Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SHERI FOX,	)	
Employee	)	OEA Matter No. 1601-0040-17AF20
	)	
v.	)	Date of Issuance: May 6, 2020
	)	
METROPOLITAN POLICE DEPARTMENT,	)	MONICA DOHNJI, ESQ.
Agency	)	Senior Administrative Judge
	)	

Marc L. Wilhite, Esq., Employee's Representative
Teresa Quon Hyden, Esq., Agency's Representative

ADDENDUM DECISION ON ATTORNEY FEES[1]

INTRODUCTION AND PROCEDURAL HISTORY

On May 2, 2017, Sheri Fox ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the Metropolitan Police Department's ("MPD" or "Agency") decision to suspend her for twenty (20) days, effective May 7, 2017. Employee was a Sergeant at the time of the adverse action.

On January 13, 2020, I issued an Initial Decision ("ID") reversing three (3) out of the five (5) specifications levied by Agency against Employee.[2] The undersigned also dismissed Employee's claims of disparate treatment and bias. Additionally, I modified the penalty from a twenty (20) days suspension to a fifteen (15) days suspension. Agency did not appeal the ID. Thus, the ID became final on February 17, 2020.

On March 13, 2020, Employee's Attorney filed a Motion for Attorney Fees and Costs.[3] Employee's attorney noted that Employee was the prevailing party and in the interest of justice, he is entitled to attorney fees and costs. After Agency's request for extension was granted to respond to Employee's Motion for Award of Attorney Fees, it filed its Opposition to Employee's Motion for Attorney Fees and Costs on April 27, 2020. Agency conceded that Employee was the

[1] This decision was issued during the District of Columbia's COVID-19 State of Emergency.
[2] *Sheri Fox v. Metropolitan Police Department*, OEA Matter No. 1601-0040-17 (January 13, 2020). Under Charge No. 1, the undersigned upheld Specifications 2 and 4, and reversed Specifications 1 and 3. The undersigned reversed Charge No. 2.
[3] Employee's Motion for Award for Attorney Fees and Costs (March 13, 2020).

prevailing; however, it insisted that Employee was not entitled to attorney fees in the interest of justice.[4] 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 fees purpose of determining whether the award of attorney fees is warranted; and

2) If so, whether the payment of attorney fees is warranted in the interest of justice.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

D.C. Official Code §1-606.08 provides that an agency may be directed to pay reasonable attorney fees if the employee is the prevailing party and payment is "warranted in the interest of justice." *See also*, OEA Rule 634.1, 59 DCR 2129 (March 16, 2012). This award is an exception from the "American Rule" which requires each party to pay its own legal fees.[5] The goal, in awarding attorney fees, is to attract competent counsel to represent individuals in civil rights and other public interest cases, where it might be otherwise difficult to retain counsel.[6]

Prevailing Party

As noted above, D.C. Official Code §1-606.08 provides that an agency may be directed to pay reasonable attorney fees if the employee is the prevailing party. OEA has previously relied on its ruling in *Zervas v. D.C. Office of Personnel,* OEA Matter No. 1602-0138-88AF92 (May 13, 1993) and the Merit Systems Protection Board's ("MSPB")[7] holding in *Hodnick v. Federal Mediation and Conciliation Service,* 4 M.S.P.R. 371, 375 (1980) which held that, "for an employee to be a prevailing party, he must obtain all or a significate part of the relief sought…" However, the decision in *Hodnick* was overruled by the MSPB in *Ray v. Department of Human and Health Services*, 64 M.S.P.R. 100 (1994). In *Ray*, the MSPB adopted the U.S. Supreme Court's holding in *Farrar v. Hobby*, 506 U.S. 103 (1992) in determining the prevailing party in the context of the Civil Service Reform Act of 1978. Pursuant to *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 judgement against the defendant from whom fees are sought … or comparable relief through a consent decree or settlement." In addition, the District of Columbia Court of Appeals in *Settlemire v. D.C. Office of Employee Appeals*, 898 A.2d 902

[4] Agency's Memorandum in Opposition to Employee's Motion for Award of Attorney Fees and Costs (April 27, 2020).
[5] *See, e.g., Huecker v. Milburn*, 538 F.2d, 1241, 1245.
[6] *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968).
[7] MSPB is this Office's federal counterpart.

