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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EMPLOYEE ¹)	OEA Matter No. 1601-0015-20AF24
)	
v.)	
)	Date of Issuance: September 12, 2024
D.C. PUBLIC SCHOOLS,)	
Agency)	
)	

OPINION AND ORDER
ON
ATTORNEY’S FEES

Employee was hired to work as a Teacher with D.C. Public Schools (“Agency/DCPS”) in June of 2002. According to Agency, Employee was separated in August of 2009 for performance issues. However, on July 18, 2018, an Arbitrator reversed Agency’s termination action and ordered Agency to reinstate Employee.² On March 15, 2019, Agency issued a letter to Employee outlining the requirements for reinstatement.³ The document provided that in accordance with the District of Columbia Municipal Regulations (“DCMR”), Employee was required to obtain a current teaching license from the Office of State Superintendent of Education (“OSSE”). Additionally, he was required to complete a criminal background check, pursuant to the Criminal Background

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

² *District of Columbia Public Schools’ Answer to Employee’s Petition for Appeal*, p. 1 (January 8, 2020).

³ *District of Columbia Public Schools’ Opposition to Employee’s Witness List*, Joint Exhibit #3 (March 2, 2023).

Checks for the Protection of Children Act of 2004.⁴ Employee was also required to submit a negative tuberculosis (“TB”) test dated within the past year, and he was required to complete a mandatory drug and alcohol test in accordance with Agency’s Mandatory Drug and Alcohol Testing (“MDAT”) policy.⁵

However, according to Agency, after several requests for extensions, Employee failed to comply with its reinstatement requirements. Therefore, on October 18, 2019, Agency issued a notice of termination action to Employee. It charged him with violating 5-E DCMR §§ 1401.2(j) – willful disobedience and 1401.2(t) – violation of the rules, or lawful orders of the Board of Education, or any directive of the Superintendent of Schools, issued pursuant to the rules of the Board of Education. As a result, Employee was terminated again, effective November 4, 2019.⁶

After conducting an evidentiary hearing,⁷ the AJ issued an Initial Decision on September 13, 2023. He held that Employee complied with Agency’s request to provide a chest x-ray, as it related to the TB testing requirement. As for Employee’s background check, the AJ opined that Agency prevented Employee from completing the fingerprinting and should have communicated with Employee how he could have accomplished securing his background check, even with its concerns related to Employee’s suspicion of TB.⁸ As it related to Employee’s license to teach, the AJ held that Agency should have provided him with a provisional license. The AJ noted that

⁴ To complete the background check, Employee was required to submit a clearance application through the DCPS Employment Clearance link, and then report to DCPS’ Central Office for fingerprinting.

⁵ The notice provided that Employee would receive an email from the MDAT team with directions to make an appointment for drug testing.

⁶ *Petition for Appeal*, p. 7 (December 2, 2019).

⁷ In Agency’s closing brief, it argued that Employee was not a District government employee pursuant to D.C. Code § 1-603.01(7). It was Agency’s position that although it placed Employee on administrative leave, the payments that were made to him were part of his back pay award and not salary payments. *District of Columbia Public Schools’ Written Closing Arguments*, p. 9-10 (May 5, 2023).

In his closing arguments, Employee highlighted several witnesses who testified that he was reinstated to his position by Agency. Therefore, it was Employee’s position that he was an employee with Agency. *Employee’s Closing Argument with Proposed Findings of Fact and Conclusions of Law*, p. 1-2 (May 5, 2023).

⁸ *Initial Decision*, p. 9-13 (September 13, 2023).

Employee's license lapsed because of the length of the arbitration process, but he reasoned that Agency could have simply searched Employee's former personnel file to find his original licensing documents. Finally, he held that Agency failed to provide authorization for Employee to schedule a drug test, which prevented him from efficiently completing his drug testing requirement. Consequently, the AJ ordered that Agency's termination action be reversed; that Agency reinstate Employee; and that Agency reimburse Employee all pay and benefits lost as a result of his removal.⁹

On October 13, 2023, Agency filed a Petition for Review. Employee filed his response to Agency's Petition for Review on November 14, 2023. Ultimately, the Board upheld the Initial Decision and found that Agency terminated Employee because he failed to complete four onboarding requirements. However, it held that Agency prevented Employee from completing three of the four requirements. The Board found that although there was one requirement that Employee could have completed, Agency failed to offer a range of penalties to determine the reasonableness of its termination action. Furthermore, it ruled that Agency did not provide any evidence that it considered relevant factors before terminating Employee. As a result, the Board upheld the Initial Decision and denied Agency's Petition for Review. Accordingly, Employee was to be reinstated with back pay and benefits, as outlined in the Initial Decision.¹⁰

Agency did not file an appeal of the OEA Board's Opinion and Order. Subsequently, on February 2, 2024, Employee's Counsel filed a Motion for Attorney's Fees alleging that Employee was the prevailing party and that an award for attorney's fees should be awarded in the interest of

⁹ *Id.*, 11-13.

¹⁰ *Employee v. D.C. Public Schools*, OEA Matter No. 1601-0015-20, *Opinion and Order on Petition for Review* (January 4, 2024).

justice.¹¹ Accordingly, his counsel requested an award of \$72,510.20 plus \$2,500 under the *Laffey* Matrix¹² or \$55,154 plus \$2,500 under the *Fitzpatrick* Matrix.¹³

In response to Employee's motion on attorney's fees, Agency filed a Motion for a Hearing on Employee's Obligation to Mitigate Damages. The motion did not address Employee's Counsel's motion for attorney's fees. It instead focused on Employee's obligation to mitigate damages for an award of back pay.¹⁴

On February 15, 2024, the AJ issued an Order Regarding Employee's Motion for Attorney's Fees and Costs. The order requested that Employee's Counsel address if Employee completed Agency's required onboarding procedures; if Employee was reinstated to his last position of record or a similar position; and if there were any other compliance related complaints to be resolved to ensure that Employee's motion for attorney's fees was ripe for adjudication. The order further provided that if the answers to any of the aforementioned questions was negative, then returning Employee to his status quo was incomplete and would require the investment of additional resources that Employee's counsel may add to his fee invoice.¹⁵

In response to Agency's motion for a hearing on mitigating damages, Employee argued that the motion should be denied because the issue of mitigation of damages is moot. He contended that the mitigation of damages is an affirmative defense which can be waived and that Agency

¹¹ *Employee's Motion for Attorney's Fees Pursuant to Rule 639*, p. 1-4 (February 2, 2024).

¹² *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983).

¹³ The *Fitzpatrick* Matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared to assist with resolving requests for attorney's fees in complex civil cases in District of Columbia federal courts handled by the Civil Division of the United States Attorney's Office for the District of Columbia. It was developed to provide "a reliable assessment of fees charged for complex federal litigation in the District [of Columbia]," as the United States Court of Appeals for the District of Columbia Circuit urged. *See DL v. District of Columbia*, 924 F.3d 585, 595 (D.C. Cir. 2019). The matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, nor has it been adopted by other Department of Justice components. *See* <https://www.justice.gov/usao-dc/page/file/1504361/dl?inline>.

¹⁴ *District of Columbia Public Schools' Motion for a Hearing on Employee's Obligation to Mitigate Damages* (February 8, 2024).

¹⁵ *Order Regarding Employee's Motion for Attorney's Fees and Costs* (February 15, 2024).

waived this defense by waiting to raise it after the case concluded. Employee further argued that Agency unlawfully refused to comply with the Initial Decision and that its filing of the motion for mitigation is in bad faith to avoid paying Employee as ordered.¹⁶

As for the AJ's order related to his Counsel's motion for attorney's fees, Employee argued that the status of his onboarding was not relevant to the request for attorney's fees. He went on to note that Agency refused to conduct a back pay and benefits analysis despite the order in the Initial Decision. Consequently, it requested that the AJ order Employee's immediate reinstatement; that back pay and benefits be paid within ten (10) days; and that his attorney's fee petition be granted and paid immediately.¹⁷

On March 4, 2024, the AJ issued an Addendum Decision on Attorney's Fees and found that Employee was the prevailing party in this case. However, he opined that Employee has not been reinstated and has not received the back pay that he is owed. The AJ found that the process of reinstating Employee and having him receive back pay would require additional legal resourcing that would become part of the evolving attorney's fee petition. Therefore, he ruled that the motion for attorney's fees was premature, and it was dismissed without prejudice for resubmission.¹⁸

Employee's Counsel filed a Petition for Review on April 1, 2024. He argues that he should not be denied attorney's fees because Agency refuses to implement OEA's decision. Employee's Counsel contends that the AJ's Addendum Decision punishes him for Agency's wrongdoing of not reinstating Employee with back pay and benefits. Therefore, he requests that the Addendum Decision on Attorney's Fees be reversed.¹⁹

¹⁶ *Employee's Opposition to Agency's Motion for a Hearing on Mitigation of Damages* (February 28, 2024).

