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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
EMPLOYEE <sup>1</sup>	)	OEA Matter No. 1601-0032-14AF21
	)	
v.	)	Date of Issuance: December 17, 2021
	)	
DEPARTMENT OF YOUTH	)	
REHABILITATION SERVICES,	)	
Agency	)	
_____	)	

OPINION AND ORDER  
ON ATTORNEY’S FEES

This matter was previously before the Board. On December 17, 2013, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting the Department of Youth Rehabilitation Services’ (“Agency”) act of removing him from his position as a Motor Vehicle Operator. Employee was charged with “any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: incompetence” and “any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious: inability to perform the essential functions of the job.”

The OEA Administrative Judge (“AJ”) issued his first Initial Decision on September 18, 2015. He held that Agency failed comply with D.C. Code § 1-623.45(b)(1), which provides that

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

an agency must accord an employee with the right to resume his or her position "...provided that the injury or disability has been overcome within two years after the date of commencement of compensation and provision of all necessary medical treatment needed to lessen [the] disability...." According to the AJ, Employee returned to work on November 5, 2012, without medical restriction, within two years of the commencement of Employee's Worker's Compensation benefits. He explained that Employee suffered a recurrence of his injury during his brief return to work and that under D.C. Code § 1-623.45(b)(1), a new two-year grace period began to run in November of 2012. Since Employee was terminated on December 29, 2013, the AJ concluded that Agency's termination action violated the applicable statutory provisions and that it failed to meet its burden of proof in establishing the requisite cause to terminate Employee. Consequently, Agency was ordered to reinstate Employee to his position with back pay and benefits.<sup>2</sup>

Agency filed a Petition for Review with the OEA Board on October 23, 2015. The OEA Board issued its Opinion and Order on Petition for Review on March 7, 2017. It noted that Employee returned to work from November 5, 2012 through December 17, 2012. However, the Board explained that there was no medical documentation from Employee's physician stating that he overcame his injury in November of 2012, or that Employee was provided with medical treatment to lessen his disability. Because there was insufficient evidence to determine whether Employee overcame his disability in November of 2012, the Board remanded the matter to the AJ to make further determinations.<sup>3</sup>

The AJ issued an Initial Decision on Remand on October 25, 2017. He held that under D.C. Code § 1-623.45(b)(1) and 7 District of Columbia Municipal Regulations ("DCMR") § 139.2, the

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<sup>2</sup> *Initial Decision* (September 18, 2015).

<sup>3</sup> *Opinion and Order on Petition for Review* (March 7, 2017).

commencement of compensation began on November 18, 2010 because that is when Employee's first Worker's Compensation check was issued. The AJ noted that Employee presented a Disability Certificate to Agency on November 5, 2012 when he returned to work. The certificate placed no restrictions or limitations on Employee's ability to work as a Van Driver. While Employee was placed in a mail room position upon his return to work, the AJ nonetheless concluded that Agency accepted the Disability Certificate as proof that Employee was medically cleared to work, without restriction, on November 5, 2012. He further opined that Employee likely re-aggravated his injury after returning to work. Based on the foregoing, the AJ held that Employee overcame his medical disability within in the two-year statutory period and that Agency violated D.C. Code § 1-623.45(b)(1) by terminating him. Consequently, Agency's termination action remained reversed.<sup>4</sup>

Agency filed a second Petition for Review with the OEA Board on November 29, 2017, and the OEA Board issued an Opinion and Order on Remand on April 24, 2018. It concluded that there was substantial evidence in the record to support a finding that Employee overcame his injury as of November 5, 2012, because the documentary evidence showed that he was medically cleared to return to work, without restriction, by his treating physician. However, in reviewing the parties' submissions, the Board could not make a determination regarding whether the AJ applied D.C. Code § 1-623.45(b)(1) or 7 DCMR § 139.2 in determining the date when the two-year 'return to work' period began to run. It was also unclear whether the "commencement of payment of compensation" date under D.C. Code § 1-623.45(b)(1) was the same date as the "first date the employee received compensation or medical treatment" under 7 DCMR § 139.2. The Board noted that an analysis performed under each of the former could result in two different outcomes regarding the disposition of this matter. Accordingly, the matter was remanded again for further

