court and the Court of Appeals held to be sufficiently substantial to support federal jurisdiction); *Young v. Kenley*, 641 F.2d 192, 194 (4th Cir. 1981) (indicating that the parties reached a settlement after the plaintiff presented her evidence at trial); *Wood v. Regan*, 622 F. Supp. 399, 402 (E.D. Pa. 1985) ("This Court, then, has jurisdiction under § 7703(b)(2) to hear plaintiff's case.").

¶19 The Board's reasoning in *Joyce* allowed for the implementation of a practical rule that the Board believed would equitably and efficiently resolve a difficult issue that would arise in a limited number of cases. After considering OPM's arguments, however, and upon further reflection, we find that the Board is constrained by statute from implementing a rule such as that set forth in *Joyce*. Thus, we will no longer apply the holding in *Joyce*. Instead, we determine that the holding in *Shaw*, that a substantive jurisdictional finding is required in order for the Board to award attorney fees, is good law and no longer overruled.

The appellant is a prevailing party

¶20 In *Joyce*, 74 M.S.P.R. at 117, the Board noted that it had recently followed the "prevailing party" test set forth in *Farrar v. Hobby*, 506 U.S. 103, 111 (1992), wherein the Supreme Court stated, *inter alia*, that a prevailing party under the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, as amended, 42 U.S.C. § 1988, is one who obtains an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. *See Ray v. Department of Health & Human Services*, 64 M.S.P.R. 100, 104 (1994) (the civil rights attorney fee statute prevailing party concept is equally applicable in awarding attorney fees under 5 U.S.C. § 7701(g)(1)-(2)). The Supreme Court had found that 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." *Farrar*, 506 U.S. at 111.

¶21 The Board held in *Joyce*, 74 M.S.P.R. at 117-18, that despite the "apparent" requirement in *Farrar* that there be an enforceable judgment, settlement agreement, or consent decree that changes the parties' legal relationship, it would continue to apply the principle set forth in *Hodnick v. Federal Mediation & Conciliation Service*, 4 M.S.P.R. 371, 373-75 (1980), *overruled on other grounds*, *Ray*, 64 M.S.P.R. at 105 n.17, that an appellant may be a prevailing party where, after the filing of an appeal, the agency voluntarily granted the relief sought, the AJ dismissed the appeal as moot, and the relief was causally related to the initiation of the appeal in the absence of a Board final decision. The Board found that the reasoning in *Hodnick* still carried weight because permitting an agency to avoid liability for fees merely by conceding an appeal before a final decision was issued would greatly diminish the purpose of the fee provision, which was to ease the financial burden of bringing meritorious appeals, and would tend to discourage settlements, which would be contrary to public policy favoring the speedy resolution of appeals to the Board. *Joyce*, 74 M.S.P.R. at 117-18. The Board noted that its decision to follow *Farrar* "liberalized" the prevailing party test by holding that parties who win nominal damages, or less than a significant portion of the relief they are seeking, may still be prevailing parties. *Id*. at 118. Thus, the Board found that the appellant was a prevailing party because he obtained, as a result of his initiation of a Board appeal, actual relief on the merits that affected the behavior of the agency toward the appellant.

¶22 OPM argues that in this case there was no enforceable judgment or comparable relief through a consent decree or settlement agreement, as required by *Farrar*, and that such an enforceable judgment or comparable relief would "rest on a determination of subject matter jurisdiction." PFRF, Tab 9 at 10-11.

OPM asserts that the Board improperly disregarded *Farrar*, and that the appellant is not, therefore, a prevailing party. We disagree.

¶23 The principle set forth in *Hodnick*, i.e., if a respondent grants all or part of the relief sought before a judgment or other order is entered, attorney fees may be awarded if that relief was granted as a result of the institution of the action, pre-existed *Farrar*, and is generally known as the "catalyst" theory of recovery. *See, e.g., Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274 (7th Cir. 1994). In the aftermath of *Farrar*, almost all of the circuits that have considered the issue have found that their versions of the catalyst theory survive *Farrar*. *See Payne v. Bd. of Educ., Cleveland City Schools*, 88 F.3d 392, 397 (6th Cir. 1996); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Zinn by Blankenship*, 35 F.3d at 275-76 (the Third, Fifth, Seventh, Eighth, and Tenth Circuits still apply the catalyst theory). *But see S-1 and S-2 v. State Bd. of Educ. of N. Carolina*, 21 F.3d 49 (4th Cir. 1994) (per curiam) (holding in a 7-6 decision that the catalyst theory is no longer available post-*Farrar*). These courts have found that *Farrar* addressed whether a plaintiff who received a jury verdict resulting in a final judgment of nominal damages could be considered a prevailing party, that the catalyst theory was not at issue in *Farrar*, and that the Supreme Court would not abolish a rule employed by nearly every circuit and previously recognized by the Court itself as settled law, without expressly indicating that it was doing so. *See Marbley*, 57 F.3d at 234; *Zinn by Blankenship*, 35 F.3d at 275-76; *see also S-1 By and Through P-1 v. State Bd. of Educ. of N. Carolina*, 6 F.3d 160, 166-67 (4th Cir. 1993), *rehearing en banc granted, opinion vacated* (Oct. 21, 1993). In the absence of a decision by the Federal Circuit addressing this particular issue, we agree with the above reasoning, which is consistent with our reasoning in *Hodnick* and *Joyce*. Therefore, we affirm our holding in *Joyce* that the appellant is a prevailing party.

The Rebuttable Presumption is Clarified

¶24 In *Joyce*, 74 M.S.P.R. at 118, the Board held that "where the agency has unilaterally rescinded its action, i.e., returned the appellant to the status quo ante, and the appellant has set forth a prima facie case of jurisdiction and has incurred attorney fees, we find that a rebuttable presumption is established that an award of attorney fees is warranted in the interest of justice." Citing *Allen*, the Board noted that it has "substantial discretion" in determining when an attorney fee award is warranted, and that the five circumstances "considered to reflect 'the interest of justice'" are not exhaustive, but illustrative. *Id.*

¶25 OPM asserts that by creating a rebuttable presumption that attorney fees are warranted in the interest of justice, the Board has improperly reversed the burden of proof by effectively requiring the agency to prove that fees are not warranted in the interest of justice, and has placed an appellant who has not won on the merits in a better position than an appellant who has proven his case on the merits and obtained a complete reversal of the agency's action. PFRF, Tab 9 at 12. OPM claims that the establishment of a rebuttable presumption requires a nexus between the facts proven and the facts presumed therefrom, and that here, the presumed facts - that attorney fees are warranted in the interest of justice because the agency's action was a prohibited personnel practice, wholly unfounded, a gross procedural error, in bad faith, or brought to harass or exert improper pressure on an appellant who is substantially innocent of charges - cannot be said to more likely than not flow from the proven facts - the agency's rescission of its action and the appellant's incursion of attorney fees. *Id*. OPM contends that the rebuttable presumption set forth in *Joyce* is not an additional *Allen* factor akin to the others because it "contains no substantive content," and it is impossible to determine precisely what the agency must rebut in order to establish that an attorney fee award was not in the interest of justice. *Id*. at 14.

¶26 As OPM points out, a presumption may be established if there is a sound, rational connection between the proven and inferred facts. *See NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979). Thus, a presumption normally arises where "proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact ... until the adversary disproves it." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788-89 (1990). The Board and the Federal Circuit have utilized rebuttable presumptions in a variety of cases. *See Bruner v. Office of Personnel Management*, 996 F.2d 290, 294 (Fed. Cir. 1993) (an agency's "action in separating an employee for disablement produces a presumption of disability that serves to shift to the government the burden of production."); *Reynolds v. Department of Justice*, 63 M.S.P.R. 189, 193 (1994) (evidence that a letter was sealed, properly addressed, and deposited in the U.S. Mail with postage prepaid gives rise to a rebuttable presumption that the letter reached the addressee in due course of the mails); *Ceja v. Defense Logistics Agency*, 34 M.S.P.R. 399, 404 (1987) (an hourly rate set forth in a fee agreement creates a rebuttable presumption that that amount represents the maximum reasonable fee which may be awarded); *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 74 (1987) (a rebuttable presumption of nexus in an adverse action appeal may arise in "certain egregious circumstances" based on the nature and gravity of the misconduct).

