UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT G. SCHNEIDER, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER DC075287A0339 DATE: JAN 30 1989

Penelope S. Dart, Esquire, Gambrills, Maryland, for the appellant.

Diane M. Nugent, Esquire, Fort Meade, Maryland, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

This case is before the Board on the appellant's petition for review of an addendum initial decision dated December 31, 1987, in which the administrative judge found that the appellant failed to prove that he was entitled to the payment of attorney fees under 5 U.S.C. § 7701(g)(1). For the reasons discussed below, the Board GRANTS the petition for review under 5 U.S.C. § 7701(e)(1), VACATES the addendum initial decision, and REMANDS the case to the Washington Regional Office for a hearing and a new

adjudication on the appellant's motion for an award of attorney fees.

BACKGROUND

The appellant appealed the agency's action suspending him for 30 days from his position of Heating Equipment Mechanic on charges that he made a false statement on an official document with intent to deceive or mislead.[1] In an initial decision dated July 9, 1987, the administrative judge dismissed the appeal as moot, noting that the agency informed the Board that it had cancelled its suspension action,[2] and when directed to show cause why the appeal should not be dismissed, the appellant failed to respond. See Initial Appeal File (IAF), MSPB Docket No. DC07528710339, Tabs 5, 6, and 7.

After the initial decision became final on August 13, 1987, the appellant filed a timely motion for an award of attorney fees totalling $5,868.74, and requested a hearing on all disputed matters. In his addendum initial decision, the administrative judge found that the appellant was a

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[1] The agency initially proposed to remove the appellant on charges of submitting a fraudulent worker's compensation claim and making false statements on his application for employment, but it later rescinded the proposal notice and issued a new notice proposing to suspend the appellant on the single charge of making a false statement on an official document concerning his compensation claim. See Initial Addendum Decision at 2.

[2] According to the agency, after the collapse of settlement negotiations in the initial case proceeding, the agency decided to cancel the action unilaterally and so notified the administrative judge. See Initial Appeal File (IAF), MSPB Docket No. DC07528710339, Tab 4.

prevailing party because he obtained the relief he sought in his appeal to the Board, even though the Board had not issued a decision on the merits of the appeal.

The appellant claimed that fees were warranted in the interest of justice because the agency's action was clearly without merit and wholly unfounded, because he was substantially innccent of the charges, because the action was initiated in bad faith, and because the agency knew, or should have known, that it would not prevail on the merits of its case. *See* Addendum Initial Decision at 3.

Although he did not specifically respond to the appellant's hearing request, the administrative judge found that an award of attorney fees was not in the interest of justice. Therefore, he denied the motion. *See* Addendum Initial Decision at 7.

In his petition for review, the appellant argues that the administrative judge erred in denying his request for a hearing, that he failed to make findings of fact and law on material issues, and that his finding that fees were not warranted is not supported by the record.

ANALYSIS

The Board may award reasonable attorney fees incurred by an appellant who is the prevailing party where an award of fees is warranted in the interest of justice. 5 U.S.C. § 7701(g)(1).

We find that the administrative judge correctly found that the appellant was the prevailing party, notwithstanding

the fact that there was no Board decision on the merits of his appeal. *See Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371, 375 (1980) (an appellant may be deemed a "prevailing party" for purposes of an attorney fee award if all or a significant part of the relief sought in petitioning for appeal was obtained, regardless of whether a final decision has been issued).

In *Allen v. United States Postal Service*, 2 M.S.P.R. 420, 434-35 (1980), the Board described the following examples of when an attorney fee award may be warranted in the interest of justice: The agency engaged in a prohibited personnel practice; the agency action was clearly without merit or wholly unfounded, or the employee was substantially innocent of the charges; the agency initiated the action in bad faith; the agency committed a gross procedural error; or the agency knew or should have known that it would not prevail on the merits. The Board has held that the appellant, as the moving party, has the burden of establishing entitlement to an award. *See Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. at 376.

The appellant's burden of proving entitlement to attorney fees must be met, even though it may be especially difficult to meet where the case is disposed of prior to a hearing. *See Kemper v. Department of Housing and Urban Development*, 9 M.S.P.R. 231, 233 (1981), *and Carpenter v. Bureau of Alcohol, Tobacco, and Firearms*, 5 M.S.P.R. 422,

425 (1981). The Board has indicated, however, that an appellant can request a hearing to supplement the record for purposes of a motion for attorney fees where the agency has cancelled the appealed action prior to the Board's adjudication. *See Wood v. U.S. Mint*, 24 M.S.P.R. 615, 619 (1984) (because the appellant failed to request a hearing or that the record be reopened for the purpose of supplementing his motion for an award of attorney fees with evidence to support a claim of discrimination, review was limited to the incomplete record established before the appeal was dismissed); and *Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. at 376 n.6 (since the appellant did not request a hearing on his motion for an award of attorney fees, the evidentiary record before the Board is limited to that established before the appeal was dismissed).

The appellant in this case requested a hearing. However, without even addressing his request, the administrative judge made evidentiary-type findings, e.g., that the appellant failed to demonstrate a lack of intent to falsify. *See* Addendum Initial Decision at 4-5. Because the appellant was entitled to a hearing on his motion for an award of attorney fees, we find that the administrative judge erred in failing to grant his request for a hearing.[3]

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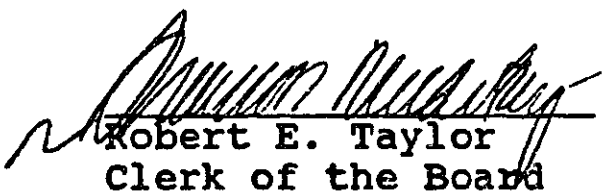
[3] In *Vann v. Department of the Navy*, MSPB Docket No. PH043285A0564 (Oct. 14, 1988), the Board did not address the question of whether an employee who settles his appeal with the agency, and files a petition for attorney fees, is

ORDER

Accordingly, we vacate the Addendum Initial Decision and remand this case to the regional office for a hearing and a new adjudication on the appellant's motion for an award of attorney fees.[4]

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.

[footnote continued]

ever entitled to a hearing. Our holding in this case is not intended to answer that question in settlement cases.

[4] In its response to the appellant's petition for review, the agency states that during a telephone conference on December 21, 1987, the administrative judge informed the parties that he was prepared to write his initial addendum decision, but first wanted to determine if there was any possibility of a settlement. According to the agency, the appellant waived his right to a hearing because his representative did not request a hearing or inquire about the status of the previous request during this conference. *See* Petition for Review File, Tab 4.

The only record of this conference in the file is the administrative judge's telephone log dated December 22, 1988. *See* Attorney Fees File, Tab 4. The log stated merely that the representatives of the parties called and informed the administrative judge that their principals were unwilling to settle the case. The administrative judge then noted that he advised the parties that he would proceed to issue a decision on the fee petition. *See id.* We cannot find from the telephone log that the parties were made to understand that the addendum initial decision would be issued without the benefit of the hearing that the appellant had specifically requested or that he clearly waived his request for a hearing. *See Sanislo v. Department of Transportation*, 15 M.S.P.R. 576, 578-79 (1983) (while an employee may waive his right to a hearing, the evidence must demonstrate an intentional relinquishment or abandonment of a known right by clear, unequivocal, and decisive action).