THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
WENDEL PALMER,	)	OEA Matter No. 1601-0048-05
Employee	)	
	)	Date of Issuance: July 22, 2009
	)	
	)	
D.C. METROPOLITAN POLICE	)	
DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Wendel Palmer ("Employee") worked as a police officer with the D.C. Metropolitan Police Department ("Agency"). On October 1, 2004, Employee was flagged down by a citizen, Mrs. Kelly, who told him about a domestic situation involving her husband. Mrs. Kelly also informed Employee that she was hungry, so he allowed her to ride in his police car to a local restaurant where he picked up some food for her. After purchasing the food, Employee followed Mrs. Kelly up to her apartment to continue the conversation about her domestic issues. Minutes later, Mrs. Kelly's husband and his aunt, Ms. Smith, entered the apartment. Assuming that something inappropriate occurred between Mrs. Kelly and Employee, Mr. Kelly and Ms. Smith went to the Sixth District

Station to file a police report.[1] Employee was summoned to the station and asked to give his account of what transpired.

As a result of this incident, Employee received a notice of final agency decision on April 8, 2005.[2] Agency suspended him for thirty-five (35) days for conduct unbecoming an officer, failure to obey orders, and neglect of duty. On May 5, 2005, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). He argued that the suspension was a violation of the law which was based on insufficient evidence and that the penalty was excessive. Therefore, Employee requested that the suspension be rescinded or reduced.[3]

Agency argued that Employee admitted that he failed to obey orders by acknowledging that he gave Mrs. Kelly a ride in his police vehicle without express permission or without notifying a dispatcher of his whereabouts. Likewise, he failed to advise a dispatcher of his actions when he admitted to entering Mrs. Kelly's apartment. Additionally, Agency argued that Employee failed to properly investigate the existence of any outstanding Temporary Protection Orders against Mr. and/or Mrs. Kelly. Moreover, Agency believed that the statements provided by Mr. Kelly and Ms. Smith were compelling and reliable to support its charge of conduct unbecoming an officer. Therefore, Employee was suspended for cause, and a 35-day suspension was appropriate

[1] According to both witnesses' written statements, Employee's shirt and pants were unbuttoned when they entered the apartment.
[2] Specifically, Employee was charged with giving Mrs. Kelly a ride in his marked vehicle without authorization; leaving his assigned patrol duties to enter Mrs. Kelly's apartment without authorization; and being found by Mr. Kelly and Ms. Smith in a mode of undress.
[3] *Petition for Appeal,* p. 3-6 (May 5, 2005).

under the circumstances.[4]

On March 6, 2007, the Administrative Judge ("AJ") issued his Initial Decision in this matter. In respect to the charge of conduct unbecoming an officer, the AJ found that Agency did not meet its burden. He held that Agency solely relied on the written statements of Mr. Kelly and Ms. Smith; however, it did not conduct any follow up interviews to substantiate their claims. The AJ also considered that neither of the witnesses appeared at the evidentiary hearing despite the subpoenaed request for them to attend. However, he found Employee's testimony on this issue to be very credible. Therefore, he dismissed this charge entirely.[5]

As for the failure to obey orders and neglect of duty charges, the AJ found that although Employee had seemingly genuine intentions, he used extremely poor judgment in handling the situation with Mrs. Kelly. Therefore, Agency met its burden of proof on these two remaining charges.[6] Applying the *Douglas*[7] factors and taking into account that there were mitigating circumstances, the AJ reduced Employee's 35-day suspension to thirteen (13) days.[8] Therefore, Agency was ordered to provide back wages for the difference in suspension terms amounting to twenty-two (22) days.

After the Initial Decision became the final order of OEA, Employee's attorney filed a Motion for Attorney's Fees. He argued that in accordance with OEA Rule 635.1, "an employee shall be entitled to an award of reasonable attorney fees if: (a) he or she is a prevailing party; and (b) the award is warranted in the interest of justice." Employee

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[4] *Agency's Proposed Findings of Fact and Conclusions of Law,* p. 3-8 (August 17, 2006).
[5] *Initial Decision,* p. 5-8 (March 6, 2007).
[6] *Id.,* 8-10.
[7] *Douglas v. Veterans Administration,* 5 M.S.P.R. 280 (D.C. 1981).
[8] *Initial Decision,* p. 13-18 (March 6, 2007).

relied on the D.C. Court of Appeals decision, *Settlemire v. District of Columbia Office of Employee Appeals*, 898 A.2d 902 (D.C. 2006), to define a "prevailing party." *Settlemire* defines it as one "who has been awarded some relief by the court . . . ." It is Employee's position that the dismissal of the conduct unbecoming an officer charge and a substantial reduction of the suspension constitute *some* relief and, therefore, makes him the prevailing party in this matter. He also argued that the award is warranted in the interest of justice because his rights were violated by Agency because of its investigation and handling of this matter. Employee highlights incidents of abusive language by supervisors and Agency's failure to conduct a formal investigation as examples of such violations.[9] Additionally, Employee's attorney believed his fee to be reasonable and provided a detailed summary of the number of hours worked and the amount per hour he charged to work on this case.[10]

