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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
EMPLOYEE,	)	
Employee	)	OEA Matter No. 1601-0023-18-AF22
	)	
v.	)	Date of Issuance: December 20, 2022
	)	
DEPARTMENT OF HEALTH,	)	
Agency	)	ERIC T. ROBINSON, ESQ.
	)	SENIOR ADMINISTRATIVE JUDGE
_____	)	
James E. McCollum, Jr., Esq., Employee Representative		
Bradford Seamon, Jr., Esq., Agency Representative		

**THIRD ADDENDUM DECISION ON ATTORNEY FEES AND COSTS**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On January 16, 2018, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting the District of Columbia Department of Health’s (“DOH” or the “Agency”) adverse action of removing him from service. Employee’s last position of record was Public Health Analyst, CS-685-13, Grade 13 Step 10. Employee’s last duty station was within the DOH’s Office of Health Equity (“OHE”). On or around January 2017, Agency presented Employee with an Individual Performance Plan (“IPP”). According to DOH, Employee did not meet these goals within the timeframe envisioned by the IPP and his Supervisor. Accordingly, DOH took the next step in attempting to rehabilitate Employee’s work performance by instituting a Performance Improvement Plan (“PIP”). The PIP was formally presented and received by Employee on June 21, 2017.

On October 6, 2017, DOH concluded that Employee had failed to successfully complete the PIP. After due consideration, DOH decided that removal from service was the only viable option. On November 1, 2017, Agency issued Employee a notice of proposed separation. The proposal was assigned to a hearing officer, who determined that the removal was sustainable. On December 18, 2017, Agency issued its final decision, removing Employee from his position with Agency.

This matter was then assigned to the Undersigned on April 4, 2018. Thereafter, the parties appeared for a Prehearing/Status Conference. Subsequently, the parties were Ordered to brief whether the instant PIP (and Employee's subsequent removal) was conducted within the bounds of applicable law, rule and regulation. The parties complied with the briefing schedule. The Undersigned issued an Initial Decision ("ID") on January 31, 2020. As part of the ID, Agency's removal action was reversed due to, *inter alia*, it not following the applicable PIP procedure outlined within the District Personnel Manual. On April 8, 2020, DOH filed a Petition for Review with the District of Columbia Superior Court. On April 9, 2020, Employee, through counsel, filed a Motion for Attorney's Fees and Costs. Thereafter, the Undersigned issued an Addendum Decision on Attorney Fees on May 29, 2020. Pursuant to that Decision, Employee's Motion for attorney fees and costs was denied without prejudice.

On October 7, 2020, District of Columbia Superior Court Judge Shana Frost Matini issued an Order affirming the ID. On November 6, 2020, Employee, through counsel submitted a Second Motion for Attorneys' Fess and Costs asserting that the ID had been affirmed. On November 5, 2020, DOH filed a Notice of Appeal ("NOA") with the District of Columbia Court of Appeals. DOH submitted its reply to the Second Motion for Attorney Fees countering that this matter is still under active review before the District of Columbia Court of Appeals. On December 10, 2021, the Undersigned issued a Second Addendum Decision on Attorney Fees and Costs and found that the submission was premature due to the then ongoing review of the matter.

On April 28, 2022, the District of Columbia Court of Appeals<sup>1</sup> issued its Opinion and Judgment wherein it affirmed the District of Columbia Superior Court judgment in the instant matter. On May 31, 2022, Employee submitted his Third Motion for Attorneys' Fees and Costs ("Third Motion"). In this motion, Employee requests Attorneys' Fees and Costs in the amount of \$54,873.46. Thereafter, the parties engaged in protracted settlement talks under the auspices of the OEA's Mediation department. Regrettably, those talks were cancelled, and the matter was returned to the Undersigned on November 15, 2022, for a judgment on the merits. On November 23, 2022, DOH responded to Employee's Third Motion and noted as follows "[DOH] does not oppose [Employee's] request for an award of attorney's fees in the amount of \$54,873.46 per his May 31, 2022, Third Motion for Attorney's Fees and Costs.

### JURISDICTION

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

### BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

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<sup>1</sup> District of Columbia Department of Health v. [Employee], No. 20-CV-655 (April 28, 2022).

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 631.2 id. States:

For appeals filed under §604.1, the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

ISSUE

Whether Employee's counsel is entitled to an award of attorneys' fees; and if so, how much.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

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: 1) the prevailing party; and 2) payment is warranted in the interest of justice. *See also* OEA Rule 635.1, 46 D.C. Reg. at 9320. An employee is considered the "prevailing party," if he or she received "all or significant part of the relief sought" as a result of the decision.<sup>2</sup>

In this matter, Agency seemingly agrees that Employee is the prevailing party. Further, Agency asserts that it does not oppose paying \$54,873.46 as requested by Employee in his Third Motion. Accordingly, I hereby GRANT Employee's request for Attorneys' Fees and Costs in the amount of \$54,873.46

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency pay Employee within 45 calendar days from the date of the issuance of this Addendum Decision, the amount of \$54,873.46, for legal fees and costs payable to James E. McCollum, Jr.

FOR THE OFFICE:

*/s/ Eric T. Robinson*  
ERIC T. ROBINSON, ESQ.  
SENIOR ADMINISTRATIVE JUDGE

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<sup>2</sup> *Zervas v. D.C. Office of Personnel*, OEA Matter No. 1601-0138-88AF92 (May 13, 1993).