THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1],	)	
Employee	)	OEA Matter No. 1601-0023-22AF23R24
	)	
v.	)	Date of Issuance: November 26, 2024
	)	
D.C. DEPARTMENT OF PUBLIC WORKS,	)	
Agency	)	MICHELLE R. HARRIS, ESQ.
	)	Senior Administrative Judge
	)	

Charles E. Walton, Esq., Employee Representative
Madeline Terlap, Esq., Agency Representative

ADDENDUM DECISION ON ATTORNEY FEES ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

On November 29, 2021, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Department of Public Works' ("DPW" or "Agency") decision to suspend him from service for thirty (30) days effective November 1, 2021, through November 30, 2021. This matter was assigned to the undersigned Senior Administrative Judge ("AJ") on October 4, 2022. On June 15, 2023, I issued an Initial Decision reversing Agency's adverse action. Agency did not file an appeal; thus, this decision became final. On August 18, 2023, Employee, by and through his counsel, filed a Motion for Attorney Fees in the amount of $46, 237.85. On August 22, 2023, I issued an Order requiring Employee's counsel to submit a supplemental brief on or before August 31, 2023, because information was missing from the initial Motion. Further, this Order required Agency to submit a response to Employee's Motion on or before September 18, 2023. Employee filed the Supplemental Motion as directed. Agency also filed its Response as prescribed. Following the submission of briefs, the parties considered the possibility of mediation, however, the matter ultimately remained in adjudication.

On January 3, 2024, the undersigned issued an Addendum Decision on Attorney Fees (Addendum Decision) which award $12,349.30 in Attorney Fees. On February 7, 2024, Agency filed a Petition for Review of this matter with the OEA Board. On May 30, 2024, the OEA Board issued its

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

Opinion and Order ("O&O") remanding this matter back to the undersigned for further consideration. Specifically, the Board cited that considerations must be made regarding "the extent or degree of Employee's success to determine if an award of attorney's fees was warranted."[2] On June 5, 2024, I issued an Order scheduling a Status Conference for June 20, 2024. Employee's representative appeared as required, however Agency failed to appear. As a result, I issued an Order for Statement of Good Cause to Agency. Agency responded and cited therein that its new representative had not received the correct WebEx time for the June 20th Conference and included the updated Designation of Representation form. On June 25, 2024, I issued an Order finding Agency had shown good cause for its absence and rescheduled the Status Conference to Wednesday, July 10, 2024, via WebEx. Both parties appeared for the July 10th Status Conference as required. On July 10, 2024, I issued an Order requiring the parties to submit briefs to address the issue for consideration as prescribed in the OEA Board's Opinion and Order. Briefs were due on or before August 26, 2024. The parties have submitted their briefs as required. I have determined that an Evidentiary Hearing is not required. The record is closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether the extent or degree of Employee's success determines if an award of attorney fees is warranted in this matter.

SUMMARY OF THE PARTIES' POSITIONS

Employee's Position

Employee asserts that an award of fees is appropriate in this matter. Employee asserts that "on June 15, 2023, the Initial Decision in this matter reversed Agency's action of suspending Employee from service for thirty (30) days."[3] Further Employee provides that the Addendum Decision on Attorney Fees determined that Employee had prevailed in this matter, even though there was no restoration of backpay, or benefits awarded to Employee. Employee asserts that "an employee is considered the prevailing party if he received all or [a] significant part of the relief sought as a result of the decision."[4] Employee avers that when he filed his "Petition for Appeal in this matter on November 29, 2021, he was facing a thirty day suspension as a result of the Notice of Final Decision on Proposed Removal."[5] Further, Employee asserts that "[h]e was also facing the consequences of

[2] *See. Employee v DPW*, OEA Matter No. 1601-0023-22AF23 *Opinion and Order* at Page 7 (May 30, 2024). Further, the OEA Board cited that it must be determined "if Employee's degree of success amounts to more than a technical or nominal success."
[3] Employee's Brief in Support of Award of Attorney Fees at Page 2 (August 26, 2024).
[4] *Id*. Employee cites to *Zervas v District of Columbia Office of Personnel*, OEA Matter 1602-0138-88AF92 (May 14, 1993)."
[5] *Id*. The undersigned would also note that while Employee's brief references notice of proposed removal, a thirty-day suspension was the penalty in this matter.

having a thirty-day suspension on record in his personnel file; that disciplinary record could have been used as a factor in future disciplinary action or removal proceeding by the Agency against Employee."[6]

Employee argues that "Agency filed a Motion for Summary Disposition on April 3, 2023 (almost a year and a half after the filing of the Petition for Appeal) that posited that because Employee had 'never served a suspension in this matter' he had 'suffered no harm that entitles him to a remedy'."[7] Employee avers that in this same motion on page 3, Agency "observed that neither the D.C. Code nor the DCMR addresses whether an agency can implement a suspension after failing to do so within a specified period." Employee contends that "the record does not indicate when the Agency decided that it would not attempt a tardy implementation of the thirty-day suspension that it had issued against Employee."[8] Employee asserts that Agency "shifted its defense against Employee's Petition for Appeal and was attempting to undercut the strength of the forthcoming Motion for Attorney Fees." Employee further cites that in its April 2023 Brief, "Agency made statements that it 'deems the suspension to be unenforceable and has no intention of attempting to enforce it' in support of its argument that Employee had 'suffered no harm' as it abandoned its defense of its October 2021 Notice of Final Decision." Employee contends that "if the Agency had decided not to shift its defense against the Petition for Appeal to the argument that Employee 'suffered no harm' the Agency could still have processed the Notice of the Final Decision as it recovered from the disruptions caused by the pandemic."[9]

Employee also argues that there was nothing in the record to suggest "when Agency found that the Notice of Final Decision had not been placed in Employee's personnel file and it does not state when the Agency decided it would not correct the error of failing to place the Notice of Final Decision in Employee's personnel file." Employee asserts that when the Initial Decision was issued by OEA in June 2023, the decision noted that the "issue of the thirty-day suspension and the request for removal of the disciplinary action from the personnel record were moot." However, Employee argues that "these issues did not become moot until the Agency filed its Brief in Support of its Motion for Summary Disposition in April 2023, when the Agency abandoned its defense."[10] Employee asserts that by April 2023, "counsel for the Employee had already billed and earned the lion's share of its attorney's fees."

Employee avers that the "degree of success justifies attorney's fees." Employee asserts that in the instant matter he was the prevailing party and received a "favorable outcome." Employee avers that while he did not lose pay regarding the suspension that the "impact on Employee's reputation, career and psychological well-being cannot be understated."[11] Further, Employee cites that the "successful challenge rectified a significant wrong, restoring the Employee's professional standing and removing the taint of misconduct from their record." Employee iterates that the "erroneous suspension" affected his professional reputation and caused undue dress and potential harm to his career trajectory, as well as public embarrassment.[12] Employee asserts that the Initial Decision "help to vindicate the Employee's positions and help to correct the adverse effects, underscoring the substantial success achieved."

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[6] *Id*.
[7] *Id*. at Pages 2 -3.
[8] *Id*. at Page 3.
[9] *Id*.
[10] *Id*.
[11] *Id*. at Page 4.
[12] *Id*.

Employee also asserts that there should be policy considerations regarding an award of attorney fees in this matter. Specifically, Employee asserts that "[a]warding attorney's fees in this case serves the broader purpose of ensuring that employees can challenge unjust or erroneous actions by their employers without being deterred by the potential costs of legal representation."[13] Further, Employee contends that an award of fees in this matter would "reinforce the principle that employers must adhere to proper procedures and that employees are entitle to seek redress when these procedures are violated…[t]he OEA's ruling in favor of the Employee highlights the importance of procedural correctness, and an award of attorney's fees would further solidify this principle."[14] As a result, Employee avers that an award of attorney fees is warranted and is in the interest of justice regarding the extent of the success achieved.