¶27 In clarification of our decision in *Joyce*, we find that there is a sound, rational connection between the proven facts that the agency canceled its action, returned the appellant to the status quo ante, and paid him back pay, and the inferred fact that the agency knew or should have known that it would not prevail on the merits when it brought the proceeding. As the Federal Circuit found in *Dunn v. Department of Veterans Affairs*, 98 F.3d 1308, 1313 (Fed. Cir. 1996), an award of attorney fees under the "knew or should have known" *Allen* category may be warranted where the agency made its original judgment "negligently or in

disregard of relevant facts." As the appellant points out, "a case where the agency gave up and rescinded its action is very likely to be one where the underlying action was so ill conceived as to warrant an award of fees." PFRF, Tab 10 at 9. We note in this regard that in the Board's experience a majority of agency actions that are initially adjudicated on the merits are affirmed. *See, e.g.,* 1997 Annual Report at 16 (68% affirmed); 1996 Annual Report at 17 (77% affirmed); 1995 Annual Report at 18 (62% affirmed). Thus, when an agency takes the relatively unusual step of voluntarily rescinding its action, it is probably because it made its original judgment "negligently or in disregard of relevant facts." This presumption is rebuttable. Although the appellant always bears the ultimate burden of proving his entitlement to attorney fees, *see, e.g., Stewart v. Office of Personnel Management*, 70 M.S.P.R. 544, 548 (1996), the burden of production shifts to the agency once the requirements for the presumption have been met. *Cf. Bruner*, 996 F.2d at 294. Thus, our holding in *Joyce* is clarified: Where the Board has jurisdiction over the appeal, the agency has unilaterally rescinded its action, i.e., returned the appellant to the status quo ante, and the appellant has incurred attorney fees, there is a rebuttable presumption that fees are warranted in the interest of justice under the "knew or should have known" *Allen* category.

Application to the Instant Case

¶28 Our holding that a substantive jurisdictional finding is required in order for the Board to award attorney fees does not mean that, when an appeal of an alleged constructive removal or suspension is mooted by agency action, a motion for fees will in every case require the Board to hold a jurisdictional hearing. An appellant is entitled to a jurisdictional hearing if he has made a nonfrivolous allegation of facts that could establish the Board's jurisdiction, i.e., that his resignation was coerced or that the agency forced him to take leave. *See Braun v. Department of Veterans Affairs*, 50 F.3d 1005, 1008 (Fed. Cir. 1995); *Waldau v. Merit Systems Protection Board*, 19 F.3d 1395, 1397 (Fed. Cir. 1994); *see also Dumas v. Merit*

Systems Protection Board, 789 F.2d 892, 893-94 (Fed. Cir. 1986) (if the alleged facts are sufficient to establish a prima facie case of involuntariness, the appellant is entitled to an evidentiary hearing). Thus, when such a nonfrivolous allegation is made, the Board cannot conclude that it *lacks* jurisdiction without giving the appellant an opportunity for a hearing. Because, however, the agency does not have a statutory right to a hearing, *Thomas v. Department of Veterans Affairs*, 51 M.S.P.R. 218, 220-21 (1991), the Board may, in appropriate cases, *find* jurisdiction over a constructive adverse action on the basis of the documentary record. This would occur when the agency has failed to rebut the appellant's prima facie case of jurisdiction, despite having had the opportunity to do so. By contrast, if the existence of jurisdiction requires additional evidence to resolve factual issues raised by the parties, a hearing should be held.

¶29 In this case, the appellant alleged in his petition for appeal that he was forced to stay away from the workplace because the agency stopped providing him assistance at work that he needed to perform because of his disability, i.e., emptying his urine leg bag, pouring liquids for him to drink, and moving him about the building. In support of this claim, the appellant submitted agency memoranda indicating that the agency was discontinuing previous help and listing the tasks, including the above, that he would be required to perform without agency assistance. Initial Appeal File (IAF), Tab 1. In his response to the acknowledgment order, the appellant stressed the medical necessity of his consuming liquids during the day, with a supporting affidavit from his physician, as well as the minimal nature of the support required. IAF, Tab 3.

¶30 The agency, in its response to the order, contended that the appellant was responsible for his absence from work because he failed to purchase a pump that would make agency assistance with his leg bag unnecessary, refused offers to help him obtain an electric wheel chair, and could drink from a water fountain that was wheel chair accessible. The agency asserted that the assistance formerly provided

the appellant was burdensome to the agency and unpleasant to a decreasing number of volunteers, and was dangerous because it exposed them to potential contact with the appellant's bodily fluids and to personal liability if the appellant were injured being helped in and out of his van. The agency disputed the minimal nature of helping the appellant to drink on the ground that mixing beverages and placing pills in his mouth was required, and it contended that the appellant had refused its offer to allow him to work at home as an accommodation. IAF, Tab 4.