(D.C. 2006), noted that, "[g]enerally speaking the term 'prevailing party' is understood to mean a party 'who had been awarded some relief by the court' (or other tribunal)…"[8]

In the instant matter, Employee did not receive the original relief she requested in her Petition for Appeal which sought the reversal of the twenty (20) day suspension. However, Agency did not meet its burden of proof in three (3) of the five (5) specifications and as such, the penalty of twenty (20) days was reduced to a fifteen (15) days suspension. While this is not a full recovery, she nonetheless succeeded in three (3) of the claims brought against her and she received a reduced penalty. Moreover, both parties acknowledged that Employee is the prevailing party in this matter. Consequently, pursuant to the holdings in *Farrar* and *Ray*, Employee is considered a prevailing party in this matter.

Interest of Justice

Pursuant to D.C. Official Code 1-606.08 and OEA Rule 634, the award of attorney fees is discretionary and not mandatory in a successful OEA appeal. In order to be awarded attorney fees, the party must be the prevailing party, and the degree of her success must also be sizeable enough to render the payment of attorney fees reasonable in the interest of justice. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the U.S. Supreme Court held that, the most critical factor in determining the reasonableness of an attorney's fee award is the degree of success obtained, since a requested fee based on the hours expended on the litigation as a whole may be deemed excessive if a plaintiff achieves only partial or limited success. In cases where a party is only partially successful, the trial court must exercise its discretion to determine what amount of fees, if any, should be awarded.[9] Hence, the determination that an employee is the prevailing party "may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved."[10] Additionally, in *Shore v. Groom Law Grp*., 877 A.2d 86 (D.C. 2005), the D.C. Court of Appeals determined that the denial of an attorney's fee request was appropriate when the plaintiff was only successful on one of her eight claims against a former employee and received limited relief as a result.

Recently, the District of Columbia Court of Appeals in *Phillippa Mezile v. District of Columbia Department of Disability Services, et al*, No. 19-CV-161 2018 CAP 2820 (March 26, 2020) stated that "[a]lthough appellant was a prevailing party on one issue, the Office of Employee Appeals could reasonably find that the fee request was unreasonable in light of her limited degree of success on appeal and the minimal amount of her award. *See Farrar v. Hobby*, 506 U.S. 103, 114 (1992) ("Indeed, the most critical factor in determining the reasonableness of a fee award is the degree of success obtained") (internal quotation marks and citation omitted); *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983) ("We hold that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees"); *see also Shore v. Groom Law Grp.*, 877 A.2d 86, 93 (D.C. 2005) (stating, "when a plaintiff recovers only minimal damages . . . the only reasonable attorney's fee is usually no fee at all") (citing *Farrar v.*

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[8] *See also Texas State Teachers Association v. Garland Independent School District,* 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) (holding that the prevailing party need only "succeed on any issue in the litigation which achieves some of the benefit he sought in bringing the action."
[9] *Fleming v. Carroll Publ'g Co*., 581 A.2d 1219 (D.C. 1990).
[10] *Hensley* at 436.

Hobby, 506 U.S. at 115) (internal quotation marks and brackets omitted)."Thus, it is possible for a plaintiff to establish prevailing party status and not receive an award of attorney's fees.

