

Calvin Saunders v. U.S. General Accounting Office

Docket No. 104-AF-17-88

Date of Decision: May 18, 1989

Cite as: Saunders v. GAO (5/18/89)

Before: Personnel Appeals Board en banc; Kaufman, Cappello, Weinstein for the majority; James, Kaplan, dissenting

Attorney Fees

Back Pay Act

Motion to Dismiss

Motion for Summary Judgment

DECISION AND ORDER

This matter has come before the Personnel Appeals Board (PAB) on a Petition for Review filed by Petitioner on September 7, 1988, requesting attorney fees for the work of Petitioner's counsel in requesting reconsideration of the denial of Petitioner's Within-Grade Increase. Respondent has filed a motion to dismiss the Petition for Review, or in the alternative, for summary judgment.

I. BACKGROUND

Petitioner is a GS-13 Personnel Management Specialist in the Policy and Executive Personnel Branch. On April 8, 1987, Petitioner was notified by Respondent's Director of Personnel that Petitioner's Within-Grade Salary Increase (WGI) due March 15, 1987, was denied because Petitioner had allegedly failed to achieve an acceptable level of competence in his position during the waiting period. On April 22, 1987, Petitioner requested reconsideration of the denial of his WGI. On May 7, 1987, the Comptroller General appointed Robert Pool as the special examiner, pursuant to GAO Order 2531.3, the Agency regulation governing the procedures for appealing the denial of WGI increases.

On July 16, 1987, Petitioner received a performance appraisal for the period of June 16, 1986, through June 15, 1987. Petitioner filed a grievance concerning the performance appraisal on July 30, 1987. Pursuant to the administrative grievance procedure outlined in GAO Order 2771.1, a grievance examiner was appointed on December 14, 1987, to investigate the grievance and prepare a recommended report.

The Special Examiner investigating the denial of Petitioner's WGI concluded his investigation, and on January 27, 1988, issued a report to the Comptroller General recommending that the WGI denial be sustained. The Grievance Examiner investigating Petitioner's performance appraisal issued his recommended decision to the Comptroller General on April 21, 1988. That report upheld Petitioner's grievance, and recommended that the performance appraisal be rescinded.

In July 1988, Petitioner filed suit in the United States District Court for the District of Columbia. Petitioner requested the District Court to issue a writ of mandamus ordering Respondent to give Petitioner a decision on Petitioner's grievances as required by applicable GAO regulations. Petitioner also requested an order of the Court directing Respondent to cease and desist from further alleged violations of Petitioner's constitutional and administrative due process rights. Petitioner requested monetary relief in the amount of one million dollars, plus attorney fees and costs, pursuant to the Back Pay Act, 5 U.S.C. Sec. 5596.

On August 11, 1988, Respondent issued a decision which (1) adopted the Grievance Examiner's recommendation and rescinded Petitioner's performance appraisal; and (2) reversed the recommendation of the WGI Examiner and awarded Petitioner his WGI retroactive to March 15, 1987.

On September 7, 1988, Petitioner filed a Petition for Review with the PAB. The sole relief requested in the Petition for Review is attorney fees in the amount of \$9,750, which represents \$100 per hour for the 97.5 hours expended by Petitioner's counsel in administratively grieving Petitioner's performance appraisal and denial of WGI. Petitioner asserts entitlement to attorney fees on the basis of Respondent's allegedly "...dilatatory, unreasonable, evasive and nonresponsive tactics" in failing to properly and timely process Petitioner's grievances which resulted in Petitioner's counsel having to expend unnecessary hours within the grievance proceedings, thus directly increasing Petitioner's out-of-pocket expenditures for costs and attorney fees. Petitioner alleges that his counsel made repeated written and oral requests to Respondent for release of the reports of the examiners investigating Petitioner's grievances and issuance of the decisions disposing of the grievances, but that Respondent steadfastly refused to do so, thus violating Respondent's own procedures. Petitioner contends that Petitioner's filing of the civil action in Federal Court was the catalyst that caused Respondent to finally issue the decisions granting Petitioner his WGI increase and rescinding the subject performance appraisal.

