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Folder Title: Attorney's Fees (3 of 3)
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WITHDRAWAL SHEET

Ronald Reagan Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	Roberts to the File, re draft SBA testimony	4/24/85	D5 CS 12/14/00
COLLECTION: ROBERTS, JOHN G.: Files			dlb
FILE FOLDER: Attorneys Fees [3 of 3] OA-12657 10017			3/1/96

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statute [(b)(3) of the FOIA].
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

WITHDRAWAL SHEET

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1. memo	Roberts to the File, re draft SBA testimony	4/24/85	P5
COLLECTION:			
ROBERTS, JOHN G.: Files			dlb
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Attorneys Fees [3 of 3] OA 12657			3/1/96

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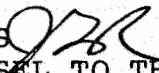
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THE WHITE HOUSE

WASHINGTON

April 22, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS 
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Draft Testimony Concerning the
Award of Attorney's Fees in Tax Cases

Counsel's Office has reviewed the above-referenced draft testimony, and finds no objection to it from a legal perspective.

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1 / 1 / Name of Correspondent: James C. Mun.☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: DOJ draft testimony concerning the
award of attorney's fees in tax cases**ROUTE TO:****ACTION****DISPOSITION**

Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>CUHOLL</u>		ORIGINATOR	<u>85.04.22</u>			<u> 1 / 1 / </u>
		Referral Note:				
<u>CUAT 18</u>		<u>R</u>	<u>85.04.22</u>		<u>S</u>	<u>85.04.23</u>
		Referral Note:				<u>4pm</u>
			<u> 1 / 1 / </u>			<u> 1 / 1 / </u>
		Referral Note:				
			<u> 1 / 1 / </u>			<u> 1 / 1 / </u>
		Referral Note:				
			<u> 1 / 1 / </u>			<u> 1 / 1 / </u>
		Referral Note:				

ACTION CODES:

A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet
to be used as Enclosure

I - Info Copy Only/No Action Necessary
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DISPOSITION CODES:

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FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 22, 1985

SPECIAL

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

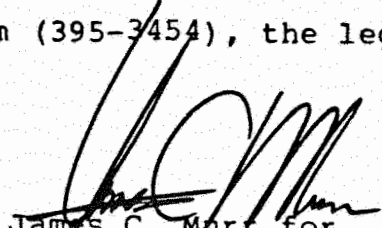
Department of the Treasury - Art Schissel (566-8523)
Small Business Administration - Janine Perrignon (653-7581)

SUBJECT: Department of Justice draft testimony concerning the
award of attorney's fees in tax cases.

The Office of Management and Budget requests the views of your
agency on the above subject before advising on its relationship
to the program of the President, in accordance with OMB Circular
A-19.

Please provide us with your views no later than 4:00 p.m., 4/23/85.
(Note -- A hearing is scheduled before a subcommittee of the House
Ways & Means Committee for 4/25/85.)

Direct your questions to Branden Blum (395-3454), the legislative
attorney in this office.


James C. Mori for
Assistant Director for
Legislative Reference

Enclosure

cc: Rick Irby
Fred Fielding
Roger Greene

Pat Szervo
Rob Veeder
Karen Wilson

Barbara Flickinger
John Donahue

April 19, 1985
Draft

STATEMENT
OF
GLENN L. ARCHER, JR.
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
BEFORE
THE
COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON SELECT REVENUE MEASURE
CONCERNING
THE AWARD OF ATTORNEY'S FEES IN TAX CASES
ON

~~MARCH~~ 25, 1985

April

I am pleased to appear at the invitation of the Subcommittee to discuss the award of attorneys' fees in tax cases. The operative statutory provision--Section 7430 of the Internal Revenue--is the subject of a December 31, 1985, sunset provision and it is important that the Subcommittee familiarize itself with the effect and impact of Section 7430, as well as with interpretative problems currently in litigation. The primary focus of my testimony is on tax litigation before the district courts, the Claims Court and the courts of appeal--the courts in which the Justice Department represents the United States.

Statutes authorizing the award of attorneys' fees in tax cases are a phenomenon of the last decade. The two enactments of greatest significance are the Equal Access to Justice Act (EAJA) and Internal Revenue Code Section 7430.

The EAJA was enacted in 1980 as the result of a congressional concern that the cost of litigation deters some individuals and small businesses from challenging unreasonable governmental actions. The Congress felt that government accountability would be promoted by authorizing the courts to award attorneys' fees. Similar concerns underlay the enactment of Internal Revenue Code Section 7430 by the Tax Equity and Fiscal Responsibility Act of 1982.

The EAJA was effective on October 1, 1981, and applied to cases pending on or filed after that date and prior to October 1,

1984. It currently applies only to cases pending as of September 30, 1984. The Administration supports reauthorization of the EAJA and President Reagan's veto last year of legislation reauthorizing the EAJA was based upon objectionable substantive amendments. The Administration likewise supports the reauthorization of Section 7430 with appropriate clarifying and technical amendments.

The EAJA provides for the award of attorneys' fees to a prevailing party against the United States unless the court finds that the position of the United States was substantially justified or that special circumstances would make an award unjust. The burden of proof is on the United States. In order to be eligible for an award, the prevailing party must meet certain net worth requirements. In general, awards of attorneys' fees are limited to \$75 per hour. The court has authority to reduce or deny an award because of conduct which unduly and unreasonably protracted the proceeding. An application for an award must be filed no later than 30 days after a final judgment is entered.

While the EAJA authorized attorneys' fee awards in tax cases litigated before the Article III courts, it did not apply to cases brought in the Tax Court. During pendency of the EAJA before the Congress, the tax-writing committees began to study the implications of authorizing attorneys' fee awards in tax cases, particularly cases brought in the Tax Court. Concern

was expressed that unless the statute was carefully crafted, legislation providing for the award of attorneys' fees in the Tax Court would have a serious adverse impact on the backlog of the court. Another potential problem having significant implications involved the IRS system of administrative appeals which results in the settlement of thousands of cases annually without resort to litigation.

As a result of these concerns, Section 7430 departs from the EAJA in several respects because of special problems inherent in tax litigation, particularly litigation before the Tax Court. Thus, Section 7430 differs from the Equal Access to Justice Act by placing the burden of proof on the taxpayer and the applicable standard is phrased in terms of reasonableness. This approach is tailored to the Tax Court's stipulation process, which is the backbone of practice before the Tax Court. Indeed, Tax Court Rule 232(b) provides for a conference in 7430 proceedings, the purpose of which is the same as the stipulation conference--to reach an agreement concerning the allegations supporting the claims for attorneys' fees. If the burden of proof remains on the taxpayer, as it does for practically every substantive tax issue, taxpayers will have an incentive to work with government counsel in an effort to resolve issues pertaining to attorney

fee awards expeditiously and with as little court involvement as possible.

One obvious question is whether any significant difference in outcome exists as a result of the variations between Section 7430 and the EAJA regarding the applicable standard and the burden of proof. In our view, the results in the cases litigated under Section 7430 would likely have been the same under the EAJA. Little, if any, difference exists between positions that are "reasonable" and positions that are "substantially justified." Indeed, the term "substantial justification" has been defined by reference to reasonableness. Moreover, the burden of proof generally does not affect the outcome in these cases; the placement of the burden of proof on the taxpayer under Section 7430 primarily serves to further the Tax Court's procedures regarding the stipulation of cases. The general focus of the courts has been on whether the government is guilty of overreaching rather than on the niceties of the burden of proof.

A second major difference between Section 7430 and the EAJA is that Section 7430 requires an exhaustion of administrative remedies. The exhaustion requirement was enacted to ensure that taxpayers, in their haste to recover attorneys' fees, would not ignore opportunities to resolve their disputes administratively. Thus, in order to prevent widespread avoidance of administrative settlement procedures, Section 7430 properly requires exhaustion

of administrative remedies as a condition precedent for obtaining an attorneys' fee award.

A third significant difference involves standards for eligibility. The Congress believed that eligibility standards based on net worth would result in factual disputes further burdening the courts. Inasmuch as taxpayers of modest means can generally resolve their tax disputes in a relatively inexpensive manner, Section 7430 does not limit eligibility by reference to the net worth of the taxpayer, but simply caps the amount recoverable at \$25,000.

Section 7430 was effective on March 1, 1983, for cases filed on or after that date. Only a small number of cases have been decided by the trial courts and we have received only two decisions from the courts of appeals, one of which involved the narrow issue of whether denial of an award could be appealed in light of the prohibition on appeal of actions under Code Section 7429 (relating to review of jeopardy determinations).

The most litigated legal issue is whether the focus of the court in determining "reasonableness" should be on the position taken in litigation or rather on the position taken by the IRS prior to the litigation. In Kaufmann v. Egger, 85-1 U.S.T.C. para. 9278 (decided Mar. 19, 1985) the Court of Appeals for the First Circuit rejected the holdings of several district courts and the Tax Court and held that the position of the IRS prior to

litigation must be taken into account. In most cases, it makes no difference whether one considers the conduct of the IRS before the trial or the position defended in court. However, looking to the position of the United States in litigation as the basis for the determination of reasonableness conserves judicial resources. The court has merely to review the arguments already made in the case before it. If the court were required to consider IRS conduct which was not the subject of the trial or argument before the court, the attorneys' fees proceeding could become essentially another trial.

Another significant advantage of considering "reasonableness" in the context of the litigation posture is that it encourages settlement. Obviously, the government will be more likely to settle a case if it can dispose of the case without having to litigate the merits in an attorneys' fee proceeding. However, if the court must look behind the settlement and consider the conduct of the IRS, essentially the entire case will have to be tried.