Furthermore, OEA has consistently relied on *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980), in determining if the award of attorney fees is in the interest of justice. The MSPB in *Allen* provided circumstances to serve as "directional markers towards the 'interest of justice,' a destination which, at best, can only be approximate." The circumstances that should be considered are:

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";
5. Whether the agency "knew or should have known that it would not prevail on the merits," when it brought the proceeding.[11]

In the instant matter, Employee argues that her request for attorney fees is warranted in the interest of justice. Employee explains that her success in three (3) out of the five (5) claims levied against her is indicative that several of the criteria in *Allen* have been met. Employee additionally notes that the adverse action against her was brought in bad faith as she never physically touched the citizen captured in the video, but instead, Employee went to great length to assist the citizen to gather her belongings. Agency on the other hand avers that, Employee is not entitled to attorney fees in the interest of justice. Agency maintains that Employee did not satisfy the factors listed in *Allen*. I find that Employee has not clearly established the existence of any of the *Allen* factors that would warrant an award of fees in the interest of justice. Also, there is no evidence in the record to support a finding that Agency engaged in a prohibited personnel practice. The undersigned upheld the charge for failure to follow directives based on the testimonial and documentary evidence presented during the course of the appeal.

The District of Columbia Court of Appeals opined in *Phillippa Mezile, supra,* that, "[t]o the extent appellant challenges the agency's analysis under *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980), we have previously held that the considerations enumerated in *Allen* are "helpful guidelines that aid a court in the exercise of its discretion whether to award attorney fees" in the interest of justice."[12] In line with the reasoning in *Hensley v. Eckerhar and Mezile*, *v. District of Columbia Department of Disability Services, et al*, I conclude that the most

[11] *Allen* at 434-35.
[12] Citing *Surgent v. District of Columbia*, 683 A.2d 493, 495 (D.C. 1996).

important factor to consider when deciding if attorney fees are warranted in the interest of justice is the size of the award received versus what was actually sought. The Court in *Mezile*, opined that, even when the appellant is the prevailing party on some issues, this Office can reasonably find that the fee request is not reasonable because of the limited degree of success on appeal and the minimal amount of award received.

Here, Employee is seeking $25,423.75 in attorney fees and costs. While Employee prevailed in three (3) out of the five (5) specifications levied against her, Employee's penalty was only reduced by five (5) days The penalty was modified from a twenty (20) day suspension to a fifteen (15) day suspension.[13] Considering the fact that Employee only had a minimal reduction to her penalty of suspension and the fact that Employee's claims of bias and disparate treatment were dismissed, the amount sought in Employee's request for an award of attorney fees is *per se* unreasonable and unwarranted in the interest of justice.

The undersigned has the discretion to award reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interest of justice. While Employee is the prevailing party in this case, attorney's fees are not warranted in the interest of justice. Employee achieved a limited degree of success in the prosecution of her appeal. The original relief sought - reversal of the twenty (20) day suspension was not attained. Thus, a request for attorney's fees in the amount of $25,423.75 is unreasonable in relation to the five-day reduction (which is worth about $1,600 of Employee's salary at the time of the suspension). Considering the small size of Employee's award (twenty (20) day suspension reduced to fifteen (15) days suspension) versus the unattained goal of a complete reversal of the twenty (20) day suspension, I conclude that Employee did not obtain all or a significant part of the relief sought. Consequently, I find that, although Employee is the prevailing party, an award of attorney fees is unwarranted and unreasonable in the interest of justice, pursuant to D.C. Official Code § 1-606.08.

ORDER

Based on the foregoing, it is hereby ORDERED that Employee's Motion for award of attorney fees is DENIED.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Senior Administrative Judge

[13] It should be noted that Employee was actually charged with two causes of action: Charge 1: failure to follow directives and Charge 2: conduct prejudicial to the reputation and good order of the police force. Charge 1 had four specifications and Charge 2 had one specification. Agency met its burden of proof on two of the four specifications under Charge 1 but did not meet its burden of proof for the one specification under Charge 2. Accordingly, Charge 1 was upheld, and Charge 2 dismissed. Additionally, this was Employee's second offense under Charge 1. According to the Table of Offenses and Penalties, the second offense for failure to follow directives ranges from 1-day suspension to termination. The undersigned's decision to modify the penalty in the instant matter was based on Agency's prior decision to suspend Employee for fifteen (15) days for a second offense under Charge 1. Both the fifteen-day and twenty-day suspension are permissible penalties for a second offense under Charge 1.