In lieu of filing a response to the Petition for Review, Respondent filed, on October 3, 1988, a motion to dismiss the Petition for Review, or in the alternative, for summary judgment.

II. CONTENTIONS OF THE PARTIES

Respondent contends that the Petition for Review should be dismissed because the PAB does not have statutory jurisdiction over the Petitioner's attorney fee request. Respondent asserts that it has issued no final decision adverse to Petitioner, therefore, there was no appealable Agency action before the PAB. Respondent posits that the PAB can only issue an award of attorney fees for services rendered in connection with an appeal before the PAB, and absent such an appeal, the PAB has no jurisdictional base on which to make an award of fees.

The Respondent argues that the PAB Regulations also obtain against Petitioner's claim. Respondent relies upon 4 CFR 28.21(m), which states that requests for attorney fees are to be submitted after a final decision of the PAB and mandates that attorney fees and costs shall be awarded pursuant to the standards of 5 U.S.C. Sec. 7701(g). Respondent argues that the language of 28.21(m) allows an attorney fee request only after a final decision of the PAB. Since there has been no final decision of the PAB, Respondent contends there can be no award of attorney fees.

Respondent further argues that, even if the PAB could assume jurisdiction over this matter, the Petitioner still has failed to state a claim upon which he is entitled to relief, based on a sovereign immunity argument. Respondent contends that attorney fees can be granted only in those instances where there has been an express waiver of sovereign immunity, and neither the federal statutes nor the GAO regulations allows attorney fees in an action where the Agency reverses its own earlier denial of a WGI or rescinds a performance appraisal pursuant to its own grievance procedure.

In the alternative to its motion to dismiss, Respondent requests summary judgment on the pleadings. Respondent contends that, based on the material facts that are not in dispute in this matter, it is entitled to summary judgment as a matter of law. Respondent has alleged the following material facts as to which there is no genuine dispute:

1. Petitioner is a GS-13 Personnel Management Specialist, employed in Respondent's Personnel Office.
2. On April 8, 1987, Petitioner was notified that his Within-Grade Increase due March 15, 1987, to GS-13-step 4, was denied because his performance during the waiting period was not at an acceptable level of competence.
3. By letter dated April 22, 1987, Petitioner requested that the denial of the WGI be reconsidered by the Comptroller General pursuant to GAO Order 2531.3. Pursuant to that Order, an examiner was appointed, on May 7, 1987, to investigate the denial and prepare a recommended report.
4. On July 16, 1987, Petitioner received a performance appraisal for the period from June 16, 1986, through June 15, 1987. On July 30, 1987, Petitioner filed a grievance concerning that performance appraisal. Pursuant to GAO Order 2771.1, Administrative Grievance Procedure, a Grievance Examiner was appointed on December 14, 1987, to investigate the matters raised and prepare a recommended report.
5. On January 27, 1988, the Examiner investigating the denial of the WGI, issued his recommended report to the Comptroller General and concluded that the WGI denial should be sustained.
6. On April 21, 1988, the Grievance Examiner investigating the performance appraisal issued his recommended decision to the Special Assistant to the Comptroller General and recommended that the appraisal be rescinded.
7. On August 11, 1988, Respondent issued a decision in which it (1) adopted the recommendation of the Grievance Examiner and rescinded the performance appraisal; and (2) overturned the recommendation of the Examiner investigating the WGI denial and granted the WGI effective on March 15, 1987.