In our view, the Kaufmann decision misread Section 7430. The relevant statutory language is that "the position of the United States in the civil proceeding was unreasonable." Section 7430(c)(2)(A)(i). The Congress could hardly have used any clearer language to indicate that the position taken prior to the proceeding is not relevant. Nevertheless, in an effort

to eliminate unnecessary litigation over this issue, the Subcommittee should consider a legislative clarification.

Another issue that deserves attention is of a more technical nature and involves the time limit in which attorneys' fee applications must be filed. Section 7430(e) provides that an order granting or denying an award of attorneys' fees shall be incorporated in the judgment or decision in the case, thus suggesting that an application is untimely if filed after the 10 days in which a motion to amend a judgment may be filed under Rule 59(e) of the Federal Rules of Civil Procedure. We have taken that position in litigation under Section 7430, but have no decisions to date. The difficulty is that the Supreme Court and numerous courts of appeal have held that Rule 59(e) is generally inapplicable to attorneys' fee awards. E.g., White v. New Hampshire Dept. of Employment Security, 455 U.S. 445 (1982); and FCC v. League of Women Voters, 52 U.S.L.W. 5008, 5010-5011, note 10 (1984).

In Tax Court cases and refund suits, a significant amount of time normally elapses between the date of the court's holding on the merits and the date the judgment is entered in order to make the necessary computations. In other types of cases, such as summons enforcement litigation, bankruptcy cases, and injunction suits, the judgment may be entered at the same time as the case is decided. To clarify the intent and effect of Section

7430 on the timing issue, we recommend that Section 7430 be amended to provide that an attorneys' fee application should be filed in accordance with any applicable court rules, but no later than 30 days following entry of a judgment from which an appeal may be taken as a matter of right.

In its press release, the Subcommittee asked for information about the cases in which awards have been made under Section 7430. Awards have been entered in only ____ cases handled by the Justice Department; and amounts awarded have been ranged as low as _____ and as high as \$25,000. The types of cases in which awards have been made include refund suits, bankruptcy cases, proceedings under Code Section 7429 to review jeopardy assessments, a collection suit, and a suit to enjoin collection of taxes. In view of the small number of decisions to date, it is difficult to draw any meaningful conclusions regarding the types of cases which the government is most vulnerable to an award.

The Subcommittee also requested information about the costs of the government in defending claims for attorneys' fees and the additional time entailed. We do not have information responsive to that request because we do not isolate the attorneys' fee segment of litigation as a separate element in our timekeeping system; nor do we otherwise account in a special manner for related costs.

Finally, I would like to bring to the attention of the Subcommittee a somewhat related problem--cases involving the award of attorneys' fees to the government. Within the last two or three years, the courts have become increasingly exasperated over the increasing volume of frivolous suits brought by tax protestors and others who abuse the judicial system. The Congress recognized the seriousness of this problem in the Tax Equity and Fiscal Responsibility Act of 1982 by authorizing the Tax Court to impose damages of up to \$5,000 against persons who bring frivolous suits. The Tax Court in consonance with the desire of Congress has shown no hesitation in applying this sanction in appropriate cases.

The district courts and the courts of appeals are also aggravated with tax protestor suits, particularly frivolous suits contesting imposition of the frivolous return penalty, and also are regularly imposing sanctions to the point where awards are being made to the government in about five cases a week on average. The system for collecting amounts awarded as sanctions by the district courts and the courts of appeal, however, is much more cumbersome than the system for collecting damages awarded by the Tax Court under Code Section 6673, in that regular judgment collection procedures must be followed. We would like to suggest that the Subcommittee consider an amendment authorizing sanctions imposed by any court in a tax case to be collected in the same manner as a tax, as in the case of damages awarded under Rule 6673.

I will be pleased to respond to any questions that the Subcommittee may have.

THE WHITE HOUSE

WASHINGTON

April 23, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: IRS Draft Testimony Concerning the
Award of Attorney's Fees in Tax Cases

Counsel's Office has reviewed the above-referenced draft testimony, and finds no objection to it from a legal perspective.

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1 1Name of Correspondent: James Mun☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: IRS draft testimony concerning the
award of attorney's fees in tax cases

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>CUHOLL</u>	ORIGINATOR	<u>85.04.23</u>			<u>1 1</u>
	Referral Note:				
<u>CUAT 18</u>	<u>R</u>	<u>85.04.23</u>		<u>S</u>	<u>85.04.23</u>
	Referral Note:				<u>COB</u>
		<u>1 1</u>			<u>1 1</u>
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		<u>1 1</u>			<u>1 1</u>
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		<u>1 1</u>			<u>1 1</u>
	Referral Note:				

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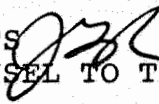
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

THE WHITE HOUSE

WASHINGTON

April 24, 1985

MEMORANDUM FOR THE FILE

FROM: JOHN G. ROBERTS 
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Draft SBA Testimony Concerning the
Award of Attorney's Fees in Tax Cases

I advised Branden Blum orally that the draft SBA testimony was inconsistent with that of Justice and GSA. Blum agreed, but indicated that those agencies considered it best to go forward with the SBA testimony, with an appropriate disclaimer.

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence Received (YY/MM/DD) 1 / 1 / 1Name of Correspondent: James C. Mun☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: Draft SBA testimony concerning
the award of attorney's fees in tax
cases**ROUTE TO:****ACTION****DISPOSITION**

Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>CUTROLL</u>		ORIGINATOR	<u>85104124</u>			<u>1</u> / <u>1</u> / <u>1</u>
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<u>CLAT 18</u>		<u>R</u>	<u>85104124</u>		<u>S</u>	<u>85104124</u>
		Referral Note:				<u>12N</u>
			<u>1</u> / <u>1</u> / <u>1</u>			<u>1</u> / <u>1</u> / <u>1</u>
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			<u>1</u> / <u>1</u> / <u>1</u>			<u>1</u> / <u>1</u> / <u>1</u>
		Referral Note:				
			<u>1</u> / <u>1</u> / <u>1</u>			<u>1</u> / <u>1</u> / <u>1</u>
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THE WHITE HOUSE

WASHINGTON

December 10, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Section 1988 -- Liability of Judges
for Attorneys Fees; Pulliam v. Allen
Section 1983 -- Liability of Public
Defenders; Tower v. Glover

Circuit Judge Cecil J. Burrows of the Circuit Court of the Eighth Judicial Circuit of Illinois has written the President, forwarding a copy of two resolutions passed by the judges of the Eighth Judicial Circuit. The two thoughtful resolutions express concern over the Supreme Court decisions last term in Pulliam v. Allen, 104 S. Ct. 1970 (1984) and Tower v. Glover, 104 S. Ct. 2820 (1984). In Pulliam a 5-4 Court ruled that judicial immunity does not bar the award of attorneys fees against judges in Section 1983 actions. In Tower the Court unanimously ruled that public defenders are not immune from Section 1983 suits alleging that they conspired with other state officials to deprive their clients of Federally protected rights. (The United States did not participate in either case.) The resolutions call upon Congress to amend 42 U.S.C. §§ 1983 and 1988 to reverse the effect of these two decisions.

I recommend referring the resolutions to Justice, and so advising Burrows. Appropriate drafts are attached.

Attachments

THE WHITE HOUSE

WASHINGTON

December 10, 1984

MEMORANDUM FOR CAROL E. DINKINS
DEPUTY ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE

FROM: FRED F. FIELDING *Orig. signed by FFF*
COUNSEL TO THE PRESIDENT

SUBJECT: Section 1988 -- Liability of Judges
for Attorneys Fees; Pulliam v. Allen
Section 1983 -- Liability of Public
Defenders; Tower v. Glover

Attached for your review and whatever other action you consider appropriate is a letter to the President from Judge Cecil J. Burrows. Judge Burrows forwarded two resolutions adopted by the judges of the Eighth Judicial Circuit of Illinois, criticizing the Supreme Court's recent decisions in Pulliam v. Allen and Tower v. Glover. I have also attached a copy of my response.

Attachments

FFF:JGR:aea 12/10/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 10, 1984

Dear Judge Burrows:

Thank you for your letter of November 28 to the President. Along with that letter you forwarded copies of two resolutions adopted by the judges of the Eighth Judicial Circuit of Illinois, calling upon Congress to amend 42 U.S.C. §§ 1983 and 1988 to reverse the effect of the Supreme Court's recent decisions in Pulliam v. Allen, 104 S. Ct. 1970 (1984) and Tower v. Glover, 104 S. Ct. 2820 (1984).

