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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
GROVER MASSENBURG,)	
Employee)	OEA Matter No. 1601-0004-13-AF16
)	
v.)	Date of Issuance: August 23, 2016
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	Eric T. Robinson, Esq.
)	Senior Administrative Judge
_____)	

Lorraine C. Davis, Esq., Employee Representative
Carl K. Turpin, Esq., Agency Representative

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL BACKGROUND

Grover Massenburg (“Employee”) was a Teacher at Wilson Senior High School (“Wilson”). On March 30, 2012, he observed a student displaying a handgun while in Wilson. Employee held a conversation with the student. During this conversation, the student, *inter alia*, expressed a desire to harm himself. DCPS alleges that Employee did not confiscate the weapon and he allowed the student to leave Wilson’s premises. On the day of the incident, District of Columbia Public Schools (“DCPS” or “the Agency”) authorities investigated the incident and took witness statements from all of the participants, one of whom was an Assistant Principal at Wilson.¹ DCPS alleges that Employee failed to promptly report this incident to school administrators and that Employee failed to confiscate the gun. Employee explained that he received no training on how to handle suicidal student or individuals with weapons and that such training was not required of him by DCPS.² After a five month review of the facts of this matter, DCPS decided to remove Employee from service based on a charge of Neglect of Duty. Employee received his notice of termination from his position as a Teacher at Wilson on August 21, 2012.

¹ Wilson’s Principal Peter Cahall was made aware of this incident on the date that it occurred.

² See Employee’s Prehearing Statement dated February 28, 2014 at 3.

Employee filed his petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) on October 2, 2012. I was initially assigned this matter on or about January 21, 2014. I convened a prehearing conference in this matter and after considering the parties’ positions as presented during this conference; I decided that an evidentiary hearing was unwarranted. Accordingly, I ordered the parties to submit final legal briefs in this matter. Both parties complied. On February 10, 2015, the Undersigned issued an Initial Decision (“ID”) wherein the Undersigned REVERSED Agency’s removal action. On March 17, 2015, DCPS filed a Petition for Review with the Board of the OEA. On June 21, 2016, the Board of OEA issued an Opinion and Order on Petition for Review (“O&O”) UPHOLDING the ID. On July 15, 2016, Employee, through counsel, filed a Motion for Attorney Fees and Costs in this matter. On July 21, 2016, DCPS filed a Petition for Review of the O&O with the District of Columbia Superior Court. According to the Initial Order and Addendum, this matter has been assigned to the Honorable Judge Jeanette J. Clark. The Initial Conference before Judge Clark is currently set for October 28, 2016.

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. Code Ann. § 1-606.8 (1999 repl.) 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; 2) and 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.³

In this matter, Agency filed a Petition for Review of the Board’s O&O in D.C. Superior court on July 21, 2106. According to the Superior Court’s docket, there has been no final disposition of Agency’s appeal and an Initial Conference has been set for October 28, 2016. 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:

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

³ *Zervas v. D.C. Office of Personnel*, OEA Matter No. 1601-0138-88AF92 (May 13, 1993).