



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Marilyn L. Scarbrough - Attorney Fees - Backpay

File: B-231813

Date: August 22, 1989

DIGEST

1. A civilian employee of the United States Coast Guard filed a grievance contesting her annual performance rating. The final agency decision upgraded the employee's performance rating and granted her request for attorney fees. Before attorney fees may be paid, the agency must determine that the employee's rating was "affected by an unjustified or unwarranted personnel action" as required by the Back Pay Act, as amended, 5 U.S.C. § 5596 (1982), and that the award of attorney fees would be in the interest of justice as required by the governing regulations under the Act. The case is remanded to the Coast Guard to make the necessary determinations.
2. An employee claims reimbursement for her attorney's photocopying costs as part of an award of attorney fees under the Back Pay Act. The courts have specifically denied reimbursement for photocopying expenses under the Act, since such "taxable costs" are excluded from the concept of "attorney fees."
3. An employee seeks payment of an interest charge she incurred on a loan secured to pay her attorney for services in connection with a grievance contesting her annual performance rating. We know of no authority which would permit reimbursement of the interest charge.

DECISION

The Chief of the United States Coast Guard, Civilian Personnel Policy and Programs Division, requested that our Office issue a decision regarding the agency's authority under the Back Pay Act, as amended, 5 U.S.C. § 5596 (1982), to pay for attorney fees incurred by an employee who successfully contested an annual performance rating. For the reasons stated below, we remand the case to the Coast Guard to determine whether there was an unjustified or unwarranted

046302/139385

personnel action and whether payment of attorney fees would be in the interest of justice.

BACKGROUND

Ms. Marilyn L. Scarbrough, a GM-15 employee of the Coast Guard, filed a grievance with the agency to contest her 1986-1987 annual performance rating, alleging, in part, arbitrary evaluation of her performance and improper weighing of job elements. Ms. Scarbrough sought an upgrade in her rating from fully successful to outstanding, in each element and as an overall rating. The Vice Commandant of the Coast Guard, the grievance deciding official, reviewed the complaint and requested the recommendation of an administrative law judge prior to rendering a final decision. Before the judge heard the case, Ms. Scarbrough and the agency reached an oral settlement agreement, which the agency subsequently rejected. The agreement provided various forms of relief to Ms. Scarbrough, including attorney fees, and contained a statement which read as follows: "It is understood that this Agreement does not constitute an admission by any party to any violation of regulation." The administrative law judge ruled that the agreement was binding upon the agency and recommended that Ms. Scarbrough receive the relief contained in the settlement document.

In a decision which made no mention of the agreement or of any aspect of the agency's conduct with regard to Ms. Scarbrough, the Vice Commandant granted her request for attorney fees, provided all other relief contained in the agreement, and upgraded Ms. Scarbrough's performance rating to outstanding, which entitled her to a cash bonus of \$1,442. The retroactive bonus was awarded on March 25, 1988, but the agency is withholding payment of attorney fees pending our decision on the following three questions: (1) whether the agency may reimburse a management official, as defined in Chapter 71 of title 5, United States Code, for attorney fees and related expenses incurred in processing an administrative grievance; (2) whether the agency is authorized to reimburse an employee for her attorney's photocopying costs; and (3) whether the agency may pay an interest charge the employee incurred on a loan secured to pay her attorney.

OPINION

Attorney Fees

The general rule is that the United States is not liable for attorney fees in the absence of a statute or contract provision authorizing such payment. See Albert D. Parker, 64 Comp. Gen. 349 at 353 (1985). The Back Pay Act of 1966 (Act), as amended, 5 U.S.C. § 5596 (1982), provides such authority. Under the Act, federal agencies are specifically authorized to reimburse employees for attorney fees they incur in the course of personnel proceedings with their employing agency. Section 5596 states, in relevant part, as follows:

"(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination . . . is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--

"(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--

.

"(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title . . . shall be awarded in accordance with standards established under section 7701(g) of this title . . .

"(4) For the purpose of this subsection . . . 'unfair labor practice' means an unfair labor practice described in section 7116 of this title . . ."

The Coast Guard asked whether Ms. Scarbrough, an employee who, by virtue of her status as a management official, could not bring her grievance under negotiated procedures, was eligible to receive attorney fees under the Act. In a memorandum accompanying the request letter, Coast Guard legal counsel asserts that the attorney fee provision of the

Act should be read to authorize reimbursement of attorney fees only when agency decisions resulted from either unfair labor practices as defined in 5 U.S.C. § 7116 (agency actions which inhibit labor union organization or operation), or a grievance processed under a procedure negotiated between labor and management in accordance with 5 U.S.C. Ch. 71.

In previous decisions bearing upon employee entitlement to attorney fees under the Act, we have made no distinction between those employees alleging an unfair labor practice, as defined by 5 U.S.C. § 7116 or utilizing 5 U.S.C. Ch. 71 grievance procedures and other employees who were subjected to unwarranted or unjustified personnel practices. See, e.g., Shelby W. Hollin, 62 Comp. Gen. 464 (1983).

The legislative history of section 5596(b)(1)(A)(ii) reflects a desire by Congress to broadly authorize reimbursement of attorney fees under the Act. The Conference Committee explained its intent to authorize attorney fees--

" . . . in cases where an employee prevails on the merits and the deciding official determines that attorneys' fees are warranted in the interest of justice, including a case involving a prohibited personnel practice or where the agency's action was clearly without merit. The reference to these two types of cases is illustrative only and does not limit the official from awarding attorneys' fees in other kinds of cases." H.R. Rep. No. 1717, 95th Cong. 2d Sess. 142, reprinted in 1978 U.S. Code Cong. and Ad. News 2876.

