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

FILE: B-208911 **DATE:** March 6, 1984

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

DIGEST:

Employee, who was reemployed by Bureau of Alcohol, Tobacco and Firearms following service with Federal Energy Administration, did not receive benefit of highest previous rate rule. Following successful claim with GAO for retroactive pay adjustment, the union representing the employee claimed attorney fees under the Back Pay Act, 5 U.S.C. § 5596, as amended. Prior decision disallowing claim for attorney fees is affirmed since the union has not shown that payment is warranted in the interest of justice. Specifically, the union has failed to demonstrate that the agency knew or should have known it would not prevail on the merits, one of the criteria for awarding attorney fees in the interest of justice.

Mr. Cary P. Sklar, Assistant Counsel for the National Treasury Employees Union, requests reconsideration of our decision in Elias S. Frey, B-208911, June 10, 1983. In that decision, we denied the union's claim for 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. For the reasons stated below, we affirm our prior determination.

BACKGROUND

Mr. Frey, an employee of the Bureau of Alcohol, Tobacco and Firearms (BATF), Department of the Treasury, transferred to the Federal Energy Administration (FEA) in 1974. After 54 weeks with FEA, Mr. Frey exercised his statutory right to return to BATF. See Federal Personnel Manual (FPM) 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

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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, Public Law 95-454, October 17, 1978. The union argued that payment of attorney fees would be warranted "in the interest of justice" in accordance with the provisions of 5 U.S.C. § 550.806(c) and standards established by the Merit Systems Protection Board (MSPB) in Allen v. U.S. Postal Service, 2 MSPB 582 (1980). Specifically, citing two of the Allen standards, the union maintained that (1) the agency knew or should have known that it would not prevail on the merits, and (2) the agency engaged in a "prohibited personnel practice."

In our prior decision Frey, we responded to the union's first contention and explained that the Allen standard "knew or should have known it would not prevail on the merits" applies to situations in which an agency takes an action clearly contrary to established law, policy, or regulation, or where the agency, if it had 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). In order to determine whether the agency knew or should have known that it would not prevail on the merits, we examined the agency's actions in reemploying Mr. Frey. We found that, although agency regulations (BATF Order 2530.1) required application of the highest previous rate rule to employees transferring from other agencies, BATF uniformly applied a different policy to employees returning from FEA. A policy statement dated April 4, 1975, from the Chief, Personnel Division, advised all BATF offices that such employees would be reemployed at their former grade and salary, plus any within-grade increases they would have received.

Since the agency's policy with respect to employees transferring from FEA was not consistent with the existing regulations governing highest previous rate, our Claims Group held that Mr. Frey was entitled to a retroactive pay

adjustment. Nevertheless, in Frey we found no basis for concluding that the agency knew or should have known that it would not prevail on the merits of Mr. Frey's backpay claim. Specifically, we recognized that the agency, upon reemploying Mr. Frey, granted him the minimum grade and step required by FPM Letter No. 352-6, which sets forth the statutory reemployment rights of FEA employees. While the agency did not further allow Mr. Frey his highest previous rate, its failure to do so apparently was based on a mistaken assumption that the reemployment rights described in FPM Letter No. 352-6 preempted or created an exception to the highest previous rate rule.

In addition, we held in Frey that we did not agree with the union's assertion that the agency's pay-setting determination constituted a prohibited personnel practice. We interpreted this standard as being limited to the statutorily defined "prohibited personnel practices" listed in 5 U.S.C. § 2302(b).

DISCUSSION

On reconsideration, the union renews its contention that payment of attorney fees is warranted because the agency knew or should have known that it would not prevail on the merits. Employing the more specific standard we derived from the MSPB's decision in O'Donnell, above, the union argues that (1) the agency's pay-setting determination was clearly contrary to established policy and regulations, and (2) the agency, if it conducted an appropriate inquiry, knew or should have known that its action would not be sustained on appeal.

In support of its contention that the agency's failure to allow Mr. Frey his highest previous rate was clearly contrary to established policy and regulation, the union states that BATF Order 2530.1, setting forth the agency's highest previous rate rule, mandates application of the rule to all employees transferring from other agencies. Thus, the union maintains that BATF, regardless of its reasons, was not free to disregard the rule in setting Mr. Frey's pay upon his reemployment.

We agree that BATF was required by its own regulations to allow Mr. Frey his highest previous rate. For

this reason, our Claims Group granted Mr. Frey's claim for a retroactive pay adjustment. Nevertheless, as we fully explained in our prior decision, we do not believe that the agency's pay-setting determination was "clearly contrary to established law, policy, or regulation." All that was statutorily required of BATF was to reemploy Mr. Frey in his former position, or in a position of comparable salary. See FPM Letter No. 352-6. Complying with those requirements, BATF reemployed Mr. Frey at the grade and step he had attained prior to his transfer to FEA.

With respect to BATF's failure to further allow Mr. Frey his highest previous rate, we noted in our prior decision that the agency did not single our Mr. Frey upon reemployment, but instead applied a consistent policy with respect to all employees being reemployed after service with FEA. The agency apparently concluded that either the highest previous rate rule was not applicable to employees returning from FEA, or that this situation constituted an exception to the rule.