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<sup>4</sup> *Initial Decision on Remand* (October 25, 2017).

consideration.<sup>5</sup>

The AJ issued a Second Initial Decision on Remand on October 31, 2018. First, he determined that the statutory language of D.C. Code § 1-623.45(b)(1), instead of the regulatory language of 7 DCMR § 139.2 should govern this matter. Next, the AJ provided that this Board previously determined that the Disability Certificate, coupled with Agency's act of permitting Employee to return to work, constituted substantial evidence that Employee overcame his injury as of November 5, 2012. However, he stated that the issue presented on remand appeared to be one of first impression before OEA which largely hinged on the statutory interpretation of the meaning of "commencement of compensation" as it related to D.C. Code § 1-623.45(b)(1). In concluding that November 10, 2010 was the date Agency should have used for calculating the two-year period, the AJ pointed to the plain language of the Code. He disagreed with Agency's contention that the calculation of the two-year period should be based on the dates of eligibility of coverage. Instead, the AJ held that using November 18, 2010 as the date that Employee's "commencement of compensation" began was consistent with the language of D.C. Code § 1-623.45(b)(1) because that is the date when Employee's Worker's Compensation benefits commenced. Thus, the AJ held that Employee had two years from November 18, 2010 to overcome his injuries.<sup>6</sup>

In the alternative, the AJ suggested that even if he agreed with Agency's position that October 30, 2010 should be the date utilized to calculate the two-year period, Employee suffered a recurrence of his injury after briefly returning to work from November 5, 2012 until December 17, 2012. According to the AJ, the documentary evidence supported a finding that Employee visited his treating physician, Dr. Sankara Kothakota, on December 17, 2012, because of neck and

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<sup>5</sup> *Opinion and Order on Remand* (April 24, 2018).

<sup>6</sup> *Second Initial Decision on Remand* (October 31, 2018).

shoulder problems; Dr. Kothakota advised Employee not to return to his regular work schedule until his injuries were resolved; and Employee's follow-up visit on December 17, 2012 was directly related to his Worker's Compensation claim for a compensable injury. Because Employee suffered a recurrence of his injury, the AJ reasoned that the two-year period under D.C. Code § 1-623.45(b)(1) was "reset" at some point during Employee's brief return to work.<sup>7</sup>

Accordingly, the AJ held that Employee was entitled to resume full-time employment with Agency because he overcame his workplace injury within two years after the commencement of compensation under D.C. Code § 1-623.45(b)(1). The AJ also concluded that the two-year period was reset when Employee suffered a recurrence of his injury. As a result, he determined that Agency failed to comply with the applicable statutory provisions. Therefore, Agency was ordered to reinstate Employee to his previous position with backpay and benefits.<sup>8</sup>

Agency disagreed with the AJ and filed another Petition for Review with OEA's Board on December 5, 2018. The Board issued its Second Opinion and Order on Remand on October 22, 2019. It held that under D.C. Code § 1-623.45, the commencement of compensation of Employee's benefits began on November 18, 2010 and that Employee overcame his work-related injury as of November 5, 2012, within the two-year statutory period. Since Employee suffered a recurrence of his injury after resuming his full-time, unrestricted duties on November 5, 2012, the two-year period was reset. Accordingly, the Board opined that Agency did not have cause to initiate its termination action. Consequently, its Petition for Review was denied.<sup>9</sup>

Agency subsequently filed an appeal with Superior Court. Its petition was denied on September 21, 2020, and the OEA Board's Second Opinion and Order on Remand was affirmed.

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Second Opinion and Order on Remand* (October 22, 2019).