¶31 In response to a subsequent show-cause order on the jurisdictional issue, the appellant referred to the evidence he had previously provided. IAF, Tab 7. The agency made no additional argument on the jurisdictional issue, but submitted material that it had provided to the appellant in discovery, such as documents relating to its efforts to accommodate him and its reasons for discontinuing some forms of assistance. IAF, Tab 8. In a second response, the appellant submitted two agency memoranda obtained in discovery that reflect one official's opinion that the agency was obligated to require employees to assist the appellant because the Federal Personnel Manual mentioned handling urine bags and transferring from wheel chair to other transport as examples of personal assistance that they may be required to provide. In that submission, the appellant's counsel also contended that the appellant could not drink from the water fountain referred to by the agency because he could not use the handle or lean over to drink out of it. IAF, Tab 9. The agency made no further response to the show-cause order.

¶32 The appellant's submissions are sufficient to constitute a nonfrivolous allegation of enforced leave entitling him to a jurisdictional hearing. Indeed, the AJ found that the appellant made a nonfrivolous allegation of jurisdiction in this appeal, and the Board discerned no error in that finding. *Joyce*, 74 M.S.P.R. at 117. Thus, when the agency unilaterally rescinded its action in this appeal, the appellant had a right to a hearing on his constructive suspension claim. The undeveloped record on jurisdiction in this attorney fee proceeding is not

attributable to any voluntary action by the appellant. Once the agency rescinded its action, the appellant was powerless to force a jurisdictional hearing. The appellant requested a hearing in connection with his motion for attorney fees to address, among other things, "factual issues necessary to resolve any jurisdictional issue." Attorney Fee File, Tab 1. The AJ, however, decided the jurisdictional issue in the attorney fee proceeding based on the written record as it existed at the time the agency rescinded its action.

¶33 We also find that the agency has introduced sufficient rebuttal evidence to require that a hearing be held. The agency's submissions appear to create fact questions concerning the feasibility or reasonableness of a leg pump, an electric wheel chair, and telecommuting as alternative forms of accommodation. The agency's contention that the formerly provided accommodations are too burdensome and dangerous to continue may be open to question, but the factual issues involved are ones that should be decided after a hearing. Whether the agency rebutted the appellant's prima facie case based on its refusal to provide him with assistance in drinking liquids is a closer question. Nevertheless, finding jurisdiction on this basis would not be justifiable because the appellant's need for assistance in drinking cannot be considered in isolation from other disputed issues bearing on whether his absence from work was involuntary. In particular, the question of whether the appellant reasonably refused the agency's offer of permission to work at home, if resolved against him, would seem to undercut an involuntariness claim relying on denial of access to liquids at the work site.

¶34 In sum, on this record the Board cannot conclude that the accommodations the appellant sought would not place an undue burden on the agency. Put differently, on this record the Board cannot conclude that the appellant had a right under the Rehabilitation Act to these accommodations. If he did not have such a right, then it appears that modification or withdrawal of these accommodations would not have been a constructive suspension. *See Schultz v. U.S. Postal*

Service, 78 M.S.P.R. 159, 163 (1998) (an employee's absence due to a medical condition was a constructive suspension because the agency was bound by the Rehabilitation Act to accommodate his medical condition).

¶35 The appellant, therefore, is entitled to a jurisdictional hearing in this attorney fee proceeding. *See Shaw*, 39 M.S.P.R. at 594-95 (in finding that the appellant was entitled to a jurisdictional hearing within the context of an attorney fee proceeding, the Board noted that although a determination of whether fees are warranted on the basis that the agency's action was without merit should be based on the record established on the merits, without holding a hearing in cases settled prior to a determination of jurisdiction, the "merits" issues have not been examined); *see also, e.g., Shu v. Veterans Administration*, 44 M.S.P.R. 423, 426-27 (1990) (remanding for a jurisdictional hearing in an attorney fee proceeding where the underlying appeal was settled). The Board has long held that it may question its own jurisdiction at any time. *See, e.g., Ellis v. U.S. Postal Service*, 77 M.S.P.R. 675, 677 (1998); *Brown v. Office of Personnel Management*, 54 M.S.P.R. 415, 419 (1992); *Shaw*, 39 M.S.P.R. at 588 n.1, 592 (citing *Antosh v. Federal Election Commission*, 664 F. Supp. 5 (D.D.C. 1987), for the principle that a defendant is not foreclosed from challenging subject matter jurisdiction in a collateral proceeding, i.e., under the Equal Access to Justice Act, although he failed to do so during the pendency of the underlying suit).