I have taken the liberty of forwarding your correspondence and the resolutions to the Department of Justice, in order that the Department may be aware of the concerns of you and your colleagues as it considers the impact of those decisions. We appreciate having the benefit of your informed views.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

The Honorable Cecil J. Burrows
Circuit Judge, Circuit Court
of the Eighth Judicial Circuit
of Illinois
Pike County Courthouse
Pittsfield, IL 62363

FFF:JGR:aea 12/10/84
bcc: FFFfielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 10, 1984

Dear Judge Burrows:

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Sincerely,

Fred F. Fielding
Counsel to the President

The Honorable Cecil J. Burrows
Circuit Judge, Circuit Court
of the Eighth Judicial Circuit
of Illinois
Pike County Courthouse
Pittsfield, IL 62363

FFF:JGR:aea 12/10/84
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 10, 1984

MEMORANDUM FOR CAROL E. DINKINS
DEPUTY ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Section 1988 -- Liability of Judges
for Attorneys Fees; Pulliam v. Allen
Section 1983 -- Liability of Public
Defenders; Tower v. Glover

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cc: FFFielding/JGRoberts/Subj/Chron

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

JL002

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1/1/

Name of Correspondent:

Cecil J. Burrows

☐ MI Mail Report

User Codes: (A) (B) (C)

Subject:

Section 1988 - Liability of Judges for
Attorneys Fees, Pulliam v. Allen
Section 1983 - Liability of Public
Defenders, Kow v. Glover

ROUTE TO:

ACTION

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CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT OF ILLINOIS

PIKE COUNTY COURTHOUSE
PITTSFIELD, ILLINOIS 62363

J. F. Burrows
CECIL J. BURROWS
CIRCUIT JUDGE

JR - dms
TELEPHONE
285-2025
AREA CODE 217

November 28, 1984

279934 *CU*

Honorable Ronald Reagan
President of the United States
White House
Washington, D.C. 20013

In re: Section 1988 -- Liability of Judges for Attorneys fees,
Pulliam v. Allen
Section 1983 -- Liability of Public Defenders,
Tower v. Glover

Dear Mr. President:

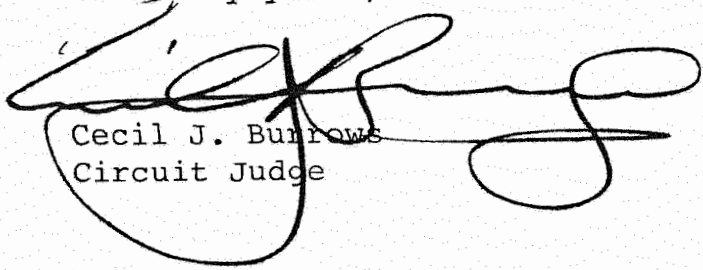
I am herewith sending to you two resolutions passed by the Judges of the Eighth Judicial Circuit of Illinois in meeting assembled.

(The case of Pulliam v. Allen relative to Judges being liable for attorneys fees under Section 1988 has received considerable notice and is of much concern to the judiciary.

The problem created by Tower v. Glover, a recent United States Supreme Court case, has probably not received as much attention; and I am, therefore, enclosing a copy of the opinion of Justice O'Connor. The problem created by this Section 1983 interpretation is particularly onerous to smaller population jurisdictions which more frequently utilize specially appointed counsel in criminal cases. In Pike County we have insurance coverage for our Public Defenders who receive a salary, but not for the others.

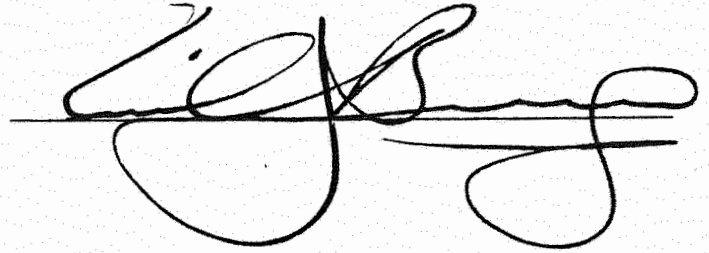
With best regards, I remain

Sincerely yours,


Cecil J. Burrows
Circuit Judge

CJB/slb
enc. (3)

I, Cecil J. Burrows, a Judge of the Eighth Judicial Circuit of Illinois, do hereby certify that the foregoing is a true and correct copy of a resolution passed by the Judges of the Eighth Judicial Circuit of Illinois in meeting assembled on the 24th day of October, 1984.

A handwritten signature in dark ink, appearing to be 'C. J. Burrows', written over a horizontal line.

DATED: November 28, 1984

RESOLUTION OF THE JUDGES OF THE
EIGHTH JUDICIAL CIRCUIT OF ILLINOIS

WHEREAS, on May 14, 1984, the United States Supreme Court rendered its decision in Pulliam v. Allen, No. 82-1432, and therein held that judicial immunity does not bar the personal liability of Judges for attorney fees under 42 USC 1988, and

WHEREAS, personal liability for attorney fees cannot meaningfully be distinguished from damages liability in its threat to judicial independence and impartiality, and

WHEREAS, Pulliam represents a significant departure from the common laws long standing protection of Judges from personal financial liability for conduct in their judicial capacity, and

WHEREAS, the availability of attorney fees can serve only to encourage vexatious and unfounded actions against Judges, and

WHEREAS, the burdens and risks of defending such actions in and of itself constitutes an unacceptable threat to judicial independence and impartiality, and

WHEREAS, Pulliam is one of a series of recent decisions by the Court signifying an accelerating erosion of the protections afforded Judges by the doctrine of judicial immunity, and

WHEREAS, it is of crucial importance to the public to preserve the impartiality and independence of its Judges and to relieve them of burdens of defending vexatious and groundless actions.

NOW, therefore, be it Resolved by the Judges of the Eighth Judicial Circuit of Illinois in meeting assembled that:

1. Congress amend Title 42 USC Section 1988 so as to exclude from its provisions members of the judiciary acting in their judicial capacity.

RESOLUTION OF THE JUDGES OF THE
EIGHTH JUDICIAL CIRCUIT OF ILLINOIS

WHEREAS, on the 25th day of June, 1984, the Supreme Court of the United States decided the case of Bruce Tower, etc., et al, Petitioner vs. Billy I. Glover, No. 82-1988, 104 Supreme Court Reporter 2820, and determined that public defenders are not immune from liability under Title 42 USC Section 1983 for intentional misconduct by virtue of alleged conspiratorial actions with state officials which deprive their clients of federal rights and,

WHEREAS, although the case concerned a public defender of the State of Oregon, its holding embraces all persons appointed to represent indigents accused of violations of the Criminal Code, and

WHEREAS, the Court stated that appointed counsel in a state criminal prosecution does not act "under color of" state law in the normal course of conducting a defense, citing Polk County vs. Dodson, 454 U.S. 312, 102 S. Ct. 445, 70 L.E.D. 2nd 509, and otherwise private person acts "under color" of state law when engaged in a conspiracy with state officials to deprive another of federal rights, Dennis vs. Sparks, 449 U.S. 24, 101 S. Ct. 183, 66 L.E.D. 2nd 185, and

WHEREAS, appointed counsel have responsibilities similar to those of a Judge or prosecutor, and therefore should enjoy similar immunities, and

WHEREAS, the threat of Section 1983 actions based on alleged conspiracies among defense counsel and other state officials may

deter counsel from engaging in activities that require some degree of cooperation with prosecutors, such as negotiating pleas, expediting trials and appeals, and so on, and

WHEREAS, many counsel, having in mind the multitude of frivolous and vexatious proceedings instituted by penitentiary inmates and the tendency to file every possible action, may not wish to accept criminal appointments, which are of necessity partially pro bono publico, unless the abberation to the immunity doctrine is eliminated,

NOW, therefore, be it Resolved by the Judges of the Eighth Judicial Circuit of Illinois meeting in meeting assembled that:

1. Congress amend Title 42 USC 1983, to exclude from its provisions all appointed counsel in criminal cases in all circumstances.

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Message:

SUPREME COURT OF THE UNITED STATES

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI AND LAW-
RENCE RHODE, PETITIONERS *v.* ALFRED W.
CHESNY, INDIVIDUALLY AND AS ADMINISTRATOR OF
THE ESTATE OF STEVEN CHESNY, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

[June 27, 1985]

JUSTICE REHNQUIST, concurring.

In *Delta Airlines v. August*, 450 U. S. 346 (1981), I expressed in dissent the view that the term "costs" in Rule 68 did not include attorney's fees. Further examination of the question has convinced me that this view was wrong, and I therefore join the opinion of THE CHIEF JUSTICE. Cf. *McGrath v. Kristensen*, 340 U.S. 162, 176 (1950) (Jackson, J. concurring).

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MAREK ET AL. *v.* CHESNY, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF CHESNY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 83-1437. Argued December 5, 1984—Decided June 27, 1985

Petitioner police officers, in answering a call on a domestic disturbance, shot and killed respondent's adult son. Respondent, in his own behalf and as administrator of his son's estate, filed suit against petitioners in Federal District Court under 42 U. S. C. § 1983 and state tort law. Prior to trial, petitioners made a timely offer of settlement of \$100,000, expressly including accrued costs and attorney's fees, but respondent did not accept the offer. The case went to trial and respondent was awarded \$5,000 on the state-law claim, \$52,000 for the § 1983 violation, and \$3,000 in punitive damages. Respondent then filed a request for attorney's fees under 42 U. S. C. § 1988, which provides that a prevailing party in a § 1983 action may be awarded attorney's fees "as part of the costs." The claimed attorney's fees included fees for work performed subsequent to the settlement offer. The District Court declined to award these latter fees pursuant to Federal Rule of Civil Procedure 68, which provides that if a timely pretrial offer of settlement is not accepted and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." The Court of Appeals reversed.

Held: Petitioners are not liable for the attorney's fees incurred by respondent after petitioners' offer of settlement. Pp. 2-9.

(a) Petitioners' offer was valid under Rule 68. The Rule does not require that a defendant's offer itemize the respective amounts being tendered for settlement of the underlying substantive claim and for costs. The drafters' concern was not so much with the particular components of offers, but with the *judgments* to be allowed against defendants. Whether or not the offer recites that costs are included or specifies an amount for costs, the offer has *allowed* judgment to be entered against

Syllabus

the defendant both for damages caused by the challenged conduct and for costs. This construction of Rule 68 furthers its objective of encouraging settlements. Pp. 3-5.

- (b) In view of the Rule 68 drafters' awareness of the various federal statutes, which, as an exception to the "American Rule," authorize an award of attorney's fees to prevailing parties as part of the costs in particular cases, the most reasonable inference is that the term "costs" in the Rule was intended to refer to all costs properly awardable under the relevant substantive statute. Thus, where the underlying statute defines "costs" to include attorney's fees, such fees are to be included as costs for purposes of Rule 68. Here, where § 1988 expressly includes attorney's fees as "costs" available to a prevailing plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68. Rather than "cutting against the grain" of § 1988, applying Rule 68 in the context of a § 1983 action is consistent with § 1988's policies and objectives of encouraging plaintiffs to bring meritorious civil rights suits; Rule 68 simply encourages settlements. Pp. 5-9.

720 F. 2d 474, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. POWELL and REHNQUIST, JJ., filed concurring opinions. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI AND LAWRENCE RHODE, PETITIONERS *v.* ALFRED W. CHESNY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF STEVEN CHESNEY, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 27, 1985]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether attorney's fees incurred by a plaintiff subsequent to an offer of settlement under Federal Rule of Civil Procedure 68 must be paid by the defendant under 42 U. S. C. § 1988, when the plaintiff recovers a judgment less than the offer.

I

Petitioners, three police officers, in answering a call on a domestic disturbance, shot and killed respondent's adult son. Respondent, in his own behalf and as administrator of his son's estate, filed suit against the officers in the United States District Court under 42 U. S. C. § 1983 and state tort law.

Prior to trial, petitioners made a timely offer of settlement "for a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND (\$100,000) DOLLARS." Respondent did not accept the offer. The case went to trial and respondent was awarded \$5,000 on the state-law "wrongful death" claim, \$52,000 for the § 1983 violation, and \$3,000 in punitive damages.

Respondent filed a request for \$171,692.47 in costs, including attorney's fees. This amount included costs incurred after the settlement offer. Petitioners opposed the claim for post-offer costs, relying on Federal Rule of Civil Procedure 68, which shifts to the plaintiff all "costs" incurred subsequent to an offer of judgment not exceeded by the ultimate recovery at trial. Petitioners argued that attorney's fees are part of the "costs" covered by Rule 68. The District Court agreed with petitioners and declined to award respondent "costs, including attorney's fees, incurred after the offer of judgment." 547 F. Supp. 542, 547 (ND Ill. 1982). The parties subsequently agreed that \$32,000 fairly represented the allowable costs, including attorney's fees, accrued prior to petitioner's offer of settlement.¹ Respondent appealed the denial of post-offer costs.

The Court of Appeals reversed. 720 F. 2d 474 (CA7 1983). The court rejected what it termed the "rather mechanical linking up of Rule 68 and section 1988." *Id.*, at 478. It stated that the District Court's reading of Rule 68 and § 1988, while "in a sense logical," would put civil rights plaintiffs and counsel in a "predicament" that "cuts against the grain of section 1988." *Id.*, at 478, 479. Plaintiffs' attorneys, the court reasoned, would be forced to "think very hard" before rejecting even an inadequate offer, and would be deterred from bringing good faith actions because of the prospect of losing the right to attorney's fees if a settlement offer more favorable than the ultimate recovery were rejected. *Id.*, at 478-479. The court concluded that "[t]he legislators who enacted section 1988 would not have wanted its effectiveness blunted because of a little known rule of court." *Id.*, at 479.

We granted certiorari, 466 U. S. —. We reverse.

II

Rule 68 provides that if a timely pretrial offer of settlement is not accepted and "the judgment finally obtained by the

¹The District Court refused to shift to respondent any costs accrued by petitioners. Petitioners do not contest that ruling.

offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Fed. Rule Civ. Proc. 68 (emphasis added). The plain purpose of Rule 68 is to encourage settlement and avoid litigation. Advisory Committee Note on Rules of Civil Procedure, Report of Proposed Amendments, 5 F. R. D. 433, 483 n.1 (1946); *Delta Air Lines, Inc. v. August*, 450 U. S. 346, 352 (1981). The Rule prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits. This case requires us to decide whether the offer in this case was a proper one under Rule 68, and whether the term "costs" as used in Rule 68 includes attorney's fees awardable under 42 U. S. C. § 1988.

A

The first question we address is whether petitioners' offer was valid under Rule 68. Respondent contends that the offer was invalid because it lumped petitioners' proposal for damages with their proposal for costs. Respondent argues that Rule 68 requires that an offer must separately recite the amount that the defendant is offering in settlement of the substantive claim and the amount he is offering to cover accrued costs. Only if the offer is bifurcated, he contends, so that it is clear how much the defendant is offering for the substantive claim, can a plaintiff possibly assess whether it would be wise to accept the offer. He apparently bases this argument on the language of the Rule providing that the defendant "may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, *with costs then accrued*." (emphasis added).

The Court of Appeals rejected respondent's claim, holding that "an offer of the money or property or to the specified effect is, by force of the rule itself, 'with'—that is, plus 'costs then accrued,' whatever the amount of those costs is." 720 F. 2d, at 476. We, too, reject respondent's argument. We do not read Rule 68 to require that a defendant's offer itemize

the respective amounts being tendered for settlement of the underlying substantive claim and for costs.

The critical feature of this portion of the Rule is that the offer be one that *allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued*. In other words, the drafters' concern was not so much with the particular components of offers, but with the *judgments* to be allowed against defendants. If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged by the terms of the Rule to include in its judgment an additional amount which in its discretion, see *Delta Air Lines, Inc. v. August, supra*, at 362, 365 (POWELL, J., concurring), it determines to be sufficient to cover the costs. In either case, however, the offer has *allowed* judgment to be entered against the defendant both for damages caused by the challenged conduct and for costs. Accordingly, it is immaterial whether the offer recites that costs are included, whether it specifies the amount the defendant is allowing for costs, or for that matter, whether it refers to costs at all. As long as the offer does not implicitly or explicitly provide that the judgment *not* include costs, a timely offer will be valid.

This construction of the Rule best furthers the objective of the Rule, which is to encourage settlements. If defendants are not allowed to make lump sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers. As the Court of Appeals observed, "many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff." 720 F. 2d, at 477.

Contrary to respondent's suggestion, reading the Rule in this way does not frustrate plaintiffs' efforts to determine whether defendants' offers are adequate. At the time an offer is made, the plaintiff knows the amount in damages caused by the challenged conduct. The plaintiff also knows, or can ascertain, the costs then accrued. A reasonable determination whether to accept the offer can be made by simply adding these two figures and comparing the sum to the amount offered. Respondent is troubled that a plaintiff will not know whether the offer on the substantive claim would be exceeded at trial, but this is so whenever an offer of settlement is made. In any event, requiring itemization of damages separate from costs would not in any way help plaintiffs know in advance whether the judgment at trial will exceed a defendant's offer.

Curiously, respondent also maintains that petitioner's settlement offer did not exceed the judgment obtained by respondent. In this regard, respondent notes that the \$100,000 offer is not as great as the sum of the \$60,000 in damages, \$32,000 in pre-offer costs, and \$139,692.47 in claimed post-offer costs. This argument assumes, however, that post-offer costs should be included in the comparison. The Court of Appeals correctly recognized that post-offer costs merely offset part of the expense of continuing the litigation to trial, and should not be included in the calculus. *Id.*, at 476.

B

The second question we address is whether the term "costs" in Rule 68 includes attorney's fees awardable under 42 U. S. C. § 1988. By the time the Federal Rules of Civil Procedure were adopted in 1938, federal statutes had authorized and defined awards of costs to prevailing parties for more than 85 years. See Act of Feb. 26, 1853, 10 Stat. 161; see generally *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U. S. 240 (1975). Unlike in England, such "costs" generally had not included attorney's fees; under the "Ameri-

can Rule," each party had been required to bear its own attorney's fees. The "American Rule" as applied in federal courts, however, had become subject to certain exceptions by the late 1930's. Some of these exceptions had evolved as a product of the "inherent power in the courts to allow attorney's fees in particular situations." *Alyeska, supra*, at 259. But most of the exceptions were found in federal statutes that directed courts to award attorney's fees as part of costs in particular cases. 421 U. S., at 260-262.

Section 407 of the Communications Act of 1934, for example, provided in relevant part that, "[i]f the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit." 47 U. S. C. § 407. There was identical language in Section 153(p) of the Railway Labor Act, 45 U. S. C. § 153(p) (1934 ed.). Section 40 of the Copyright Act of 1909, 17 U. S. C. § 40 (1934 ed.), allowed a court to "award to the prevailing party a reasonable attorney's fee as part of the costs." And other statutes contained similar provisions that included attorney's fees as part of awardable "costs." See, *e. g.*, the Clayton Act, 15 U. S. C. § 15 (1934 ed.); the Securities Act of 1933, 15 U. S. C. § 77k(e) (1934 ed.); the Securities Exchange Act of 1934, 15 U. S. C. §§ 78i(e), 78r(a) (1934 ed.).

