THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No. 1601-0050-16AF23
EMPLOYEE[1],	)	
Employee	)	
	)	
v.	)	Date of Issuance: July 16, 2024
	)	
D.C. OFFICE OF THE ATTORNEY	)	
GENERAL	)	MICHELLE R. HARRIS, ESQ.
Agency	)	Senior Administrative Judge
	)	

Employee, *Pro Se*
Bradford Seamon, Jr., Esq., Agency Representative

THIRD ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL HISTORY

On May 24, 2016, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Office of the Attorney General's ("Agency" or "OAG") decision to terminate her from service for failing a Performance Improvement Plan ("PIP"). Employee's removal was effective April 25, 2016. On August 10, 2016, Agency filed its Answer to Employee's Petition for Appeal. Following a two-day Evidentiary Hearing held on February 27, 2018, and February 28, 2018, the undersigned issued an Initial Decision on October 22, 2018, reversing Agency's action. Employee and Agency both filed Petitions for Reviews to the OEA Board ("Board"). On July 16, 2019, the Board issued its Opinion and Order ("O&O") upholding the October 22, 2018, Initial Decision. On August 13, 2019, Agency filed a Petition for Review of Agency Decision to the Superior Court for the District of Columbia. On July 2, 2020, the Superior Court for the District of Columbia issued a decision denying Agency's Petition for Review and affirming the Initial Decision and the OEA Board's decision. On July 30, 2020, Agency appealed the action to the District of Columbia Court of Appeals. On May 23, 2023, the District of Columbia Court of Appeals issued its decision affirming the Superior Court's dismissal of Agency's Petition for Review and sustaining the OEA decision.

[1]Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

On June 21, 2023, Employee filed a Motion for Attorney Fees. It should be noted that Employee filed two (2) previous Motion for Attorney Fees, one on August 15, 2019, and another on July 31, 2020, however those were dismissed as premature because appeals were pending.[2] On June 28, 2023, I issued an Order requiring Agency to submit a response to Employee's Motion. Agency's response was due by July 14, 2023. On July 12, 2023, Agency filed a Consent Motion for Extension of time, citing therein that the representative had just been assigned to the matter and more time was needed for which to prepare a response. Agency requested an extension of time for two (2) weeks to submit its response. On July 13, 2023, I issued an Order granting Agency's Motion and required that the response be submitted by July 31, 2023. On July 21, 2023, and July 28, 2023, Employee filed supplemental submissions with receipts and notations regarding additional costs. On July 31, 2023, Agency filed its Opposition to Employee's Motion for Attorney Fees.

On August 1, 2023, I issued an Order scheduling a Status Conference in this matter for August 24, 2023. Employee also filed a Motion for Enforcement on July 28, 2023, which resulted in OEA Matter No. 1601-0050-16C23. For purposes of communication, many subsequent orders and status conferences addressed both matters, though each required separate final decisions. On August 8, 2023, Agency filed a Consent Motion to Reschedule the Status Conference to a different time on August 24, 2023. On August 10, 2023, I issued an Order granting Agency's request and rescheduled the Status Conference to 3:00pm on August 24, 2023. Both parties appeared for the August 24, 2023, Status Conference as required. During the conference, the undersigned determined that supplemental filings were required. Specifically, the undersigned noted that Employee's motion was filed *pro se*, and that no attorneys had submitted the requisite information regarding hourly rates and hours expended. Further, Employee noted in the Status Conference that she was seeking possible representation for the instant matter. The undersigned noted again during this Status Conference that fee petitions should be filed by the attorneys of record for consideration for attorney fees. On August 25, 2023, I issued a Post Status Conference Order requiring Employee to submit supplemental filings with the required information by September 30, 2023. That Order also scheduled a Status Conference for September 20, 2023.

Both parties appeared for the September 20, 2023, Status Conference as required. Employee noted therein that she needed more time for which to submit her supplemental filings for the instant matter. Employee reiterated that she was seeking representation in this matter. On September 20, 2023, I issued a Post Status Conference Order requiring Employee to submit her supplemental attorney fee submissions by October 13, 2023. On September 29, 2023, Alan Lescht and Associates, P.C. filed a Fee Petition for work completed in this matter for fees totaling $54,524.60. On October 13, 2023, Employee filed a Motion for an Extension of Time to submit a supplemental attorney fee petition. Employee also filed a Motion to Disregard the Fee Petition filed by Alan Lescht and Associates, P.C. Employee cited therein that the "petition for attorney fees was filed without the consent of employee." Further, Employee asserted that "the Alan Lescht and Associates are not rehired to represent the employee." Employee also averred that "attorney Sara Safriet from the Alan Lescht and Associates, P.C. deliberately and intentionally failed to represent the employee truthfully in 2016-2017." Employee also asserted that actions of Alan Lescht and Associates, P.C. were "fabricated" and must be disregarded.[3] On October 18, 2023, I issued an Order granting Employee's Motion for an Extension of Time, in part. A Status Conference was scheduled for October 31, 2023, to discuss Employee's

[2] Addendum Decision on Attorney Fees issued January 27, 2020, and Second Addendum Decision on Attorney Fes issued September 30, 2020.
[3] Employee's Motion to Disregard the Petition Filed for Attorney Fees by Ms. Lease, Attorney from Alan Lescht and Associates (October 13, 2023).

request. Additionally, that Order granted Employee's Motion to Disregard the September 29, 2023, Fee Petition submitted by Alan Lescht and Associates, P.C. As a result, that Fee Petition has not been considered for the purpose of this Addendum Decision.

On October 31, 2023, both parties appeared for the Status Conference as required. Employee again advised that she needed more time to obtain invoices and other pertinent information from the attorneys who represented her over the course of this matter. Employee also noted during this Status Conference that she was facing health challenges which also required more time and was also seeking legal representation. On October 31, 2023, I issued a Post Status Conference Order granting Employee's request and scheduled another Status Conference for November 27, 2023.

The parties appeared for the November 27, 2023, Status Conference as required. Employee conveyed a request for additional time, citing that she still had not been able to ascertain all the information needed to file the supplemental information. On November 28, 2023, I issued a Post Status Conference Order extending Employee's time to file to December 29, 2023. On December 26, 2023, Employee sent an email to the undersigned and Agency's representative, again requesting more time. Employee explained that she had been ill and would not be able to complete the submission by December 29, 2023, as required. On January 2, 2024, I issued an Order granting Employee's request. I noted therein that Employee's email was accepted as an exception to the required written motion given that she was facing health issues. Additionally, that Order required Employee to submit the supplemental filings in this matter on or before January 29, 2024. On January 29, 2024, Employee filed a response and again requested additional time for which to file the supplemental information for the petition for attorney fees. Employee again asserted wrongdoing on the part of one of her former representatives and noted that other attorneys were also required to withdraw their representation of her due to alleged wrongdoing for which Employee averred left her to represent herself *pro se*. Because of what Employee conveyed in the January 29, 2024, submission, I determined that a Status Conference was warranted to address Employee's submission and the request for another extension of time. As such, I issued an Order on January 30, 2024, scheduling a Status Conference for February 13, 2024. On February 9, 2024, Agency filed a Consent Motion to Reschedule citing to a schedule conflict. On February 13, 2024, I issued an Order granting this Motion and rescheduled the conference to February 21, 2024.

Both parties appeared for the Status Conference on February 21, 2024. During that Conference, the undersigned advised Employee that a final extension of time would be granted to submit the supplemental information required by the previous orders. Employee's response was due on or before March 8, 2024. Employee filed a supplemental response on March 8, 2024. Based upon a review of the submissions and the record in its entirety, I have determined that an Evidentiary Hearing in this matter is not warranted. The record is now closed.

JURISDICTION

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

ISSUE

Whether an award of attorney fees may be granted to a pro se employee.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

D.C. Official Code § 1-606.08 provides that an 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." Similarly, OEA Rule § 639.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021), provides that an employee shall be entitled to an award of reasonable attorney fees if: (1) he or she is a prevailing party; and (2) the award is warranted in the interest of justice. 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.

Prevailing Party

The Initial Decision ("ID") issued on October 22, 2018, in this matter, reversed Agency's action of terminating Employee from service. Both Employee and Agency filed a Petition for Review to the OEA Board of the ID. On July 16, 2019, the Board issued its Opinion and Order upholding the October 22, 2018, Initial Decision. On August 13, 2019, Agency filed a Petition for Review of Agency Decision to the Superior Court of the District of Columbia. On July 2, 2020, the Superior Court for the District of Columbia issued a decision denying Agency's Petition for Review and affirming the Initial Decision and the OEA Board's decision. On July 30, 2020, Agency appealed the action to the District of Columbia Court of Appeals. On May 23, 2023, the District of Columbia Court of Appeals issued its decision affirming the Superior Court's dismissal of Agency's Petition for Review and sustaining the OEA decision. The Court of Appeals decision issued on May 23, 2023, was final and Agency's action was reversed, thus requiring Agency to reinstate Employee to her position of record, restore all backpay and benefits owed and attorney fees. Further, this Office has consistently held that "[f]or an employee to be a prevailing party, he must obtain all or a significant part of the relief sought."[4] Employee asserts that she is the prevailing party in this matter. Agency concedes that Employee is the prevailing party in this matter.[5] In the instant matter, it is clear that based upon the final ruling issued by the D.C. Court of Appeals on May 23, 2023, sustaining the October 22, 2018, Initial Decision, that Employee is the prevailing party in this matter. Accordingly, based on the record in this matter, I conclude that Employee is the prevailing party.

Interest of Justice

In *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980), the Merit Systems Protection Board (MSPB), this Office's federal counterpart, set out several circumstances to serve as "directional markers toward the 'interest of justice' (the "Allen Factors")—a destination which, at best can only be approximate. *Id*. at 435. The circumstances to be considered are:

1. Where the agency engaged in a "prohibited personnel practice".

2. Where 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. Where the agency initiated the action against employee in "bad faith", including:

[4] *Alice Lee v. Metropolitan Police Department*, OEA Matter No 1601-0087-15AF18 (July 27, 2018) citing to *Zervas v D.C. Office of Personnel*, OEA Matter No 1601-0138-88AF92 (May 16, 1993). *See also. Hodnick v Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371, 375 (1980).
[5] Agency's Opposition to Employee Motin for Attorney Fees (July 31, 2023).

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. Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced the employee".

5. Where the agency "knew or should have known that it would not prevail on the merits", when it brought the proceeding, *Id*. at 434-35.

Employee's Motion for Attorney Fees makes no assertions regarding any *Allen* Factors. Agency asserts that while Employee is the prevailing party, that an award of fees is not in the interest of justice. Agency asserts that Employee's Motion "fails to establish which, if any *Allen* factor is applicable in this case."[6] Agency avers that none apply, in that it did not engage in a prohibited personal practice and that its actions were not clearly without merit or wholly unfounded. Further Agency avers that "OEA did not find that the charges were wholly unfounded…or that Employee was substantially innocent." Agency avers that OEA's reversal was based on other grounds. Agency also argues that it did not act in bad faith and did not commit a gross procedural error. Agency maintains that "Employee's informed consent to an extension constituted a waiver of the ten-day timeline and rendered the error harmless from a practical standpoint." To this same end, Agency avers that it believed "that because the evidence clearly demonstrated that an agreement was made – at Employee's behest – its action would be ultimately upheld by the adjudicator."[7]

In the instant matter, I find that the basis of the Initial Decision reversing the termination of Employee was due to Agency's violation of *Allen Factor 4 – gross procedural error.* While Agency avers that informed consent made the error harmless, the Initial Decision noted that this was not harmless error and as a result I find that *Allen* Factor 4 is applicable in this matter. Accordingly, I find that the requirements of both D.C. Official Code § 1-606.08 and OEA Rule 639.1[8] have been satisfied. The issue now is whether Employee, who submitted this Motion for Attorney Fees *pro se*, is entitled to an award of attorney fees.

ANALYSIS

In the instant matter, Employee had representation during the course of her appeal before this Office. The OEA record in this matter reflects that initially, Employee was represented by Sara Safriet, Esq., of the Alan Lescht and Associates, P.C. On May 1, 2017, Ms. Safriet entered a withdrawal of her appearance and representation of Employee. On August 14, 2017, William G. Dansie, Esq., of Dansie and Dansie LLP, entered his designation of representation of Employee. On April 23, 2018, Mr. Dansie submitted a withdrawal of representation, citing that Employee no longer wanted his services to represent her in this matter. In addition to the aforementioned representative history in the record, Employee cited in her Motion for Attorney Fees dated June 21, 2023, that she paid fees to the following for legal services related to her matter: 1) David Branch, Esq., ($2, 975 – in the March 9, 2024 filing, Employee cited that $3,150 was the amount); 2) Berry & Berry -John V. Berry ($300 consultation fee), and 3) David Shapiro, Esq. ($520.00 consultation fee). Employee further asserts that she paid Alan Lescht and Associates PC $19,560.34, and that she "does not recognize the services and fees in

[6] *Id*. at Page 4.
[7] *Id*. at Pages 6-8.
[8] 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021)

the time sheet received from William G. Dansie, Attorney for the employee…[t]herefore, the [E]mployee is requested (sic) for only $3600 paid in attorney fees to William G. Dansie." In a supplemental Motion filed July 28, 2023, Employee cited that she was asking for fees for monies paid to David Branch of $150 on July 10, 2020, and $1000 on July 16, 2020, along with a "supplemental receipt" for $2,000, other costs of $35.01 and USPS bills and transportation estimated costs of approximately $50.00. In her March 8, 2024, submission, Employee cited therein that the total costs of attorney's fees sought was $32,124.93, which included "other costs paid by the employee" which was listed as an amount of $4,994.59.[9] On October 13, 2023, Employee filed a Motion for this tribunal to disregard the fee petition filed by Alan Lescht and Associates, P.C. on September 29, 2023. As was previously noted, Employee's Motion to Disregard was granted and therefore will not be considered for these purposes.

Agency avers that Employee's request for attorney fees is unsupported by the record. Agency asserted that Employee's request in the amount of $31,866.69, was not supported by hourly rate or other billing information. Agency avers that "the burden of establishing reasonableness of the hours claimed in an attorney fee request is on the moving party."[10] Agency further asserts that "an employee seeking attorney's fees shall submit reasonable documentation and evidence to support the number of hours expended by the attorney." Agency further notes that "even affording Employee the benefit of the doubt as to the requests for Alan Lescht & Associates, PC and William G. Danise, no information has been offered to show how many hours David Branch worked on Employee's case to justify the requested amount."[11] Agency argues that "there is clearly insufficient documentation to award Employee the fees that she either paid or still owes to David Branch." Agency asserts that "the fact that an attorney was already paid for services rendered does not establish reasonableness for purposes of awarding attorney fees." Agency also avers that Employee "requests attorney fees for services she rendered *herself*." (Emphasis in original).

Agency also argues that "the law is well established that someone such as Employee cannot be reimbursed for expenses made as part of his or her own case." Agency asserts that the District of Columbia Court of Appeals ("DCCA") "has long followed the United States Supreme Court holding that a pro se party is not entitled to an award of attorney's fees and cannot recover such fees."[12] Agency further cites that in the instant matter "Employee essentially acted as a pro se litigant when she elected to "arrange voluminous personal actions and other relevant documents for filing at the court to save time and costs."[13] Consequently, Agency maintains that these request are not legally recoverable. Agency reiterates that its position is that the award of fees must be denied altogether as it is not in the interest of justice but cites that "even in the light most favorable to Employee" she would only be entitled to fees to account for monies paid to Alan Lescht & Associates, PC, William G. Danies and the consultation fee for Berry & Berry."