The matter was not appealed to the District of Columbia Court of Appeals and Employee was returned to work on December 20, 2020.<sup>10</sup>

On February 4, 2021, April 19, 2021, and June 4, 2021, counsel for Employee filed what were treated as Petitions for Attorney's Fees. Agency submitted its opposition to Employee's Petition for Attorney Fees on July 2, 2021. The AJ issued an Addendum Decision on Attorney's fees on September 15, 2021. He explained that pursuant to the holdings *Zervas v. D.C. Office of Personnel*<sup>11</sup> and *Hodnick v. Federal Mediation and Conciliation Service*,<sup>12</sup> in order to be entitled to an award of fees, an employee must be considered the "prevailing party," meaning he or she received "all or significant part of the relief sought" as a result of the decision. Since it was undisputed that Employee was the prevailing party in this matter, the AJ held that an award of fees was warranted in the interest of justice.<sup>13</sup>

In considering the reasonableness of the attorney's fees requested by Employee's counsel, the AJ utilized what is commonly referred to as the "Laffey Matrix"<sup>14</sup> which calculates reasonable hourly attorney's fees based on the amount of work experience the attorney has and the year in which the work was performed. He opined that the rate requested by counsel for Employee, \$500 per hour, was reasonable considering the Laffey Matrix as well as counsel's fifty years of legal experience. However, the AJ believed that the petition for fees contained time entries which were excessive and duplicative. According to the AJ, the hours counsel for Employee expended in prosecuting the current appeal did not align with the amount of time expected of someone with his

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<sup>10</sup> *Agency's Petition for Review and Request for Extension of Time to Submit its Memorandum of Supporting Points and Authorities* (October 19, 2021).

<sup>11</sup> OEA Matter No. 1601-0138-88AF92 (May 14, 1993).

<sup>12</sup> 4 M.S.P.R. 371 (1980).

<sup>13</sup> *Addendum Decision on Attorney Fees* (September 15, 2021).

<sup>14</sup> The Laffey Matrix is an "x-y" matrix, with the x-axis being the years during which the legal services were performed; and the y-axis being the attorney's years of experience. The axes are cross-referenced, which yields a figure that is a reasonable hourly rate.

experience. Therefore, he believed that a significant reduction in fees was warranted.<sup>15</sup> As a result, the AJ reduced the number of hours requested by Employee's counsel from 323.08 hours to 58.5 hours. Consequently, Agency was ordered by pay a total of \$29,250 in fees to Employee's counsel.<sup>16</sup>

Agency disagreed with the Addendum Decision and filed a Petition for Review and Request for Extension of Time to Submit its Memorandum of Supporting Points and Authorities with the OEA Board on October 19, 2021. It claims that Employee's now former counsel admitted on October 14, 2021, that his law license had been suspended since July of 2019. Agency states that despite counsel's suspension, he represented to Employee and this Office that he was an active member of the District of Columbia bar. It believes that the award of fees should be denied in light of counsel's current suspension.<sup>17</sup>

#### Attorney Suspension

Agency argues that counsel's Petition for Attorney's fees should be denied because he was suspended by the D.C. bar on July 2, 2019.<sup>18</sup> While this Board agrees that Employee's attorney is not entitled to fees incurred while he was administratively suspended from the practice of law, Agency has not provided a compelling basis for finding that counsel should not be entitled to fees accrued prior to the date of his suspension. In fact, the last entry provided by Employee's counsel was titled "Prepared Employee's Memorandum in Opposition to DYRS' [December 5, 2018] Petition for Review. Employee's response was filed on January 15, 2019.<sup>19</sup> Thus, counsel has not requested the award of attorney's fees during the time in which he was suspended by the bar.

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<sup>15</sup> *Addendum Decision on Attorney Fees* at 13.

<sup>16</sup> *Id.*

<sup>17</sup> *Agency's Petition for Review and Request for Extension of Time to Submit its Memorandum of Supporting Points and Authorities* (October 19, 2021). Agency did not file a supplemental memorandum.

