

Sandra P. Davis v. U.S. General Accounting Office

Docket Nos. 00-05 and 00-08

Date of Decision: November 17, 2003

Cite as: S.Davis v. GAO

Before: Michael Wolf, Administrative Judge

Attorney's fees

Intervention

DECISION ON MOTION TO INTERVENE

This case was tried before me on multiple hearing days between October 29 and November 7, 2001. I issued a decision on July 26, 2002, which rejected all of Petitioner's claims, save one. As to that one claim, I concluded that the procedure used to determine Petitioner's 1999 performance appraisal was flawed and violative of GAO Order 2430.1. I further concluded that the Agency committed a prohibited personnel practice when it issued this performance appraisal. 5 U.S.C. §2302(b)(12). As a remedy for this prohibited personnel practice, the Agency was instructed to revise Petitioner's performance appraisal for 1999 and to make an appropriate adjustment in her earnings for that year and thereafter, if appropriate. The full Board affirmed the decision on July 11, 2003.

Petitioner (through her current attorney) has now filed a Request for Attorney's Fees and Costs incurred in this proceeding. Petitioner's motion seeks the recovery of fees paid and/or owed to both her current attorney and her former attorney. The current attorney did not begin representing Petitioner until after the trial was completed.¹ As a result, most of the fees incurred by Petitioner are attributable to the work performed by her prior attorney. However, that attorney (Janice F. Willis) has now moved to intervene in the proceeding with respect to the attorney fee issue.

Ms. Willis's motion states that she billed Petitioner a total of \$108,553.91 in fees, of which \$63,325.00 is still owed. Ms. Willis also "asserts a lien on any award made to Petitioner." Petitioner opposes Ms. Willis's motion to intervene on several grounds: (1) her motion is untimely, since it was filed more than 20 days after the Board's final decision; (2) Ms. Willis's dispute is with Petitioner over an attorney's lien and this Board does not have jurisdiction to

¹ An Entry of Appearance was received by the Board on April 3, 2002.

adjudicate such a dispute; (3) only a party, and not the attorney, may make a claim for an award of attorney's fees; (4) Ms. Willis's request for \$63,325 is "preposterously high" and riddled with errors; (5) Ms. Willis previously wrote to Petitioner that her outstanding fees were much lower than \$63,325; and (6) an award of fees to Ms. Willis would constitute "double payment" and a "windfall." The Agency has also opposed Ms. Willis's motion to intervene, arguing that, as a non-party, she has no right to request an award of fees.

Under Section 28.89 of the Board's regulations, a prevailing petitioner may submit a request for attorney fees and costs within 20 days of a final Board decision. 4 C.F.R. §28.89. That provision identifies only a prevailing petitioner as someone authorized to seek an award of fees and costs. Under Section 28.89, Ms. Willis is not a prevailing petitioner and may not file a request for attorney's fees. Only Petitioner may do that.

However, the issue presently before me is not merely whether Ms. Willis may independently seek the payment of fees. Her motion also raises the question whether she is entitled under Section 28.27 of the regulations to intervene in this Board proceeding to protect her interests. Intervenors are defined under Section 28.27(a) as persons who are permitted "to participate in a proceeding because the proceeding, or its outcome, may affect their rights or duties." The standard for granting a request to intervene is set forth at Section 28.27(c):

A motion for permission to intervene will be granted where a determination is made by the administrative judge or the Board that the requestor will be affected directly by the outcome of the proceeding. [Emphasis added].

This language leaves little room for discretion if a finding is made that a Board determination will directly affect the proposed intervenor. Once that determination is made, a motion to intervene "will be granted."

In this case, Petitioner seeks an award of attorney's fees including payment of fees billed to her by Ms. Willis for work performed in the pre-trial and trial phases of the litigation. However, while Petitioner has requested payment of these fees, she has expressly declined to request payment of the \$63,325 in fees that Ms. Willis claims is outstanding. *See* Petitioner's Response at 2-3. Under Section 28.27, the issue is not whether Ms. Willis is entitled to the fees she is claiming. Rather, the only question is whether her interests will be affected by my ultimate ruling on Petitioner's motion for a fee award. The answer to that question is clearly "yes." *Cf. Blessin v. Department of the Navy*, 26 MSPR 615 (1985) (attorney fee award is payable to the attorney, rather than the client).

