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**DECISION**



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

**FILE:** B-197737

**DATE:** January 8, 1982

**MATTER OF:** Leslie H. Graham, Jr. -- Claim for Attorney Fees under Back Pay Act, as amended

**DIGEST:** Employee, who successfully appealed demotion before Federal Employee Appeals Authority in 1977 and before Merit Systems Protection Board in 1979, claims attorney fees in connection with appeal. Claim for attorney fees under Back Pay Act, 5 U.S.C. § 5596, as amended by the Civil Service Reform Act of 1978, is denied since employee's appeal was pending on effective date of Reform Act. Savings provision in section 902(b) of Reform Act precludes application of the amendment to administrative proceedings pending on effective date of Reform Act.

**ISSUE**

The issue in this decision is the entitlement of an employee to attorney fees incident to his successful appeal of an agency action before the Federal Employee Appeals Authority and the Merit Systems Protection Board. We hold that the claim for attorney fees under the Back Pay Act, as amended by the Civil Service Reform Act of 1978, must be denied in view of the savings provision in the Reform Act precluding the application of the Reform Act to administrative proceedings pending on or before January 11, 1979, the effective date of the Reform Act.

**BACKGROUND**

This decision is in response to the appeal filed by Mr. Leslie H. Graham, Jr., from our Claims Division settlement, Z-2818820, November 21, 1979, denying his claim for attorney fees.

Mr. Graham, an employee of the Department of Housing and Urban Development, appealed a change to lower grade effective January 30, 1977, to the Federal Employee Appeals Authority (FEAA). The FEAA held, in a decision dated September 30, 1977, that the action against Mr. Graham was "not well founded and in effect unnecessary" and that it

should be reversed. The agency appealed that decision, and the agency appeal was denied by the Merit Systems Protection Board on June 22, 1979. Mr. Graham asked the Board to award him attorney fees incurred in connection with his appeal, but Mr. Graham has advised our Office that his claim was denied by the Board by letter dated September 6, 1979.

#### DISCUSSION

Prior to the amendments made by the Civil Service Reform Act, there was no authority under the Back Pay Act or other laws to pay attorney fees in connection with employee appeals of adverse actions. See 5 U.S.C. § 5596 (1976) and S. Rep. No. 95-969, 95th Cong., 2d Sess. 60 (1978). However, with the enactment of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1139, October 13, 1978, specific authority was provided in 5 U.S.C. § 7701(g)(1) under which the Merit Systems Protection Board may award reasonable attorney fees to employees who prevail on appeal under certain conditions. Since the authority in section 7701 is limited to the Board and since Mr. Graham has been denied attorney fees by the Board, we shall turn to the question of his claim for attorney fees under the Back Pay Act.

The Civil Service Reform Act also amended the Back Pay Act to provide for the payment of reasonable attorney fees 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 amendments (5 C.F.R. Part 550, subpart H) were recently issued by the Office of Personnel Management (OPM), 46 Fed. Reg. 58271, December 1, 1981. The regulations provide in section 550.806 (h) that the payment of attorney fees is not applicable to "any administrative proceeding that was pending on January 11, 1979 [the effective date of the Civil Service Reform Act]."

As stated by OPM in the supplementing information preceding these regulations, this limitation on attorney fees coincides with the "savings provision" in section 902(b) of the Reform Act. See 46 Fed. Reg. 58275. Section 902(b) of the Reform Act (set out in 5 U.S.C. § 1101 note) provides as follows:

"No provision of this Act shall affect any administrative proceedings pending at the

time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted."

The Court of Claims has held that this savings provision precludes the payment of attorney fees in cases pending prior to the effective date of the Reform Act, January 11, 1979. Nibali v. United States, 634 F.2d 494 (Ct. Cl. 1980). The courts have applied a similar interpretation to the savings provision of the Reform Act with respect to appellate review of decisions of the Merit Systems Protection Board. See Glenn v. M.S.P.B., 616 F.2d 270 (6th Cir. 1980); Ellis v. M.S.P.B., 613 F.2d 49 (3rd Cir. 1980); and Kyle v. I.C.C., 609 F.2d 540 (D.C. Cir. 1980).

Therefore, we conclude that the amendments to the Back Pay Act providing for the payment of attorney fees are not applicable to administrative proceedings pending at the time such amendments took effect. Since Mr. Graham's appeal of the adverse action was filed in 1977 and was pending on the effective date of the Reform Act (January 11, 1979), he is not eligible for attorney fees under the Back Pay Act. A similar result would follow for personnel actions or appeals which were concluded prior to the effective date of the Reform Act. See Nibali v. United States, supra.

In his appeal, Mr. Graham cites a recent district court decision providing a broad interpretation of the attorney fees provision in the Back Pay Act. Crowley v. Muskie, 496 F. Supp. 360 (D.D.C. 1980). The court's decision in Crowley interprets the Back Pay Act amendments as entitling all prevailing plaintiffs to reasonable attorney fees. The court, therefore, held that the plaintiffs therein, employees of the State Department who had filed suit in 1974 over improper personnel actions, were entitled to attorney fees to be ascertained in accordance with the Back Pay Act amendments.

We have learned that the Department of Justice has filed a notice of appeal and intends to appeal the Crowley decision as being inconsistent with the interpretation of the savings provision of the Reform Act in Nibali v. United States, supra, and Kyle v. I.C.C., supra. In view of the interpretation

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of the saving provision by the Office of Personnel Management and several court decisions, we are not persuaded by the court's decision in Crowley that the amendments to the Back Pay Act are intended to be retroactively effective.

Accordingly, we sustain our Claims Division settlement denying Mr. Graham's claim for attorney fees.

*Harry R. Van Cleave*  
For the Comptroller General  
of the United States