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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EMPLOYEE ¹)	
)	OEA Matter No. 1601-0023-22AF23
v.)	
)	Date of Issuance: May 30, 2024
D.C. DEPARTMENT OF)	
PUBLIC WORKS,)	
Agency)	
)	

OPINION AND ORDER
ON
ATTORNEY’S FEES

Employee worked as a Heavy Mobile Equipment Mechanic Supervisor at the Department of Public Works (“Agency”). On October 26, 2021, Agency issued a Notice of Final Decision on Proposed Removal which provided that Employee was suspended for thirty days, pursuant to District Personnel Manual (“DPM”) § 1607. According to Agency, Employee was charged with failure or refusal to follow instructions, in accordance with DPM §§1607.2(d)(1) and (d)(2) and safety and health violations, pursuant to DPM § 1607.2(i)(4).² However, Agency failed to process Employee’s suspension.

Accordingly, the Office of Employee Appeals’ (“OEA”) Administrative Judge (“AJ”)

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

² *Petition for Appeal*, p. 46-52 (November 29, 2021).

ordered Agency to submit documentation or other personnel records related to its final notice, Employee's administrative leave, and the procedural administration of the adverse action.³ In its brief, Agency asserted that Employee did not serve his suspension and instead remained on paid administrative leave through December 1, 2021. It explained that the Covid-19 Public Health Emergency caused significant disruptions in the District and during this period, it failed to process Employee's suspension or place the final notice in his personnel file. Thus, it contended that Employee suffered no harm that would entitle him to a remedy.⁴

In his response, Employee argued that due to Agency's error, he served a suspension but remained on paid administrative leave until December 1, 2021. He conceded that he received his regular pay during this period. However, he contended that he lived under the threat of unpaid leave because of Agency's notice on final decision. Employee also requested that Agency's action be removed from his personnel file.⁵

On June 15, 2023, the AJ issued an Initial Decision. She opined that Agency committed numerous administrative processing errors and held that Agency lacked cause for the adverse action. The AJ determined that while the final decision imposed a thirty-day suspension against Employee, he never served the suspension. She held that Employee was on administrative leave prior to the effective date of the suspension, and Employee conceded that he received his full salary during the suspension period. Thus, she found that the issue of the thirty-day suspension without pay was moot. As it related to Employee's personnel file, the AJ found that Agency's assertion that the adverse action was not part of Employee's personnel file was made in good faith. Therefore, she held that his request that the action be removed from his personnel file was also

³ *Post-Status Conference Order* (February 9, 2023).

⁴ *Agency's Brief in Support of Its Motion for Summary Disposition*, p. 2-3 (April 3, 2023).

⁵ *Employee's Brief in Support of His Motion for Summary Disposition and Response to the Agency's Brief in Support of Its Motion for Summary Disposition*, p. 3-4 (April 11, 2023).

moot. The AJ ordered that Agency's action of suspending Employee be reversed and that Agency confirm that this action is not part of Employee's personnel record.⁶

Employee filed a Motion for Attorney's Fees on August 18, 2023. In his motion, he explained that he was the prevailing party in the matter and an award of attorney's fees and costs were warranted in the interest of justice.⁷ Accordingly, Employee requested \$46,237.85 in attorney fees, representing 47.8 hours of service performed by his attorneys before OEA.⁸

In response to the motion, Agency argued that an award of attorney's fees was not appropriate because Employee was not the prevailing party because the thirty-day suspension without pay and his request for relief were moot. It further reasoned that an award of fees was not warranted in the interest of justice. However, Agency submitted that if fees are awarded, they should be reduced by \$6,411.80 for duplicative work and for work conducted on unrelated matters not before OEA.⁹

The AJ issued an Addendum Decision on Attorney's Fees on January 3, 2024. She found that Employee was the prevailing party. The AJ also found that Agency was in violation of *Allen* factor 4, gross procedural error which prolonged the proceeding or severely prejudiced the

⁶ *Initial Decision*, p. 5-6 (June 15, 2023).

⁷ Employee cited to *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980), which outlined circumstances that serve as directional markers toward the interest of justice. The *Allen* factors exist in the following circumstances:

- (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.

Employee asserted that Agency violated the second *Allen* factor.

⁸ *Motion for Attorney Fees*, p.1-4 (August 18, 2023).

⁹ *Agency's Response to Employee's Motion for Attorney Fees*, p. 2-5 (September 18, 2023).

employee. She explained that while Agency's action may not have caused severe prejudice or prolonged the proceeding, it was a procedural error on Agency's part that warranted an award of attorney fees in the interest of justice.¹⁰

As it related to attorney fees, the AJ opined that Employee's request for fees was unreasonable. She determined that the number of hours expended was excessive given the degree of difficulty and the amount of time required in comparison to experienced attorneys who have appeared before OEA. Additionally, the AJ found that the fees requested included work performed prior to the filing of the OEA Petition for Appeal and a supplemental motion to Employee's original motion on attorney's fees. Thus, she denied these fees. Further, the AJ highlighted that there were no complex legal arguments made by either party; there was no evidentiary hearing conducted; and the delays in adjudication were because of Employee. As a result, she ordered Agency to pay \$12,349.30 in attorney fees.¹¹

Agency disagreed with the decision and filed a Petition for Review with the OEA Board on February 7, 2024. Agency asserts that an award of attorney's fees is required when the appellant is the prevailing party, and where payment is warranted in the interest of justice. It is Agency's position that the AJ erroneously determined that attorney's fees should be awarded in the interest of justice. Specifically, it argues that it did not violate *Allen* factor 4, as the AJ contended. According to Agency, this factor required gross procedural error *that prolonged the processing or severely prejudiced the employee* (emphasis added). However, it opines that the AJ held that its procedural error did not severely prejudice Employee or prolong the proceedings. Thus, according to Agency, the AJ's finding was erroneous.¹²

¹⁰ *Addendum Decision on Attorney Fees*, p. 3 (January 3, 2024).