¶36 Finally, although we agree with the Chairman's observation in his dissent that it would be more efficient for the Board to take jurisdiction based on the appellant's allegations, we do not interpret the authorities discussed above, 5 U.S.C. §§ 1204 & 7701, as permitting the Board to disregard the agency's rebuttal to the appellant's allegations. If the agency had rescinded its actions without attempting to rebut the appellant's allegations then there would be no need for a hearing, but in light of the agency's opposition to the appellant's pleadings there is some doubt about whether the Board has the power to do

anything other than dismiss the case. *Cf. Johns-Manville Corp. v. United States*, 893 F.2d 324, 327 (Fed. Cir. 1989) (the trial court erred in awarding costs to the defendant after concluding that it lacked subject matter jurisdiction; regardless of whether the lack of jurisdiction was apparent only when matters outside the pleadings were considered, if the court lacks jurisdiction "it has no power to do anything but strike the case from its docket"). In this connection, notwithstanding the Chairman's belief that it is not in the best interests of the parties to go to a jurisdictional hearing, the agency evidently believes that it is better off fighting the appellant's motion for attorney fees than conceding jurisdiction; it is not for the Board to decide that the agency should pay the appellant's attorney fees to save the agency the cost of a hearing.

ORDER

¶37 Accordingly, we VACATE the remand initial decision and REMAND this appeal for a jurisdictional hearing and a new initial decision consistent with this Opinion and Order. If the AJ finds that the Board does not have jurisdiction over the appellant's alleged constructive suspension he shall deny the motion for attorney fees. If the AJ finds that the Board does have jurisdiction over the alleged constructive suspension, he shall address all aspects of the appellant's motion for attorney fees, including whether the agency, after having an opportunity to do so, has rebutted the presumption as clarified above.

FOR THE BOARD:

_____
Robert E. Taylor
Clerk of the Board

Washington, D.C.

DISSENTING OPINION OF
BENJAMIN L. ERDREICH, CHAIRMAN
IN
***Edward Joyce v. Department of the Air Force*,**
MSPB Docket No. PH-0752-95-0085-B-1

Although my colleagues present a plausible basis for overruling the Board's earlier holding in this case, I would not overrule our recent precedent so readily.

Mr. Joyce filed an appeal with the Board alleging a constructive suspension. Prior to an initial decision by an administrative judge regarding that appeal, the agency unilaterally rescinded the action and paid Mr. Joyce for the time during which he claims he was improperly suspended. By doing so, the agency avoided the expense and the potential liability involved in having to defend itself in a hearing on the merits of Mr. Joyce's claim.

The majority's decision to remand this appeal for a "jurisdictional" hearing effectively demands that the parties participate in a merits hearing regarding Mr. Joyce's claims (the very type of expensive hearing avoided by the agency's recission of the action), even though the appeal was effectively made moot by the agency's complete rescission. Such action on the part of the Board is counterintuitive and leads to the inefficient use of the parties' and the Board's resources. Despite the arguments set forth by the majority, there is still no practical justification for the Board to build a record and engage in a significant expenditure of analytical resources on the merits of an action merely to determine whether an agency should be spared the cost of attorney fees expended by an appellant in challenging practices or policies that the agency ultimately rescinded. *Joyce v. Department of the Air Force*,

74 M.S.P.R. 112, 116-17 (1997). I do not believe that Congress intended for the Board to engage in such a tortured procedure when it granted the Board the authority to award attorney fees.

Moreover, the result reached by my colleagues is not in the best interests of parties who, quite reasonably, expect that a rescission of an action will fully and finally end the merits of their litigation. Not only does the majority's decision have the potential to disrupt reasonable expectations, but I believe it will have a chilling effect on the willingness of agencies to rescind actions that, upon reflection, they commendably realize might be questionable. Consider the hypothetical example of an agency that during the early stages of an appeal, realizes that there are arguable grounds for its action to be reversed. If the agency rescinds the action and declines to defend the merits of the action, based on the rationale set forth by the majority, then the agency may still have to defend itself in a hearing if it is not willing to concede an appellant's entitlement to attorney fees. If the agency does *not* rescind the action, then it will still have to defend itself in a hearing, but it will be doing so with the chance that it just might prevail on the merits. In this situation, why would the agency rescind?