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[9] Employee advised that reference to her previously filed Motion for Attorney Fees filed on August 15, 2019, July 31, 2020, and the instant filings should be referenced.
[10] Agency's Opposition to Employee's Motion for Attorney Fees at page 9 (July 31, 2023). The undersigned notes that Agency's amount differs from the final amount requested by Employee in the March 8, 2024, supplemental filing. For the purposes of consideration, and because Employee has the burden regarding the fees requested, the undersigned has considered this matter based upon the amount cited in Employee's March 8, 2024, filing of $32,124.93.
[11] *Id*. at Page 10.
[12] *Id*.
[13] *Id*.

Pursuant to OEA Rule 615.1, an employee "… may appear on their own behalf, through an attorney, through a union representative, or through any *other competent individual*" in any proceeding before this Office. Further, OEA Rule 639 provides that an employee may be entitled to an award of attorney fees if they are the prevailing party and the award is warranted in the interest of justice.[14] However, D.C. Official Code 1-606.08 and OEA Rule 639 do not provide for an award for fees for union representatives or other competent individuals *or for employees representing themselves* (Emphasis added). In the instant matter, Employee retained legal representation throughout her matter. However, the record reflects that Employee required the withdrawal of her representation by those attorneys at different junctures during her appeal. As a result, Employee filed a Motion for Attorney Fees as a *pro se* litigant before this Office. This Office, pursuant to the findings of the District of Columbia Court of Appeals has held that "[t]he plain language of the statute [D.C. Code § 1–623.27(b)(2)] provides for payments to 'attorney-at-law' and **does not specify any other class of person eligible to receive such payments**." *See*. *Copeland v. District of Columbia Department of Employment Services.*[15] (Emphasis added).

In this instant matter, while Employee was previously represented and utilized attorneys , the instant fee petition was filed *pro se*. Employee's Motion seeks reimbursement for the fees she paid to attorneys who represented her during her appeal. Further, Employee also seeks reimbursement for fees and services she completed herself, including the submissions to this Office for which she cited was done to save costs and time. I find that Employee's request for reimbursement of fees she paid is not an award of attorney fees and cannot be granted. I further find that as a *pro se* litigant, Employee would not be entitled to an award of fees. Assuming *arguendo* that Employee could be awarded fees, the undersigned finds that the documentation submitted would be insufficient to support such an award. Employee's submissions do not include citations regarding the attorney's years of experience, billing rates, hourly expenses or otherwise. Employee's receipts of her payments to these attorneys over the course of her legal matter, are not sufficient for an analysis and subsequent award of attorney fees. As such, I find that Employee's personal payment records for legal representation for her matter are insufficient for a review and determination of an award of attorney fees for services provided by legal representation. As a result, I find that Employee's Motion for Attorney Fees lacks sufficient information to support that claim. I further find that pursuant to OEA Rule 639, Employee was the prevailing party in this matter and an award of fees would be in the interest of justice, however, as a *pro se* litigant, she is not eligible for such an award. Accordingly, I conclude that Employee's Motion for Attorney's Fees (and the request for $32, 124.93) must be denied.

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[14] OEA Rule 639 (December 27, 2021).

[15] See. *Copeland v. District of Columbia Department of Employment Services,* 3 A.3d 331 (Sept. 2, 2010). *Copeland* was represented in an administrative proceeding by two (2) law students from the George Washington University Law School Public Justice Advocacy Clinic, under the direct supervision of the Clinic professor, a member of the District of Columbia Bar. In that matter, Copeland was the prevailing party and was represented by law students, and their professor, who filed an attorney fee petition pursuant to D.C. Code § 1–623.27(b)(2)[15]. The claim for fees was denied and was appealed to the District of Columbia Court of Appeals wherein, it was held that "*[t]here is no question that a claimant must "utilize[ ] the services of an attorney-at-law in the successful prosecution of his or her claim" in order to be entitled to the award of "a reasonable attorney's fee*" under § 1–623.27(b)(2).

ORDER

Based on the foregoing it is hereby **ORDERED** that Employee's Motion for Attorney's Fees is **DENIED**.

FOR THE OFFICE:

/s/ Michelle R. Harris
Michelle R. Harris, Esq.
Senior Administrative Judge