Respondent contends that these facts alone make it impossible for Petitioner to prove that he obtained any part of his relief through an appeal to the PAB, which showing, Respondent argues, is an indispensable first step to proof that Petitioner is the prevailing party for the purposes of an award of attorney fees. Moreover, Respondent argues that, even if Petitioner could prove that he is the prevailing party in this action, the undisputed facts of the record clearly preclude Petitioner from carrying his second stage burden, that of showing that attorney fees are warranted in the interests of justice. Thus, Respondent reasons, summary judgment is appropriate in the alternative to its motion to dismiss, because Petitioner cannot prove as a matter of law that he is entitled to attorney fees.

Petitioner has five primary points of opposition to Respondent's motion for summary adjudication. Petitioner argues that the PAB has jurisdiction over requests for fees pursuant to 4 CFR 28.11(e) of the PAB's Rules and Regulations. Petitioner argues that, in addition to 4 CFR 28.11(e) specifically providing for attorney fees without a ruling on the merits by the PAB, jurisdiction would also lie because his action is prospectively appealable, and causally related to the initiation of the appeal. Petitioner also argues that there is both statutory and case law authority to support his assertion that Respondent's failure to follow its own administrative procedure, thereby barring the door to the PAB's appellate process, is sufficient to state a cause of action for which Petitioner is entitled to relief in the form of attorney fees. Petitioner reasons that, but for Respondent's conduct of refusing to issue a decision on Petitioner's grievances, he would not have been forced into court.

Petitioner also contends that he is a prevailing party within the meaning of 5 U.S.C. Sec. 7701(g), because he has obtained all of the back pay relief to which he is entitled in the Agency reconsideration proceeding, notwithstanding Respondent's attempts to prevent Petitioner from appealing to the PAB. Finally, Petitioner argues that attorney fees are warranted in the interest of justice because Respondent's actions constitute conduct that violates each of the standards to be applied in the interest of justice as set forth in Allen v. U.S. Postal Service, 2 MSPB 582 (1980). Under Allen, fees may be awarded to a prevailing party under the interest of justice standard when: an agency engages in prohibited personnel practices; where the agency's actions are clearly without merit; where the agency initiated the personnel action in bad faith; where the agency committed a gross procedural error which prolonged the proceeding or severely prejudiced the employee; or where the agency knew or should have known that it would not prevail on the merits when it instituted the action. See 2 MSPB at 593. Petitioner submits that Respondent's conduct herein has embraced all of the above proscriptions, even though breaching just one of them would be sufficient to warrant a fee award in the interest of justice.

OPINION

The threshold issue here is whether the PAB has jurisdiction over Petitioner's fee request. In order to properly decide this issue, we must first look to our statutory base. In interpreting the applicable statutory and regulatory provisions governing matters before us, it must be borne in mind that, although we do not have the last word on statutory construction, we certainly must have the first, because our interpretation of our own legislation is entitled to considerable deference. United States v. Rutherford, 442 U.S. 544, 553 (1978). In construing our statute, however, we are mindful that our powers are not plenary; rather our jurisdiction is limited to those actions which are made appealable to us by law, rule or regulation. Synan v. Merit Systems Protection Board, 765 F.2d 1099, 1100 (Fed. Cir. 1985).

The Personnel Appeals Board was created by, and our authority is derived from, the General Accounting Office Personnel Act of 1980 (GAOPA), Pub. L. 96-191 (1980), as codified by 31 U.S.C. Secs. 732 and 751-755. The purpose of the GAOPA is to give employees of GAO substantive and procedural rights comparable to those enjoyed by executive branch employees under the Civil Service Reform Act of 1978. In enacting the GAOPA, Congress has given the PAB the combined responsibilities of the Merit Systems Protection Board, the Office of Special Counsel of the MSPB, the Federal Labor Relations Authority, and the Equal Employment Opportunity Commission. General Accounting Office v. GAO Personnel Appeals Board, 698 F.2d 516, 523 (D.C. Cir. 1983). In order to achieve the purposes of the GAOPA, Congress has given the PAB broad discretion to promulgate regulations and design appropriate procedures for processing appeals before the PAB. Ibid.

