THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
RONALD COCOME	)	
Employee	)	
	)	OEA Matter No. 1601-0014-84A02P04
	)	
v.	)	Date of Issuance: February 11, 2004
	)	
D.C. LOTTERY AND	)	
CHARITABLE GAMES	)	
CONTROL BOARD	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Thinking that Employee had violated the applicable conflict of interest provisions, Agency told Employee to resign his position or face the possibility of having criminal charges filed against him. Agency further told Employee that because of his probationary status, he had no appeal rights and that if he chose to resign, his resignation must be tendered by 9:00 the

next morning. Given these options, on June 22, 1983, Employee resigned his position as a Special Assistant to Agency's Chairman. He then filed with the Office of Employee Appeals (OEA or Office) a Petition for Appeal claiming that his resignation had been involuntary.

In a decision issued April 11, 1986, the Administrative Judge found that because Employee was not a probationary employee but rather a permanent employee in the Career Service, Agency had misled Employee when it told him that he had no appeal rights. Having relied on this misrepresentation to his detriment, the Administrative Judge held that Employee's resignation had indeed been involuntary. Thus Agency was ordered to reinstate Employee with all back pay and benefits due him.

Agency appealed that ruling but in a December 5, 1986, Opinion and Order on Petition for Review, we denied its Petition for Review. Thus the April 11, 1986, decision became a final decision of this Office. Ultimately this appeal culminated with an opinion issued on June 28, 1989, by the District of Columbia Court of Appeals.[1] In that opinion the Court found that there was substantial evidence to support this Office's conclusion that Employee was a permanent employee whom Agency had misled with respect to his appeal rights and as such, Employee's resignation was rightfully deemed involuntary.

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[1] Agency first appealed the final decision to the Superior Court of the District of Columbia. That court held that Employee had resigned voluntarily and thus reversed our ruling.

Having had the merits of his appeal finally resolved in his favor, Employee then filed with this Office on October 6, 1989, a Petition for Attorney Fees and Costs.[2] The Administrative Judge recommended to the Board that the petition be denied on the basis that this Office lacked the statutory authority to award attorney fees to an employee, such as the employee in this case, who had been hired after January 1, 1980.[3] The Board accepted this recommendation and issued Orders on May 25, 1990 and again on September 10, 1990 in which the Board denied Employee's request.[4]

Thereafter, the Council of the District of Columbia enacted a law that affirmatively granted this Office the authority to award attorney fees. The Council subsequently amended that law with the enactment of the "Office of Employee Appeals Attorney Fees Clarification Amendment Act of 2002 ". The amendment designated the existing provision as subsection (a) and added the following new provision:

> (b)(1) The provision of subsection (a) of this section shall apply retroactively to those who prevailed, and applied to the Office of

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[2] Employee's October 6, 1989, Petition for Attorney Fees and Costs claimed fees for services rendered in connection with the appeals brought before the courts.

[3] Even though the D.C. Court of Appeals had held in *District of Columbia v. Hunt (Hunt I)*, 520 A.2d 300 (D.C. 1987),that pursuant to the federal Back Pay Act, 5 U.S.C. § 5596, this Office had the authority to consider petitions for attorney fees submitted by employees who were hired by the District prior to January 1, 1980, Employee could not avail himself of this authority because he had been hired after January 1, 1980. Subsequently, this authority was extended to post-January 1, 1980 hires in *Zenian v. D.C. Office of Employee Appeals*, 598 A.2d 1161 (D.C. 1991).

[4] Employee had filed for reconsideration of the May 25, 1990 Order thereby necessitating the issuance of the September 10, 1990 Order.

> Employee Appeals for such payment between September 15, 1988 and May 15, 1990.

With the retroactive provision of the law in place, Employee filed on May 13, 2002, a Petition for Attorney Fees. In an Addendum Decision on Attorney Fees issued June 5, 2003, the Administrative Judge found that based on Employee's October 6, 1989, application for attorney fees and the May 13, 2002, petition, Employee was entitled to an award of attorney fees for services rendered before this Office for the time periods of February 3, 1984 through December 5, 1986, September 8, 1989 through September 10, 1990 and May 13, 2002 through March 21, 2003. Thus, the Administrative Judge ordered Agency to pay Employee $23,162.12 in attorney fees and costs.

Agency has since timely filed a Petition for Review in which it puts forth several arguments. Agency's first claim of error is that the retroactive provision of the attorney fees law "contemplates that Employee should be held to recover attorney fees limited to the amount claimed and documented in his original petition. . . ." *Petition for Review* at 6. We disagree. Instead, we believe the plain language of this provision makes it clear that this provision was simply a way by which this Office gained the authority to consider petitions for attorney fees submitted by a prevailing party who had filed their petition between September 15, 1988 and May 15, 1990. This provision does not determine an employee's entitlement to an award of attorney fees. Once a petition for attorney fees has been filed in this Office, it is then up to an

administrative judge, as was done in this appeal, to determine whether an employee is entitled to such an award and the amount, if any, that should be recovered.

Agency's second claim of error is that the Administrative Judge incorrectly applied two of the standards that this Office considers when deciding whether an award of attorney fees to the prevailing party is warranted in the interest of justice. The case of *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980) sets forth five circumstances that may be determinative of whether such an award is warranted in the interest of justice. The two standards that Agency believes the Administrative Judge misapplied are "where the agency engaged in a 'prohibited personnel practice'" and "where the agency 'knew or should have known that it would not prevail on the merits' when it brought the proceeding." *Allen*, 2 M.S.P.R. at 434-435.

In the Addendum Decision on Attorney Fees, the Administrative Judge stated that the judge who initially adjudicated this appeal determined that, based on the evidence presented, "Employee's resignation [had been] the product of time pressure and duress created by Agency, and that Agency had misled Employee as to his 'right to be removed for cause.'" Based on this finding made in the trial below, the Administrative Judge in the instant matter held that "[c]learly, a resignation obtained by time pressure, duress and misinformation is a 'prohibited personnel practice.'" We agree with this finding. According to the record, Agency informed Employee late in the day that he had until 9:00 the next morning to either resign or face criminal charges for allegedly violating the conflict of interest rules. Furthermore Agency, who

should have known that Employee was a permanent employee at that time, told Employee that he had no appeal rights. Having such a limited time period in which to decide whether he would resign his job or possibly have to defend himself against criminal charges, Employee submitted his resignation. Based on these facts, we too believe that Agency's actions constitute a prohibited personnel practice.

With respect to its second claim of error, Agency also argues that the "finding that the Agency 'knew or should have known that it would not prevail on the merits' is contrary to the evidence." Again, we disagree. In the April 11, 1986, decision, the Administrative Judge stated that the "Board of Elections and Ethics [had] investigated, but did not sustain a charge of conflict of interest against Employee. It is, therefore, doubtful that charges brought by Agency could have been sustained. . . ." 34 D.C. Reg. at 4279. Moreover, the Administrative Judge ruled in Employee's favor in that decision and the Board upheld that ruling in its December 5, 1986 opinion. Essentially, Agency had been met with defeat three times before it brought a petition for review in Superior Court. Even though that court found in favor of Agency, the Court of Appeals reversed the trial court ruling and ordered that court to reinstate this Office's final decision. We believe that based on these rulings all in favor of Employee, Agency knew or should have known that it could not prevail on the merits of this appeal.

Agency's last claim of error is that the Administrative Judge erred by not conducting an evidentiary hearing on the issue of attorney fees. Agency filed a motion requesting a hearing

on this issue. The Administrative Judge denied Agency's motion and reasoned that "the instant attorney fees matter can be properly adjudicated based on the considerable documentary evidence and arguments of record." *Addendum Decision on Attorney Fees* at 6, footnote 11. Agency believes that its motion should have been granted so that it could have had the opportunity to "subject to cross-examination" Employee's claims.

According to OEA Rule 625.2, 46 D.C. Reg. 9297, 9314 (1999), the decision of whether to conduct an evidentiary hearing is within the discretion of the administrative judge. Agency had filed a response to each of Employee's petitions requesting attorney fees. Moreover, after the Administrative Judge had concluded his second Status Conference in this appeal, Employee supplemented the record with additional information to which Agency filed a responsive pleading. Based on all of this documentation, the Administrative Judge determined that because there was enough evidence in the record upon which to decide whether Employee was entitled to an award of attorney fees, an evidentiary hearing was not necessary. We agree.

In sum, we believe there is substantial evidence in the record to uphold the Addendum Decision on Attorney Fees. Accordingly, Agency's Petition for Review is denied.

ORDER

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

FOR THE BOARD:

Erias A. Hyman, Chair

Horace Kreitzman

Brian Lederer

Jeffrey J. Stewart

Keith E. Washington

The initial decision in this matter shall become a final decision of the Office of Employee Appeals five days after the issuance date on this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.