

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
Robert Alvarado)	OEA Matter No. 1601-0069-13A18
Employee)	
)	Date of Issuance: February 7, 2019
v.)	
)	Senior Administrative Judge
D.C. Fire & Emergency Medical Services)	Joseph E. Lim, Esq.
Agency)	
)	
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Megan Mechak, Esq., Employee Representative		
Tamika Springs, Esq., Agency Representative		

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL BACKGROUND

On March 27, 2013, Robert Alvarado (“Employee”), a Lieutenant at the D.C. Fire & Emergency Medical Services (“Agency”), filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) from Agency’s action demoting him for charges of insubordination.

This matter was assigned to me on February 25, 2014. After I conducted a Prehearing Conference on May 9, 2014, I ordered the parties to submit legal briefs on the issues identified. After their submissions, the parties requested mediation on April 13, 2015, and thus, this matter was assigned to a mediator. On May 13, 2015, Agency informed this Office that it had reversed its adverse action against Employee and had the mediation cancelled. Employee’s demotion was rescinded and he was restored to his position of Lieutenant retroactive to July 1, 2012. In addition, all back pay and benefits lost during the demotion period were reimbursed. Agency then filed a Motion to Dismiss on the grounds that the appeal is moot. Employee opposed the motion on the ground that Agency had not yet fully given his backpay. I held a Status Conference on March 4, 2016, where both sides presented their arguments regarding Agency’s motion. On March 9, 2016, I dismissed the appeal for mootness. This decision became final thirty-five days later.

On September 19, 2018, Employee filed a motion for award of attorney fees, pursuant to OEA Rule 635.1.¹ On October 18, 2018, pursuant to OEA Rule 634.4,² I ordered Agency’s

¹ OEA Rule 634.1, 59 D.C. Reg. 2129 (2012). Reads as follows: “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.”

² OEA Rule 634.4, 59 D.C. Reg. 2129 (2012), states “An agency may file a written opposition to the employee’s motion for attorney fees within fifteen (15) business days of service of the motion or within such time as the

response to Employee's fee motion. After Agency submitted a request for an extension of time, I partly extended the deadline for submission of Agency's response to November 5, 2018. Agency filed its opposition to the motion on November 5, 2018. In its response, Agency questioned the entirety of Employee's fee petition, as well as its specifics. The record is closed.

JURISDICTION

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

ISSUES

1. Whether Employee is the prevailing party, and whether payment of attorneys' fees is warranted in the interest of justice.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The following facts are not subject to genuine dispute:

1. On January 4, 2012, Employee was interviewed by a reporter for Washington's Fox 5 News regarding a recent change to the Agency's uniform policy. During the interview, a patient arrived at the firehouse needing immediate medical assistance. Employee immediately delivered care to the patient. A portion of the care that was provided was recorded and broadcast in a Fox 5 news segment. As a result of this incident, FEMS charged Employee with Neglect of Duty for violating the patient's right to privacy. Agency noted this as Case No. U-12-073.
2. On February 21, 2012, Employee was assisting a colleague outside the FEMS Training Academy when he was approached by Battalion Fire Chief ("BFC") Mark J. Wynn who reported that Employee was wearing logo noncompliant gear. Employee responded that he did not have compliant gear that was weather appropriate and accordingly refused the order. As a result of this incident, FEMS charged Employee with Insubordination. Agency noted this as Case No. U-12-077.
3. As a result of these charges, a Fire Trial Board hearing held on May 16, 2012, on Case No. U-12-073 and Case No. U-12-077, Agency demoted Employee from Lieutenant to Sergeant and suspended him without pay for two hundred sixty-four duty hours for neglect of duty and insubordination.
4. Employee served his suspension from July 3, 2012, through August 22, 2012.
5. Employee appealed this adverse action in OEA Matter No. 1601-0173-12. This

matter was assigned to Senior Administrative Judge Eric Robinson.

6. After returning to work from his suspension, Employee worked overtime on August 25, 2012, which was in the same pay period as August 22, 2012.
7. On July 2, 2012, while that matter was pending, Agency issued an Amended Letter of Decision/Demotion to Employee, informing him that he would be demoted again from Sergeant to Firefighter effective March 10, 2013, for an insubordination charge on Case No. U-12-216.
8. Case No. U-12-216 accused Employee of working overtime during the pay period of his suspension above, in violation of Fire Department Bulletin 11, Section 111.5.
9. As a result of this charge, a Fire Trial Board hearing held on January 24, 2013, on Case No. U-12-216, demoted Employee from Sergeant to Firefighter.
10. On February 28, 2013 Agency issued an Amended Letter of Decision/Demotion to Employee, which corrected the aforementioned suspension period for Case No. U-12-216.
11. On March 27, 2013, Employee filed a Petition for Appeal on Case No. U-12-216 with OEA, where it was labeled as this instant matter, OEA Matter No. 1601-0069-13. This matter was assigned to me.
12. On February 2, 2015, Judge Robinson issued an Initial Decision (“ID”) in OEA Matter No. 1601-0173-12 reversing Agency’s action.
13. On or around March 10, 2015, Agency informed Employee that it would not seek review of OEA Matter No. 1601-0173-12, and would implement Senior Administrative Judge Robinson’s decision.
14. In the instant matter, the parties were ordered into mediation on April 17, 2015. However, the mediation never occurred.
15. On May 13, 2015, Agency issued to Employee a Rescission of Final Agency Decision: Demotion. The letter informed Employee that Agency will reinstate him to the rank of Lieutenant retroactive to July 1, 2012, and that Agency will also reimburse all his back pay and benefits lost during the demotion period. Further, all Agency records pertaining to Case U-12-216 will be removed from its files. Employee was then directed to assume his duty station at the rank of Lieutenant effective May 31, 2015.
16. Based on Agency’s motion to dismiss due to the fact that the demotion was in fact

rescinded prior to its effective date, I issued an ID on March 9, 2016, dismissing OEA Matter No. 1601-0069-13 as moot.