On May 23, 2007, the AJ issued an Addendum Decision on Attorney Fees in this matter. He agreed with Employee and found him to be the prevailing party. The AJ also relied on *Settlemire* and found that Employee received substantial relief by having the conduct unbecoming an officer charge dismissed and the suspension reduced to 13 days from 35. Moreover, the AJ agreed with Employee that his attorney's fees were warranted in the interest of justice because Agency's investigation was questionable from the outset. The AJ found that Agency failed to conduct a full and complete investigation before reaching certain conclusions about Employee's professional conduct. As a result of the AJ's review of the case, he determined that the amount requested by Employee's attorney

[9] *Employee's Motion for Attorney's Fees,* p. 2-5 (April 23, 2007).
[10] *Id*. at Exhibit B.

for fees was reasonable given the degree of difficulty and amount of legal service required in this matter. Therefore, he ordered Agency to pay Employee the requested fees.[11]

Also on May 23, 2007, but after the AJ issued his Addendum Decision on Attorney's Fees, Agency submitted its Opposition to Employee's Motion for Attorney's Fees. It argued that Employee was not the prevailing party in this case because OEA has held that a prevailing party must obtain "all or a significant part of the relief sought . . . ." Agency reasoned that Employee cannot be considered the prevailing party because it proved by preponderance of the evidence that he committed two of the three charges and his actions were more than *de minimus.* Consequently, the charges were justified, and attorney's fees are not warranted. Finally, Agency contends that Employee's attorney's fees are duplicative in nature and excessive.[12]

On May 24, 2007, the AJ issued an Order Denying Agency's Opposition to Employee's Motion for Attorney's Fees. The AJ held that Agency did not file an appeal of the Initial Decision in this case, and it also failed to file a timely motion to oppose Employee's Motion for Attorney's Fees. In accordance with OEA Rule 635.5, Agency had 15 business days from the date of Employee's motion to file his opposition. After waiting well past the 15-day deadline, the AJ issued his Addendum Decision on Attorney's Fees, and the record was closed. Therefore, the AJ denied Agency's Opposition to Employee's Motion for Attorney's Fees.[13]

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[11] *Addendum Decision on Attorney's Fees* (May 23, 2007).
[12] *Agency's Opposition to Employee's Motion for Attorney's Fees* (May 23, 2007).
[13] *Order Denying Agency's Opposition to Employee's Motion for Attorney's Fees* (May 24, 2007).

On June 22, 2007, Agency filed a Petition for Review with the OEA Board arguing that they consider his motion in opposition to Employee's Motion for Attorney's Fees. Although its motion was filed untimely, Agency argued that the record should have been kept open for it to present its argument because there was no prejudice to Employee in doing so. Additionally, he provided that the AJ should have found the number of hours spent on this matter by Employee's attorney to be duplicative and request that the fees be reduced.[14] Employee filed a response to Agency's Petition for Review on July 27, 2007.

Agency presents two matters for the Board to consider, but they were both untimely filed. The first is the Petition for Review. The Initial Decision was issued on March 6, 2007. In accordance with OEA Rule 633.1, "the initial decision *shall* become final thirty-five (35) calendar days after issuance." OEA Rule 633.2 provides the conditions upon which an Initial Decision can not become final. It states that "the initial decision *shall not* become final if any party files a petition for review or if the Board reopens the case on its own motion within thirty-five (35) calendar days after issuance of the initial decision." Because neither party filed a Petition for Review within 35 calendar days, the Initial Decision became final on April 10, 2007. Therefore, Agency's Petition for Review filed on June 22, 2007, was filed over two months past the deadline.

Secondly, Agency requests the Board to consider its Opposition to Employee's Motion for Attorney's Fees. Employee timely submitted his motion for attorney's fees on April 23, 2007. As the AJ correctly held, OEA Rule 635.5 provides that Agency had

[14] *Petition for Review* (June 22, 2007).

fifteen business days (until May 14, 2007) to file its opposition. However, it waited until May 23, 2007 to do so. Unlike what Agency seems to suggest, the AJ had no obligation to hold the record open any longer than the rules mandated regardless of how prejudicial it would not have been to Employee. This Board cannot justify reopening the record for Agency after having missed two important deadlines, while offering no compelling arguments to justify its untimely filings. Therefore, we must **deny** Agency's Petition for Review.[15]

[15] It should be noted that even if the Board considered the Petition for Review on the merits in this matter, we still would have denied it. Employee and the AJ correctly relied on *Settlemire* to properly define "prevailing party" as one who has been awarded some relief by the court. Employee is clearly the prevailing party in this case having had the serious charge of conduct unbecoming an officer dismissed, while also having his suspension reduced by 22 days. Even by Agency's definition of a prevailing party as one who obtains a significant part of relief, Employee would have been victorious because having 22 days of a 35-day suspension reversed in significant.

Additionally, we would have upheld the AJ's ruling that the attorney's fees are reasonable and not duplicative. As Employee provided in his response to Agency's Petition for Review, OEA has consistently relied on the Laffey Matrix when considering the reasonableness of attorney's fees. The fee of $180 per hour that Employee's attorney charged was lower than that assigned on the Laffey Matrix. Agency also offered no real evidence to prove that Employee's attorney duplicated charges. It only relied on the similarity of the language the attorney used to describe the work done on the case. This does not adequately prove that Employee's attorney's fees were duplicative. Therefore, we see no reason to disturb the AJ's order for Employee's Attorney's Fees in this matter.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**

FOR THE BOARD:

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Sherri Beatty-Arthur, Chair

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Barbara D. Morgan

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Richard F. Johns

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Hilary Cairns

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Clarence Labor, Jr.

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.