

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

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|-------------------------------------|---|---------------------------------|
| In the Matter of: |) | |
| |) | |
| JAMES O'BOYLE |) | OEA Matter No. 1601-0020-05A10 |
| Employee |) | |
| |) | Date of Issuance: April 5, 2010 |
| v. |) | |
| |) | Joseph E. Lim, Esq. |
| D.C. METROPOLITAN POLICE DEPARTMENT |) | Senior Administrative Judge |
| Agency |) | |
| |) | |

Robert Deso, Esq., Employee Representative
Ross Buchholz, Esq., Agency Representative

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL HISTORY

On February 1, 2005, Employee, a sergeant, appealed his termination effective January 8, 2005, for 1) Drinking alcoholic beverage 2) Conviction; and 3) Conduct unbecoming of an officer. In an Initial Decision issued October 17, 2006, Administrative Judge (AJ) Muriel Aikens-Arnold upheld Agency's decision to terminate Employee. The AJ concluded that the suspension without pay proposed on August 11, 2004 constituted a non-disciplinary administrative action and not a disciplinary adverse action. The AJ further stated that Agency's selection of a penalty was a management prerogative, not subject to the exercise of discretionary disagreement by this Office.

Employee then filed a Petition for Review on November 8, 2006. In an Opinion and Order on Petition for Review issued on September 16, 2009, the Office of Employee Appeals (OEA) Board remanded the matter to the AJ for a determination on the appropriate penalty. The Board had found that there was disparate treatment and that Employee had been penalized twice for the same offense.

The matter was reassigned to the undersigned judge on November 2, 2009. I held a status conference on December 7, 2009, and closed the record after receiving briefs from the parties. On January 27, 2010, I issued an Initial Decision on Remand where I held that given the facts of this case and the Board's findings in the Opinion and Order on Petition for Review, I found that a penalty of a 30-day suspension, with 10 days held in abeyance (effectively a 20-day suspension) would place Employee in the position where he would have received the same treatment as similarly situated employees. Again, based on the Board's findings, I also find that the termination was a double punishment that should be reversed. I therefore reversed Employee's termination.

On January 27, 2010, Agency filed a petition for review of the Initial Decision on Remand with the Superior Court of the District of Columbia where it is now pending.

On March 17, 2010, Employee, through his attorney, submitted a Motion for Attorney Fees and Costs in the amount of \$11,647.00. That attorney fees motion is the basis for the instant Addendum Decision. On April 1, 2010, Agency submitted its opposition to Employee's motion. The record is closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.08 (2001).

ISSUE

Whether Employee's motion for attorney fees should be dismissed as being premature.

ANALYSIS AND CONCLUSIONS

D.C. Code Ann. § 1-606.8 (1999 repl.) 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, 46 D.C. Reg. at 9320.

In his motion for attorney fees, Employee states that since Employee's termination has been overturned, he is now the prevailing party and should be awarded attorney fees. Here, the relief which Employee sought was the reduction of his removal to a suspension and restoration to duty. In the ID, I ordered a reduction of his removal to a suspension, reversed a prior suspension, and ordered Agency to reinstate Employee to duty.

Agency has submitted a petition for review with the Superior Court of the District of Columbia. That petition is currently pending. Thus, at this point the question of whether Employee is a prevailing party has not been finally determined. Consequently, the motion for attorney fees is premature and must now be dismissed. However, the dismissal will be without prejudice, since Employee may yet become a prevailing party. If this occurs, he may then resubmit his motion for attorney fees.

ORDER

It is hereby ORDERED that Employee's motion for attorney fees is DISMISSED without prejudice.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge