THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
PHILLIPPA MEZILE,	)	OEA Matter No. 2401-0158-09R12AF17
Employee	)	
	)	
v.	)	Date of Issuance: March 20, 2018
	)	
DEPARTMENT ON	)	
DISABILITY SERVICES,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Phillippa Mezile ("Employee") worked as a Public Affairs Specialist with the Department on Disability Services ("Agency"). On May 12, 2009, Agency informed Employee that her position was being abolished as a result of a Reduction-in-Force ("RIF"). The effective date of the RIF was June 12, 2009. Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 10, 2009. She argued, *inter alia*, that the RIF violated District of Columbia laws and that Agency failed to provide her with the requisite thirty-day written notice prior to the effective date of the RIF.[1] In its answer, Agency denied Employee's claims and provided that her position was abolished because of a shortage of funds for the 2010 fiscal year. Agency also contended that its RIF action complied with all applicable laws, rules,

[1] *Petition for Appeal* (July 10, 200).

and regulations.[2]

The OEA Administrative Judge ("AJ") assigned to the matter held a prehearing conference on March 24, 2010.[3] The parties were subsequently ordered to submit briefs addressing whether Agency's RIF action should be upheld. The AJ issued an Initial Decision on April 2, 2010. He first noted that Agency issued an Administrative Order on April 23, 2009, stating that several positions were identified for abolishment as a result of realignment and a shortage of funds for the 2010 fiscal year. Next, the AJ stated that D.C. Official Code § 1-624.08 was the applicable RIF statute and that Employee was limited to contesting whether she was afforded one round of lateral competition and whether Agency provided her with thirty days' written notice prior to the effective date of the RIF. Lastly, the AJ dismissed Employee's collateral arguments relating to discrimination and pre-RIF conditions. Consequently, Agency's RIF action was upheld.[4]

Employee disagreed with the AJ and filed a Petition for Review in D.C. Superior Court on June 3, 2010. In her appeal, Employee argued that the AJ's finding that she received thirty days' written notice was not based on substantial evidence; the AJ failed to address her claim that the RIF was conducted under D.C. Official Code § 1-624.02, rather than D.C. Official Code § 1-624.08; the AJ failed to properly consider her argument that Agency violated the RIF procedures; and the AJ failed to discuss whether the RIF was a sham because it was conducted for discriminatory reasons. In its Order, the Court agreed with the AJ's conclusion that OEA was the wrong venue for adjudicating Employee's discrimination claims. However, the Court provided that the AJ should have made a finding pertinent to Employee's claim that the RIF action was a "sham" based on her arguments that were unrelated to discrimination. Accordingly,

[2] *Agency's Answer to Petition for Appeal* (August 13, 2009).
[3] *Order Scheduling a Prehearing Conference* (February 25, 2010).
[4] *Initial Decision* (April 2, 2010).

the matter was remanded to the AJ for further consideration.[5]

The AJ held a status conference on March 23, 2012. He subsequently issued an Initial Decision on Remand on October 10, 2012. With respect to the appropriate statute to utilize in conducting the RIF, the AJ stated that although Agency authorized the RIF pursuant to D.C. Official Code § 1-624.02, D.C. Official Code § 1-624.08 was the more applicable statute in this case. In support thereof, he highlighted the holding in *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*, 960 A.2d 1123 (D.C. 2008), in which the D.C. Court of Appeals stated that a RIF conducted for budgetary reasons triggered the Abolishment Act instead of the normal RIF procedures enumerated in § 1-624.02. The Abolishment Act created a more streamlined process for conducing RIFs during times of fiscal emergencies. Accordingly, the AJ concluded that the instant RIF was conducted as a result of budgetary restraints and that D.C. Official Code § 1-624.08 was the appropriate statute to utilize in this case.

With respect to the lateral competition requirement, the AJ stated that OEA has consistently held that when an employee holds the only position in her competitive level, D.C. Official Code § 1-624.08(e) is inapplicable. Thus, Agency was not required to afford Employee with one round of lateral competition because she was the sole Public Affairs Specialist, DS-1035-13-01-N, in her competitive level. The AJ dismissed Employee's claims that there was not a Mayoral Order which authorized and approved the RIF. He further categorized Employee's other arguments as "bare allegations" that were void of supporting proof. Additionally, the AJ opined that an evidentiary hearing was unwarranted to validate the truthfulness of Agency's statements pertaining to its need to conduct a RIF.

Regarding the notice requirement, the AJ provided that Title 5, Section 1506 of the D.C. Municipal Regulations ("DCMR") states that employees selected for separation from service

[5] *Mezile v. D.C. Department on Disability Services*, 2010 CA 004111 P(MPA) (D.C. Super. Ct. February 2, 2012).

shall be given specific written notice at least thirty days prior to the effective date of separation. Moreover, he noted that D.C. Official Code § 1-624.08(e) requires an agency to provide affected employees with thirty days' written notice prior to the effective date of the RIF. In this case, Employee admitted to receiving Agency's RIF notice on May 18, 2009. The notice reflected an effective date of June 12, 2009. Accordingly, both the AJ and the parties conceded that Employee only received twenty-six days' notice prior to the effective date of the RIF. Citing District Personnel Manual ("DPM") § 2405.6, the AJ found that Agency's failure to provide Employee with adequate notice was considered a procedural error and that retroactive reinstatement was not appropriate under the circumstances. Therefore, the AJ determined that the RIF was conducted in accordance with D.C. Official Code § 1-624.08. However, he ordered Agency to reimburse Employee for four days' of back pay and benefits as a result of Agency's notice error.[6]

On November 14, 2016, Employee, without the assistance of her attorney, filed a Request for Compliance with Initial Decision on Remand. Employee requested that the AJ order Agency reimburse her with back pay and benefits for four days, as required in the Initial Decision on Remand.[7] In its response, Agency stated that it forwarded to the District of Columbia Office of Pay and Retirement Services ("OPRS") a request to issue Employee a check in the amount of $1,807.46, less any applicable federal and District tax withholdings. It provided that the request would be processed and that a check was expected to be issued and mailed to Employee within two to three weeks. Thus, Agency maintained that it had taken all of the necessary steps to

[6] *Initial Decision* (October 10, 2012). Employee appealed to D.C. Superior Court a second time; however, her appeal was denied. Employee then filed an appeal with the D.C. Court of Appeals, who affirmed OEA's Initial Decision on Remand. *See Mezile v. D.C. Department of Disability Services*, 117 A.3d 1042 (D.C. 2015).
[7] *Request for Compliance with Initial Decision on Remand* (November 11, 2016).

comply with the Initial Decision on Remand.[8] On January 6, 2017, the AJ issued an Addendum Decision on Compliance. He stated that Agency complied with the Initial Decision on Remand and Employee's motion for compliance was dismissed.[9]

Thereafter, Employee filed a Petition for Attorney's Fees and Costs with OEA on February 6, 2017. In her petition, Employee requested $48,347.50 in attorney's fees and $100 in costs. The amount included legal work performed by Attorney David A. Branch before OEA, D.C. Superior Court, and efforts to collect the funds owed to Employee.[10] Agency's response to the motion argued that an award of attorney's fees was not appropriate because Employee was not the prevailing party in this matter. It further reasoned that an award of fees was not warranted in the interest of justice. Therefore, Agency asserted that Employee's request was without merit and requested that the AJ deny her motion.[11]

The AJ issued an Addendum Decision on Attorney's Fees on June 14, 2017. He first highlighted the holding in *Zervas v. District of Columbia Office of Personnel*, OEA Matter No. 1602-0138-88AF92 (May 14, 1993), which held that that the initial criterion for fee eligibility is that the employee be the prevailing party on the final decision on the merits of the case. The AJ also noted that the U.S. Supreme Court in *Farrar v. Hobby*, 113 S. Ct. 566 (1992), held that a plaintiff prevails "when the 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." According to the AJ, the relief that Employee sought was the reversal of Agency's RIF action; reinstatement to her previous position of record; and back pay and

[8] *Agency's Response to Employee's Request for Compliance* (December 12, 2016). On January 4, 2017, Agency filed with OEA a Report on Compliance, stating that a check was issued to Employee on December 13, 2016, in the after-tax amount of $1,153.43. Agency attached a copy of the paystub to its submission.
[9] *Addendum Decision on Compliance* (January 6, 2017).
[10] *Employee's Petition for Attorneys' Fees and Costs* (February 6, 2017).
[11] *Agency's Final Response to Employee's Petition for Attorneys' Fees and Costs* (March 31, 2017).

benefits. While Employee did not receive the total relief that she sought because Agency's RIF action was ultimately upheld, she did receive an award of four days' worth of back pay and benefits because of Agency's failure to provide adequate notice of the RIF. Thus, the AJ opined that Employee obtained "an actual, if nominal, relief on the merit[s] of her claim that she was not given the full thirty-day notice required by law." He further stated that Agency's failure to comply with the notice requirements altered the legal relationship between the parties because Employee received some form of direct benefit.

With respect to whether the payment of attorney's fees was warranted in the interest of justice, the AJ again referenced the holding in *Farrar*, which recognized that "the degree of the plaintiff's overall success goes to the success the reasonableness of the fee award." He concluded that Employee only obtained a minimal amount of success because she received compensation for four days' worth of back pay instead of a reversal of the RIF. Considering that Employee requested attorney's fees and costs in the amount of $48,347.50 after obtaining an award of approximately $1,800, the AJ opined that a fee award was unreasonable and unwarranted in the interest of justice. Therefore, her petition for attorney's fees was denied.[12]

Employee subsequently filed a Petition for Review of Addendum Decision on Attorney's Fees with the OEA Board on July 19, 2017. Employee argues that the AJ erred in finding that she was not entitled to any attorney's fees for appealing the April 2, 2010 Initial Decision to D.C. Superior Court. She also contends that the AJ failed to show special circumstances which would make an award of fees unjust and opines that the case law relied upon by the AJ in rendering his decision is misplaced. Additionally, Employee states that the AJ incorrectly characterized her recovery of $1,807.46 in back pay as nominal damages to justify the refusal of attorney's fees. According to Employee, the fees requested are reasonable and exclude fees incurred in appealing

[12] *Addendum Decision on Compliance* (January 6, 2017).

this matter to the D.C. Court of Appeals. As a result, she requests that OEA's Board grant her Petition for Review and order Agency to pay fees and costs in the amount of $48,347.50.[13]

In response, Agency submits that the AJ correctly determined that that an award of attorney's fees to Employee was not warranted in the interest of justice. Agency states that it did not engage in a prohibited personnel practice and that its RIF action was conducted in good faith. It further reasons that the amount of Employee's fee request is unreasonable in comparison to the amount of back pay she actually received. Finally, Agency states that the statutory language of D.C. Official Code § 1-606.08 makes the award of attorney's fees discretionary, not mandatory. Consequently, it asks this Board to deny Employee's Petition for Review.[14]

Substantial Evidence

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[15] Under OEA Rule 628.1, 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.

[13] *Petition for Review of Addendum Decision on Attorney Fees* (July 19, 2017)
[14] *Agency's Response to Employee's Petition for Review* (August 23, 2017).
[15] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

Prevailing Party

D.C. Official 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."[16] OEA has previously relied on its ruling in *Zervas supra* and the Merit Systems Protection Board's ("MSBP") holding in *Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371 (1980), which held that "for an employee to be a prevailing party, he must obtain all or a significant part of the relief sought…."[17] However, the holding in *Hodnick* was overruled by the MSPB in *Ray v. Department of Health and Human 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), for the purpose of determining the prevailing party within the context of the Civil Service Reform Act of 1978. Pursuant to the standard established 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." Further, in *Settlemire v. D.C. Office of Employee Appeals*, 898 A.2d 902 (D.C. 2006), the D.C. Court of Appeals noted that "[g]enerally speaking the term 'prevailing party' is understood to mean a party 'who has been awarded some relief by the court' (or other tribunal)…."[18]

In this case, Employee did not receive the original relief she requested in her Petition for Appeal, which was the reversal of the RIF and reinstatement to her previous position with back

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[16] *See* OEA Rule 634.

[17] *See also Edwards v. Department of Youth and Rehabilitation Services*, OEA Matter No. 1601-0017-06AF-10 (December 17, 2012); *Ross v. Office of Contracting and Procurement*, OEA Matter No. 2401-0133-09R11AF14 (September 20, 2014); *Fogle v. D.C. Public Schools*, OEA Matter No. 2401-0123-04-AF10 (March 21, 2011); and *Bey v. Department of Parks and Recreation*, OEA Matter No. 1601-0118-02AF08 (September 14, 2009).

[18] *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."

pay and benefits. However, Agency committed a procedural error by virtue of its non-compliance with D.C. Official Code §1-624.08(e) because it did not provide Employee with thirty days' written notice of the RIF. As a result, Employee was entitled to a judgment of four days in back pay and benefits, totaling approximately $1,800. While this is not the full amount of recovery that Employee would have been entitled to if she prevailed on the substantive merits of her arguments, she was nonetheless successful on at least one of her claims. Accordingly, under the holdings in *Farrar* and *Ray*, Employee is considered the prevailing party in this matter. Therefore, we will not disturb the AJ's ruling regarding such.