The Board has long held that in Board actions public policy favors the use of mechanisms that serve to avoid unnecessary litigation and encourage a fair and speedy resolution of the issues. *See Richardson v. Environmental Protection Agency*, 5 M.S.P.R. 248, 250 (1981), *modified, Shaw v. Department of the Navy*, 39 M.S.P.R. 586 (1989), *overruled in part on other grounds, Joyce v. Department of the Air Force*, 74 M.S.P.R. 112 (1997). The result called for by the majority in this case runs counter to this

principle, as well as to the more recent public policy encouraging a greater use of alternative dispute resolution measures to avoid costly litigation.

The specifics of this case clearly demonstrate the impracticality of the majority's approach. At the time this problem began, November 1, 1994, Mr. Joyce was a GS-11 quadriplegic employee with over 10 years of satisfactory service and the recipient of several performance awards. Because of the agency's decision to modify the accommodations it had been providing for his disability, Mr. Joyce determined he could not safely report for work from November 1, 1994 until February 1995 (about three months). It is this absence that is the subject of Mr. Joyce's constructive suspension claim before the Board.

Mr. Joyce filed an appeal with the Board three days after he began absenting himself from the workplace, and his attorney began an aggressive representation of the claims being made. During the prehearing process and just days before the scheduled hearing, the agency decided to establish certain accommodations for Mr. Joyce's disability, and restored him to work with back pay for the three months of his absence, roughly $10,000. To me, it is inconceivable that the agency would have so promptly made this good faith effort to resolve the problem had it not been for the active representation by Mr. Joyce's attorney. On the contrary, had Mr. Joyce simply gone home on the first day of November 1994 when the agency initially changed its accommodation of his medical needs and had he not pursued an appeal of the action through counsel, I believe it fair to assume that he would still be at home today without a job or an income.

According to the documents submitted by Mr. Joyce's attorney, the fees for representing Mr. Joyce totaled about $6000 on the date the agency

returned him to employment. Had the agency simply reimbursed Mr. Joyce for this amount at that time, February 1994, this case would have ended then. However, the agency and now the Office of Personnel Management (OPM) argue before us that fees are not warranted and not even allowed because the Board has not considered the merits of the appellant's claim and found "jurisdiction." So far, this argument has cost Mr. Joyce another $8000 in attorney fees for a total indebtedness now of $14,000. I would assume that the government's pursuit of its no-jurisdiction argument has cost the taxpayer at least an equal amount in the salaries of the agency attorneys assigned to this case, and of course the Board has accrued related adjudicatory expenses attempting to resolve these conflicting claims. The costs that have accrued in an attempt to deny Mr. Joyce his claim for reasonable fees are probably now in excess of $20,000. The majority's decision to remand this five year old case for a full merits hearing could easily double that amount. I find it surprising that the agency and OPM argue that this is the proper outcome, given the significant expense to the government and the delay this will cause in reimbursing a quadriplegic employee who has successfully challenged an agency's questionable action.[1]

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[1] I would not disregard the agency's rebuttal to the appellant's allegations regarding the merits of his claim of constructive suspension as suggested by the majority opinion. I would find those arguments to be relative to the "clearly without merit" aspect of an attorney fee entitlement determination, rather than to the question of our jurisdiction over this dispute. In addition, I am not arguing that "the agency should pay the appellant's attorney fees to save the costs of a hearing." Majority Opinion, paragraph 36. I am arguing that we should get to the merits of the appellant's attorney fee claim now instead of remanding for a jurisdictional hearing on the merits of a claim and the consideration of facts and law no longer relevant to us because the agency has rescinded its action. I might very well find that this appellant is not entitled to attorney fees if the merits of that fee claim were before me. Unfortunately, the

I would find that, upon a proper showing of attorney fee entitlement, fees may be awarded in the absence of a substantive finding of jurisdiction so long as the appellant sets forth a prima facie case of jurisdiction, as this appellant has done here. Accordingly, I respectfully dissent.

_____ _____

Date Ben L. Erdreich
Chairman

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majority's approach unnecessarily prevents us from considering those merits until some time in the future.