The union suggests that the agency's reasons for failing to allow Mr. Frey his highest previous rate are immaterial, in view of the compulsory nature of BATF Order 2530.1. However, the pivotal question is not whether the agency was compelled by BATF Order 2530.1 to pay the returning employees at higher rates, but whether the agency, having failed to follow the regulation, knew or should have known that it would not prevail on the merits of Mr. Frey's backpay claim. See Brown, et al. v. Department of Defense, MSPB No. DC075209174 (July 1, 1982). Since the agency mistakenly assumed that reemployment after service with FEA warranted an exception to the highest previous rate rule, and since that assumption was not successfully challenged until our Claims Group adjudicated Mr. Frey's claim, we cannot find that the agency knew or should have known it would not prevail on the merits of that claim. A different case would be presented if our Claims Group or another decision-making authority determined that BATF was required to apply the highest previous rate rule in setting the pay of employees returning from FEA, and the agency subsequently failed to apply the rule in setting Mr. Frey's pay. See Brown, cited previously and discussed below. See also Sims v. Department of the Navy, 711 F.2d 1578, 1581-82 (Fed. Cir. 1983).

The union further maintains that payment of attorney fees is warranted because the agency, if it had conducted an appropriate inquiry, knew or should have known that its pay-setting determination would not be sustained by our Claims Group. In this regard, the union states that Mr. Frey filed a grievance shortly after his return to BATF requesting that he be allowed his highest previous rate. The union alleges that BATF officials advised Mr. Frey to hold his grievance in abeyance pending the disposition of a similar grievance filed by an employee of the Internal Revenue Service (IRS). Affidavits submitted by Mr. Frey and union steward further allege that agency officials agreed to monitor the progress of the IRS grievance and to settle Mr. Frey's grievance accordingly. Although the IRS employee in question ultimately was allowed his highest previous rate, BATF failed to so advise Mr. Frey and summarily rejected his grievance.

The agency disputes the union's allegations concerning the grievance filed by Mr. Frey. Specifically, the agency claims that it was not aware of a similar grievance filed within IRS and denies that its representatives agreed to be bound by a determination on any such grievance.

Claims are decided by this Office on the basis of the written record presented by the parties, and the burden of proof rests on the claimants. See 4 C.F.R. § 31.7. Where, as here, the record contains an irreconcilable dispute of fact between a Government agency and a claimant, it is our policy to accept the agency's statement of the facts. See Ambrose W. J. Clay, et al., B-188461, December 20, 1977. Accordingly, we must accept the agency's statement that it had no knowledge of, and did not agree to be bound by, a grievance processed within IRS.

Additionally, the union argues that payment of attorney fees is warranted on the basis of MSPB decisions in Cicero v. U.S. Postal Service, 4 MSPB 145 (1980), and Brown, et al. v. Department of Defense, cited above. In Cicero, an employee was charged with not being present at work for the days he claimed on his time card. Although the employee, in response to the charges, filed credible evidence of his presence at work, the agency disregarded such evidence and demoted the employee. After the employee had successfully challenged his demotion, the MSPB awarded

him attorney fees based on its conclusion that, "if the deciding official had properly considered the appellant's response in light of the paucity of the agency's evidence, he should have known that the demotion of appellant could not be sustained." 4 MSPB 145, 146.

The union argues that Mr. Frey's case is analogous to Cicero because he provided our Claims Group with, "adequate evidence in support of his claim," and because the agency, "never advanced substantive arguments with probative value." However, as the MSPB stated in Cicero, the failure of an agency to successfully defend a particular personnel action does not necessarily mean that an award of attorney fees is warranted in the interest of justice. Rather, an agency's failure to defend its action goes to only one of the requirements for a fee award--that the employee was a prevailing party. 4 MSPB 145, 146. See generally Sterner v. Department of the Army, 711 F.2d 1563 (Fed. Cir. 1983).

Thus, in Cicero, the MSPB emphasized that it found attorney fees to be warranted in the interest of justice not only because the agency failed to substantiate its charges against the employee, but because the agency failed to investigate exonerating facts which employee brought to its attention. Since the claim Mr. Frey filed with our Claims Group presented a question of law, not fact, the MSPB's determination in Cicero has no bearing on NTEU's claim for attorney fees. Compare also Steger v. Department of Defense, No. 82-1226 (D.C. Cir. Sept. 13, 1983), and cases cited therein.

In Brown, cited previously, the MSPB considered claims for attorney fees filed by a number of overseas guidance counselors employed by the Department of Defense (DOD). The DOD had downgraded the counselors' positions in disregard of the Overseas Teachers Pay and Personnel Practices Act, 20 U.S.C. § 902, as amended, which requires that teachers and individuals serving in comparable positions overseas be paid at rates established under a prescribed formula.

Having found that DOD failed to comply with 20 U.S.C. § 902, the MSPB in Brown addressed the question whether the agency knew or should have known that it was required to use

the statutory method for computing the counselors' pay. Answering this question affirmatively, the MSPB pointed out that a Federal court previously had determined that DOD was required to apply the statutory formula in fixing the compensation of its overseas teachers, and that it had consistently failed to do so. March, et al. v. United States, 506 F.2d 1306 (D.C. Cir. 1974). In view of the specificity and clarity with which the court discussed DOD's prior violation of 20 U.S.C. § 902, the MSPB concluded that the agency had ample notice that it was required to set the pay of its overseas guidance counselors in accordance with the statutory formula.

In this case, the agency's erroneous interpretation of its regulations governing highest previous rate was not successfully challenged until our Claims Group adjudicated Mr. Frey's claim. Thus, in contrast to the situation presented in Brown, there is no basis for concluding that BATF was aware at the time it reemployed Mr. Frey that he was entitled to the benefits of the highest previous rate rule.

Accordingly, for the reasons stated above, we affirm our prior decision disallowing the union's claim for payment of attorney fees.

Milton J. Socolar

for Comptroller General
of the United States