The conference report shows that the conferees did not intend to limit the award of attorney fees to cases in which unfair labor practices as defined in 5 U.S.C. § 7116 are alleged or in which grievance procedures negotiated in accordance with 5 U.S.C. Ch. 71 are utilized. Therefore, although Ms. Scarbrough did not allege an unfair labor practice as defined in 5 U.S.C. § 7116 or pursue a grievance under procedures negotiated pursuant to 5 U.S.C. Ch. 71, she would be entitled to attorney fees under § 5596(b)(1)(A)(ii) if other qualifying criteria are met.

The Back Pay Act requires a finding of an unjustified or unwarranted personnel action in order for an agency to award backpay and other relief permitted by the Act. The Office of Personnel Management (OPM) regulations implementing the Act provide that the Act's requirement for an administrative determination is met when an "appropriate authority determines, in writing, that an employee has been affected by 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." 5 C.F.R. § 550.804(c) (1988). The regulations further provide that an award of attorney fees under the Act may issue only if the appropriate authority makes a "specific finding . . . setting forth the reasons such payment is in the interest of justice." 5 C.F.R. § 550.806(c)(2) (1982). See Sims v. Department of the Navy, 711 F.2d 1578 (Fed. Cir. 1983).

Consistent with the foregoing, we have held that there is no authority to award attorney fees unless the personnel action in question has resulted in loss of pay, allowances, or differentials. Attorney Fees--Authority of Special Counsel, 59 Comp. Gen. 107, 109 (1979); Julian C. Patterson, 61 Comp. Gen. 411 (1982); Stanley D. Welli, B-231938, Apr. 4, 1989.

It is unclear from the final agency decision by the Vice Commandant, the appropriate authority within the Coast Guard for purposes of the Back Pay Act, what provided the basis for the Vice Commandant's order of relief to Ms. Scarbrough. The decision upgraded Ms. Scarbrough's performance rating to outstanding, thereby entitling her to a performance bonus payment, and awarded her attorney fees, but it neither explicitly adopted the administrative law judge's recommendation nor made any independent evaluation of the agency's conduct toward Ms. Scarbrough. It also did not make a written determination that Ms. Scarbrough was "affected by 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," under the Back Pay Act and implementing regulations.^{1/}

The record likewise does not contain a finding that the award of attorney fees is in the interest of justice, as is specifically required under 5 C.F.R. § 550.806(c)(1) and (2). In light of this insufficiency in the record, we are unable to determine whether Ms. Scarbrough is entitled to be

^{1/} The Coast Guard states that the retroactive performance bonus paid to Ms. Scarbrough was granted under authority of the Back Pay Act. Although the Coast Guard has not raised any question about the bonus, it is subject to the above rules governing backpay. We would not object to the payment, provided the agency makes the requisite finding that there was an unjustified or unwarranted personnel action. If such a finding is made, then the Coast Guard may consider the appropriateness of allowing attorney fees.

reimbursed for attorney fees. Accordingly, we remand this case to the Coast Guard to make the necessary determinations. Should the Coast Guard determine that there was an unjustified or unwarranted personnel action and that an award of attorney fees is in the interest of justice, we would have no objection to payment of reasonable attorney fees in this case.

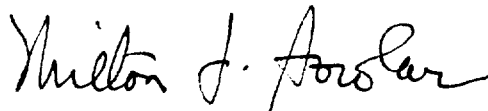
Photocopying Costs

Regarding the reimbursement of the attorney's photocopying costs, we note that the courts do not permit photocopying expenses to be awarded as attorney fees under the Back Pay Act. Naekel v. Department of Transportation, 845 F.2d 976 (Fed. Cir. 1988); Bennett v. Department of the Navy, 699 F.2d 1140 (Fed. Cir. 1983). Under the Act, attorney fee awards must be made in accordance with the standards established under 5 U.S.C. § 7701(g), which limits recovery to "attorney fees" with no mention of costs or expenses. See 5 U.S.C. § 5596(b)(1)(A)(ii). The Court of Appeals has held that "costs" and "attorney fees" are distinct concepts, and therefore "taxable costs" which may be recovered under 28 U.S.C. § 1920, including photocopying costs, are excluded from the concept of "attorney fees." See Bennett, supra, 699 F.2d at 1144; Gavette v. Office of Personnel Management, 808 F.2d 1456, 1462 & n.29 (Fed. Cir. 1986). This position has also been endorsed by the Federal Labor Relations Authority and the Merit Systems Protection Board. See FAA, Washington Flight Service Station, and National Association of Air Traffic Specialists, 27 FLRA No. 99 (1987); Naval Air Development Center, Employee Local 1928, AFL-CIO, 21 FLRA No. 25 (1986); Harris v. Department of Agriculture, MSPB Docket No. DE043282A9031, May 19, 1989; Koch v. Department of Commerce, 19 M.S.P.R. 219 (1984).

Accordingly, Ms. Scarbrough may not be reimbursed for her attorney's photocopying costs.

Interest on Loan

Regarding the payment of the interest Ms. Scarbrough incurred on the money that she borrowed to pay for her attorney's fees, we know of no statute or regulation which would authorize such a payment.



Acting Comptroller General
of the United States