17. On December 7, 2017, Employee filed a petition for \$61,708.58 in attorney fees covering both OEA Matters No. 1601-0173-12 and 1601-0069-13.
18. While the parties were engaged in mediation on the attorney fee, Employee amended his fee petition for both matters to \$189,963.08, explaining that the earlier lower figure was due to an inadvertent clerical error.
19. Administrative Judge Robinson ordered Employee to separate his fee petition between OEA Matters No. 1601-0173-12 and 1601-0069-13, as he was dealing only with OEA Matter No. 1601-0173-12.
20. Employee then submitted to Administrative Judge Robinson a \$120,856.31 attorney fee petition for OEA Matter No. 1601-0173-12.
21. On September 19, 2018, Employee also filed an attorney fee petition in the instant matter for \$99,145.94.

ENTITLEMENT OF EMPLOYEE TO ATTORNEY FEES

D.C. Official Code § 1-606.08 provides that “[An Administrative Judge of this Office] may require payment by the agency of reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interest of justice.” *See also* OEA Rule 635.1, *supra* at n.1.

1. Prevailing Party

“[F]or an employee to be a prevailing party, he must obtain all or a significant part of the relief sought. . . .” *Zervas v. D.C. Office of Personnel*, OEA Matter No. 1602-0138-88AF92 (May 14, 1993). *See also Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371, 375 (1980). As noted in the above statement of facts, Employee appealed Agency’s action demoting him again from Sergeant to Firefighter effective March 10, 2013, for insubordination. Employee regained his former position when Agency reversed his demotion.

First, Agency opposes Employee’s motion for an award of attorney’s fees because the motion was untimely. Agency states that OEA Rule 634.2 requires that a request for attorney fees be filed within thirty days of the date that the initial decision becomes final, unless the assigned Administrative Judge orders otherwise.³ However, I note that Agency was also untimely in its response to the fee petition. OEA Rule 634.4, states that “An agency may file a written opposition to the employee’s motion for attorney fees within fifteen (15) business days of service

3 59 D.C. Reg. 2129 (2012).

of the motion or within such time as the Administrative Judge may direct.”⁴ In fact, Agency had to be ordered to provide a response, and it still responded by asking for an extension. Thus, Agency’s argument regarding timeliness is without merit.

Agency also asserts that because it rescinded its adverse action and the appeal was dismissed for mootness, Employee is not a prevailing party for purposes of awarding attorney fees. Employee insists that he is a prevailing party since he obtained all of the relief sought and is thus entitled to attorney fees. He refers back to OEA Matter No. 1601-0173-12 and the actions taken by Agency thereafter to show that he had been made whole from this particular adverse action.

It cannot be reasonably disputed that Employee is a prevailing party in OEA Matter No. 1601-0173-12, and thus, is entitled to attorney fees in that matter. In *D.C., et. al. v. Jerry M. et. al.*, the D.C. Court of Appeals expanded the definition of a prevailing party to include those who obtained relief by way of a settlement agreement or consent decree.⁵ However, the issue in the instant matter is whether Employee is a prevailing party for the purpose of awarding attorney fees where an appeal was dismissed for mootness.

This Office dealt with this issue in *Nury Hernandez v. Office of Unified Communications*, OEA Matter No. 1601-0073-14, *Opinion and Order on Petition for Review* (April 18, 2017). In *Hernandez*, Employee objected to Agency’s motion to dismiss her appeal as moot despite the fact that Agency had rescinded its adverse action. The employee in *Hernandez* had argued that her appeal is not entirely moot because Agency did not reimburse her for attorneys’ fees and that she needed to retain legal counsel for the sole purpose of convincing Agency to rescind her adverse action. Similar to the instant matter, Agency in *Hernandez* argued that Employee cannot be considered the prevailing party in this matter because she did not secure a favorable judgement before OEA on the merits of her appeal.

The OEA Board held that when there is no meaningful relief that could be afforded Employee, then Employee cannot be permitted to pursue litigation based solely on the desire to be awarded attorney’s fees and thus, the appeal was properly dismissed as moot.

The OEA Board concluded that where an employee’s petition was rendered moot because Agency had rescinded its adverse action, the employee cannot be considered a prevailing party as she did not secure a favorable judgment before OEA on the merits of her appeal. Based on the undisputed record, I conclude that Employee is not a prevailing party, and thus, is not entitled to attorney’s fees.

ORDER

It is hereby ORDERED that Employee’s motion for attorney’s fees is denied.

⁴ *Id.*

⁵ 580 A.2d 1270 (September 5, 1990).

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge