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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
NURY HERNANDEZ,	)	
Employee	)	
	)	OEA Matter No.: 1601-0073-14
v.	)	
	)	Date of Issuance: April 18, 2017
OFFICE OF	)	
UNIFIED COMMUNICATIONS,	)	
Agency	)	
_____	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Nury Hernandez (“Employee”) worked as Dispatcher with the Office of Unified Communications (“Agency”). On March 17, 2014, Agency issued Employee an Advance Written Notice of Proposed Suspension of Ten Days based on a charge of “any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty.” On April 9, 2014, Agency issued a Final Decision on Proposed Suspension of Ten Days, sustaining the charge against Employee. Her suspension became effective on April 14, 2014.

Employee filed a Petition for Appeal on April 18, 2014. In her appeal, Employee argued that Agency failed to fully consider the evidence which formed the basis for the neglect of duty

charge. She also stated that she was working in a hostile work environment. Therefore, Employee requested that her suspension be reversed with back pay and benefits.<sup>1</sup>

Agency filed its Answer to the Petition for Appeal and a Motion to Dismiss on June 6, 2014. It contended that there was sufficient evidence to prove the neglect of duty charge against Employee. Agency further requested that the matter be decided based on the documents of record.<sup>2</sup>

OEA Administrative Judge (“AJ”), Stephanie Harris, was originally assigned to this matter in July of 2014. AJ Harris held several Status Conferences and ultimately ordered the parties to submit legal briefs addressing whether OEA had jurisdiction over Employee’s appeal. On June 26, 2015, AJ Harris issued an Order on Jurisdiction. There were two issues addressed in the order: whether Agency’s rescission of Employee’s suspension prevented OEA from exercising jurisdiction in this matter; and whether Employee’s attorney should be entitled to attorneys’ fees if jurisdiction was not established. AJ Harris held that Employee was not made whole because she incurred legal fees to hire an attorney to defend her in the matter before OEA prior to Agency’s decision to rescind the suspension. Therefore, she concluded that this Office was not divested of jurisdiction because the rescission alone could not return Employee to the “*status quo ante*” until the issue surrounding attorneys’ fees was remedied. Ultimately, AJ Harris ordered that the matter be reassigned to another AJ for further adjudication.<sup>3</sup>

AJ Dohnji was assigned to this matter on July 22, 2015. After reviewing the submissions of the parties, the AJ decided that an evidentiary hearing was not warranted and that a decision could be decided based on the documents of record. An Initial Decision was subsequently issued on October 6, 2015. The sole issue that was addressed was whether Employee’s Petition for

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<sup>1</sup> *Petition for Appeal* (April 18, 2014).

<sup>2</sup> *Answer to Petition for Appeal and Motion for Dismissal with Prejudice* (June 6, 2014).

<sup>3</sup> *Order on Jurisdiction* (June 26, 2015).

Appeal should be dismissed as moot. The AJ concluded that Agency rescinded Employee's ten-day suspension on October 8, 2014, and reimbursed her with all lost wages incurred as a result of the suspension. However, the AJ provided that as of the date of the Initial Decision, Employee's Petition for Appeal was moot because a reversal of the suspension was the only remedy that she would be entitled to if she was to prevail on the merits of her appeal. The AJ highlighted the holding in *Culver v. District of Columbia Fire Department*, OEA Matter No. 1601-0121-90, *Opinion and Order on Petition for Review* (January 16, 1991) wherein OEA's Board held that there is no requirement that this Office adjudicate a matter that is moot. According to the AJ, there were no longer any issues in controversy as of the date of her Initial Decision. Consequently, Employee's Petition for Appeal was dismissed.

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on November 2, 2015. She argues that the AJ disregarded the "law of the case" doctrine because AJ Harris previously determined that OEA could exercise jurisdiction over this appeal. Employee also contends that the AJ should have determined that this matter is not entirely moot because Agency did not reimburse her for attorneys' fees, thereby affording her full relief. In addition, she states that she needed to retain legal counsel for the sole purpose of convincing the Agency to rescind her suspension. Consequently, Employee believes that she is the prevailing party in this matter and requests that the Board overturn the Initial Decision and permit her to file a petition for reimbursement of attorneys' fees.<sup>4</sup>

Agency filed an Opposition to the Petition for Review on December 2, 2015. It argues that the "law of the case" doctrine is inapplicable in this matter because AJ Harris' ruling on jurisdiction was not "sufficiently final." Agency further states that the Initial Decision was based

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<sup>4</sup> *Petition for Review* (November 2, 2015).

on substantial evidence because the AJ correctly determined that Employee's appeal is moot. Lastly, it provides that Employee cannot be considered the prevailing party in this matter because she did not secure a favorable judgment before OEA on the merits of her appeal. Therefore, Agency requests that her Petition for Review be denied.<sup>5</sup>

#### Law of the Case Doctrine

In her appeal, Employee argues that the Initial Decision violated the "law of the case" doctrine. In *Kritsidimas v. Sheskin*, 411 A.2d 370 (February 13, 1980), the District of Columbia Court of Appeals provided that "this doctrine holds that once the court has decided a point in a case, that point becomes and remains settled unless or until it is reversed or modified by a higher court." However, the Court noted that the law of the case doctrine has two limitations. First, the doctrine does not apply when the initial ruling has "little or no finality to it."<sup>6</sup> Second, a court may depart from the doctrine in cases where the first ruling is clearly erroneous in light of newly-presented facts or a change in substantive law.<sup>7</sup> The law of the case doctrine "serves the judicial system's need to dispose of cases efficiently by discouraging 'judge-shopping' and multiple attempts to prevail on a single question."<sup>8</sup>

This Board is not persuaded by Employee's argument that the law of the case doctrine applies in this matter. The central issue that was decided by AJ Harris in her June 26, 2015 Order was whether Agency's rescission of Employee's suspension precluded OEA from exercising jurisdiction in this matter. AJ Harris concluded that this Office could exercise jurisdiction over Employee's appeal because the rescission of her suspension could not return her to *status ante quo* until after the issue surrounding her attorney's fees was remedied. However, the issue

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<sup>5</sup> *Opposition to Petition for Review* (December 2, 2015).

<sup>6</sup> *See United States v. Davis*, D.C. App., 330 A.2d 751, 755 (1975).

<sup>7</sup> *Kritsidimas* at 372.

<sup>8</sup> *Id.* at 371.

decided in the subsequent AJ's (Dohnji) Initial Decision was whether Employee's Petition for Appeal should be dismissed as moot, not whether OEA could exercise jurisdiction over her appeal. The Initial Decision provided that OEA had jurisdiction over Employee's appeal pursuant to D.C. Official Code § 1-606.03. Thus, AJ Dohnji did not violate the law of the case doctrine because she did not alter or re-examine AJ Harris' previous jurisdictional ruling. Accordingly, we find Employee's argument to be without merit.

### Mootness

Next, Employee argues that her Petition for Appeal should not have been dismissed as moot. In *Settemire v. District of Columbia Office of Employee Appeals*, 898 A.2d 902 (D.C. 2006), the D.C. Court of Appeals held that "it is well-settled that, while an appeal is pending, an event that renders relief impossible or unnecessary also renders that appeal moot."<sup>9</sup> The Court went on to explain that the mootness of an employee's appeal is not overcome by his interest in being awarded attorneys' fees. Moreover, "a party's interest in pursuing litigation in order to be awarded attorney's fees cannot by itself create the requisite live controversy where none exists on the merits of the underlying claim."<sup>10</sup> Once the only concrete interest in the controversy has terminated, the litigation is not to be "pressed forward solely in order to obtain reimbursement of 'sunk costs.'"<sup>11</sup>

In this case, Employee was suspended for ten days effective April 14, 2014, based on a neglect of duty charge. She subsequently filed a Petition for Appeal with OEA on April 18, 2014, and requested that the suspension be reversed. However, on October 8, 2014, Agency issued Employee a Notice of Reversion of Suspension of Ten Days. In the notice, the Office of Unified Communication agreed to process a return payment of Employee's lost wages for the

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<sup>9</sup> Quoting *Vaughn v. United States*, 579 A.2d 170, 175 n. 7 (D.C.1990) (citations omitted).

<sup>10</sup> *Lewis v. Continental Bank Corporation*, 494 U.S. 472, 480, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990).

<sup>11</sup> *Id.*

entire duration of her suspension.<sup>12</sup> Although she argues that the facts in *Settlemyre* are distinguishable from the facts in this case, the premise is the same. After Agency rescinded Employee's suspension, there was no meaningful relief that she could seek before this Office. Thus, there was no live controversy after Agency reimbursed her for any lost wages. Counsel for Employee cannot be permitted to pursue litigation based solely on the desire to be awarded attorney's fees. Accordingly, this Board agrees with the AJ's finding that Employee's appeal should be dismissed as moot.

#### Attorney's Fees

Lastly, Employee states that she should be entitled to attorney's fees because she needed to employ an attorney to "convince the Agency to rescind her suspension," and she is the prevailing party in this case. Under D.C. Official Code § 1-606.08 and OEA Rule 634.1, an employee shall be entitled to an award of reasonable attorney fees if the appellant is: a) the prevailing party; and b) payment is warranted in the interest of justice. Generally speaking, the term "prevailing party" means a party who has been awarded some relief by the court (or other tribunal).<sup>13</sup>

Here, it is clear from the record that Employee is not the prevailing party. The Initial Decision dismissed Employee's petition as moot because Agency rescinded her suspension. She did not secure a favorable judgment before OEA on the merits of her appeal. Since the relief that Employee originally sought—reversal of the ten-day suspension—is unavailable to her at this juncture, she cannot be deemed a prevailing party. Therefore, she is not entitled to attorney's fees under OEA Rule 634.1.

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<sup>12</sup> *Agency's Renewed Motion to Dismissed for Lack of Jurisdiction*, Tab 3 (May 20, 2015).

<sup>13</sup> *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Resources.*, 532 U.S. 598, 603, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001).

### Substantial evidence

According to Rule OEA 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. The D.C. Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 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.<sup>14</sup> Therefore, if there is substantial evidence in the record to support the AJ's decision to dismiss Employee's Petition for Appeal because the matter is moot, then this Board must accept it. Based on our review of the record, the Initial Decision was based on substantial evidence. The AJ correctly determined that this matter was moot because Agency reversed Employee's suspension with back pay and benefits prior to the issuance of the Initial Decision. A reversal of the suspension was the only remedy to which Employee was entitled to if she were to prevail on the merits of her appeal before OEA. In addition, Employee is not entitled to attorney's fees in this case because she is not the prevailing party. Therefore, her Petition for Review must be denied.

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<sup>14</sup>*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).

**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

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Patricia Hobson Wilson

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P. Victoria Williams.

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.