Agency's Position

Agency avers that Employee is not entitled to attorney fees in this matter. Agency asserts that "an agency may be required to pay 'reasonable attorney fees if the appellant is the prevailing party *and* payment is warranted in the interest of justice."[15] (Emphasis in original). Agency asserts that "because Employee's success amounted only to a 'technical or nominal' success, Employee is not entitled to attorney's fees."[16] Agency avers that "as far as actual relief was concerned, Employee's case was moot…[t]herefore the only relief he obtained was an acknowledgement that Agency did not have cause to take adverse action against him."[17] Agency contends that "this sort of nominal relief has been found to reduce -or altogether eliminate- an employee's request for attorney's fees."[18]

Agency argues that OEA precedents suggest that "Employee is not entitled to an award of attorney's fees because he failed to obtain any of the relief he sought."[19] Agency avers that "because Employee achieved only nominal success, the awarded attorney fees of $12,349.30, are 'per se unreasonable and unwarranted in the interest of justice."[20] To support this contention, Agency cites to *Mezile v D.C. Department on Disability Services*[21], wherein the OEA considered employee's request for $48,347.50 for attorney fees, after employee obtained an award of $1800 in pay. Agency asserts that in *Mezile*, the OEA found that an award of attorney fees was "neither reasonable or in the interest of justice and awarded no attorney fees."[22] Agency also cites that the D.C. Court of Appeals upheld this decision, citing to the limited degree of employee's success. Agency asserts that in the instant matter, Employee received "even less than the employee received in *Mezile* – only an acknowledgement that his suspension that was never served was improper." As such, Agency

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[13] *Id*. at Page 5.
[14] *Id*.
[15] Agency's Opposition to Employee's Request for Attorney's Fees at Page 2 (August 26, 2024). Citing to 6-B DCMR§639.1; *Allen v U.S. Postal Serv*., 2 M.S.P.R 420 (1980).
[16] *Id*. Citing to *Farrar v Hobby*, 506 U.S. 103, 114 (1992).
[17] *Id*.
[18] *Id*. at Pages 2-3.
[19] *Id*. at Page 3. Agency cited to *Employee v. D.C. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0006-20AF22, at *4 (March 17, 2023) which cited to *Hensley v. Eckerhart*, 461 U.S. 424 (1983); see also *Marek v. Chesny*, 473 U.S. 1, 105 (1985).
[20] *Id*.
[21] OEA Matter No. 2401-0158-09A17 at*6 (June 14, 2017).
[22] *Id*. at Pages 3-4.

maintains that "Employee's limited degree of success makes an award of attorney's fees unreasonable and contrary to the interests of justice."[23]

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

In the Addendum Decision on Attorney Fees issued on January 4, 2024, I found that Employee was the prevailing party in this matter and also made a finding that an award of attorney fees was in the interest of justice given Agency's actions failing to appropriately administer the 30-day suspension, while having issued a Notice regarding, in violation of *Allen Factor 4 – Gross Procedural Error*.[24] Following those findings, I determined that while fees were in the interest of justice, that the requested fees were unreasonable and ultimately determined that an award of $12,359.30 was an appropriate award. As was previously cited, Agency filed a Petition for Review on February 7, 2024, arguing that because there was no award of backpay that an award of attorney fees in this matter was unwarranted. On May 30, 2024, the OEA Board issued its Opinion and Order, which cited that the undersigned should have considered the extent or degree of Employee's success in this matter and whether an award of fees is appropriate.

Employee does not dispute that he did not receive a monetary award. However, Employee asserts that because of Agency's actions, he incurred legal expenses to have this issue addressed before OEA. Specifically, Employee asserts that Agency's actions only became moot after Agency filed its Motion for Summary Disposition while this matter was being adjudicated before OEA. Further, Employee notes that Agency's "change in defense" in that it would not seek to institute the suspension and that it was not in Employee's personnel file was not until April 2023, nearly a year and a half after the date of the final notice of the 30-day suspension. Employee filed his Petitoin for Appeal for the suspension on November 29, 2021. Following an attempt at the mediation of this matter and several requests for extensions, the parties submitted final substantive briefs in this matter in April 2023. Employee asserts that his counsel "earned the lion's share" of fees during this time frame. Further, Employee avers that he was harmed and that the Initial Decision reversing the suspension ensured that his personnel record was clear. Further, Employee maintains that Agency's actions resulted in the proceedings before this Office for which Employee sought and obtained legal representation. Employee further cites that an award of fees is in the interest of justice, as "[a]warding attorney's fees

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[23] *Id*.