The authors of Federal Rule of Civil Procedure 68 were fully aware of these exceptions to the American Rule. The Advisory Committee's Note to Rule 54(d) contains an extensive list of the federal statutes which allowed for costs in particular cases; of the 25 "statutes as to costs" set forth in the final paragraph of the Note, no fewer than 11 allowed for attorney's fees as part of costs. Against this background of varying definitions of "costs," the drafters of Rule 68 did not define the term; nor is there any explanation whatever as to its intended meaning in the history of the Rule.

In this setting, given the importance of "costs" to the Rule, it is very unlikely that this omission was mere oversight; on

the contrary, the most reasonable inference is that the term "costs" in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awardable in an action are to be considered within the scope of Rule 68 "costs." Thus, absent Congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68. See, e. g., *Fulps v. City of Springfield Tenn.*, 715 F. 2d 1088, 1091-1095 (CA6 1983); *Waters v. Heublein, Inc.*, 485 F. Supp. 110, 113-117 (ND Cal. 1979); *Scheriff v. Beck*, 452 F. Supp. 1254, 1259-1260 (D Colo. 1978). See also *Delta Air Lines Inc. v. August*, 450 U. S., at 362-363 (1981) (POWELL, J., concurring).

Here, respondents sued under 42 U. S. C. § 1983. Pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, a prevailing party in a § 1983 action may be awarded attorney's fees "as part of the costs." Since Congress expressly included attorney's fees as "costs" available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68. This "plain meaning" interpretation of the interplay between Rule 68 and § 1988 is the only construction that gives meaning to each word in both Rule 68 and § 1988.²

Unlike the Court of Appeals, we do not believe that this "plain meaning" construction of the statute and the Rule will

² Respondents suggest that *Roadway Express, Inc. v. Piper*, 447 U. S. 752 (1980), requires a different result. *Roadway Express*, however, is not relevant to our decision today. In *Roadway*, attorney's fees were sought as part of costs under 28 U. S. C. § 1927, which allows the imposition of costs as a penalty on attorneys for vexatiously multiplying litigation. We held in *Roadway Express* that § 1927 came with its own statutory definition of costs, and that this definition did not include attorney's fees. The critical distinction here is that Rule 68 does not come with a definition of costs; rather, it incorporates the definition of costs that otherwise applies to the case.

frustrate Congress' objective in § 1988 of ensuring that civil rights plaintiffs obtain "effective access to the judicial process." *Hensley v. Eckerhart*, 461 U. S. 424, 429 (1983), quoting H. R. Rep. No. 94-1558, p. 1 (1976). Merely subjecting civil rights plaintiffs to the settlement provision of Rule 68 does not curtail their access to the courts, or significantly deter them from bringing suit. Application of Rule 68 will serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer. There is no evidence, however, that Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned. Indeed, Congress made clear its concern that civil rights plaintiffs not be penalized for "helping to lessen docket congestion" by settling their cases out of court. See H. R. Rep. No. 94-1558, p. 7 (1976).

Moreover, Rule 68's policy of encouraging settlements is neutral, favoring neither plaintiffs nor defendants; it expresses a clear policy of favoring settlement of all lawsuits. Civil rights plaintiffs—along with other plaintiffs—who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected. But, since the Rule is neutral, many civil rights plaintiffs will benefit from the offers of settlement encouraged by Rule 68. Some plaintiffs will receive compensation in settlement where, on trial, they might not have recovered, or would have recovered less than what was offered. And, even for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation. In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants.

To be sure, application of Rule 68 will require plaintiffs to "think very hard" about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates. This effect of Rule 68, however, is in no sense inconsistent

with the congressional policies underlying § 1983 and § 1988. Section 1988 authorizes courts to award only “reasonable” attorney’s fees to prevailing parties. In *Hensley v. Eckerhart*, 461 U. S. 424 (1983), we held that “the most critical factor” in determining a reasonable fee “is the degree of success obtained.” *Id.*, at 436. We specifically noted that prevailing at trial “may say little about whether the expenditure of counsel’s time was reasonable in relation to the success achieved.” *Ibid.* In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff—although technically the prevailing party—has not received any monetary benefits from the post-offer services of his attorney. This case presents a good example: the \$139,692 in post-offer legal services resulted in a recovery \$8,000 less than petitioner’s settlement offer. Given Congress’ focus on the success achieved, we are not persuaded that shifting the post-offer costs to respondent in these circumstances would in any sense thwart its intent under § 1988.

Rather than “cutting against the grain” of § 1988, as the Court of Appeals held, we are convinced that applying Rule 68 in the context of a § 1983 action is consistent with the policies and objectives of § 1988. Section 1988 encourages plaintiffs to bring meritorious civil rights suits; Rule 68 simply encourages settlements. There is nothing incompatible in these two objectives.

III

Congress, of course, was well aware of Rule 68 when it enacted § 1988, and included attorney’s fees as part of recoverable costs. The plain language of Rule 68 and § 1988 subjects such fees to the cost-shifting provision of Rule 68. Nothing revealed in our review of the policies underlying § 1988 constitutes “the necessary clear expression of congressional intent” required “to exempt . . . [the] statute from the operation of” Rule 68. *Califano v. Yamasaki*, 442 U. S. 682, 700 (1979). We hold that petitioners are not liable for costs of

83-1437—OPINION

10

MAREK *v.* CHESNY

\$139,692 incurred by respondent after petitioners' offer of judgment.

The judgment of the Court of Appeals is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI AND LAWRENCE RHODE, PETITIONERS *v.* ALFRED W. CHESNY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF STEVEN CHESNEY, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 27, 1985]

JUSTICE POWELL, concurring.

In *Delta Airlines, Inc. v. August*, 450 U. S. 346 (1981), the offer under Rule 68 stated that it was "in the amount of \$450, which shall include attorney's fees, together with costs accrued to date." *Id.*, at 365. In a brief concurring opinion, I expressed the view that this offer did not comport with the Rule's requirements. It seemed to me that an offer of judgment should consist of two identified components: (i) the substantive relief proposed, and (ii) costs, including a reasonable attorney's fee. The amount of the fee ultimately should be within the discretion of the court if the offer is accepted. In questioning the form of the offer in *Delta*, I was influenced in part by the fact that it was a Title VII case. I concluded that the "'costs' component of a Rule 68 offer of judgment in a Title VII case must include reasonable attorney's fees accrued to the date of the offer." *Id.*, at 363. My view, however, as to the specificity of the "substantive relief" component of the offer did not depend solely on the fact that *Delta* was a Title VII case.

No other Justice joined my *Delta* concurrence. The Court's decision was upon a different ground. Although I think it the better practice for the offer of judgment expressly to identify the components, it is important to have a

Court for a clear interpretation of Rule 68. I noted in *Delta* that “parties to litigation and the public as a whole have an interest—often an overriding one—in settlement rather than exhaustion of protracted court proceedings.” *Ibid.* The purpose of Rule 68 is to “facilitat[e] the early resolution of marginal suits in which the defendant perceives the claim to be without merit, and the plaintiff recognizes its speculative nature.” *Ibid.* See also *ibid.*, n. 1. We have now agreed as to what specifically is required by Rule 68.

Accordingly, I join the opinion of the Court.

*attorney fees
file*

SUMMARIES OF SIGNIFICANT ATTORNEY FEE AWARD DECISIONS

Prepared By:

**Appellate Policies Division
Office of Employee, Labor, and Agency Relations
U. S. Office of Personnel Management**

November 1985

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I. BASIC AUTHORITY TO AWARD ATTORNEY FEES

Introduction - The primary authority under which attorney fees are awarded in cases involving Federal employees is found at 5 U.S.C. 7701(g) which authorizes MSPB to award fees in any action which is appealable to the Board. The Board may also award fees under the Back Pay Act (5 U.S.C. 5596). Nevertheless, attorney fees claimed under that statute in adverse action cases are subject to the same guidelines and limitations as fees awarded under 5 U.S.C. 7701(g). Note also that while Federal Courts, under various circumstances, may award attorney fees against an employee, 5 U.S.C. 7701(g) only authorizes the Board to award attorney fees in favor of prevailing employees.

A. Fees may be awarded in connection with judicial phase of MSPB appeal

Lizut v. Dept. of the Army, PH07528110266ADD (1985)

Mr. Lizut appealed his removal to MSPB which upheld the agency's action. He then filed an appeal with the U.S. Court of Appeals for the Federal Circuit which vacated the Board's decision and remanded his case back to MSPB for further proceedings. On remand, the Board reversed the agency's action. Mr. Lizut then petitioned for attorney fees. The MSPB presiding official granted an award of fees incurred in challenging his removal before the Board but denied an award for services provided in the judicial phase of the appellant's case.

In considering the case on review, the full Board first noted that the Federal Circuit had recently held that 5 U.S.C. 7701(g) is limited to fees incurred in MSPB proceedings and does not authorize the Board to award fees for services rendered in connection with judicial review of a Board decision (Olsen v. Dept. of Commerce, 735 F.2d 558 (1984)). The Board went on, however, to hold that the Back Pay Act (5 U.S.C. 5596) authorizes an award of fees incurred for the services of an appellant's attorney before the Court as well as before the Board. Mr. Lizut was therefore awarded fees for work in obtaining the Court's order vacating the Board's decision which had upheld his removal. (Further discussion in **OPM Significant Cases**, No. 49, 9/85.)

B. Frivolous appeals filed in Court may result in fee award against employee

Moir v. Dept. of the Treasury, 754 F.2d 341 (1985)

MSPB originally dismissed Mr. Moir's appeal of his removal pursuant to a stipulation by the parties that it was being withdrawn to permit Mr. Moir to seek reconsideration of OPM's denial of his request for disability retirement. The order of dismissal specifically stated that "the appeal may be refiled within twenty days of a reconsideration by OPM." In July 1982, OPM denied his application for disability retirement and that decision was upheld in an order which became final in October 1982. In November 1983, or over a year later, Mr. Moir filed a motion to reinstate his original appeal of his removal. When MSPB denied that motion as untimely, he filed suit in the Court of Appeals for the Federal Circuit. The Court stated that "the petitioner has offered no possible justification for that substantial delay, and we discern none."

Noting that "the petitioner has not even come close to showing that the Board committed a legal error or abused its discretion," the Court found the appeal to be frivolous and assessed court costs and fees of \$500 in favor of the Government against the appellant and his attorney. (Further discussion in **OPM Significant Cases**, No. 45, 3/85.)

C. Arbitrator awards of attorney fees must comply with 5 U.S.C. 7701(g)

Army and IBEW, 14 FLRA 90 (1984)

An arbitrator may award attorney fees in connection with the resolution of an appeal filed under a negotiated grievance procedure. The authority for such an award is the Back Pay Act (5 U.S.C. 5596). This decision was issued by the Federal Labor Relations Authority (FLRA) in response to the agency's claim that the arbitrator's award of attorney fees was not authorized. The FLRA listed the several requirements that must be met in such a case. First, it must be shown that the grievant has been affected by an unwarranted or unjustified personnel action which has resulted in the withdrawal or reduction in his pay. Second, any award of attorney fees must be in conjunction with an award of backpay and both reasonable and related to the personnel action. Finally, the Authority made it clear that any award must be in accordance with 5 U.S.C. 7701(g) and cited several key MSPB decisions as providing criteria as to what is permitted. Furthermore, it was held that arbitrators' awards must contain a "fully articulated, reasoned decision setting forth the specific findings supporting the determination on each pertinent statutory requirement." Thus an arbitrator's award of attorney fees is ultimately subject to the guidelines discussed in the various MSPB cases covered in this issuance.

II. SERVICES FOR WHICH FEES ARE AVAILABLE

Introduction - Fees may normally be awarded for legal services provided at all stages of the processing of an appeal so long as the work is performed: 1) within the context of an attorney-client relationship and 2) in connection with a matter which is appealed to MSPB. The five cases below deal with application of these two criteria. Cases dealing with specific types of expenses and the degree to which they may be included in an attorney fee award are provided under Section V., "Determining Whether the Fees Requested Are Reasonable."

A. An award may compensate for services provided prior to an appeal, so long as they were provided in connection with an action subject to MSPB jurisdiction

McBride v. Dept. of Agriculture, SF043209006 (1980)

Ms. McBride apparently retained the services of legal counsel prior to the issuance of her agency's final decision to remove her for unacceptable performance. Upon MSPB reversing her dismissal, she included in her motion for attorney fees, 15 hours of services provided by her attorney in contesting the action before the agency issued its decision. The Board overruled the presiding official's initial addendum decision and stated that it had jurisdiction to award attorney fees for services rendered prior to issuance of the agency's final decision, so long as two prerequisites are met. Those prerequisites are: 1) that the Board have jurisdiction over the appeal (5 U.S.C 7701) and 2) that the services rendered were in connection with an appealable agency action.

B. Awards are limited to those fees actually incurred within an attorney-client relationship

O'Donnell v. Dept. of the Interior, NY075299058 (1980)

In this case the Board defined the meaning of the phrase in 5 U.S.C. 7701(g)(1) that provides that limits awards to those "attorney fees incurred by an employee or applicant". Mr. O'Donnell's attorney was not retained directly by him but rather by his union in his behalf. The attorney attested that rather than billing the union at his customary rate which would have resulted in a charge of \$12,829, he billed at a reduced rate which resulted in an actual charge of \$6,100. The presiding official determined that a reasonable award in this case would be an amount midway between the sum produced by applying the normal rate and that actually billed to the union.

The full Board first considered the potential argument that the fees were not actually "incurred" by the appellant since counsel was retained by appellant's union and it was undisputed that he had no contractual obligation to pay his counsel. The Board ruled that the fact that the appellant was not personally obligated to compensate his counsel did not affect his right to an award. It stated that "attorney fees are 'incurred' within the ambit of 7701(g)(1) where an attorney-client relationship exists and counsel has rendered legal services on behalf of the appellant in an appeal before this Board." It may be useful here to note that the the Board in a number of cases has held that the requirement of an attorney-client relationship means that representation by a non-attorney is not covered under 5 U.S.C. 7701(g)(1).

The Board then addressed the question of whether the amount awarded could exceed the fee actually charged the appellant's union, i.e., \$6,100. Noting that fee awards must not provide a windfall to counsel at the expense of the public treasury, the Board ruled that "where it is agreed that a specific fee be paid to counsel for services rendered on behalf of an appellant in a case before the Board, we will presume that the amount agreed upon represents the maximum reasonable fee which may be awarded."

C. Fees may be awarded for time spent on a petition for review

Langenbach v. U.S. Postal Service, NY07528090142ADD (1982)

In the initial processing of his case, Mr. Langenbach was represented by two individuals who were not attorneys. After its removal action was reversed in an initial MSPB decision, the agency filed a petition for review with the full Board. Mr. Langenbach then retained a licensed attorney who provided legal services in connection with the Board's consideration of the agency PFR. The Board first noted that since the appellant's first two representatives were not attorneys, no attorney-client relationship existed and no reimbursement was due for services rendered by those persons. It then went on to hold that an attorney may be compensated for services in connection with a petition for review. (Unfortunately for Mr. Langenbach, it was determined that the facts in his case did not warrant a finding that such an award would be in the "interests of justice.")

D. A fee award may include time spent on a petition for attorney fees

Lamorge v. Dept. of Agriculture, BN075209027 (1981)

In this case, the appellant's attorney submitted a motion for attorney fees which was granted by the MSPB presiding official. The agency filed a petition for review of this attorney fee award which the full Board denied, upholding an award of \$5,995. In his response to the agency PFR, the appellant's attorney noted that the fees awarded by the presiding official did not cover the work done in relation to the agency's objections to that award because the work was done after the initial fee motion was submitted and it was not clear whether a supplementary motion could be made. The Board, reasoning that it would not be fair to allow an agency to force an appellant to respond to general objections to a fee request, stated that time spent on the preparation of a fee petition and on the successful appeal of a fee award is compensable under 5 U.S.C. 7701(g)(1). The appellant's attorney was permitted to submit the information necessary to determine what a reasonable fee would be for work "done in relation to the fee award and the agency's objections thereto."

E. Fees may be recovered for services provided in obtaining enforcement of an MSPB order

Alfaro v. Dept. of Transportation, NY075281F0428ADD2d (1985)

The agency, after having its removal action reversed (and attorney fees assessed based on their negligent case preparation), sought a stay of compliance pending a decision on an OPM petition for reconsideration. MSPB denied the request for a stay and ordered the agency to submit proof of compliance. Eventually, but not until after the Board had denied OPM's petition for reconsideration, the agency did submit proof of compliance. In a second addendum decision, the presiding official awarded additional attorney fees to the appellant's attorney for services performed during the enforcement proceedings.

The agency argued that such an award was not in the interest of justice since its failure to timely comply resulted from its attempt to obtain a stay of reinstatement. The Board noted that its regulations do not provide for a stay of the agency's duty to comply pending disposition of an OPM petition for reconsideration. Thus it concluded that the agency's stated reason for its delay in compliance was not persuasive and also noted that the agency further delayed in complying with the Board's order even after the final denial of its request for a stay. As a result, the Board held that "counsel for a prevailing appellant may be compensated for time spent working on enforcement proceedings and in reference to an agency's petition for review of an addendum decision awarding attorney fees to counsel for enforcement proceedings." (Further discussion in OPM Significant Cases, No. 45, 3/85.)

III. DETERMINING WHETHER THE APPELLANT IS A PREVAILING PARTY

Introduction - 5 USC 7701(g) allows only those employees who "prevail" to apply for attorney fees. As applied by MSPB and the Courts, all that is required is that the appellant obtain all or a significant part of the relief sought and that such relief be related to the initiation of the appeal. As seen in the several cases below, this definition may be met in situations where an agency cancels its proposed action, where there is substantial mitigation of the original penalty proposed, or pursuant to a settlement agreement.

A. An appellant may be a prevailing party if they obtain all or a significant part of the relief sought

Hodnick v. FMCS, SF531D09004 (1981)

After a hearing on Mr. Hodnick's appeal of the denial of his within-grade increase (WIGI) had been scheduled, his agency cancelled its action and granted the WIGI. The agency indicated that the cancellation was solely due to procedural errors which occurred during the within-grade determination process. When Mr. Hodnick subsequently moved for an award of attorney fees, the agency argued that for him to be a "prevailing party" to whom fees could be awarded, a final decision must have been entered. In an initial decision, the presiding official agreed, specifically distinguishing the definition of "prevailing party" in discrimination cases provided for in 5 USC 7701(g)(2) from that in non-discrimination cases covered in 5 USC 7701(g)(1).

