



**The Comptroller General
of the United States**

Washington, D.C. 20548

Farman

Decision

Matter of: Stanley D. Welli - Attorney Fees
File: B-231938
Date: April 4, 1989

DIGEST

1. An employee who filed an agency grievance alleging that his reassignment was in retaliation for his whistleblowing, received a favorable settlement but no backpay or other monetary award. Since the grievance did not involve a reduction or denial of pay or allowances, it was not subject to the Back Pay Act, as amended, 5 U.S.C. § 5596 (1982). He may not be reimbursed his attorney fees since there is no statutory or other authority for the payment of attorney fees in connection with an administrative grievance proceeding where there is no backpay or other monetary award.

2. An employee who settled an agency grievance may not be reimbursed his attorney fees under the Equal Access to Justice Act. The Act only applies to "adversary adjudications" and the agency grievance is not within the statutory definition of an adversary adjudication.

DECISION

The Internal Revenue Service (IRS) requests our decision regarding whether payment may be made from agency appropriations to reimburse Stanley D. Welli, an IRS employee, for attorney fees in connection with settlement of an agency grievance brought by Mr. Welli. Because there is no legal authority for payment of attorney fees in such a case, reimbursement may not be made.

BACKGROUND

Mr. Welli's GM-14 operations manager position was abolished as a result of a reorganization. He was reassigned to a GS-14 staff assistant position and subsequently was denied a transfer to a GM-14 audit manager position. Mr. Welli then retained legal counsel and filed an agency grievance alleging, in part, that the reorganization under which he

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was reassigned was in retaliation for whistleblowing allegations that he had made. He also filed a complaint with the Office of the Special Counsel, Merit Systems Protection Board, apparently involving the same matters as the grievance, that is still ongoing.

The grievance was settled to the employee's satisfaction. Mr. Welli was given a GM-14 audit manager position and some other incidental and collateral relief, but no backpay or other monetary award.

Mr. Welli seeks to be reimbursed for his attorney fees. The IRS recognizes the general rule that unless there is express statutory authority, reimbursement of attorney fees may not be allowed. E.g., Norman E. Guidaboni, 57 Comp. Gen. 444 (1978). The IRS asks whether the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), supplies this necessary authority. If not, the IRS asks whether such authority could be found in two of our cases, 61 Comp. Gen. 515 (1982) and Jeannette E. Nichols, 67 Comp. Gen. 37 (1987).

OPINION

Initially, we point out that we have held that an employee who prevails in a grievance handled under agency grievance procedures but receives no monetary award cannot be reimbursed his attorney fees. See Julian C. Patterson, 61 Comp. Gen. 411 (1982). Our holding reflects the general rule that in the absence of express statutory authority an employee may not be reimbursed his attorney fees. Specifically, we held that, since the grievance did not involve any reduction or denial of pay or allowances, it was not subject to the Back Pay Act, as amended, 5 U.S.C. § 5596 (1982), and attorney fees could not be awarded under that authority. See id. at 413-414.

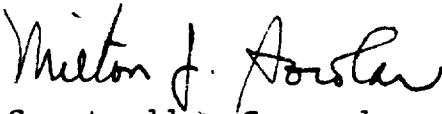
The Equal Access to Justice Act does not provide an alternate source of the necessary statutory authority. The Act enables an agency that conducts an "adversary adjudication" to award fees and expenses incurred by a prevailing party. 5 U.S.C. § 504(a)(1). The Act defines adversary adjudication as a proceeding under the Administrative Procedure Act (APA), 5 U.S.C. § 554, in which the position of the United States is represented by counsel or otherwise, 5 U.S.C. § 504(b)(1)(c). Although not clearly reflected in the original case record, we were able to verify from the IRS that their grievance proceedings are not governed by or under the APA. Therefore, this grievance is not an adversary adjudication under the Equal Access to Justice Act and that authority is not available to pay the attorney fees in

question. See Cherokee Leathergoods, Inc., B-205960, Dec. 27, 1982.

Nor do 61 Comp. Gen. 515, supra, and Jeannette E. Nichols, 67 Comp. Gen. 37, supra, provide the necessary authority. In these cases we held that supervisors or employees charged with prohibited personnel practices by the Merit Systems Protection Board could have their attorney fees paid for by the agency out of appropriated funds.

Clearly, the facts of the present case do not come under the rule of law set out immediately above. Mr. Welli is not "an employee who [was] forced to defend himself against charges arising out of conduct which was within the scope of his Federal employment." 61 Comp. Gen. at 516. This is not a case in which the government's interest is aligned with the interest of the employee against charges pressed by a third party. See generally B-212487, Apr. 17, 1984; 58 Comp. Gen. 613, 618-619 (1979). Rather, this is a case in which the employee is complaining of the agency having taken action against him.

Accordingly, the IRS may not reimburse Mr. Welli for his attorney fees.

for 
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