

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

JOHN J. M. OBREMSKI,  
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,  
Agency.

DOCKET NUMBER  
DC083180A0336

DATE: SEP 08 1986

BEFORE

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

OPINION AND ORDER

For the reasons below, the Board REOPENS the appellant's case on its own motion. 5 U.S.C. § 7701(e). The initial addendum decision is REVERSED and appellant is awarded attorney fees in the amount of \$1,000.00.

BACKGROUND

The appellant prevailed in his legal retirement claim that he is a law enforcement officer and therefore qualifies for early retirement benefits under 5 U.S.C. § 8336(c)(1) when the Court of Appeals for the District of Columbia Circuit reversed the Board's finding to the contrary. *Obremski v.*

*Office of Personnel Management*, 699 F.2d 1263 (D.C. Cir. 1983).

Subsequently, in an initial addendum decision issued by the Board's Washington, D.C., Regional Office, which relied on *Williams v. Office of Personnel Management*, 718 F.2d 1553 (Fed. Cir. 1983), the appellant's request for attorney fees incurred in the initial appeal was denied. The appellant petitioned the United States Court of Appeals for the Federal Circuit for review of that initial addendum decision. The Court remanded the case at the request of the Board, for a determination of whether an award of attorney fees to the appellant is warranted in the interest of justice, in light of *Simmons v. Merit Systems Protection Board*, 768 F.2d 323 (Fed. Cir. 1985), which overruled *Williams*, 718 F. 2d 1553.

#### ANALYSIS

*Simmons* held that the Board has authority to award attorney fees to a federal employee who has prevailed on a claim of entitlement to disability retirement. Based on *Simmons*, the Board determined in *Leppelman v. Office of Personnel Management*, 29 M.S.P.R. 263 (1985), that it also has authority to award attorney fees in a legal retirement appeal, such as the appellant's.

In accordance with its statutory mandate, 5 U.S.C. § 7701(g), the Board will award attorney fees to a prevailing appellant when fees are warranted in the interest of justice. In *Allen v. United States Postal Service*, 2 M.S.P.R. 420

(1980), the Board set forth the following categories as examples of situations which would meet the interest of justice standard:

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" which "prolonged the proceeding" or "severely prejudiced" the employee;
5. Where the agency "knew or should have known that it would not prevail on the merits" when it brought the proceeding.

In *Simmons v. Office of Personnel Management*, MSPB Docket No. DC831L80A0132-1 ( September 8, 1986 ), the Board found that all the *Allen* categories, with the exception of the substantially innocent sub-category of category 2, are applicable to retirement-related appeals. Thus, in this appeal we determine if fees are warranted in the interest of justice by comparing the appellant's situation with the applicable *Allen* categories. In so doing, we find that only category 2 is relevant and material to the appellant's motion for attorney fees.

In *Yorkshire v. Merit Systems Protection Board*, 746 F.2d 1454 (Fed. Cir. 1984), the Court analyzed category 2. The appellant's case differs from *Yorkshire* because it does not involve an agency-initiated action, and does not involve the "substantially innocent" sub-category upon which the Court focused in *Yorkshire*. However, given *Yorkshire's* view of the consistency of the category 2 sub-categories relative to the quality of the evidence relied on by the agency before the Board, we hold that fees should be awarded in a legal retirement case if the Board finds that the agency based its case on incredible or unspecific evidence or reasoning fully countered by the record. We base this holding on the rationale that the agency's denial of benefits or credit, in the absence of justifiable reason supported by specific credible evidence or analysis, results in the expenditure of unnecessary fees by the applicant, and that such fees should be reimbursed.<sup>1</sup>

In *Obremski*, 699 F.2d 1263, the court found that the statutory interpretation which the agency used to defend its denial of law enforcement retirement status to the appellant was "poorly reasoned and eminently out of accord with applicable law." *Id.* at 1269. The court found further that the agency's interpretation was conclusory and gave no consideration to the contrary view of Federal Prison

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<sup>1</sup>*Cf. Young v. Department of the Air Force*, MSPB Docket No. DE04328410193ADD (January 8, 1986) (because the appellant not only prevailed but also fully countered the agency's unspecific evidence of unacceptable performance, the Board found fees warranted under *Allen, supra*, category two).