Appeals to the PAB, as with appeals by executive branch employees and applicants, are processed under the applicable provisions of the Civil Service Reform Act of 1978, 5 U.S.C. Sec. 7701 (CSRA). See 31 U.S.C. Sec. 753 (d). Prior to the passage of the CSRA, federal employees could not get attorney fees in personnel actions against the federal government. The former Civil Service Commission did not have the express statutory authority to award attorney fees to federal employees who prevailed in hearings before it. Nor could federal employees get attorney fees through the courts, the Supreme Court having previously ruled that, because of sovereign immunity, federal courts could not award attorney fees against the United States without express statutory authority to do so. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

As a result of the Supreme Court's decision in Alyeska, Congress passed a number of laws designed to expressly waive sovereign immunity in order to allow attorney fees to be awarded against the United States in appropriate cases. One such enactment was the Civil Rights Attorneys Fees Act of 1976, 42 U.S.C. Sec. 1988. Another was the Equal Access to Justice Act (EAJA), 28 U.S.C. Sec. 2412. The old title 28 U.S.C. Sec. 2412 was a statute that previously had been used to allow the taxing of costs of litigation against the United States when the government was the losing party in litigation. The Court of Appeals for the D.C. Circuit had used equitable principles to extend the meaning of 28 U.S.C. Sec. 2412 to allow attorney fees against the government in Alyeska, 495 F.2d 1024 (1974) (en banc). When Congress passed the EAJA in 1980, its purpose was to specifically waive sovereign immunity to allow a successful litigant to collect attorney fees and expenses in a wide variety of actions against the federal government.

Contemporaneously with the passage of the Civil Rights Attorneys Fees Act of 1976 and the Equal Access to Justice Act, Congress passed the Civil Service Reform Act of 1978. The CSRA also contained express statutory language allowing attorney fees to be awarded to federal employees or applicants who prevailed in their actions against federal agencies. The attorney fees provisions in the CSRA were specifically included by Congress to reduce the barriers presented to federal employees attempting to resolve their personnel grievances. One of the operative attorney fee provisions of the CSRA is the Back Pay Act (BPA), 5 U.S.C. Sec. 5596(b)(1), Pub. L. No. 89-380, tit. IV, 80 Stat. 94, 95 (1966). Originally, the BPA did not allow for attorney fees, providing only that a federal employee who was the victim of an unjustified or unwarranted personnel action could sue the federal government for correction of the personnel action, including back pay, in a Court of Claims action. The BPA was amended by Section 702 of the Civil Service Reform Act of 1980 to broaden the particular items recoverable as back pay by a federal employee to include interest, costs and attorney fees. See U.S. v. Fausto, U.S., 108 S.Ct 668, 680 n.8 (1988). The Supreme Court, in Fausto, decreed that the U.S. Claims Court is no longer an "appropriate authority" to review administrative determinations under the BPA and only the MSPB (and therefore, the PAB), the agency itself, or the Court of Appeals for the Federal Circuit, are appropriate authorities for the purpose of the BPA.

The pertinent provisions of the BPA state as follows:

"(b)(1) An employee of an agency¹ who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--
(A) is entitled, on correction of the personnel action to receive for the period for which the personnel action was in effect--

.....

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

5 U.S.C. Sec. 5596(b)(1)(A)(ii) (Supp.V 1981).²

The purpose of the BPA is to make employees whole who are the victims of unwarranted or unjustified personnel actions. That is, to put the employee in the position he or she would have been in had the erroneous personnel action not occurred. Bush v. Lucas, 462 U.S. 367, 385-86 (1983); Naekel v. Dept. of Transportation, 845 F.2d 976, 979 (Fed. Cir. 1988); Gavette v. Office of Personnel Management, 808 F.2d 1456, 1464 (Fed. Cir. 1986) (en banc). One aspect of complete, make-whole relief is an award of attorney fees. New York Gaslight Club v. Carey, 447 U.S. 54, 67-68 (1980).