The full Board disagreed, reasoning that the same interpretation of "prevailing party" is applicable under either section of the statute. It held that attorney fees may be awarded if the appellant obtains "all or a significant part of the relief sought in petitioning for appeal, regardless of whether a final decision has been issued". It further noted, however, that if an agency grants all or part of the relief sought before a judgment is entered, it must be shown that relief was granted as a result of the institution of the appeal. To permit agencies to avoid liability for fees merely by conceding an appeal before a final decision had been rendered was seen as contrary to the purpose of the fee provision as well as tending to discourage settlements. It is useful to note, however, that the Board ultimately denied Mr. Hodnick any attorney fees, finding that although he was a "prevailing party," he had failed to establish that an award would be "in the interest of justice." Thus it is clear that "prevailing party" and "interest of justice" are two separate tests that must be met before an award may be made.

B. Distinction between being a prevailing party and meeting the interest of justice test

Sterner v. Dept. of the Army, 711 F.2d 1563 (1983)

This case is a judicial affirmation of the Board's analysis and conclusion in Hodnick. Mr. Sterner was removed based on five charges of misconduct, two of which he admitted. In a hearing before MSPB, the agency was unable to prove the three contested charges and his removal was reduced to a 16-day suspension. In considering his appeal from the Board's denial of attorney fees, the Court explicitly set out two prerequisites for an award of attorney fees under 5 USC 7701(g)(1), for which the employee bears the burden of proof: the employee must be a prevailing party and the award must be warranted in the interest of justice.

The Court agreed that the first prerequisite is met if an appellant obtains all or a significant part of the relief sought. It went on to note that "the determination of who prevailed is, after all, only a threshold test of eligibility; the more difficult question of entitlement is reserved for the second prerequisite, 'warranted in the interest of justice.'" Since Mr. Sterner's removal was reversed, he

clearly was a prevailing party. However, as to the second prerequisite, the Court agreed with MSPB that there was no showing that an award was warranted in the interest of justice and the Board's denial of any award of fees was affirmed. This case is also cited for two subsidiary points the Court made: 1) its statement that it will accord the Board's determinations on attorney fees great deference and 2) its indication that generally speaking, economic hardship is not a relevant criteria in awarding attorney fees.

- C. An appellant may be a prevailing party if as result of a settlement agreement they obtain the relief sought

Carpenter v. Bureau of Alcohol, Tobacco, and Firearms, 5 MSPB 432 (1981)

Mr. Carpenter appealed his reduction in grade based on misconduct to MSPB. Subsequently, the Special Counsel intervened, claiming that the agency action constituted or was taken as a result of a prohibited personnel practice. Following the initiation of a hearing but prior to a determination on the merits of the action, the parties entered into a stipulated settlement of the appeal. The settlement agreement provided that instead of being downgraded from GS-13, step 4, to GS-12, step 1, he would only be downgraded to GS-12, step 10; and that his records would show that the action was taken for the efficiency of the service. The Board restated its holding in Hodnick, that a final determination on the merits is not required, so long as the appellant obtained all or part of the remedy sought. Thus an employee may be the prevailing party as a result of a settlement agreement. Nevertheless, in Mr. Carpenter's case, the Board found that the token concession he received in the settlement agreement was insufficient to qualify him as a prevailing party and his motion for attorney fees was denied.

IV. APPLICATION OF THE INTEREST OF JUSTICE STANDARD

Introduction - Easily the most controversial area in any discussion of attorney fees involves the interpretation and application of the requirement in 5 U.S.C. 7701(g)(1) that an award may be made only after a determination that it is "warranted in the interest of justice." Any review in this area must begin with Allen v. USPS discussed immediately below. Nearly all attorney fee decisions follow the analytical framework first discussed in Allen and all attorney fee cases involving the application of the 'interest of justice' standard are ultimately based on one or more of the five categories of circumstances listed in that case. Recent Court decisions in this area, as seen below, have tended to broaden the circumstances under which an award may be determined to be "in the interest of justice."

A. Establishment of criteria under which interest of justice standard is applied

Allen v. U.S. Postal Service, AT075299011 (1980)

The agency's removal of Mr. Allen was reversed after a finding by MSPB that the agency had failed to establish that his purported falsification of his time card was intentional. Along with reversing the agency action, the presiding official, in his initial decision, found that "because the appellant is the prevailing party, he is entitled, in the interest of justice, to reasonable attorney fees."

In reviewing this decision, the full Board began by setting out the framework under which attorney fee motions should be analyzed. It stated:

Thus in awarding attorney fees that have been 'incurred' in appeals under 7701(g)(1), the statutory language demands that each of the following requirements be met: 1. The appellant must be the 'prevailing party'; 2. The award must be 'warranted in the interest of justice'; and 3. The fees must be 'reasonable.'

After reviewing the legislative history of 5 U.S.C. 7701(g)(1), the Board then set out a non-exhaustive list of circumstances in which the "interest of justice" standard would be met. The examples listed, which have subsequently come to be referred to as the "Allen categories" are:

1. Where the agency engaged in a 'prohibited personnel practice';
2. Where the agency's action was 'clearly without merit', or was 'wholly unfounded', or the employee is 'substantially innocent' of the charges brought by the agency;
3. Where the agency initiated the action against the employee in 'bad faith,' including:
 - a. Where the agency's action was brought to 'harass' the employee;
 - b. Where the agency's action was brought to 'exert improper pressure on the employee to act in certain ways;'
4. Where the agency committed a 'gross procedural error' which 'prolonged the proceeding' or 'severely prejudiced' the employee;
5. Where the agency 'knew or should have known that it would not prevail on the merits' when it brought the proceeding.

The Board then noted that under its regulations, a request for award of attorney fees must be made by separate motion, with the burden of entitlement to such an award resting on the appellant. The case was remanded back to the presiding official to determine whether, in light of the above guidance, an award of attorney fees was "warranted in the interest of justice."

B. An award may be independently based on a finding that an agency's petition for review is clearly without merit

Keely v. MSPB, 760 F.2d 246 (1985)

Mr. Keely successfully appealed his separation during a reduction-in-force. His agency had refused to reassign him to another position because he did not meet the requirements of a special selective factor for that position. The MSPB presiding official found that the selective factor cited by the agency had not been approved by OPM and reversed the separation action. The agency petitioned for review, citing newly discovered evidence that OPM had indeed approved the selective factor in question. The Board denied this petition, indicating that the agency appeal lacked merit since the documents in question had been the agency's possession for several years before the hearing.

Mr. Keely's motion for attorney fees was denied by the presiding official who stated that the agency's initial decision that Mr. Keely could not be reassigned was a narrow but tenable determination under the circumstances. The full Board subsequently upheld this denial of attorney fees. Mr. Keely then took his case to the Federal Circuit Court. The Court overruled MSPB, stating that "the determination of whether an award is warranted . . . is not limited to examination of the agency's initial action." It stated that "an award of attorney fees is proper where an agency brings an appeal that is clearly without merit." In reviewing the facts of the case, the Court concluded that the agency knew or should have known that it had no chance of obtaining a rehearing before MSPB on the basis of the supposed new evidence, that its appeal was therefore without merit, and that an award of attorney fees was warranted from the date the agency filed its petition for review.

C. Factually close cases do not per se fall into a class in which fees are not available

Thomson v. MSPB, 772 F.2d 879 (1985)

Mr. Thomson's agency sought to remove him for threatening his supervisors and sleeping on duty. On appeal to MSPB, it was determined, on conflicting evidence, that while there was insufficient evidence to prove that he had threatened his supervisors, the charge of sleeping on duty was sustained. The removal action was therefore reversed and a five day suspension imposed. MSPB subsequently denied Mr. Thomson's petition for attorney fees, holding that: 1) there was no showing that the agency did not act reasonably in bringing the charges given the evidence before it and 2) that cases decided primarily on the basis of credibility do not warrant fee awards nor are the interest of justice served by a fee award in "factually close cases."

The denial of attorney fees was appealed to Federal Court which took exception to both of MSPB's holdings. The Court noted that in his motion for an award of attorney fees, Mr. Thomson asserted that he was "substantially innocent" of the charges of threatening his supervisor based on the evidence presented at the MSPB hearing. The Court restated its holding in Yorkshire that when considering whether the "substantially innocent" criteria is met, the reasonableness of the agency's action at the time the removal was taken is "irrelevant." Second, the Court explicitly rejected the notion that there is any general rule against fee awards either in cases decided primarily on the basis of credibility or in "factually close" cases. While the closeness of the

evidence can be considered as one factor in determining whether the appellant was substantially innocent of the charges, there is no automatic denial of fee awards in such cases.

D. If an appellant is determined to be substantially innocent, an award may be made regardless of the agency's original fault in bringing the action

Yorkshire v. MSPB, 746 F.2d 1454 (1984)

This case focuses specifically on the second Allen category discussed above, when the appellant is "substantially innocent of the charges brought by the agency." In the initial MSPB decision, the presiding official found no evidence supporting any of the agency's charges against the appellant and dismissed the agency's action removing Mr. Yorkshire for striking a patient under his care. At the hearing, the agency's principal witness had changed her testimony and admitted not having actually seen the alleged incident, and the testimony of the agency's other witness was determined to be totally lacking in credibility. In ruling on the motion for attorney fees, the presiding official determined that nothing in the record suggested that the agency knew or should have known that its principal witness would change her account of the incident and noted that further investigation would not necessarily have revealed to the agency that it could not reasonably expect to prevail on the merits. Therefore Mr. Yorkshire's motion for attorney fees was denied upon a finding that on the basis of the facts available to the agency, its action was not "clearly without merit." The full Board upheld this decision.