[24] In *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980), the Merit Systems Protection Board (MSPB), this Office's federal counterpart, set out several circumstances to serve as "directional markers toward the 'interest of justice' (the "Allen Factors")—a destination which, at best can only be approximate. Id. at 435. The circumstances to be considered 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 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 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, *Id*. at 434-35.

in this case serves the broader purpose of ensuring that employees can challenge unjust or erroneous actions by their employers without being deterred by the potential costs of legal representation."[25]

Agency maintains that because Employee's success amounted only to a "'technical or nominal' success, Employee is not entitled to attorney's fees."[26] Agency avers that "as far as actual relief was concerned, Employee's case was moot…[t]herefore the only relief he obtained was an acknowledgement that Agency did not have cause to take adverse action against him."[27] Agency contends that "this sort of nominal relief has been found to reduce -or altogether eliminate- an employee's request for attorney's fees."[28] Agency maintains that Employee never served a suspension and never had salary withheld, and as such suffered no harm. Agency avers that OEA's holding in *Mezile*, which was upheld by the D.C. Court of Appeals evinces that attorney fees are not warranted in the instant matter.

The undersigned agrees with Agency that OEA has consistently held that an award of attorney fees must consider the degree of success for that award. This noted, the undersigned finds that the interest of justice must also weigh in the balance of considerations for an award of fees. In the Initial Decision issued on June 15, 2023, the undersigned reversed Agency's actions of suspending Employee from service for 30 days. The undersigned noted in that Initial Decision that the actions regarding the restoration of backpay and benefits were "moot" since Employee did not suffer any loss of the aforementioned. This noted, the undersigned would note that this "mootness" only applied to practicality of an order citing to any responsibility for Agency to provide backpay, this did not mean that Agency's actions were without fault or that the Petition for Appeal was without merit. The undersigned found that Agency's actions regarding the suspension were without cause and as a result the action was reversed. Additionally, the Initial Decision required Agency to provide documentation evincing that the suspension and all associated documentation related to that adverse action were removed from Employee's personnel file. It is of note because Agency had not previously done so. Employee averred that he was not able to simply rely on Agency's word that they would never seek to enforce/levy the suspension and/or that it would not be a part of his personnel record moving forward. Agency cited in its own brief that it did not have a specific policy in this regard, but that it had no knowledge of a suspension being enforced after a passage of time as was in this case. Further, in the Addendum Decision of Attorney Fees issued on January 3, 2024, the undersigned found that Agency's failures in its administration of the action constituted gross procedural error as considered by the *Allen* factors. As such, the undersigned disagrees with Agency's position that there was no harm and that the only relief was just "an acknowledgement that there was no cause for adverse action." Accordingly, the undersigned finds that despite the lack of monetary compensation in this matter, the relief of removing the action from Employee's personnel file is substantive in nature, even if difficult to quantify in typical measures given there was no pay withheld or otherwise. Further, the undersigned finds that harm can be suffered when an employee's personnel file reflects discipline and adverse actions. Disciplinary actions in personnel records can result in prohibitions of promotion and can be utilized when considering any future disciplinary actions.

For these reasons, the undersigned finds that an award of attorney fees are in the interest of justice. However, upon consideration of OEA's findings in *Mezile*, **the undersigned finds that the initial award of $12,349.30, is not appropriate under the circumstances**. **This noted and for the**

[25] Employee's Brief *at* at Page 5. (August 26, 2024).
[26] Agency's Opposition Brief. Citing to *Farrar v Hobby*, 506 U.S. 103, 114 (1992). (August 26, 2024).
[27] *Id.*
[28] *Id.* at Pages 2-3.

aforementioned reasons regarding Agency's gross procedural error, the undersigned does find that an award of fees in the amount of $2,219.25 is warranted. This award constitutes the time expenditure made on April 10, 2023, for work done on the substantive brief that was submitted on Employee's behalf. That brief, along with Agency's brief, was the material documents relied upon in rendering the Initial Decision in this matter. The undersigned finds that in the interest of justice, namely regarding employees from being deterred from seeking legal representation and/or challenging adverse actions levied against them; that this award of fees is warranted in the instant matter.

ORDER

Based on the foregoing it is hereby **ORDERED** that Agency pay, within thirty (30) days from the date on which this Addendum Decision on Remand becomes final, **$2,219.25 (Two thousand, two hundred nineteen dollars and twenty-five cents)** in attorney fees.

FOR THE OFFICE:

/s/ Michelle R. Harris
Michelle R. Harris, Esq.
Senior Administrative Judge