The BPA is an express fee-shifting statute, and as such, constitutes a waiver of sovereign immunity. Martin v. U.S., 12 Cl. Ct. 223, 226 (1987), citing Nibali v. U.S., 634 F.2d 495 (Ct. Cl. 1980). Under the BPA, an employee is entitled to an award of attorney fees upon correction of an unjustified or unwarranted personnel action, if the services for which the fees are claimed are "related to" the personnel action corrected. Martin v. U.S., 12 Cl. Ct. at 227, citing Austin v. Department of Commerce, 742 F.2d 1417, 1419 (Fed. Cir. 1984); Olsen v. Department of Commerce, 735 F.2d 558, 562 (Fed. Cir. 1984).

Under the BPA, an appropriate authority may be the courts, the PAB, or the agency employing the grievant. U.S. v. Fausto, U.S., 108 S. Ct. at 677; Crowley v. Schultz, 704 F.2d 1269, 1273 (D.C.Cir. 1983); Martin v. U.S. 12 Cl. Ct. at 227. See also 5 CFR 550.801, et seq., the regulations promulgated by the Office of Personnel Management pursuant to the statutory directive of the BPA.

We think this case falls within the BPA. Petitioner was affected by a personnel action (the denial of his within-grade salary increase) which caused a withdrawal or reduction in his pay. Petitioner appealed the denial to the appropriate authority, the Comptroller General. The Comptroller General caused the grievance to be investigated, and, as a result of the investigation, corrected the personnel action.

The BPA also requires that any claim for attorney fees be presented only to the appropriate authority which corrected or directed the correction of the personnel action. Sec. 550.806(a). Re: Hellman, 61 Comp. Gen. 326 (1982); Re: Hatler, 61 Comp. Gen. 290 (1982). Petitioner, in his request for reconsideration of his WGI denial, asked for remedies of attorney fees and costs, as well as back pay. Petitioner received his back pay upon correction of the personnel action, but the letter from the Assistant Comptroller General informing Petitioner that he had prevailed upon reconsideration did not address the issues of attorney fees and expenses. In this regard, this matter is almost squarely on point with Maney v. Department of Health and Human Services, 637 F. Supp. 1128 (D.D.C. 1986). In Maney, a federal employee filed an agency grievance concerning her performance appraisal. The agency accepted findings by a grievance examiner that were favorable to the employee, and as a result, the employee was awarded a retroactive merit increase and a performance bonus. The agency, however, denied her request for attorney fees. She appealed the denial of fees to the District Court. The Court awarded fees under the BPA, holding that the performance bonus was back pay within the meaning of the Act, and therefore, the plaintiff was entitled to request fees under the BPA.

Here, the Petitioner requested fees in his request for reconsideration, but the Agency failed to address the issue of fees and expenses in its letter correcting the personnel action. Since this matter is before us on a motion to dismiss, we must take as true all of the factual allegations of the Petition for Review, and "any ambiguities or doubts concerning the sufficiency of the claim must be resolved in favor of the complaining party." Scheuer v. Rhodes, 416 U.S. 232, 236 (1979) (emphasis in original); Conley v. Gibson, 355 U.S. 41, 45 (1957). Therefore, we must infer that respondent has denied Petitioner's request for an award of attorney fees.

Having concluded that Respondent has, in fact, denied Petitioner's request for an award of attorney fees, we also conclude that we have jurisdiction over this matter, since the decision of the PAB is the final administrative appeal from the Agency with respect to appeals of denials of a WGI. See GAO Order 2531.3(6), para.2. Thus, Respondent's motion to dismiss must be denied, since such a motion should be granted only where it appears that, beyond a doubt, there is no set of facts in support of Petitioner's claim which would entitle him to relief. Conley, 355 U.S. at 45-46; see, Hughes v. Rowe, 449 U.S. 510 (1980).

