DECISION

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

FILE: B-208911 DATE: June 10, 1983

MATTER OF: Elias S. Frey - Claim for Attorney Fees Under the Back Pay Act

DIGEST:

Employee, who was reemployed by Bureau of Alcohol, Tobacco and Firearms following service with Federal Energy Agency, did not receive benefit of highest previous rate rule. Following successful claim with GAO for retroactive pay adjustment, the union representing the employee claims attorney fees under the Back Pay Act, 5 U.S.C. § 5596, as amended. The claim for attorney fees is denied since payment is not deemed in the interest of justice under the circumstances. We conclude that the agency did not commit a prohibited personnel practice and that the agency neither knew nor should have known it would not prevail on the merits, two criteria for awarding attorney fees in the interest of justice.

The issue in this decision involves a claim for attorney fees under the Back Pay Act pursuant to a settlement by our Claims Group allowing an employee's claim for a retroactive step increase based on his highest previous rate. Since we conclude that payment of attorney fees would not be in the interest of justice, we deny the claim for attorney fees.

Mr. Cary P. Sklar, Assistant Counsel for the National Treasury Employees Union, claims attorney fees and expenses in the amount of $1,458 in connection with the backpay claim of Mr. Elias S. Frey which was allowed by our Claims Group.

Mr. Frey's claim for a retroactive step increase based upon the highest previous rate rule was allowed by our Claims Group by settlement Z-2837664, dated April 13, 1982. Although the settlement did not specifically state the authority for a retroactive pay adjustment, we infer that the authority is the Back Pay Act, 5 U.S.C. § 5596.

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Mr. Frey was employed by the Bureau of Alcohol, Tobacco and Firearms (BATF), Department of the Treasury, in 1974 when he transferred to the Federal Energy Administration (FEA). After 54 weeks with FEA, Mr. Frey exercised his statutory right to return to BATF. See Federal Personnel Manual Letter No. 352-6, January 10, 1975. Mr. Frey left FEA as a grade GS-11, step 2, and returned to his former level at BATF, grade GS-9, step 3. Later, Mr. Frey learned that all employees who had worked for FEA and were later reemployed by the Internal Revenue Service were accorded higher rates of pay based on the highest previous rate rule. Mr. Frey's claim for a retroactive pay adjustment was denied by BATF but allowed by our Claims Group.

Following our Claims Group's settlement, the union filed for attorney fees in the amount of $1,235 and expenses in the amount of $223 for a total claim of $1,458. The claim was filed under the authority of the Back Pay Act, 5 U.S.C. § 5596, as amended by the Civil Service Reform Act of 1978, Pub. L. 95-454, October 10, 1978. Under the amended Act, reasonable attorney fees may be paid to employees found to have been affected by unjustified or unwarranted personnel actions. 5 U.S.C. § 5596(b)(1)(A)(ii) (Supp. III 1979). Final regulations implementing the Back Pay Act were issued by the Office of Personnel Management (OPM), 46 Fed. Reg. 58271, December 1, 1981, and appear in 5 C.F.R. Part 550, Subpart H (1982).

Section 550.806(a) of 5 C.F.R. provides as follows:

> "(a) An employee or an employee's personal representative may request payment of reasonable attorney fees related to an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee. Such a request may be presented only to the appropriate authority that corrected or directed the correction of the unjustified or unwarranted personnel action. * * *"

Since Mr. Frey's claim was filed with and decided by our Office and since our Office is an "appropriate authority" as defined by the Back Pay Act and implementing regulations, the request for attorney fees is properly presented to our Office. Mr. Sklar's representation of Mr. Frey is supported by an appropriate power of attorney.

Section 550.806(b) of 5 C.F.R. provides that:

> "(b) The appropriate authority to which such a request is presented shall provide an opportunity for the employing agency to respond to a request for payment of reasonable attorney fees."

The employing agency, BATF, has responded to the request by letter dated August 3, 1982, by questioning the claim for attorney fees. The response from BATF disagrees with the union's contentions that the agency knew or should have known it would not prevail on the merits and that the agency engaged in a prohibited personnel practice. Without specifically stating so, it appears that BATF opposes the request for attorney fees.

Under the provisions of 5 C.F.R. § 550.806(c), the payment of reasonable attorney fees shall be deemed to be warranted only if:

> "(1) Such payment is in the interest of justice, as determined by the appropriate authority in accordance with standards established by the Merit Systems Protection Board under section 7701(g) of title 5, United States Code; and
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> "(2) There is a specific finding by the appropriate authority setting forth the reasons such payment is in the interest of justice."

The union argues that payment of attorney fees is warranted "in the interest of justice" as interpreted by the Merit Systems Protection Board since (1) the agency knew or should have known it would not prevail on the merits and (2) the agency engaged in a "prohibited personnel practice." As noted by the union, these examples are two of the five illustrations provided by the MSPB in its leading decision in Allen v. U.S. Postal Service, 2 MSPB 582 (1980).

As to whether the agency knew or should have known it would not prevail on the merits, we must examine the actions of BATF in reemploying Mr. Frey. Although BATF regulations

(BATF Order 2530.1) required the use of highest previous rate if employee transfers from other agencies, the agency chose a different policy for reemployment of former BATF employees who were transferring from the Federal Energy Agency. A policy statement dated April 4, 1975, from the Chief, Personnel Division, advised all BATF offices that such employees will be reemployed at their former grade and salary, plus any within grade increases they would have received.

It is unclear why BATF chose a different policy with regard to these returning employees, and since this policy was not consistent with the existing regulations governing highest previous rate, Mr. Frey was entitled to a retroactive pay adjustment. However, we do not find that the agency knew or should have known it would not prevail on the merits.

The agency did not single out Mr. Frey upon reemployment but instead applied a consistent policy with respect to all employees being reemployed after service with the Federal Energy Administration. The agency apparently concluded that either the highest previous rate rule was not applicable here or that this situation constituted an exception to the rule.

We interpret the standard "knew or should have known it would not prevail on the merits" as applying to situations where an agency takes an action clearly contrary to established law, policy, or regulation or where the agency, if it conducted an appropriate inquiry, knew or should have known the action would not be sustained on appeal. See O'Donnell v. Interior, 2 MSPB 604 (1980). We do not find Mr. Frey's situation as falling within that standard where the agency, upon reemploying Mr. Frey, granted him the minimum grade and step as required by FPM Letter No. 352-6 but did not further allow his highest previous rate.

Similarly, we do not agree with the union's contention that the agency's action constituted a prohibited personnel practice. We interpret this standard as limited to the statutorily defined "prohibited personnel practices" listed in 5 U.S.C. § 2302(b). We do not find, contrary to the union's contention, that there was any violation of the merit system principles set forth in 5 U.S.C. § 2301(b) with regard to this pay setting determination. Nor do we agree that Mr. Frey suffered an adverse action in returning to his

position at BATF. All that was statutorily required of BATF was to reemploy Mr. Frey in his former position or a position of comparable salary. The agency mistakenly failed to follow its own regulations governing use of the highest previous rate rule. We do not find that such action constituted a prohibited personnel practice.

For the reasons stated above, we conclude that payment of attorney fees would not be in the interest of justice. Therefore, we need not decide whether the fees which are claimed are reasonable in amount. See 5 C.F.R. § 550.806(d).

Accordingly, we deny the union's claim for payment of attorney fees.

Milton J. Socolar

Acting Comptroller General
of the United States