The Appeals Court overturned MSPB's decision, stating that "when dealing with the 'substantially innocent' standard for award of attorney fees, the question of the agency's original fault need never arise." It held that an examination of whether the agency knew or should have known that it would not prevail on the merits is irrelevant to the issue of whether the "substantially innocent" criteria had been met. The Court drew a clear distinction between the fifth Allen category (which deals with whether the agency knew or should have known that it would not prevail when it brought the action) which it said requires a "sensitive evaluation of the agency's original action" and the "substantially innocent" criteria which "refers to the result of the case in the Board, not to the evidence and information available prior to the hearing." Since the presiding official in the initial MSPB hearing found no credible evidence that the appellant had engaged in any misconduct, the "substantially innocent" standard was met and an award of attorney fees was warranted.

The Court went on to indicate that its ruling did **not** mean that every prevailing employee will be entitled to an award of attorney fees, noting that an employee must prevail on substantially **all** the charges to be found "substantially innocent." It further noted that the degree of fault on the employee's part should be taken into account in assessing whether he is "substantially innocent." (Further discussion in **OPM Significant Cases**, No. 43, 1/85.)

E. Failure to afford an opportunity period may warrant an award of fees

Grant v. Dept. of Transportation, AT04328410145ADD (1985)

Mr. Grant's removal based on unacceptable performance was reversed by the Board upon a finding that his agency had failed to afford him a reasonable opportunity to improve as required by statute and first recognized by MSPB in its Sandland decision. Mr. Grant then petitioned for attorney fees, arguing that he was "substantially innocent" of the charges and that an award was warranted in the interest of justice. The presiding official denied his motion, finding that: 1) he was not substantially innocent since the Board did not reverse the finding that his performance on at least one critical element was unacceptable as charged and 2) since the Sandland decision was issued after the agency effected the action, the agency therefore had no reason to know that it would not prevail when it took the action.

The full Board reversed this ruling and granted the motion for an award of attorney fees. It noted that when considering whether an agency's action was "clearly without merit" (or whether an employee is "substantially innocent"), the relevant focus is on the result before the Board, not on the information available to the agency prior to the hearing. Since the agency did not present credible evidence that it had afforded the appellant an opportunity to improve, the agency's action was determined to be clearly without merit. The Board went on, however, to find that the both the statute itself as well as OPM guidance made it clear that agencies must afford employees an opportunity to improve prior to taking action based on unacceptable performance. Hence the fact that the Sandland decision was issued after the agency action took place was irrelevant. The lesson here is that failure to provide a key substantive right provided in the statute (such as a reasonable opportunity to improve) may result in an award of attorney fees based upon a finding that the agency action was "clearly without merit."

F. Negligent presentation of an agency's case may lead to an attorney fee award

Trowell v. U.S. Postal Service, 3 MSPB 117 (1980)

In this case, the MSPB presiding official reversed the agency's dismissal of Mr. Trowell, finding that the agency failed to support the charge with any evidence. In subsequently granting an award of attorney fees, he specifically noted that the agency's representative's "apparent unfamiliarity with prosecuting an appeal amounted to negligence. This negligence clearly existed to such a degree as to unconscionably taint the entire proceeding." Both the agency and OPM contended in their petition for review before the full Board that the award of attorney fees cannot be warranted "in the interest of justice" simply because the agency's presentation of its case before the Board was negligent.

The Board disagreed with this argument, stating that while agencies are not required to be represented by legal counsel, "the assignment of totally unskilled, inexperienced, and unprepared agency representatives who are utterly lacking in familiarity with the essentials of presenting the agency's case before the Board" is not permitted. It noted that "If an agency is not prepared to take a removal action seriously enough to present its case with at least a minimal degree of competence, then in the interest of justice to all concerned it should not initiate the action to begin with." Attorney fees were awarded, based on the reasoning that the fifth Allen category, "where the agency knew or should have known it would not prevail on the merits when it brought the proceeding," includes instances where the agency presented its case so negligently that the action could not possibly be sustained on the record established before the Board.

V. DETERMINING WHETHER THE FEES REQUESTED ARE REASONABLE

Introduction - Once it has been determined that the prerequisites of 5 USC 7701(g)(1) as to "prevailing party" and "interest of justice" have been met, the final significant statutory requirement is that only "reasonable" attorney fees be awarded. As seen in the cases below, there has been considerable effort at establishing an analytical framework by which a determination whether the fees requested are "reasonable" may be made. In actual practice, decisions in this area often turn on the individual facts in each case. The Board's holding in O'Donnell (discussed earlier at p. 3), the first significant decision which addressed reasonableness of attorney fees, has been substantially expanded in the following cases.

A. Factors used in determining reasonableness of fees

Kling v. Dept. of Justice, AT075299048 (1980)

In this case the agency did not contest the amount of the fees which Mr. Kling's attorney claimed, instead challenging whether the award was in the interest of justice. Nevertheless, after upholding the initial decision as to the merits of the award, the Board took the time to discuss at some length the pertinent factors to be considered in determining the amount of a "reasonable" attorney fee and the analytical framework for considering these factors. The Board indicated that the two most critical factors are the lawyer's customary billing rate and the number of hours devoted to the case. Once these two factors have been scrutinized and multiplied to obtain their product, presiding officials may take into account other factors not adequately reflected in the time and hourly rate charged. Such factors, the Board suggested, might include the "quality of professional performance, unusual time restraints, an unusually unpopular cause, and a contingency factor when the attorney has agreed to be paid only if successful."

The Board emphasized that the presiding official must carefully scrutinize the hours and billing rates claimed by attorneys seeking fee awards. In particular, the billing rate must be evaluated according to the individual attorney's professional standing, specialized experience, and status. Presiding officials must include in their decision information sufficient to substantiate not only the billing rate and hours charged, but also any adjustment to this amount, even if the agency fails to contest the amount claimed. The Board concluded that: "The particular facts and circumstances of the parties and attorneys will necessarily vary from case to case, but the method of determining a reasonable fee award should not vary. A reasoned analysis with factual support in the record is always required."

B. Importance of market rate in determining reasonable fees

Mitchell v. Dept. of Health and Human Services, DA07528110152ADD (1984)

The Board in this case focused specifically on the determination of the appropriate billing rate used in the Kling formula to arrive at a reasonable attorney fee award. Recognizing that the actual rate which was billed is not necessarily the appropriate rate, it stated that the rate that an attorney can command in the market is "important substantiating evidence of the prevailing community rate". However, the Board went on to require: 1) that attorneys who vary their rates according to the kind of case should state the average rate charged in cases similar to the one for which an award is being sought, and 2) that fee applications should provide information to show that the attorney has billed sufficient work to establish that their rate reflects a market value for his services. If an attorney either does not bill clients or has not billed sufficient work to establish a market rate, the Board indicated that they could introduce other evidence, such as affidavits of attorneys with similar experience as to the rate at which they charge clients.

In addressing the question of whether the same rate should be billed for different types of legal work, the Board held that while the applicable rate is presumed to be the same for all types of legal work, such a rate should not be used for work "which is normally done by nonlegal personnel such as clerical or paralegal workers". Similarly, the time spent in travel is not legal work and should be compensated at a lower rate. Finally, with regard to recovery of costs (as opposed to attorney fees) the Board noted that its authority under 5 USC 7701(g)(1) is limited to those expenses normally included within attorney fees. This is in contrast to fees authorized as a result of a finding of discrimination (5 USC 7701(g)(2)), where in addition to attorney fees, the costs of expert witnesses, transcripts, depositions, subpoenas, and duplicating may be recovered.

C. Compensation of union and other salaried attorneys

Powell v. Dept. of the Treasury, DC075299039 (1981)

The issue in this case was how to arrive at a reasonable billing rate when legal services are provided by a union attorney who is compensated on the basis of an established salary. In this case, the appellant was represented by union counsel who sought to have the attorney fee award based on prevailing rates in the community, rather than on his actual salary. OPM intervened in this case to argue that a fee award to a salaried union attorney must be limited to the actual cost to the union of providing the legal services. The problem in this area is that disciplinary rules covering attorneys prohibit their splitting their fees with non-attorneys. If a salaried union attorney was reimbursed at a rate exceeding their salary and the excess reimbursement was turned over to the union, a violation of such rules would occur.

The Board agreed with OPM and held that the reasonable attorney fee recoverable by a salaried union attorney may consist of no more than the actual cost to the union of providing legal services to the appellant. This actual cost may include, in addition to the attorney's hourly salary, an allowance of 100% of the salaried attorney's compensation for overhead. However, if the fee is to be retained by the attorney, rather than turned over to the union (as when a union hires outside counsel), then the establishment of a reasonable fee may be set based on the prevailing rate in the community.

D. Degree to which "costs" may be included in a fee award

Bennett v. Dept. of Navy, 699 F.2d 1140 (1983)

The question of the degree to which "costs", as opposed to attorney fees, may be covered in an attorney fee award was addressed by the Court in this case. The Court ruled that since 5 USC 7701(g)(1) only authorizes the MSPB to award attorney fees, "costs" may not be covered. The problem, of course, is distinguishing between fees and costs. The Court agreed with the Board's definition in O'Donnell that fee awards may include "reimbursement for the attorney's out-of-pocket disbursements for incidental and necessary expenses incurred in furnishing effective and competent representation." The Court indicated that certain "costs" were clearly not covered, including witness fees and expenses, fees for stenographic transcripts, compensation of expert witnesses, and investigation expenses. Properly included in an award are an attorney's travel expenses, postage, and long distance telephone costs. The Court stated that such charges are "directly related to the services performed by the attorney, are not charges that are normally subsumed within the hourly rate figure, and yet may fairly be described as part of the fee for services rendered."

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