THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,	)	OEA Matter No. 1601-0215-11R18R20AF22
	)	
	)	Date of Issuance: May 23, 2022
v.	)	
	)	JOSEPH E. LIM, ESQ.
D.C. PUBLIC SCHOOLS,	)	Senior Administrative Judge
Agency	)	
	)	

Lynette Collins, Esq., Agency Representative
Employee *Pro se*

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL HISTORY

On September 9, 2011, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Public School's ("DCPS" or "Agency") final decision to remove him from his position as a School Psychologist due to two (2) consecutive years of a "Minimally Effective" IMPACT rating.[1] Employee's termination was effective August 12, 2011. On May 20, 2014, I issued an Initial Decision ("ID") dismissing the matter for lack of jurisdiction due to Employee's retirement.

Employee subsequently filed a Petition for Review with the OEA's Board on June 26, 2014. On February 16, 2016, the OEA Board issued an Opinion and Order on Petition for Review denying Employee's petition. It held that OEA had no jurisdiction over his appeal because the evidence supports a finding that Employee's decision to retire was of his own volition and was not a result of incorrect or misleading information on Agency's part.

Thereafter, Employee appealed to the Superior Court of the District of Columbia ("Superior Court"). On February 21, 2017, the Superior Court affirmed OEA's decision and denied Employee's appeal.[2] Employee's Motion for Reconsideration was denied on April 11, 2017.

[1] IMPACT is the effectiveness assessment system Agency uses to rate the performance of school-based personnel.
[2] *Johnson v. District of Columbia Public Schools, et al*., Case No. 2016 CA 001551 (D.C. Super. Ct. February 21, 2017).

Employee then appealed to the District of Columbia Court of Appeals ("CA"). On August 9, 2018, the CA vacated the ID on the issue of jurisdiction and remanded the case to the Superior Court for further remand to OEA. The Superior Court then remanded the matter back to OEA on February 8, 2019, with instructions to proceed with the matter. On June 14, 2019, I issued an Initial Decision on Remand ("IDR") upholding Agency's termination of Employee's employment due to his two consecutive years of 'Minimally Effective' IMPACT ratings.[3]

Employee appealed the IDR and on May 19, 2020, the OEA Board upheld the legality of the IMPACT but remanded the matter to the Undersigned for the purpose of conducting an Evidentiary Hearing.[4] Specifically, the Board determined that a hearing was needed to address Employee's allegations of procedural errors in Agency's removal of Employee as it pertained to his IMPACT scores. After an Evidentiary Hearing on July 23, 2020,[5] I issued a Second Initial Decision on Remand ("Second IDR") on October 15, 2020, whereby I reversed Agency's action of separating Employee for receiving a "Minimally Effective" IMPACT rating for two consecutive school years but upheld his "Minimally effective" IMPACT score for the 2010-2011 school year. Consequently, I ordered Agency to reinstate Employee to his last position of record and reimburse Employee all back-pay and benefits lost as a result of the separation less any retirement benefits he has received.

On November 12, 2020, Agency filed a Petition for Review to the OEA Board seeking review of the reversal of the termination.[6] While the appeal to the OEA Board was still pending, Employee filed a Motion for Attorney Fees in the amount of $5,660 in attorney's fees and $566 in costs on January 1, 2021. After Agency submitted its response to the Fee petition, I dismissed Employee's Motion for Attorney Fees without prejudice. I held that his fee petition was premature, as Employee had not yet been deemed the prevailing party.[7]

On February 4, 2021, the OEA Board held that Agency failed to prove just cause in terminating Employee and denied Agency's Petition for Review.[8] Employee accepted Agency's job offer on or about December 21, 2020, and his position as a School Psychologist took effect on January 4, 2021. At the parties' request, an Evidentiary Hearing on the issue of the amount of backpay was held on June 23, 2021, with the parties submitting their written closing arguments by August 4, 2021. On September 29, 2021, I issued an Addendum Decision on Compliance where I found that Employee failed to adequately mitigate his damages for 2011 to 2020. I thereby ordered Agency to reimburse Employee all backpay and benefits lost as a result of the improper removal action starting from August 2011 until January 3, 2021, less any annuity retirement benefits paid[9] and less any amounts he could have earned had he diligently sought other work, prorated to the

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[3] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18, *Initial Decision on Remand* (June 14, 2019).
[4] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18, *Opinion and Order on Remand* (May 19, 2020).
[5] Due to the District of Columbia's Covid-19 State of Emergency, the Evidentiary Hearing was held virtually via WebEx.
[6] Agency mistakenly captioned this as OEA Matter No. 1601-0215-11R18 instead of OEA Matter No. 1601-0215-11R20.
[7] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11AF21, *Addendum Decision on Attorney Fees* (January 14, 2021).
[8] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18R20, *Opinion and Order on Remand* (February 4, 2021).
[9] *See* 6B DCMR 1149.12(b).

months Employee was unemployed.[10] Employee took issue with the Addendum Decision and appealed to the OEA Board on October 28, 2021. On December 17, 2021, the OEA Board denied Employee's appeal.[11]

On January 27, 2022, Employee filed a motion that he titled "Motion for Compliance Addendum" whereby he complained that Agency failed to submit calculations regarding his annual leave payout, retirement pay adjustment, restoration of benefits, or attorney's fees. On February 3, 2022, I ordered Agency to submit detailed calculations and supporting documents to show the amount of backpay and benefits due Employee, if any, by February 22, 2022. After both parties submitted their briefs, I dismissed Employee's Motion for Compliance on March 15, 2022, after finding that Agency had complied.[12]

Employee filed a Petition for Attorney Fees with this Office on March 15, 2022.[13] Following the submission of the parties' responses and counter-responses addressing this issue, I determined that an Evidentiary Hearing was not required. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Employee is a prevailing party for attorney fee purposes.

2. If so, whether payment of the attorney fee requested is warranted in the interest of justice.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

D.C. Official Code § 1-606.08 (1992 *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."[14] [Emphasis supplied.] Thus, the statute for the award of attorney fees is at the judge's discretion.

1. Whether Employee is a prevailing party

The first criterion for fee eligibility is that the employee be the "prevailing party." "[F]or an employee to be considered a prevailing party, he must obtain all or a significant part of the relief sought . . ."[15] Here the relief that Employee sought was: 1) reversal of his termination and

[10] The Addendum Decision on Compliance specified the amounts per year from 2011 to 2020 that Agency must deduct from Employee's backpay.
[11] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18R20C21, *Opinion and Order* (December 17, 2021).
[12] *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0215-11R18R20C21 (Mar. 15, 2022).
[13] Employee filed three Motions for Attorney Fees, titling the subsequent ones as 2nd Motion for Attorney Fees and 3rd Motion for Attorney Fees. These are all consolidated and considered in this Decision.
[14] *See* also OEA Rule 639, 68 DCR 012473 (December 27, 2021), 6-B DCMR Ch. 600.
[15] *Zervas v. District of Columbia Office of Personnel*, OEA Matter No. 1602-0138-88AF92 (May 14, 1993). *See also Farrar v. Hobby*, 113 S.Ct. 566, 573 (1992) ("[A] plaintiff 'prevails' when actual relief on the merits of his claim

reinstatement to his position, and 2) back pay and benefits award for the period between his termination and reinstatement. Employee argues that his appeal was successful when I ordered his reinstatement. Employee argues that OEA's ruling that he was improperly removed from his position and his subsequent reinstatement establishes his prevailing party status. Agency contests Employee's status as a prevailing party. It pointed out that Employee failed to obtain all or even a significant part of the relief sought as Employee was unable to obtain backpay and benefits.

The U.S. Supreme Court has defined what a "prevailing party" is in terms of attorney fee awards. In *Farrar v. Hobby,* 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), the U.S. Supreme Court summarized:

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim.... In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Id. at 111–12, 113 S.Ct. at 573.

Here, Employee did obtain a significant part (reversal of his termination) of the relief he sought. However, he did not obtain an equally significant relief in that this Office had found that he did not merit backpay and benefits. In *Farrar,* the Supreme Court held that even a party who obtains an award of nominal damages qualifies as a "prevailing party" under civil rights attorney fee provision. In *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.,* the Court once again emphasized that "[a] prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of the litigation."[16] The Court noted that "[i]f the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind."[17] With respect to a partial success, the court held that where the party had obtained a "material alteration of the legal relationship of the parties," the "degree of the plaintiff's overall success goes to the reasonableness of the award ... not to the availability of a fee award…"[18]

Further, the D.C. Court of Appeals in *D.C., et al. v. Jerry M., et al*, 580 A.2d 1270 (1990) held, "[t]o be deemed a "prevailing party," it is necessary only that the plaintiff "succeed on any *significant* issue in litigation which achieves *some of the benefit* the parties sought in bringing the suit."[19] A reversal of Agency's adverse action is a significant part of Employee's appeal. Based on the facts in this matter and the Supreme Court and D.C. Court of Appeals holdings, I conclude

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materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.); *Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371, 375 (1980); *Chun v. Department of Pub. Works*, OEA Matter No. 2401-0079-94AF95 (Sept. 30, 1996).

[16] 489 U.S. 782, 791, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989).

[17] *Id.* at 791–92, 109 S.Ct. at 1493 (quoting *Nadeau v. Helgemoe,* 581 F.2d 275, 278–79 (1st Cir.1978)).

[18] *Id.* at 792–93, 109 S.Ct. at 1493–94.

[19] *Allen v. District of Columbia,* 503 A.2d 1233, 1236 (D.C.1986), *quoting Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983), *in turn quoting Nadeau v. Helgemoe,* 581 F.2d 275, 278–79 (1st Cir.1978) (emphasis in *Allen*). *See also Texas State Teachers Ass'n v. Garland Independent School Dist.,* 489 U.S. 782, 109 S.Ct. 1486, 1491–93, 103 L.Ed.2d 866 (1989) (endorsing *Hensley*/*Nadeau* formulation).

that Employee is a prevailing party.

2. Whether payment of the attorney fee requested is warranted in the interest of justice.

Once it is determined that a party has attained the status of "prevailing party, the Supreme Court in *Farrar* goes on to hold that, "[a]lthough the "technical" nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded..."[20] The Supreme Court emphasizes that once litigation materially alters the legal relationship between the parties, "the degree of the plaintiff's overall success goes to the reasonableness" of a fee award.[21] Indeed, "the most critical factor" in determining the reasonableness of a fee award "is the degree of success obtained."[22] The U.S. Supreme Court stressed that the extent of a plaintiff's success is a crucial factor in determining the proper amount of award of attorney fees. Where the plaintiff's claims arise out of a common core of facts and involve related legal theories, the most critical factor in determining whether a fee can be awarded is the degree of success obtained.[23] The Court stated that prevailing party attorney fee awards under civil rights statute are not intended to produce windfalls to attorneys.

In *Marek v. Chesny,*[24] the Supreme Court declined to award any attorney fees where the plaintiffs obtained a judgment less than the pretrial offer of settlement. In *Farrar v. Hobby, supra*, petitioners received nominal damages instead of the $17 million in compensatory damages that they sought. The Court in *Hensley* observed that if "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount."[25] Having considered the amount and nature of damages awarded, the court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness,[26] or multiplying "the number of hours reasonably expended ... by a reasonable hourly rate,"[27]

The Supreme Court held that, when a plaintiff's victory is purely technical or *de minimis,* a district court need not go through the usual complexities involved in calculating attorney's fees. *Ante,* at 575 (court need not calculate presumptive fee by determining the number of hours reasonably expended and multiplying it by the reasonable hourly rate; nor must it apply the 12 factors bearing on reasonableness). As a matter of common sense and sound judicial administration, it would be wasteful indeed to require that courts laboriously and mechanically go through those steps when the *de minimis* nature of the victory makes the proper fee immediately obvious. Instead, it is enough for a court to explain why the victory is *de minimis* and announce a sensible decision to "award low fees or no fees" at all. *Ante,* at 575.

In this case, Employee is asking for attorney fees in the amount of $5,660 and $566 in

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[20] *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).
[21] *Id*. See also *Garland, supra,* 489 U.S., at 793, 109 S.Ct., at 1494.
[22] *Hensley v. Eckerhart, supra,* 461 U.S. at 436, 103 S.Ct. at 1941 (1983).
[23] *Texas State Teachers Assn. v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486 (March 28, 1989).
[24] 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985)
[25] *Hensley, supra,* 461 U.S., at 436, 103 S.Ct., at 1941.
[26] *Hensley,* 461 U.S., at 430, n. 3, 103 S.Ct., at 1937–1938, n. 3.
[27] *Id.,* at 433, 103 S.Ct., at 1939.

costs incurred when he was represented by Attorneys Lee Boothby and Olekanma Ekekwe-Kauffman. Employee is also asking for $49,808 for himself for acting as his own *pro se* attorney for the past eight years.

Agency posits several reasons why Employee should not be awarded attorney's fees: 1) OEA does not have jurisdiction to award attorney fees for work incurred before the United States District Court for the District of Columbia; 2) the legal work done in the United States District Court for the District of Columbia had nothing to do with Employee's OEA appeal; 3) OEA rules entitles the attorney to be paid only for the time he/she spent for litigating a matter before the OEA; 4) OEA rules does not allow for an Employee to be reimbursed for monies that he/she paid for an attorney to represent them; 5) Employee is attempting to be reimbursed for a matter that was filed in D.C. Superior Court; 6) Employee is seeking attorney fees when there is no evidence that Attorney Lee Boothby did any legal services on his behalf; 3) the documents submitted by Employee are insufficient to warrant attorney fees.

Employee's fee petition centers on two separate amounts, $5,660 in attorney's fees and $566 in costs he either paid or was obligated to pay to Attorneys Lee Boothby and Olekanma Ekekwe-Kauffman, and $49,808 to be paid to him directly for acting as his own attorney for eight years. First, I will address the fee amount of $5,660 and $566 sought by Employee.

Employee's fee petition detailed the dates, hours expended, hourly rate, description of the legal services, and costs provided by Attorney Lee Boothby in his age discrimination and Equal Employment Opportunity Commission ("EEOC") case against the District of Columbia starting from March 1, 2011, to May 28, 2013.[28] Employee also provided his email communications with Attorney Boothby[29] and a printout of his proceedings at the District of Columbia Superior Court.[30] The only evidence that Employee provides regarding Attorney Olekanma Ekekwe-Kauffman's legal service(s) is the printout.[31] Employee did not provide any information on Ekekwe-Kauffman's hourly rate, amount of time expended, or description of the legal service provided other than a cryptic note that the attorney emailed a copy of Employee's appeal to Agency. Employee's fee petition contains no information on any of his lawyer's credentials, years of legal experience, areas of expertise, or other data pertinent to ascertaining the proper hourly rate his attorneys can charge.

However, the significant challenge with Employee's fee petition is that there is no evidence presented that Attorney Boothby's representation of him and his fellow litigant Dr. Oscar Harp III at the United States District Court for the District of Columbia had anything to do with this instant appeal. Attorney Boothby's own letter indicates that the subject matter of the litigation was the age discrimination and EEOC complaint against the District of Columbia. In addition, in the printout of his proceedings at the District of Columbia Superior Court, the Court indicates that Employee was *pro se* throughout all its proceedings. This meant that neither Attorney Boothby nor Attorney Ekekwe-Kauffman represented him at the Court. Employee has not presented any statute, regulation, or other legal authority for OEA to order Agency to pay his

[28] Petitioner's 2nd Motion for Attorney Fees (Feb. 18, 2021), Exhibit B.
[29] Petitioner's 2nd Motion for Attorney Fees (Feb. 18, 2021), Exhibit C and D
[30] Petitioner's 2nd Motion for Attorney Fees (Feb. 18, 2021), Exhibit E.
[31] *Id.*

legal bills in an unrelated matter. I therefore find that Employee is not entitled to be awarded $5,660 in attorney's fees and $566 in costs.

Employee's petition also includes a request for Agency to pay him $49,808 for acting as his own attorney. D.C. Official Code § 1-606.08 (1992 *repl.*) authorizes OEA to 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. The Code does not authorize the payment of attorney fees to a non-attorney. Employee is not, and does not, claim to be an attorney. I therefore find that Employee is not entitled to be awarded $49,808 in attorney fees.

Considering the evidence that Employee submitted, and the zero amount of backpay and benefits awarded to Employee, I find that the amount sought in his attorney fee request is per se unreasonable and unwarranted in the interest of justice. The Supreme Court has held that even the prevailing plaintiff may be denied fees if "special circumstances would render [the] award unjust."[32]

To reiterate, according to D.C. Official Code § 1-606.08 and OEA Rule 639,[33] the award of attorney fees is discretionary and not mandatory in a successful OEA appeal. The successful appellant must not only obtain an actual relief on the merits of his or her claim(s) to be considered a prevailing party, the degree of his/her success must also be sizable enough to render the payment of attorney fees reasonable in the interest of justice. Considering the facts presented in this matter, I conclude that the payment of attorney fees is not in the interest of justice under D.C. Official Code § 1-606.08.

ORDER

It is hereby ORDERED that Employee's Petition for Attorney Fees and Costs is DENIED.

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FOR THE OFFICE: *s/Joseph Lim*
JOSEPH E. LIM, ESQ.
Senior Administrative Judge

[32] *Hensley v. Eckerhart, supra* (citations omitted).
[33] 68 DCR 012473 (December 27, 2021), 6-B DCMR Ch. 600