<sup>18</sup> *Petition for Review*, Attachments A and B.

<sup>19</sup> *Employee's Memorandum in Response to Agency's Petition to Review and Motion to Dismiss* (January 15, 2019).

Accordingly, this Board finds that it is appropriate to determine whether the fee award is supported by the record based on the below analysis.

### Prevailing Party

D.C. Code § 1-606.08 provides that an OEA Administrative Judge “...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.”<sup>20</sup> OEA has previously relied on its ruling in *Zervas supra* and the Merit Systems Protection Board’s (“MSBP”) holding in *Hodnick supra*, which held that “for an employee to be a prevailing party, he must obtain all or a significant part of the relief sought....” However, the holding in *Hodnick* was overruled by the MSPB in *Ray v. Department of Health and Human Services*.<sup>21</sup> In *Ray*, the MSPB adopted the U.S. Supreme Court’s holding in *Farrar v. Hobby*<sup>22</sup> for the purpose of determining the prevailing party within the context of the Civil Service Reform Act of 1978. Under the standard provided in *Ray*, “...to qualify as a prevailing party, a...plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought...or comparable relief through a consent decree or settlement.”

Here, the parties concede that Employee was the prevailing party in the instant appeal. On September 21, 2020, the Superior Court affirmed the OEA Board’s Second and Opinion and Order on Remand which determined that Agency lacked cause to terminate Employee. Thus, the record supports a finding that the standard provided in *Ray* and *Farrar* was met. However, this Board must also determine whether there is substantial evidence to support the AJ’s finding that the award of attorney’s fees was warranted in the interest of justice.

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<sup>20</sup> See OEA Rule 634.

<sup>21</sup> 64 M.S.P.R. 100 (1994).

<sup>22</sup> 506 U.S. 103 (1992).

### Interest of Justice

To determine whether a fee award is merited, OEA has relied on *Allen v. United States Postal Service*, in which the MSPB provided circumstances to serve as “directional markers towards the ‘interest of justice,’ a destination which, at best, can only be approximate.”<sup>23</sup> The circumstances that should be considered are the following:

1. Whether the agency engaged in a “prohibited personnel practice;”
2. Whether 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. Whether the agency initiated the action against the 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. Whether the agency committed a “gross procedural error” which “prolonged the proceeding” or “severely prejudiced the employee”; and
5. Whether the agency “knew or should have known that it would not prevail on the merits,” when it brought the proceeding.

The AJ in this case performed an analysis of the *Allen* factors in determining that an award of fees was appropriate in the interest of justice. He explained that two factors were specifically applicable: Agency engaged in a “prohibited personnel practice” by terminating Employee in violation of D.C. Code § 1-623.45(b)(1) and Employee was “substantially innocent” of the charges levied against him. Accordingly, he disagreed with Agency’s argument that none of the *Allen* factors weighed towards an award of attorney’s fees. This Board believes that the AJ’s analysis constitutes a reasonable interpretation of the relevant case law and that his conclusions of law are based on substantial evidence.<sup>24</sup> As such, we find no reason to disturb his finding that the interest

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<sup>23</sup> 2 M.S.P.R. 420 (1980).

<sup>24</sup> Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.<sup>15</sup> Under OEA Rule 628.1, the burden of proof with regard to material issues of fact shall be by a

of justice warranted the award of fees.

### Reasonableness of Fees

The D.C. Court of Appeals, in *Frazier v. Franklin Investment Company, Inc.*, held that the determination of the reasonableness of an award is within the sound discretion of the trial court.<sup>25</sup> It reasoned that the trial court has a superior understanding of the litigation.<sup>26</sup> The OEA AJ is the equivalent of the trial court in this matter. Judge Cannon drafted each decision and has a unique and superior understanding of the case. As a result, this Board must rely on his conclusions regarding the reasonableness of the hourly rate and time expended. Therefore, we are solely tasked with deciding if the AJ's decision was based on substantial evidence.

