

1710 or more

DECISION



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

25411

FILE: B-206237

DATE: June 10, 1983

MATTER OF: Shelby W. Hollin - Claim for Attorney Fees
Under the Back Pay Act

DIGEST:

1. Employee's attorney claims attorney fees in case where GAO held Army committed an unjustified and unwarranted personnel action following the denial of an agency-filed application for disability retirement. David G. Reyes, B-206237, August 16, 1982. Claim for reasonable attorney fees under the Back Pay Act, 5 U.S.C. § 5596, as amended, is allowed since GAO, as an "appropriate authority" under the Back Pay Act, finds fees to be warranted in the interest of justice. See 5 C.F.R. § 550.806.
2. Claim for reasonable attorney fees under the Back Pay Act requested payment for 29 hours at \$100 per hour. Following criteria established by Merit Systems Protection Board, the hourly rate is reduced to \$75 to be consistent with rates charged by other attorneys in the locality.

The issue in this decision concerns a claim for attorney fees for representation of a Federal employee whose claim for backpay and restoration of leave we allowed in a prior decision. We hold that reasonable attorney fees may be paid under the Back Pay Act, 5 U.S.C. § 5596, and implementing regulations since payment is warranted in the interest of justice.

Mr. Shelby W. Hollin claims attorney fees in the amount of \$2,900 in connection with his representation of David G. Reyes, the subject of our decision David G. Reyes, B-206237, August 16, 1982. In Reyes, we held that, although the

025844
121604

Department of the Army could place the employee on involuntary leave while the agency filed for his disability retirement since the agency's determination was based on a medical opinion that the employee was incapacitated for duty, the Army was obligated to either restore Mr. Reyes to active duty or to take steps to separate him on grounds of disability after the Office of Personnel Management (OPM) denied the application for disability retirement. We concluded that the Army's failure to restore Mr. Reyes to active duty or to take steps to separate him on grounds of disability constituted an unjustified or unwarranted personnel action under 5 U.S.C. § 5596 (1976). Accordingly, we granted Mr. Reyes' claim for backpay and restoration of leave for the period March 27, 1980, to May 8, 1980. Following our decision, Mr. Hollin filed a claim for attorney fees in the amount of \$2,900.

The authority for the payment of attorney fees is contained in the Back Pay Act, 5 U.S.C. § 5596, as amended by the Civil Service Reform Act of 1978. Under the amended Act, 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). Final regulations implementing the amended Back Pay Act were issued by the Office of Personnel Management, 46 Fed. Reg. 58271, December 1, 1981, and appear in 5 C.F.R. Part 550, Subpart H. Section 550.806(a) of 5 C.F.R. provides as follows:

"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 unwarranted personnel action * * *."

The fact that Mr. Reyes incurred attorney fees pursuant to an attorney-client relationship is supported by an affidavit provided in the request. The statement of

services provided to Mr. Reyes are all related to defending Mr. Reyes against the actions of the Army which, in part, resulted in our finding of an unjustified or unwarranted personnel action. Finally, since this Office rendered the decision granting part of Mr. Reyes' claim for backpay and restoration of leave, we are "the appropriate authority that * * * directed the correction of the unjustified or unwarranted personnel action * * * ". Therefore, the request for attorney fees is properly presented to this Office.

Section 550.806(b) of title 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."

We forwarded Mr. Hollin's claim for attorney fees to the Director of Civilian Personnel, Department of the Army. By letter of October 26, 1982, the Office of the Judge Advocate General, Department of the Army, responded and stated, in part:

"We have reviewed the file and interpose no legal objection to the payment of reasonable attorney fees. Based on the affidavit of claimant's attorney * * *, we accept a claimed attorney fee of \$2,900.00 * * * as reasonable."

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

"(2) There is a specific finding by the appropriate authority setting forth the reasons such payment is in the interest of justice."

The Merit Systems Protection Board (MSPB) has enumerated the criteria relating to payment of attorney fees in the interest of justice. In a leading case, Allen v. U.S. Postal Service, 2 MSPB 582 (1980), the MSPB held that "in the interest of justice" is not coextensive with the concept of prevailing party, but is not limited to cases involving prohibited personnel actions as defined by 5 U.S.C. § 2302 (Supp. III 1979) or agency actions which are "clearly without merit." After reviewing the legislative history of the amendments to the Back Pay Act which provide for the payment of attorney fees, the MSPB held in Allen that payment would be "in the interest of justice" under the following circumstances as summarized below:

- 1) the agency engaged in a prohibited personnel practice;
- 2) the agency's action was clearly without merit or was wholly unfounded or the employee was substantially innocent of the charges brought by the agency;
- 3) the agency initiated the action in bad faith;
- 4) the agency committed a gross procedural error (not simply harmful procedural error) which prolonged the proceeding or severely prejudiced the employee; or
- 5) the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.

