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John J. Gallagher, Jr.

Number: B-258290

Date: 1995-06-26

Matter of: John J. Gallagher, Jr. File: B-258290 Date: June 26, 1995

Employee filed a grievance contesting his annual performance rating for the 1992-93 rating period. Agency deciding official found that the disputed rating accurately reflected employee's performance during the rating period, but instructed employee's new supervisor to reevaluate employee's performance after he had an opportunity to supervise the employee for at least 90 days and to have this rating supersede the disputed rating if he were rated fully successful in all critical elements. Based on new evaluation of fully successful for subsequent period, employee claims backpay and attorney's fees under 5 U.S.C. Sec. 5596. Employee's claim is denied. He was not affected by an unjustified and unwarranted personnel action because disputed rating was upheld by agency.

DECISION

The Deputy Chief Financial Officer, Bureau of Alcohol, Tobacco and Firearms (Bureau), Department of the Treasury, requests an advance decision as to the propriety of paying John J. Gallagher, Jr., $629 for a merit pay increase, $476 for a bonus and $2,793.50 for attorney's expenses. For reasons discussed in this decision, we hold that Mr. Gallagher is not entitled to payment.

BACKGROUND

Mr. Gallagher, Chief, Acquisition Branch of the Bureau, received a "less than fully successful" performance rating on September 9, 1993. The evaluation covered the annual performance appraisal period of July 1, 1992, to June 30, 1993, as well as a 60-day performance improvement period from July 2 through August 30, 1993.

On October 22, 1993, Mr. Gallagher grieved his performance rating for the period July 1, 1992, to August 30, 1993, contending that he should have been rated "exceeds fully successful." He also asserted that the rating was procedurally defective.

On January 7, 1994, the agency deciding official responded to the grievance, stating that Mr. Gallagher did not have sufficient basis to grieve on procedural grounds and that, on the merits, the September 9, 1993, rating accurately reflected Mr. Gallagher's performance for the rating period. Having determined that the less than fully successful rating was accurate, the deciding official denied Mr. Gallagher's requests that the September 1993 appraisal be canceled, that a new appraisal for the period July 1, 1992, to June 30, 1993, be issued with an overall rating of "exceeds fully successful," and that he receive any awards that flow from such an appraisal. The deciding official also stated he

was not authorized to grant payment of attorney's fees in an administrative grievance.

Finally, the deciding official provided for a reevaluation of Mr. Gallagher's performance after his new supervisor had the opportunity to review his performance for 90 days. If his performance in all critical elements was at least "fully successful", a new evaluation of record would be prepared which would supersede his current evaluation. In accordance with this decision, on April 7, 1994, Mr. Gallagher received a new performance appraisal for the period of September 10, 1993, to March 2, 1994, with a rating of "fully successful" in all critical elements.

Pursuant to the Back Pay Act, 5 U.S.C. Sec. 5596 (1994), Mr. Gallagher now contends that, the 1992-93 rating was an "unjustified and unwarranted personnel action" since it was "superseded, i.e. voided" by the deciding official as a result of his grievance. Therefore, he believes that he is entitled to the merit pay salary increase and bonus he would have received had he originally been rated as fully successful, as well as the attorney's fees he incurred in pursuing his grievance.

ANALYSIS AND CONCLUSION

This Office will not inquire into matters relative to a grievance since such matters are within the jurisdiction of the employing agency and the Office of Personnel Management. However, if an employee is found by an appropriate authority to have undergone an unjustified or unwarranted personnel action resulting in a withdrawal or reduction of all or part of the employee's pay, allowances, or differentials, we will authorize backpay under the Back Pay Act, 5 U.S.C. Sec. 5596 (1994). Raymond W. Leone, B-222379, April 10, 1987. In such cases, the act also authorizes "reasonable attorney's fees related to the personnel action."

Addressing Mr. Gallagher's request for backpay, covering a merit increase and a bonus, we note that a finding of an unjustified or unwarranted personnel action might apply in this case had the agency determined that the disputed appraisal misrepresented Mr. Gallagher's performance for the period in question. However, the record before us clearly indicates that the deciding official found that Mr. Gallagher's September 1993 rating accurately reflected his performance for the prior rating period. Mr. Gallagher's request that the performance appraisal for that period be canceled was denied. Thus the prior rating was not voided, and the denial of a merit increase and bonus to Mr. Gallagher is not inconsistent with the rating as upheld. Under the circumstances, we cannot agree that Mr. Gallagher was subjected to "an unjustified or unwarranted personnel action" within the meaning of the Back Pay Act. The improvement in Mr. Gallagher's subsequent rating reflected an improvement in his performance; the newer rating superseded the disputed rating in the sense that the newer rating replaced it as the current rating, but did not serve to void it.

Mr. Gallagher's request for attorney's fees relies on our decision in Marilyn L. Scarbrough, B-231813, August 22, 1989. In that case, we did hold that attorney's fees could be awarded in administrative grievances, but we quoted the Conference Committee's report which explained its intent to authorize attorney's 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." H.R. Rep. No. 1717, 95th Cong., 2d Sess. 142, reprinted in 1978 U.S. Code Cong. & Ad. News 2976.

Thus, in Scarbrough, supra, we held that before attorney's 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 5 U.S.C. Sec. 5596, and that the award of attorney's fees would be in the interest of justice as required by the governing regulations under the act. See 5 C.F.R. Sec. 550.807.

Here, Mr. Gallagher was not affected by an unjustified or unwarranted personnel action; he did not prevail on the merits in that grievance. Attorney's fees are therefore not payable in this case.

We find no basis on which Mr. Gallagher's claim for a merit increase, bonus, and reimbursement of attorney's fees can be granted.