UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GEORGE F. METZ, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	DOCKET NUMBER AT075283A0206 DATE: SEP 9 1987

George M. Rountree, Esquire, George M. Rountree & Associates, Brunswick, Georgia, for the appellant.

John J. O'Meara, Esquire, Glynco, Georgia, for the agency.

BEFORE

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

Chairman Levinson issues a separate opinion dissenting in part.

OPINION AND ORDER

The agency petitions for review of an initial addendum decision that awarded appellant attorney fees in the amount of $26,725.69. The Board DENIES the agency's petition, REOPENS the case on its own motion, and AFFIRMS the initial addendum decision as MODIFIED, for the reasons discussed below.

BACKGROUND

Appellant originally appealed his removal for threatening his superiors to the Board's Atlanta Regional Office. Following a hearing, the administrative judge mitigated appellant's removal to a thirty-day suspension. After the agency filed a petition for review of this decision, the Board reinstated the removal penalty. *Metz v. Department of the*

Treasury, 23 M.S.P.R. 576 (1984). Appellant then sought review with the United States Court of Appeals for the Federal Circuit, and in an opinion dated January 2, 1986, that court reversed the Board's final decision. *Metz v. Department of the Treasury*, 780 F.2d 1001 (Fed. Cir. 1986).

On May 2, 1986, appellant filed a motion for attorney fees and costs totaling $34,831.91. In her initial addendum decision, the administrative judge awarded appellant's attorney fees and costs of $26,725.69, finding the following: (1) the Board's regulations requiring that a motion for attorney fees be filed within ten days of the final Board decision[1] did not apply because the court's decision, rather than the Board's, constituted the final decision concerning the merits of appellant's case; (2) appellant acted reasonably in filing his request for fees; (3) if appellant's request for fees was not in accord with any applicable regulatory deadline, good cause existed for the delay; (4) attorney fees were warranted in the interest of justice; (5) appellant was entitled to the requested hourly rate of $75 rather than the fixed amount of one-third of appellant's back pay award; and (6) certain requested time and costs were not recoverable.

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[1] At the time appellant filed his request for attorney fees, 5 C.F.R. § 1201.37 provided that motions for attorney fees must be filed within ten days of the final date of a decision under § 1201.113. On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. 51 Fed. Reg. 25,146-72 (1986). Under these revised regulations, the time limit for filing a request for fees is now twenty days. 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.

The agency has now petitioned for review contending that good cause does not exist for appellant's untimely request for attorney fees and that if fees are warranted, the award should be limited to one-third of appellant's back pay award.

ISSUES

1. May appellant file a motion for attorney fees with the Board where the final decision under which appellant prevailed was not issued by the Board?

2. Does good cause exist for waiving the Board's time requirements for filing a request for attorney fees?

3. Is the award of attorney fees limited to one-third of appellant's back pay award?

ANALYSIS

1. Appellant appropriately filed a request for fees with the Board because the finding providing the basis for the request was made on appeal from a Board decision.

At the outset, we note that the agency argued before the administrative judge that under Rule 20 of the Federal Circuit's rules of practice, appellant was required to request attorney fees before that court within thirty days after the court's decision in this case. Although the agency has not raised this issue in its petition for review, we will address it on our own because of its jurisdictional implications.

We find that appellant correctly filed his request for fees with the Board even though no final Board decision exists in which appellant prevailed. In *Lizut v. Department of the Army*, 27 M.S.P.R. 611, 616 (1985), the Board held that under the Back Pay Act, it has authority to award attorney fees

incurred in obtaining a court decision that reversed a Board decision upholding an agency action. In reaching this conclusion the Board noted that 5 C.F.R. § 550.806(a) provides that where the finding forming the basis of the fee request is made on appeal from a decision by an appropriate authority other than the employing agency, the employee shall present the fee request to the appropriate authority from which the appeal was taken. *Lizut* at 616 n.7.