¹¹ *Id.*, 8-14.

¹² *Agency's Petition for Review*, p. 3-4 (February 7, 2024).

Furthermore, Agency argues that Employee never served the suspension, and he never lost wages because he was paid in full during the suspension period. It contends that the only relief Employee obtained was the acknowledgment that it did not have cause to take the adverse action against him. Agency opines that this is nominal relief that according to the holding in *Phillippa Mezile v. D.C. Department on Disability Services*, OEA Matter No. 2401-0158-09AF17 (June 14, 2017), would not warrant attorney's fees because the fees would be unreasonable and unwarranted in the interest of justice. Consequently, it requests that the Board reverse the Addendum Decision on Attorney Fees.¹³

Employee filed a response to Agency's Petition for Review on March 13, 2024. He asserts that the AJ's decision is based on substantial evidence and that the fees are reasonable. Employee maintains that he is the prevailing party and is entitled to attorney's fees in the interest of justice. Employee, again, argues that Agency violated the second *Allen* factor. Further, Employee contends that Agency did not contest the fees requested by Employee. Therefore, it requests that the Addendum Decision on Attorney Fees be upheld.¹⁴

Substantial Evidence

According to OEA Rule 637.4(c), the Board may grant a Petition for Review when the AJ's findings are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.¹⁵

¹³ *Id.*, 4-6.

¹⁴ *Response to Agency's Petition for Review*, p. 2-6 (March 13, 2024).

¹⁵ *Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

Reasonableness of Attorney's Fees

In its Petition for Review, Agency does not make any arguments related to Employee being the prevailing party in this matter; it focuses on the AJ wrongfully awarding attorney's fees that are not in the interest of justice. Agency argues that Employee's only relief obtained was the acknowledgement by the AJ that Agency did not have cause. It asserts that this is a nominal relief which would not warrant attorney's fees. Finally, Agency contends that Employee could not recover lost wages because he never served the suspension and received full pay during the suspension period.¹⁶

As the AJ highlighted in her Addendum Decision on Attorney's Fees, this case provided a unique set of circumstances because there was no restoration of backpay or benefits because Employee never served the suspension.¹⁷ Consequently, the AJ found that Employee's thirty-day suspension without pay, and his request to remove the matter from his personnel record were both moot.¹⁸ In *Settemire v. District of Columbia Office of Employee Appeals*, 898 A.2d 902 (D.C. 2006), the D.C. Court of Appeals found that a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. The Court further held that the legal interest at stake must be more than simply the satisfaction of a declaration that a person was wronged.¹⁹ Thus, as will be explained below, this Board believes that this matter must be remanded to the Administrative Judge.

The D.C. Court of Appeals held in *Phillippa Mezile v. District of Columbia Department of Disability Services, et al.*, No. 19-CV-161 (D.C. 2020) that “. . . although [an] appellant was a prevailing party . . . , the Office of Employee Appeals could reasonably find that the fee request was unreasonable in light of [their] limited degree of success on appeal and the minimal amount of her award.” Furthermore, the United States Supreme Court held in *Farrar v. Hobby*, 506 U.S. 103 (1992) that “although the ‘technical’ nature of a nominal damage award . . . does not affect the prevailing party

¹⁶ *Agency's Petition for Review*, p. 5-6 (February 7, 2024).

¹⁷ *Addendum Decision on Attorney's Fees*, p. 3 and 8 (January 2, 2024)

¹⁸ *Initial Decision*, p. 8 (June 15, 2023).

¹⁹ Citing *Lankford v. City of Hobart*, 73 F.3d 283, 288 (10th Cir. 1996).

inquiry, it does bear on the propriety of fees awarded.” Likewise, the Court in *Farrar* (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)) reasoned that “the most critical factor in determining the reasonableness of a fee award is the degree of success obtained.” The Court opined that if a party has achieved only partial or limited success, the number of reasonably expended hours times a reasonable hourly rate, may be an excessive amount. Moreover, it held that “in some circumstances, even a plaintiff who formally prevails . . . should receive no attorney’s fees at all.”

As a result, OEA Administrative Judges have *first* determined an employee’s degree of success before considering the amount of attorney’s fees (emphasis added).²⁰ Although there was an extensive analysis of the hourly rate and reasonable hours expended in this case, there was no analysis offered by the AJ to consider the extent or degree of Employee’s success to determine if an award of attorney’s fees was warranted. The AJ must determine if Employee’s degree of success amounts to more than a technical or nominal success, as Agency contends. This is especially prudent given the AJ’s holding that the requested relief was moot, and where there was no restoration of backpay or changes to Employee’s personnel file. Accordingly, we remand this matter to the Administrative Judge to provide this analysis.

²⁰ *Phillippa Mezile v. D.C. Department on Disability Services*, OEA Matter No. 2401-0158-09AF17, p. 5-6 (June 14, 2017); *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18R20AF22 (May 23, 2022); and *Employee v. D.C. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0006-20AF22 (March 17, 2023).

ORDER

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Administrative Judge for further consideration.

FOR THE BOARD:

Clarence Labor, Jr., Chair

Peter Rosenstein

Dionna Maria Lewis

Arrington L. Dixon

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.