We also deny Respondent's motion for summary judgment, since summary judgment is appropriate only when there is no dispute as to any material facts, such that Respondent would be entitled to judgment as a matter of law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). The question of whether or not Petitioner is entitled to attorney fees is essentially a factual determination which must be made by the PAB. For purposes of summary judgment, we must accept Petitioner's version of the facts, and resolve all issues of fact in favor of Petitioner. Bishop v. Wood, 426 U.S. 341 (1976). Since a review of the record in this light shows that inferences can be made adverse to those of the party moving for summary judgment, the motion for summary judgment must be denied. U.S. v. Diebold, 369 U.S. 654 (1962). Petitioner has alleged that all of the interest of justice factors enunciated in Allen v. U.S. Postal Service, *supra*, have been violated by Respondent, and has pleaded facts supporting those allegations. Taking all of Petitioner's allegations to be true, Bishop v. Wood, *supra*, we hold there are material facts at issue.

The Dissent would have the Board disavow jurisdiction, primarily on the theory that, since we have not decided (or affected the resolution of) the merits of Petitioner's appeal, we have no authority to award fees for the work of counsel on the appeal. In thus disavowing jurisdiction, the dissenting members close their eyes to several facts which we deem controlling in this matter. First, Congress has expressly granted to the PAB jurisdiction over any case arising from a reduction in pay or grade, 31 U.S.C. §753(a)(1), or any other personnel matter which the Comptroller General, by regulation, decides the PAB shall resolve. 31 U.S.C. §753(a)(8). Clearly, denials of within-grade salary increases are within the PAB's jurisdiction, but, further, the Comptroller General has specified by regulation that the PAB shall be the final administrative appeal in such matters. GAO Order 2531.3(6).

Also, the PAB Regulations provide for appeals to the Board when attorney fees are the only issue in the appeal. 4 C.F.R. 28.11(e). Where the Board does receive a case in which attorney fees are the only issue, the procedures for prehearing, hearing and final decision and order are the same as for all other appeals. *Id.* The Dissent would interpret 4 C.F.R. 28.11(e) to apply only to cases involving discrimination, and would have us rule that Petitioner may only seek relief from the Agency, itself, or the federal courts. This reading is unnecessarily restrictive. Obviously, the former avenue is not viable because the Respondent has clearly refused to consider Petitioner's attorney fee request. In thus relegating Petitioner to the federal courts, our dissenting members close their eyes to the legislative history of the attorney fees provisions of the CSRA. Congress specifically enacted the attorney fees provisions of the CSRA to relieve Federal employees of the burden of having to resort to the courts for consideration of their attorney fees requests.

Senate Report at 60-61, U.S. Code Cong. and Admin. News 1978, pp. 2782-2783. To refuse jurisdiction of Petitioner's claim would frustrate the clear congressional intent of our enabling legislation. We are unanimous in our belief that Petitioner is entitled to request fees because his grievance is covered by the Back Pay Act. If however, as the Dissent urges, Petitioner's only recourse is to the courts, then the PAB is not serving the purpose Congress intended. We find the arguments of the Dissent to have no foundation in either the case law (the cases cited by our dissenting members are inapposite) or the legislative history governing the attorney fees provisions of the CSRA.

Exercising judicial restraint, we do not address other issues raised by the parties, since this would serve only to extend, without changing, the decision reached herein.

Accordingly, Respondent's motions are denied, the Petition for Review is accepted, and Petitioner is given 30 days from the date of entry of this Order to submit a proper request for attorney fees.