The MSPB cautioned in Allen that the above list was not exhaustive, but illustrative, and the examples should serve as "directional markers" towards the interest of justice.

In his request for payment, Mr. Hollin argues that payment is warranted in the interest of justice since the agency failed to comply with its own "directives" which constituted a prohibited personnel practice. However, based on our review of the statutorily-defined "prohibited personnel practices" contained in 5 U.S.C. § 2302(b), we do not find that the Army committed a prohibited personnel practice. On the other hand, we conclude that attorney fees may be paid "in the interest of justice" since the Army has interposed no objection to payment and since the error committed by the Army borders on gross procedural error.

As we held in Reyes, B-206237, supra, once the agency-filed application for disability retirement was denied, the Army was obligated to either restore the employee to active duty or to take steps to separate him on grounds of disability, and the Army failed to do either. Our decisions have long held that such action constitutes an unjustified or unwarranted personnel action under the Back Pay Act. Therefore, we conclude that under the circumstances such action constitutes gross procedural error which prejudiced the employee by prolonging the period of involuntary leave and leave without pay for 5 weeks. Accordingly, we conclude that payment of attorney fees are warranted in the interest of justice. 5 C.F.R. § 550.806(c)(2).

The Back Pay Act regulations provide further in 5 C.F.R. § 550.806(d) that:

"(d) When an appropriate authority determines that such payment is warranted, it shall require payment of attorney fees in an amount to be determined to be reasonable by the appropriate authority. * * *"

The MSPB in Kling v. Department of Justice, 2 MSPB 620 (1980), ruled on the question of what constitutes reasonable fees. The MSPB reviewed the considerable judicial precedent available including the 12 factors outlined in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). However, the MSPB stated that the preferred approach for cases appealed to the MSPB would be to review the lawyer's customarily hourly billing and the number of hours devoted to the case. See Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973). Therefore, the MSPB concluded that the Lindy approach (hourly rate x hours devoted) would be utilized while the Johnson factors could provide guidance. Kling, supra.

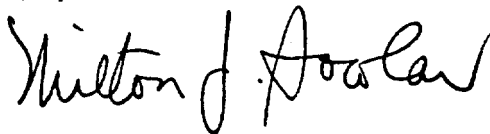
In his affidavit Mr. Hollin states that the hours devoted to the case totaled 29 hours and the hourly rate is \$100. Mr. Hollin has also supplied a statement responding to the 12 factors outlined by the Johnson case and has submitted affidavits from 11 other attorneys in the San Antonio, Texas, area attesting to their normal hourly rates. These rates range from \$60 to \$125 per hour with five attorneys attesting to the fact that they normally charge \$75 per hour.

We note that according to Mr. Hollin all of the billable hours were spent conferring with his client and preparing letters and petitions for review. There was no trial or appellate work in this case for which several of the attorneys in the San Antonio area charge hourly rates in excess of \$75. Mr. Hollin also states there is no customary fee for such cases but he adds that he was paid \$100 per hour in a recent case involving the Social Security Administration. Finally, Mr. Hollin argues that since his fee was contingent upon the success of the case his fee of \$2,900 should be adjusted upward.

As Mr. Hollin notes, the MSPB held in Kling that a public policy "bonus multiplier" of the attorney's fee would not be justified in cases before the MSPB but that when counsel's compensation is contingent on success, the award could be adjusted upward to compensate the attorney for the risk the attorney accepted of not being paid at all.

Although Mr. Hollin states that his fee was contingent upon success in Mr. Reyes' case, we note that Mr. Reyes paid a retainer of \$560 which would be refunded if Mr. Hollin obtained fees from the Government. Thus, Mr. Hollin's reimbursement was not strictly contingent upon success in Mr. Reyes' case. In addition, we believe a reasonable hourly rate under the circumstances in this case is \$75. We adopt this figure as most nearly representative of customary hourly rate in San Antonio as evidenced by affidavits supplied by Mr. Hollin from 11 other attorneys in the area. See also the Equal Access to Justice Act, Public Law 96-481, October 21, 1980, codified in 5 U.S.C. § 504, which limits attorney fees awarded under that Act to \$75 per hour unless special factors justify a higher award.

Accordingly, we conclude that payment of attorney fees by the Department of the Army is warranted in the interest of justice and that reasonable fees in this case would be Mr. Hollin's hours claimed (29) times a reasonable hourly rate (\$75) for a total fee of \$2,175.


for Comptroller General
of the United States