This is precisely the situation in the present case. The court's finding forming the basis of the award for fees was made on appeal of the Board's decision. Thus, under 5 C.F.R. § 550.806(a), it was proper to submit the request for fees to the Board.[2]

2. Good cause exists under the unusual circumstances in this case.

As the administrative judge correctly found, the Board's regulations concerning requests for attorney fees do not address the circumstances presented in this case. Those regulations only pertain where a decision of the Board in favor of the appellant has become final. 5 C.F.R. §§ 1201.37(a)(2), 1201.113. No such decision exists in the present case because the appellant first prevailed before the court, and the court did not remand the case to the Board for

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[2] We also note that the Federal Circuit has remanded an attorney fee dispute to the Board where the appellant prevailed before the court, and filed a request for attorney fees with the court, that included time spent on the Board proceedings. *See Gavette v. Office of Personnel Management*, 808 F.2d 1456 (Fed. Cir. 1986).

issuance of a final Board decision implementing the court's holding.

We find, however, that because appellant properly filed his request for fees with the Board under the Back Pay Act, the absence of applicable regulations should not bar an award of attorney fees here. Further, as the administrative judge found, appellant's counsel acted reasonably and expeditiously under the circumstances. Although the court issued its decision on January 2, 1986, it did not issue its mandate until March 25, 1986, and then did not serve a copy on appellant or his attorneys. When appellant's counsel first learned of the mandate on April 28, he promptly filed the request for fees on May 2. Initial Addendum Decision at 4, 4 n. 3. We, therefore, find that even if there were a time limit for filing a motion for attorney fees under the Board's regulations, good cause has been shown for any delay.[3] *See Trachy v. Defense Communications Agency*, 20 M.S.P.R. 104 (1984).

3. Appellant's attorney fee award is not limited to one-third of his back pay award.

The Board has held that fee arrangements establish a rebuttable presumption as to the maximum reasonable rate for attorney fees. *See Carter v. Small Business Administration*, 28 M.S.P.R. 296, 300 (1985). The agency contends that a memorandum signed by appellant constitutes a fee arrangement

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[3] In light of this finding, we need not decide whether a particular date is the appropriate point of reference for determining when the time limit for filing a request for attorney fees begins to run under these circumstances.

that limits attorney fees to one-third of his back pay award. *See* Attorney Fee File Tab 7, Exhibit C.

To the extent that the memorandum in question constitutes a fee agreement, we find that appellant's counsel has overcome the presumption that attorney fees are limited to one-third of the back pay recovery. Appellant's counsel and his wife have both submitted affidavits stating that the fee arrangement between appellant and counsel called for an hourly rate of $75. Attorney Fee File Tab 7. The affidavits further establish that the memorandum in question merely authorized payment of one-third of the back pay award to be applied towards the outstanding balance for legal services. *Id.* Counsel has, therefore, overcome the presumption that fees are limited by the memorandum and is entitled to the agreed rate of $75 per hour.

ORDER

The agency is ORDERED to pay appellant attorney fees and costs totaling $26,725.69 (342.9 hours at $75 per hour, and costs in the amount of $1,008.19.) *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). This action must be accomplished within twenty days of the date of this order.

The agency is hereby ORDERED to inform the appellant of all actions being taken to comply with the Board's order and the date on which it believes it has fully complied. *See* 5 C.F.R. § 1201.181(b). The appellant is ORDERED to provide all necessary information requested by the agency in furtherance

of compliance and should, if not notified, inquire as to the agency's progress from time to time. *See id.*

The appellant is hereby notified that if, after being informed by the agency that it has complied with the Board's order, he believes that there has not been full compliance, he may file a petition for enforcement with the Atlanta Regional Office within thirty days of the agency's notification of compliance. *See* 5 C.F.R. § 1201.182(a). The petition for enforcement shall contain specific reasons why the appellant believes there is noncompliance, and include the date and results of any communications with the agency with respect to compliance. *See id.*

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision is now final. *See* 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal, if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

SEPARATE OPINION OF CHAIRMAN DANIEL R. LEVINSON DISSENTING IN PART

I respectfully dissent from the majority decision insofar as it awards attorney fees under the Back Pay Act for work performed on an appeal before the United States Court of Appeals for the Federal Circuit. As a practical matter, only that tribunal is situated to assess the reasonableness of requests for fees incurred in connection with judicial review. In addition, it seems to me that the majority opinion perpetuates Board precedent that is at odds with relevant guidance furnished by the Federal Circuit in a series of attorney fees cases decided under the Equal Access to Justice Act (EAJA).