Dissenting Opinion

The majority opinion is premised upon reasoning which holds that where an employee is found by an appropriate authority to have been affected by an unwarranted or unjustified personnel action, attorney fees may be recovered. The view of the majority is that simply because an employee is the victim of an unwarranted or unjustified personnel action, which warrants application of the Back Pay Act, we, therefore, have sufficient jurisdiction to consider and award attorney fees. The majority's vision is, however, myopic and is blurred by a desire to make employees whole when the government takes what the majority believes is inappropriate action. I share that desire with the majority and firmly believe that where a Federal agency takes an unwarranted personnel action, it should bear all reasonable costs for its action or non action. However, we do not have any authority to award attorney fees unless Congress has granted us authority to do so. Thomas v. United States, 709 F.2d 48 (Fed. Cir. 1983). No matter how unjust the acts of the agency, if the action does not fall within the ambit of authority given to us by Congress, we have no basis to prescribe our own brand of elixir, herb or correctional cure. The PAB is not an Article III Court. Glidden Co. v. Zdanok, 370 U.S. 530 (1962). Therefore, we do not have the same plenary jurisdiction as the District Court in Maney v. Department of Health and Human Services, 637 F. Supp. 1128 (D.D.C. 1986). Burning v. Veterans Administration, 32 MSPR 213 (1987). We have only that special mixture of administrative and adjudicative jurisdiction granted to or conferred upon us by Congress. Thomas v. United States, 709 F.2d at 49; Manning v. Merit Systems Protection Board, 742 F.2d 1424, 1427 (Fed. Cir. 1984); Ross v. Department of Health and Human Services, 721 F.2d 355, 357 (Fed. Cir. 1983); Aho v. Dept. of Agriculture, 25 MSPR 569 (1985), aff'd, 776 F.2d 1065 (Fed. Cir. 1985).

Hence, the primary issue before us is not whether the provision of 5 C.F.R. 7701(G) or the Back Pay Act (5 U.S.C. Section 5595) is applicable to this particular fact pattern. Instead, initially, we must resolve a question of first impression, namely, whether Congress has granted this Board jurisdiction to decide an appeal which is based solely on a request for attorney fees which did not arise out of a claim of discrimination and where the original appealable action which gave birth to the claim for attorney fees was rescinded by the agency prior to an appeal to us. Unfortunately, we do not have jurisdiction to decide such a case. The fact pattern presented to us here does not fall within the statutory jurisdiction granted to us. When GAO rescinded its denial of the within-grade prior to any appeal being filed with us, it left no arguably appealable matter which may have given rise to this Board's jurisdiction to decide the question of attorney fees. Burning v. Veterans Administration, *supra*; Himmell v. Department of Justice, 6 MSPB 408, 6 MSPB 484, 486 (1984). In other words, there no longer exists an appealable action which permits

us to seize or grasp jurisdiction. Brown v. U.S. Coast Guard, 28 MSPR 539, 546 (1985). As in Himmell, the denial of the within-grade increase no longer exists and was never appealed to us. An isolated request for an award of attorney fees, unconnected to any past or present matter before us is not an appealable action for purposes of our jurisdiction. Even our own regulations, which the majority opinion found the need to overlook, contemplates that a request for an award of attorney fees would have some previous connection with the Board, prior to the coupling of the Board's jurisdictional tentacles. Section 28.25(m) of 4 C.F.R. provides that:

"Within 20 days after receipt of a notice of final decision by the Board, the petitioner may submit a request for the award of reasonable attorney's fees and costs..." [Emphasis added].