Interest of Justice

The central issue presented to this Board is whether there is substantial evidence to support the AJ's conclusion that the award of attorney's fees was unwarranted in the interest of justice. To determine whether a fee award is merited, OEA relies on *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980), 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." 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.[19]

The U.S. Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), 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.[20] 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."[21] 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. Accordingly, it is possible for a plaintiff to establish prevailing party status and not receive an award of attorney's fees.

This Board finds that the AJ did not abuse his discretion in denying Employee's petition for attorney's fees. We further conclude that Employee has failed to establish the existence of any of the *Allen* factors that would warrant an award of fees in the interest of justice.[22] First, there is no evidence in the record to support a finding that Agency engaged in a prohibited personnel practice. In his Initial Decision on Remand, the AJ upheld Agency's RIF action and

[19] *Allen* at 434-35.
[20] *Fleming v. Carroll Publ'g Co*., 581 A.2d 1219 (D.C. 1990).
[21] *Hensley* at 436.
[22] *See Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 988 (D.C. 2007) (holding that the scope of the Court's review [of an award of attorney's fees] was a limited one because the disposition of attorney's fee motions "is firmly committed to the informed discretion of the trial court" and requires "a very strong showing of abuse of discretion to set aside the decision of the trial court."(citing *Maybin v. Stewart*, 885 A.2d 284, 288 (D.C. 2005)).

made specific findings of fact and conclusions of law on each of Employee's arguments. He found that the RIF was properly authorized; that Employee was correctly placed in a single-person competitive level; and that she was not entitled to one round of lateral competition. Next, there was no credible proof that Agency's RIF action was clearly without merit or initiated in bad faith. Likewise, there is no indication that Agency knew or should have known that it would not prevail on the merits when it initiated the RIF.

However, it bears noting that the relief Employee was granted in this case was a result of Agency's failure to provide her with thirty days' written notice as required by D.C. Official Code §1-624.08. Thus, we must determine whether Agency's procedural error warrants the award of attorney's fees. Under *Allen* factor number four, to determine whether a "gross procedural error" occurred warranting an award of attorney fees in the interest of justice, a balance must be struck between the nature of and any excuse for the agency's error and the prejudice and burden that error caused the appellant.[23] If, in the balance, the prejudice and burden to the appellant predominates, gross procedural error exists and the appellant is entitled to a fee award.[24]

In this case, the Employee received twenty-six days' notice prior to the effective date of the RIF. The May 12, 2009 letter stated that Employee could appeal the RIF to OEA and included a copy of the appeal form and OEA's rules.[25] Employee subsequently filed a timely appeal with this Office to contest her separation from service. While it is unclear why Agency's RIF notice was received by Employee four days late, we do not believe that the deficiency constitutes a gross procedural error. The lack of timely notice did not require that Employee be retroactively reinstated to her position, nor did Employee provide proof that she was severely

[23] *See Woodall v. Federal Energy Regulatory Commission*, 33 M.S.P.R. 127 (1987).
[24] *Swanson v. Def. Logistics Agency*, 35 M.S.P.R. 115 (1987).
[25] *Petition for Appeal* (July 10, 2009).

prejudiced by Agency's delay.[26] Employee was able to adequately prosecute her appeal before this Office and her substantive due process rights were not adversely affected. Consequently, this Board concludes that *Allen* factor number four does not warrant an award of attorney's fees.

Conclusion

Based on the foregoing, we find that the AJ's Addendum Decision on Attorney's Fees is supported by substantial evidence. D.C. Official Code § 1-606.08 provides an AJ of this Office 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 RIF action with back pay and benefits—was not attained. Thus, a request for attorney's fees in the amount of $48,347.50 is unreasonable in relation to the $1,800.00 that Employee was awarded. Consequently, Employee's Petition for Review must be denied.

[26] *See* DPM 2405.7, 47 D.C. Reg. 2430 (2000). This section defines harmful error as an error with "such a magnitude that in its absence, the employee would not have been released from his or her competitive level."

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD**:**

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Sheree L. Price, Chair

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Vera M. Abbott

_____
Patricia Hobson Wilson

_____
P. Victoria Williams

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Jelani Freeman

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.