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Payment of Attorney Fees Incurred by Employee During the Administrative Settlement of a Personnel Action

Number: B-253507

Date: 1994-01-11

Matter of: Payment of Attorney Fees Incurred by Employee During the Administrative Settlement of a Personnel Action File: B-253507 Date: January 11, 1994

The National Archives and Records Administration does not have authority to pay attorney fees incurred by an employee during the administrative settlement of a personnel matter when the employee did not appeal to the Merit Systems Protection Board.

DECISION

The National Archives and Records Administration (NARA) requested our decision, by letter dated May 6, 1993, regarding its authority to pay attorney fees incurred by an employee during the administrative settlement of a personnel action. The settlement agreement stemmed from a proposal by NARA to remove the employee from his position as Inspector General (IG) of the agency and reduce his salary by two grades. NARA settled this matter through negotiations with the employee's attorney. Under the terms of the settlement agreement, NARA agreed to pay the employee's attorney fees. As explained below, however, NARA does not have authority to pay an employee's attorney fees for negotiating a settlement agreement of this nature with the agency.

BACKGROUND

The Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, as amended by Pub. L No. 100-504, 102 Stat. 2515 (1988), established Offices of Inspector General in a number of federal agencies, including NARA. As one way to protect the IGs' independence and objectivity, the Act prohibits agency heads from transferring program operating responsibilities to the IG. 5 U.S.C. app. 3, Sec. 8E(b) (Supp. 1989). NARA contends that its former IG violated the Act by participating in program activities, and failed to "function as an independent objective reviewer of the agency." As a result of these contentions, the former Archivist of the United States, the head of NARA, wrote a letter to the individual, dated December 23, 1992, initiating action to remove the employee from the IG position and reduce his salary by two grades. Negotiations with the employee's attorney ensued, and NARA settled this matter in February 1993. Among other things, NARA agreed that the employee would request, and NARA would approve, removal from the IG position and that he would suffer only a one-grade reduction in salary.

As part of the settlement agreement, NARA agreed to pay the employee's attorney fees in the amount of $10,803. The IG's Office of the Department of Health and

Human Services, on behalf of the President's Council on Integrity and Efficiency, questioned NARA's authority to pay attorney fees to an employee as part of a settlement agreement of this nature.[1] According to the Report, NARA cited 5 U.S.C. Sec. 770l(g) (1) as authority to pay the attorney fees. Report at 8. The Report questioned whether this law authorizes payment of attorney fees in cases which could have been, but were not, appealed to the Merit Systems Protection Board. The Report recommended that the Archivist refer this matter to our Office for review. Report at 28.

ANALYSIS

The issue raised in this case is whether NARA has authority to pay an employee's attorney fees which resulted from negotiating an administrative settlement of a personnel action. The longstanding rule is that the hiring of an attorney is a private matter between the attorney and the client, and absent express statutory authority, an agency is not authorized to pay an employee's attorney fees.[2] 68 Comp. Gen. 366 (1989); 61 Comp.Gen. 515, 516 (1982); B-231813, Aug. 22, 1989. NARA argues that the Civil Service Reform Act of 1978 (Act), Pub. L. No. 95-454, 92 Stat. 1111, 1121, provides the requisite statutory authority. The Act established the Merit Systems Protection Board (MSPB or Board), and authorizes it to award attorney fees to employees, which the employing agency must pay, on successful appeals to the MSPB. 5 U.S.C. Sec. 7701(g) (1). This authority, however, does not apply to the payment at issue here.

The MSPB (or an administrative law judge designated by the Board) conducts hearings to determine whether federal employees have engaged in prohibited personnel practices. These practices include discrimination on several bases for or against an employee, taking or failing to take a personnel action as a reprisal for "whistleblowing", and taking or failing to take such actions which violate any law, rule, or regulation pertaining to the merit systems principles. See 5 U.S.C. Sec. 2302; 61 Comp.Gen. at 515. Employees can also appeal to the MSPB adverse actions taken against them by an agency, actions which include reducing an employee's grade or removal for unacceptable performance. See 5 U.S.C. Secs. 7512-13. Under the authority of 5 U.S.C. Sec. 7701 (g) (1), the MSPB may award reasonable attorney fees under certain conditions to employees who prevail on appeals before the Board.[3] Since the personnel matter in this case was handled at the agency level and the employee did not appeal to the MSPB, the employee's attorney fees cannot be paid under this authority.

It has been argued, however, that because the employee could have appealed NARA's actions to the MSPB, NARA has implied authority to award attorney fees as part of this settlement.[4] We do not agree with this position. As held by the court in Kennedy v. Whitehurst, 690 F.2d 951, 963 (D.C. Cir. 1982), an agency must have, "specific statutory authorization" to award attorney fees. See also Lehman v. Nakshian, 453 U.S. 156 (1981); 69 Comp.Gen. at 471; 64 Comp.Gen. 349 (1985) . Since the Civil Service Reform Act of 1978 did not provide agencies specific statutory authorization to award attorney fees in administrative settlements, and the employee did not appeal to the MSPB, we will not imply such authority here.

Agencies do have specific statutory authority under the Back Pay Act to reimburse employees for attorney fees they incur in the course of personnel proceedings at the administrative level, if the agency determines that the employee was "affected by an unjustified or unwarranted personnel action." 5 U.S.C. Sec. 5596(b) (1) . See B-231813, Aug. 22, 1989. An unjustified or

unwarranted personnel action is defined in the regulations as an act of commission or omission that an appropriate authority subsequently determines to have been unjustified or unwarranted under applicable law. Such actions include personnel actions and pay actions. 5 C.F.R. Sec. 550.803 (1993) . Since NARA did not determine that there was an unjustified or unwarranted personnel action in this case, NARA does not have authority under the Back Pay Act to award attorney fees.[5]

1. "Study of the National Archives and Records Administration", April 1993. Referred to as Report.

2. Where the government's interest is aligned with the interest of the employee against charges pressed by a third party, the Department of Justice is authorized to provide the employee counsel in certain situations. See 70 Comp. Gen. 647 (1991). This is not the case here.

3. Section 7701(g) (1) provides that "the Board . . . may require payment by the agency involved of reasonable attorney fees incurred by an employee . . . if the employee . . . is the prevailing party and the Board . . . determines that payment by the agency is warranted in the interest of justice."

4. This argument was made in a letter to our Office, dated September 3, 1993, from counsel representing NARA'S Chief of Staff. The Chief of Staff signed the settlement agreement in this case for the Archivist.

5. Regulations implementing the Back Pay Act limit the payment of attorney fees to cases that led to the correction of personnel actions that resulted in withdrawal, reduction, or denial of all or part of the employee's pay, allowances, or differentials. 5 C.F.R. Sec. 550.807. We have also held that an employee who prevails in a grievance handled under agency grievance procedures but receives no monetary award cannot be reimbursed attorney fees. 68 Comp.Gen. 366 (1989); 61 Comp.Gen. 411 (1982)