THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CLARENCE STANBACK, JR.,	)	
Employee	)	OEA Matter No. 1601-0023-18-AF21
	)	
v.	)	Date of Issuance: December 10, 2020
	)	
DEPARTMENT OF HEALTH,	)	
Agency	)	ERIC T. ROBINSON, ESQ.
	)	SENIOR ADMINISTRATIVE JUDGE
	)	

James E. McCollum, Jr., Esq., Employee Representative
Stephen F. Milak, Esq., Agency Representative

SECOND ADDENDUM DECISION ON ATTORNEY FEES[1]

INTRODUCTION AND PROCEDURAL BACKGROUND

On January 16, 2018, Clarence Stanback, Jr. ("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

[1] This decision was issued during the District of Columbia's COVID-19 State of Emergency.

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.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a 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.

OEA Rule 628.2 *id.* states:

> 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 motion for attorney's fees should be dismissed.

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.[2]

In this matter, Agency filed an NOA with the District of Columbia Court of Appeals on November 5, 2020. This matter is currently under review and a final decision has not been rendered as of yet. Thus, at this point, the question of whether Employee is a prevailing party has not been finally determined. Consequently, the motion for attorney fees is premature and must now be dismissed. However, the dismissal is without prejudice, since Employee may yet become a prevailing party. If Employee is determined to be the prevailing party, he may resubmit a motion for attorney fees to this Office.

ORDER

Based on the aforementioned, it is hereby **ORDERED** that Employee's Motion for Attorney Fees and Costs is **DISMISSED** without Prejudice.

FOR THE OFFICE:

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

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