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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

File

21045

FILE: B-199468

DATE: March 9, 1982

MATTER OF: Mary K. Hatler - Attorney Fees - Downgrading

DIGEST: Air Force employee was downgraded, but was later restored retroactively by Air Force following decision of Merit Systems Protection Board regarding personnel actions related to "unacceptable performance." Claim for attorney fees was denied by Air Force and MSPB. Our Office has no authority to review decisions of MSPB under 5 U.S.C. § 7701. In addition, under regulations implementing Back Pay Act amendments, such claim for attorney fees is subject to review only if provided for by statute or regulation. Since no review by GAO of claim presented here is authorized by statute or regulation, we may not review the prior denials.

ISSUE

The issue in this decision is the entitlement of an employee to attorney fees incident to her appeal of a downgrading which was retroactively canceled by her employing agency. We hold that our Office has no authority in this situation to review the denial of attorney fees by the employing agency or the Merit Systems Protection Board.

BACKGROUND

This decision is in response to the appeal by Ms. Mary K. Hatler from our Claims Division settlement Z-2822004, April 15, 1980, denying her claim for attorney fees. In presenting this claim Ms. Hatler has been represented by her attorney, Mr. Shelby W. Hollin.

Ms. Hatler, an employee of the Department of the Air Force, was downgraded from grade GS-9 to grade GS-4 effective November 18, 1979, based on unacceptable performance. She appealed that action to the Merit Systems Protection Board (MSPB) on November 27, 1979. While her appeal was pending the MSPB decided Wells v. Harris (MSPB Order No. RR-80-3, December 17, 1979), holding that disciplinary actions for "unacceptable performance" may not be

taken in the absence of a performance appraisal system established under 5 U.S.C. § 4302. Federal Merit Systems Reporter, para. 7005, p. XI-10 (April 1981).

In light of the decision in Wells the Air Force canceled the downgrading action against Ms. Hatler and retroactively restored her to her former position. However, the Air Force denied Ms. Hatler's claim for attorney fees. The MSPB dismissed Ms. Hatler's appeal as moot, and Ms. Hatler filed a motion with the MSPB for payment of attorney fees in the amount of \$5,320. We have been advised that Ms. Hatler's claim for attorney fees was denied by the MSPB.

On appeal Mr. Hollin argues on behalf of Ms. Hatler that nothing in the Back Pay Act or its implementing regulations preclude our Office from considering claims for attorney fees where the agency has denied such fees. Mr. Hollin also contends that no appropriate authority will ever find that payment of attorney fees is in the "interest of justice" when that agency must admit to and correct an unjustified or unwarranted personnel action.

DISCUSSION

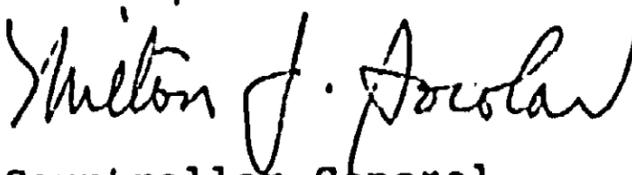
With the enactment of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, October 13, 1978, there now exists statutory authority to pay attorney fees in connection with employee appeals of adverse actions. Under the provisions of 5 U.S.C. § 7701(g)(1), the Merit Systems Protection Board may award attorney fees to employees who prevail on appeal where payment by the agency is deemed to be warranted "in the interest of justice." This authority in section 7701 is limited to the Board, and review or appeal of Board decisions is limited to the U.S. Court of Claims and the U.S. Courts of Appeal. See 5 U.S.C. § 7703. Our Office is without authority to review decisions of the Merit Systems Protection Board on employee appeals or requests for attorney fees.

There is additional authority for the payment of attorney fees contained in the Back Pay Act, 5 U.S.C. § 5596, as amended by the Civil Service Reform Act of

1978. Under that authority, reasonable attorney fees may be paid to employees found to have been affected by unjustified or unwarranted personnel actions. See 5 U.S.C. § 5596 (b)(1)(A)(ii) (Supp. III 1979).

The final regulations for the amended Back Pay Act were recently issued by the Office of Personnel Management (OPM), 46 Fed. Reg. 58271, December 1, 1981 (to appear in 5 C.F.R. Part 550, Subpart H). These regulations provide in section 550.806(a) that a request for attorney fees "may be presented only to the appropriate authority that corrected or directed correction" of the unjustified or unwarranted personnel action. Further, if the finding of an unwarranted or unjustified personnel action has been made on appeal, the request for attorney fees shall be presented to the appropriate authority (other than the employing agency) from which the appeal was taken. Finally, section 550.806(g) states that determinations concerning whether to pay attorneys fees or concerning the amount of such payment "shall be subject to review or appeal only if provided for by the statute or regulation."

In the present case, Ms. Hatler has presented her request for attorney fees to the Air Force, her employing agency, and the Merit Systems Protection Board, and her requests were denied. We know of no basis to review those determinations. The proper action would have been to appeal the MSPB decision to the Court of Claims or appropriate Court of Appeals under 5 U.S.C. § 7703. In addition, our Office did not assume the role of an "appropriate authority" in reviewing Ms. Hatler's downgrading, so that no request for attorneys fees may be considered by our Office in this case.

for 
Comptroller General
of the United States