In *Hensley v. Eckerhart*, the Supreme Court of the United States provided that “[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer’s services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed.”<sup>27</sup> The OEA Board has determined that OEA Administrative Judges may consider the Laffey Matrix in determining the reasonableness of a claimed hourly rate.

Regarding the hourly rate, the courts in *Blum v. Stenson*<sup>28</sup> and *Save Our Cumberland Mountains v. Hodel*<sup>29</sup> held that the burden of proof is on the employee’s counsel to provide evidence that the rates he requested were in line with attorneys in the area for similar services and

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preponderance of the evidence. Preponderance of the evidence shall mean “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.

<sup>25</sup> 468 A.2d 1338 (1983).

<sup>26</sup> *Id.*

<sup>27</sup> 461 U.S. 424 (1983).

<sup>28</sup> 465 U.S. 886 (1984).

<sup>29</sup> 857 F.2d 1516 (D.C. Cir. 1988).

comparable skill, experience, and reputation. This Board believes that the AJ's determination that \$500 was a reasonable rate was based on substantial evidence considering Employee's counsel's fifty years of experience practicing law and customary billing practices.

However, as it related to the number of hours expended, the AJ significantly reduced the number requested by counsel. OEA Rule 634.3 establishes that "an employee shall submit reasonable evidence or documentation to support the number of hours expended by the attorney on the appeal." OEA has consistently held that the number of hours reasonably expended is calculated by determining the total number of hours and subtracting all non-productive, duplicative, and excessive hours.<sup>30</sup>

Counsel's Revised Petition for Attorney's Fees requested a total of 323.8 hours for the work performed during the course of this appeal. After reviewing his time submissions, the AJ held that many of the time entries were demonstrably excessive and duplicative. In support thereof, he pointed to counsel's lack of detailed information and "patently inflated hours" in the fee petition. The AJ provided a thorough analysis of each time entry in determining whether the hours expended by Employee's counsel were reasonable, ultimately concluding that an award fee of 58.5 hours was appropriate. This Board defers to the AJ's interpretation of the reasonableness of each time entry and finds that the number of hours awarded was based on substantial evidence. Therefore, we conclude that the total award of attorney's fees, \$29,250, was appropriate under the circumstances.

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<sup>30</sup> *Employee v. D.C. Lottery and Charitable Games Control Board*, OEA Matter No. 1601-0014-84AF02 (June 5, 2003); *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0022-04AF01 (December 14, 2007); *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0008-05AF08 (June, 25, 2008); *McCray v. D.C. Public Schools*, OEA Matter No. 1601-0010-03AF07 (May 21, 2007); *Employee v. D.C. Child and Family Services*, OEA Matter No. 1601-0057- 01AF07 (May 7, 2007); *Employee v. D.C. Public Schools, Department of Transportation*, OEA Matter Nos. 1601-0063-04AF06 and 1601-0092-04AF06 (December 22, 2006) (citing *Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985)); and *Employee v. D.C. Government Operations Division*, OEA Matter No. 1601- 0033-07AF11, *Opinion and Order on Petition for Review* (March 4, 2014).

Conclusion

Based on the foregoing, this Board finds that Employee's counsel is entitled to the payment of attorney's fees related to the prosecution of this appeal up until the date of his suspension. Employee has been deemed the prevailing party in this matter, and the award of fees is appropriate in the interest of justice. Additionally, Employee's counsel has sufficiently established that an hourly rate of \$500 is reasonable based on his legal experience and billing practices. Lastly, we believe that the AJ's award of 58.5 hours was based on substantial evidence. For these reasons, we must deny Agency's Petition for Review.

**ORDER**

Accordingly, it is hereby ordered that Agency's Petition for Review is **DENIED**.

**FOR THE BOARD:**

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Clarence Labor, Chair

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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Dionna Maria Lewis

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.