While the language of Section 28.25(m) is not as broad and demanding as that proposed by Respondent, the breath of the language of the regulation leaves little doubt that something must be pending or have been pending before the Board related to the request for attorney fees before the Board can consider an award for attorney's fees. Further, it goes without saying that the Majority's reliance on GAO Order 2531.3(6) para. 2 is misplaced. The Section merely establishes the procedure for exhaustion of administrative remedies for GAO employees. It does not grant us authority to review a request for attorney's fees as is suggested by the Majority, which is unrelated to a matter before us. Likewise, while it is without doubt that we have jurisdictional basis to award attorney fees for service reasonably spent in connection with an agency action (including services provided prior to an appeal to us and after an appeal to us) the fee award must arise from a common core of facts which are the jurisdictional underpinning of an appeal to us. Young v. Department of Air Force, 29 MSPR 589, 592 (1986). There are no questions before us regarding the merits of denial of the within-grade increase and attorney fees for which we clearly could decide. The only matter before us is the request for attorney fees. That request is not in furtherance of the same goals of an appeal which is before us or has been before us. Bartel v. Federal Aviation Administration, 30 MSPR 451, 454 (1986); Lizut v. Department of Army, *supra* at 614; See Morley v. Defense Logistics Agency, 83 FMSR 5150 (MSPB 1983), where the appellant filed a petition for review of the initial decision which dismissed his petition for appeal from a denial of attorney's fees for the Defense Supply Agency. In 1975, the appellant was denied a promotion by his supervisor. Appellant attempted to grieve his non-selection through the agency on the ground that the agency violated provisions of the Federal Merit Promotion Program when it failed to select him for a promotion. The agency refused to give appellant relief for the alleged wrongful failure to promote him. Appellant initiated a civil action in the U.S. District Court for the Northern Ohio District, Eastern Division, alleging race and age discrimination in addition to violations of the federal merit promotion program. The judge dismissed the discrimination claims but remanded appellant's claim related to violations of the Federal Merit Promotion Program to the agency for further consideration. After entry of this order, the agency wrote to the appellant that he had been adversely affected by an unjustified and unwarranted personnel action, and that he would be promoted retroactively and receive back pay. The agency, however, rejected appellant's request for attorney fees and appellant filed a petition for appeal with the Merit Systems Protection Board's Chicago Regional Office.

The presiding official of the Merit Systems Protection Board dismissed the petition for appeal, finding that the Board did not have jurisdiction to consider the request for attorney fees. Appellant filed a petition for review of the initial decision. On appeal, the MSPB held that Appellant obtained the relief he sought through a civil action in federal court and did not seek relief from his improper non selection before the Board; nor could he have obtained such relief as non-selection for a position is not appealable. Morley v. DLA, *supra*, citing Humphries v. Veterans Administration, 3 MSPB 80 (1980). The MSPB further held

that employees may appeal to the MSPB only those actions for which a right of appeal is granted by law, rule or regulation. 5 U.S.C. §7701(a)(1980). Similarly, in the case before us, we are without jurisdiction over the gravamen of appellant's cause. We therefore do not have jurisdiction over the collateral issue of fees. Morley, supra, citing Feltus v. Department of Energy, 4 MSPB 308, 310 (1980).

Even more important, the Majority's use of the Back Pay Act is inappropriate because while under ordinary circumstances we are "the appropriate authorities" for purposes of the Back Pay Act, the facts of this case preclude us from being the "appropriate authority". On its face, the Back Pay Act authorizes an award of fees incurred for the services of an attorney before a court as well as before us. Lizut v. Department of Army, 27 MSPR 611 (1985). However, the Act contemplated that the request for fees would be presented only to the appropriate authority that corrected or directed the correction of the unjustified or unwarranted personnel action. Lizut v. Dept. of Army at 615, 616. See 5 C.F.R. 550; 806(a). Here, we did not correct nor did we direct the correction of the alleged unjustified personnel action. Moreover, we did not even influence the correction of the denial of the within-grade increase. We were totally unaware that the denial had occurred and was corrected. The appropriate authority in this case is the agency and the United States District Court is also, because it influenced or may have influenced the decision of the agency. The PAB did neither.

For the reasons stated above, we do not have the statutory prerequisite to grasp jurisdiction in this case. The case should be dismissed for lack of jurisdiction.

Notes

1. Sections 5 U.S.C. 104(2) and 105 expressly make the GAO subject to the BPA, defining GAO as an executive agency within the meaning of 5 U.S.C. Sec. 5596(a)(1).
2. 5 U.S.C. Sec. 7701(g)(1) is the other provision of the CSRA dealing with attorney fees. The language of Sec. 7701 establishes two prerequisites to an award of attorney fees: The Petitioner must be a prevailing party, and the fees must be warranted in the interest of justice.