The majority opinion relies on *Lizut* v. *Department of the Army*, 27 M.S.P.R. 611 (1985). There the Board held that under the Back Pay Act, 5 U.S.C. § 5596(b)(1), it has authority to award attorney fees incurred by a party prevailing before the Federal Circuit. This holding, however, rests on an interpretation of an Office of Personnel Management (OPM) regulation implementing the Back Pay Act, 5 C.F.R. § 550.806(a)[1], not shared by that court. The Federal Circuit has construed the regulation as

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[1] That regulation states in pertinent part: "if the finding that provides the basis for a request for . . . attorney fees is made on appeal from a decision by an appropriate authority other than the employing agency, the employee . . . shall present the request to the appropriate authority from which the appeal was taken."

authorizing the Board to award attorney fees only "to a party who prevailed before the Board *for services there provided.*" *Olsen v Department of Commerce*, 735 F.2d 560, 563 (1984) (emphasis supplied). Given the court's interpretation of OPM's regulation, reliance on *Lizut* in the circumstances presented here seems misplaced.

Olsen was the first of several cases in which the court addressed the Board's authority to award fees for work before the court. In addition to construing OPM's regulation, the court also held that 5 U.S.C. § 7701(g), which permits the Board to award fees to prevailing parties in its administrative proceedings, does not authorize the Board to award attorney fees for services rendered before the Federal Circuit. 735 F.2d at 561.

Two years later, in *Gavette v. Office of Personnel Management*, 808 F.2d 1456 (Fed. Cir. 1986), the court again spoke on this subject. Sitting *en banc*, the Federal Circuit noted that Federal Circuit Rule 20, which governs the filing of motions for attorney fees, contemplated that the court would award fees in connection with the judicial review of Board decisions. A seven-member majority explained that the court was in a better position than the Board to make such awards. *Id* at 1468. Accordingly, the court divided the fee request between the original three-judge panel and the Board. The original panel was directed to determine the amount of the fee award for work before the court, and the

case was remanded to the Board to award fees in connection with the administrative proceedings.[2]

Finally, in another EAJA case, decided just this year, *Covington v. Department of Health and Human Services*, 818 F.2d 838 (Fed. Cir. 1987), the court again addressed the Board's authority to award fees for work before the court. *Covington* rejected the argument that motions for attorney fees for services performed before the court had to be first filed with the Board. The court, quoting *Olsen*, found that the Board "'has no authority to award attorney fees for services rendered in connection with judicial review.'" *Id.* at 840.

To be sure, none of these cases *directly* holds that the Board may not award attorney fees under the Back Pay Act for services performed before the Federal Circuit. Still, taken collectively, these cases establish a general principle that awarding attorney fees for court time lies within the province of the court, not the Board.[3] For that

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[2] Even the four members who dissented, and who would have relied solely upon the Back Pay Act as the source of the court's authority to award fees in that case, still would have followed this bifurcated review. *Gavette*, 808 F.2d at 1471.

[3] There are, of course, circumstances in which it is proper for a court to award attorney fees for work performed in connection with administrative proceedings. Fee awards under Title VII of the Civil Rights Act of 1964 are prime examples. *See New York Gas Light Club, Inc. v. Carey*, 447 U.S. 54 (1980).

reason, I cannot concur in the majority decision to award attorney fees incurred while seeking judicial review of the Board's decision.

Daniel R. Levinson
Chairman

Washington, D.C.