Petitioner and the Agency are correct that, under PAB regulations, only a prevailing petitioner may request the recovery of fees. Ms. Willis is not a prevailing party and therefore has no standing before the Board to file an independent motion for the payment of fees. Nor does the

statute authorize the PAB to adjudicate the lien that Ms. Willis purports to assert.² However, Petitioner's fee request attaches numerous invoices submitted by Ms. Willis and claims a total of 335.25 hours expended in the trial stage of this case. In addition, Petitioner seeks to have her fee reimbursement made at an hourly rate that is more than double the rate actually billed by Ms. Willis.³ While Ms. Willis may not file her own independent request for fees, Section 28.27 does permit her to intervene so that she may protect her interests with respect to the issues that Petitioner has raised in her motion. Since neither Petitioner nor the Agency has argued that Ms. Willis will not be directly affected by my decision on the fee request, I conclude that she fits within the definition of an intervenor in Section 28.27 of the regulations and is entitled to intervene in this stage of the proceedings.

Both the Agency and Petitioner have generally ignored the critical language in Section 28.27 and have instead based their arguments on Section 28.89 and on several MSPB decisions that they claim are adverse to Ms. Willis's position. These arguments are unavailing. As to Section 28.89 of the regulations, the 20-day deadline for requesting an attorney fee award is directed at prevailing parties. Since Ms. Willis was not a prevailing party and may not file an independent request for reimbursement of her fees, the time deadline in that regulation is irrelevant.

The MSPB decision in *McAlear v. MSPB*, 806 F.2d 1016 (Fed. Cir. 1986), which was cited by both the Agency and Petitioner, also fails to support their arguments. In that case, the employee-petitioner had replaced her original attorney with a new attorney and then settled her claims against her employing agency; the settlement involved the payment of money and a full release by the employee. The employee withdrew her request filed with the MSPB for an attorney fee award after she entered into her settlement. The former attorney thereupon filed a request directly with the MSPB for recovery of fees owed by the former client. The Court held "that the MSPB has no jurisdiction, in the particular circumstances of this case, either to award fees to [the former attorney] or to enforce any attorney's lien he may have against the settlement money." 806 F.2d at 1017. The Court also noted that the Civil Service Reform Act, 5 U.S.C. §7701(g)(11), permits the "prevailing party" to make such a request for attorney's fees; once the employee withdrew her request for fees after executing the settlement, there was "no cognizable request for such fees before the MSPB." *Id.*

The motion by the former attorney in *McAlear* and the resulting holding arose out of a completely different set of circumstances than those confronted here. In the instant case, Petitioner has not settled or withdrawn her fee request. Indeed, her fee request is premised

² See *McAlear v. MSPB*, 806 F.2d 1016 (Fed. Cir. 1986) (attorney does not have independent standing to petition for fees when the prevailing employee-client declines to do so). Cf. *Phillips v. GSA*, 924 F.2d 1577, 1582 (Fed. Cir. 1991) ("As the statute [Equal Access to Justice Act] requires, any fee award is made to the "prevailing party, not the attorney. Thus, Phillips' attorney could not directly claim or be entitled to an award").

³ The invoices indicate an hourly billing rate of \$150. The motion for an award of fees requests that Petitioner be awarded at a rate of \$335 per hour.

largely on the work performed by Ms. Willis. Ms. Willis has an interest in the arguments made about that work. The *McAlear* holding does not preclude intervention by an attorney in a fee request proceeding filed by a former client, especially when the fee request arises out of that attorney's work. Those facts were not presented in *McAlear*. They are, however, squarely raised in the instant case. Given the language of the PAB's regulation governing intervention, I can find no basis for denying Ms. Willis's motion and find nothing in the *McAlear* decision to compel a contrary result.⁴

Ms. Willis is cautioned, however, that her role as an intervenor is limited. She may not advance a request for payment of fees beyond the hours encompassed within Petitioner's motion. If she has a dispute with Petitioner over the payment of additional fees, that dispute must be resolved in a different forum. Similarly, the PAB is not the proper forum for adjudicating attorney liens. Ms. Willis is limited to making arguments with respect to the issues raised in Petitioner's motion and with respect to the opposition filed by the Agency. If Ms. Willis wishes to submit a position with respect to these issues, she may do so by filing a brief within 10 days from the date of this Order.

SO ORDERED.

⁴ Similarly inapposite is the decision in *Gensburg v. Department of Veterans Affairs*, 85 MSPR 198 (2000), which denied a motion to intervene filed by a non-attorney representative claiming an entitlement to reimbursement of fees. As the MSPB noted, the statute does not permit non-attorney representatives to recover their fees. *Id.* at 208-09.