Industries (FPI), a unit of the Department of Justice, and the body which the court found was charged with primary interpretation of the statute. Moreover, the court characterized the agency's construction of the statutory terms in issue as glaring error and the contrary view of FPI as unrefuted. The Court further found that "OPM simply ignored the determination of the 'appropriate administrative authority' and openly disregarded the critical, undisputed facts concerning the petitioner's job." *Id.* at 1273. Most relevant to the determination of whether an award of attorneys fees would be in the interest of justice, the Court found that "OPM - after thrice considering the case - has repeatedly applied, in the most conclusory fashion, an incorrect interpretation of the controlling statutory term." *Id.*

Based on the findings of the Court of Appeals, we find that the agency's denial of law enforcement officer status to the appellant under 5 U.S.C. § 8336(c)(1) was without specific basis. OPM supplied no credible evidence to support its statutory construction. Thus, we find that attorney fees are warranted in the interest of justice.

We now consider the reasonableness of the amount of fees requested.

The appellant submitted a motion for attorney fees totalling \$1,000.00, and interest of \$389.49. Sovereign immunity generally disallows an award of interest against the United States unless a statute specifically provides for payment of interest. *Shaw v. Library of*

*Congress*, 747 F.2d 1469 (D.C. Cir. 1984) *aff'd sub nom. Library of Congress v. Shaw*, 54 U.S.L.W. 4951 (U.S. July 1, 1986); *Fitzgerald v. Staats*, 578 F.2d 435 (D.C. Cir. 1978). The Board's authority to award fees, 5 U.S.C. § 7701(g), does not specifically provide for payment of interest. Thus, we find that the appellant is not entitled to an award of interest.

In support of his motion for fees, the appellant submitted an itemized list of the time spent and the work performed by counsel in his case before the Board.<sup>2</sup> The appellant filed this documentation prior to the Board's decision in *Mitchell v. Department of Health and Human Services*, 19 M.S.P.R. 206, 210 (1984), in which the Board held that an attorney fee application must provide specific evidence of the prevailing community rate for similar work. Thus, the appellant's fee request does not meet the evidentiary standard set forth in *Mitchell*.

The Board, however, has held in *Johnson v. Internal Revenue Service*, 24 M.S.P.R. 202, 204 (1984), that it will not deny fees in a case where they have been found warranted in the interest of justice but there is insufficient evidence regarding reasonableness, unless there is evidence suggesting that the hourly rate is unreasonable or that the hours claimed are excessive; rather, the Board will determine the minimum reasonable fee on the basis of the record before it. The fee

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<sup>2</sup>Counsel represented the appellant before the Board only. He did not appear in any of the subsequent litigation of the case.

of \$1,000.00 for the approximately thirty hours of services listed by counsel in representing the appellant in his legal retirement appeal to the Board, which included a hearing, does not appear to be either unreasonable or excessive. Nor does the number of hours expended appear unwarranted. Therefore, we award the appellant attorney fees of \$1,000.00.

ORDER

The agency is hereby ORDERED to pay the appellant's attorney fees in the amount of \$1,000.00. The agency is ORDERED to complete all computations and issue a check to the appellant for the appropriate amount within sixty days of the date of this decision. The appellant is ORDERED to cooperate in good faith with the agency's efforts.

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 51 Fed. Reg. 25,164 (1986) (to be codified at 5 C.F.R. § 1201.181(b)).<sup>3</sup> 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.*

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<sup>3</sup>On July 10, 1986, the Board published 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. § 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part.

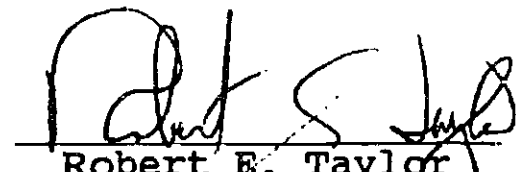
The appellant is hereby notified that if, after being informed by the agency that it has complied with the Board's order, he believes that there has not been full compliance, he may file a petition for enforcement with the Washington, D.C., Regional Office within 30 days of the agency's notification 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. 5 C.F.R. § 1201.113(c).

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, DC 20439. The court must receive the petition no later than 30 days after you or your representative receives this order.

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.