¹⁷ *Employee's Response to Order of February 15, 2024, Regarding Employee's Motion for Attorney's Fees* (February 28, 2024).

¹⁸ *Addendum Decision on Attorney's Fees* (March 4, 2024).

¹⁹ *Employee's Petition for Review* (April 1, 2024).

Agency filed its response to Employee's petition on May 1, 2024. It argues that Employee's request for attorney's fees is premature. It is Agency's position that the AJ still needs to resolve the issue of backpay and Employee's duty to mitigate before considering the petition for attorney's fees. Accordingly, it requests that the petition be denied.²⁰

There were several subsequent filings related to the compliance matter filed by both parties.²¹ However, on August 26, 2024, Employee's counsel filed a notice withdrawing his representation of Employee in this matter, effective immediately. His counsel provided that Employee terminated his firm from representing him, and Employee will continue in this matter as a *pro se* litigant.²²

As it relates to premature filings, OEA Rule 610.3 provides that "a motion seeking . . . attorney's fees shall be considered a premature filing if it is filed before the last decision becomes final, or if an appeal of the last decision is pending before the Board or the Superior Court of the District of Columbia." Moreover, OEA Rule 610.4 provides that "premature filings seeking . . . attorney's fees shall be dismissed by the Administrative Judge." In the current case, the OEA Board's issued an Opinion and Order on January 4, 2024, denying Agency's Petition for Review. Agency did not appeal this decision to the Superior Court for the District of Columbia. Therefore, in accordance with OEA Rule 635.4, the Initial Decision became final when the Board issued its Opinion and Order denying Agency's Petition for Review.²³ Employee's Motion for Attorney's

²⁰ *District of Columbia Public Schools' Response to Employee's Petition for Review* (May 1, 2024).

²¹ Employee filed a Petition for Enforcement, *Employee's Petition for Enforcement of Final Decision* (May 3, 2024). Agency filed a Motion for a Hearing on Mitigation and a Response to Employee's Petition for Enforcement, *District of Columbia Public Schools' Motion for a Hearing on Employee's Obligation to Mitigate Damages* (May 31, 2024) and *District of Columbia Public Schools' Response to Employee's Petition for Enforcement of Final Decision* (May 31, 2024). Employee filed his Opposition to the Motion for Hearing on Mitigation, *Employee's Opposition to Agency's Motion for a Hearing on Employee's Obligation to Mitigate Damages* (June 6, 2024). Finally, the parties had a mediation conference scheduled for August 20, 2024, *Corrected Notice of Mediation/Settlement Conference* (August 8, 2024).

²² *Praecepte Withdrawing Representation by Counsel* (August 26, 2024).

²³ OEA Rule 635.4 provided that "if the Board denies all Petitions for Review, the Initial Decision shall become final

Fees was filed on February 2, 2024, after the Board denied the Petition for Review and after the Initial Decision became final. Accordingly, the Motion for Attorney's Fees was not prematurely filed.

Although the motion was not prematurely filed, this Board does understand why procedurally the AJ decided to defer rendering a decision on attorney's fees while the parties were still engaged in remedying the outstanding compliance and back pay issues. However, because Employee has terminated his counsel's representation, there will be no additional attorney's fees accrued after counsel's August 26, 2024, withdrawal. Thus, although the AJ must still render a decision on compliance, that portion of the case will be handled by Employee in a *pro se* posture. Accordingly, the attorney's fees portion of this case has concluded. Consequently, Employee's Motion for Attorney's Fees is ripe for review. As a result, this Board grants Employee's Petition for Review to have the Administrative Judge render a decision on attorney's fees.

ORDER

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

FOR THE BOARD:

Clarence Labor, Jr., Chair

Peter Rosenstein

Dionna Maria Lewis

Arrington L. Dixon

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.