UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

LEO LEDEAUX, appellant, v. VETERANS ADMINISTRATION, agency.	DOCKET NUMBER BN075285A0039 DATE: SEP 25 1986

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

The agency petitions for review of an addendum decision, issued April 15, 1986, that awarded appellant attorney fees. For the reasons below, the Board DENIES the petition. 51 Fed. Reg. 25,158 (1986) (to be codified in 5 C.F.R. § 1201.115).[1]

BACKGROUND

The agency removed appellant for making false, slanderous, and defamatory statements against his acting supervisor, Anthony Debenedictis, when he filed a claim for worker's compensation and a criminal assault and battery charge against Mr. Debenedictis. Appellant had asserted that Mr. Debenedictis pushed him into a door during a meeting with Mr. Debenedictis and Joseph Hohmann.

---

[1] On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part.

On appeal, the administrative judge[2] reversed the agency action after finding that appellant lacked the requisite intent to lie to sustain a falsification charge. She also found that appellant proved his affirmative defenses--racial discrimination and reprisal--against the agency. The Board reversed the administrative judge's findings on appellant's affirmative defenses but affirmed her finding that the agency failed to prove the charges.

In the addendum decision, the administrative judge granted appellant attorney fees after finding that appellant was the prevailing party and fees were warranted in the interest of justice because appellant was substantially innocent of the charges. In finding appellant substantially innocent, she noted that appellant prevailed on all the charges and the agency failed to establish intent--the gravamen of a falsification charge. After reducing appellant's requested fee for excessive hours and disallowing nonrecoverable costs, the administrative judge awarded appellant $11,396.51.

ISSUE

1. Are attorney fees warranted in the interest of justice because appellant was substantially innocent of the charges?

---

[2] Effective May 8, 1986, the Board changed the working title of its regional office attorney-examiners from presiding official to administrative judge.

ANALYSIS

The administrative judge correctly found that appellant is entitled to attorney fees in the interest of justice based on his substantial innocence.

The agency asserts that the administrative judge erred in finding appellant substantially innocent because appellant did, in fact, make false statements. It cites the initial decision's findings that appellant's statements were false and that Mr. Hohmann's and Mr. Debenedictis's testimony refuting appellant's statements was credible. It further contends it could not have known appellant was so emotionally upset he believed he had been pushed into the door.

We find the agency's arguments unavailing. In essence, the agency is still arguing the merits of the case--that it proved the charges because appellant's statements were untrue. As the administrative judge stated, however, the crucial element of a falsification charge is intent and the agency did not prove appellant's intent to make false statements. Although the agency asserts it could not have known appellant's intent, this is irrelevant in determining whether appellant was substantially innocent of the charges. The substantial innocence category refers to the result of the case at the Board, not to the evidence and information available prior to the hearing. *Yorkshire v. Merit Systems Protection Board*, 746 F.2d 1454, 1457 (Fed. Cir. 1984).

We find that this result warrants an award of attorney fees. The administrative judge's finding that the agency witnesses were credible dealt only with whether appellant had been pushed, not whether appellant perceived he had been pushed. Indeed, the agency's witnesses' testimony, as reflected in the initial decision, supports the finding that appellant thought he had been pushed. Both Mr. Hohmann and Mr. Debenedictis admitted that Mr. Debenedictis came into contact with appellant when he brushed past appellant on the way to the door. Both acknowledged that appellant accused Mr.

Debenedictis of "manhandling" him. In addition, Mr. Hohmann stated appellant was totally out of control. Initial Decision (I.D.) at 2-4.

Furthermore, the initial decision cites appellant's emotional and physical condition after the incident as indicating that appellant was not deliberately lying when he said he had been pushed. Finally, the administrative judge specifically found that the only proof the agency offered on intent was that appellant must be lying because he disagreed with Mr. Hohmann's and Mr. Debenedictis' versions of the incident. The administrative judge found "not a scintilla of evidence" to support the "defamatory" and "slanderous" portion of the charges. I.D. at 4-5.[3]

The substantial innocence category set forth in *Allen v. United States Postal Service*, 2 M.S.P.R. 420, 234 (1980), is, in itself, an adequate ground for allowing attorney fees. *Boese v. Department of the Air Force*, 784 F.2d 388, 391 (Fed. Cir. 1986). Therefore, the administrative judge did not err in granting attorney fees on this basis.

---

[3] The agency notes that appellant missed an opportunity to establish his credibility, and avoid a protracted personnel action, by failing to present a polygraph test supporting his truthfulness until the hearing before the administrative judge. In *Wise v. Merit Systems Protection Board*, 780 F.2d 997, 1000 (Fed. Cir. 1985), the Court of Appeals for the Federal Circuit found fees were not warranted when an appellant knew he was substantially innocent, could prove his substantial innocence, and deliberately did not communicate all the facts to the deciding official which would lead the official to rule against his removal. We do not find, however, that *Wise* requires a different result in the present case. Indeed, the agency objected to allowing the polygraph test into evidence because appellant's emotional background might have caused him to believe his version of the events was true. *Ledeaux v. Veterans Administration*, 29 M.S.P.R. 440, 443 (1985). Therefore, even if the agency had possessed the polygraph test when it decided to remove appellant, the evidence does not indicate that it would have changed its decision.