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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
WEBSTER A. ROGERS,)	OEA Matter No. 2401-0255-10AF16
Employee)	
)	
v.)	Date of Issuance: April 24, 2018
)	
D.C. PUBLIC SCHOOLS,)	
Agency)	
)	

OPINION AND ORDER
ON MOTION FOR ATTORNEY’S FEES

This matter has been previously before the Office of Employee (“OEA”) Board. By way of background, Webster Rogers (“Employee”) worked as a Music Teacher with D.C. Public Schools (“Agency”). On October 2, 2009, Agency notified Employee that he was being separated from his position pursuant to a Reduction-in-Force (“RIF”).

After a protracted litigation process with several levels of appeals, the OEA Administrative Judge (“AJ”) issued an Initial Decision on Remand on February 27, 2015. The AJ found that one round of lateral competition was not provided to Employee. She reasoned that Agency failed to conduct the RIF under the Abolishment Act and failed to prove that Employee was rated as an “Inadequate Performer.” She also held that Agency did not prove that Employee was considered for priority reemployment. Furthermore, she opined that Agency failed to consider Employee for the Displaced Employee Program. Therefore, the AJ ordered that

Agency's action be reversed and that it reinstate Employee to his position with back pay and benefits.¹

Agency filed a Petition for Review with the OEA Board on April 3, 2015. The Board issued its Opinion and Order on Petition for Review on July 21, 2015. It held that in accordance with District Personnel Manual ("DPM") § 2427.1, Agency was required to establish and maintain priority re-employment lists. The Board found that Agency offered nothing more than its RIF notice to prove its compliance. Additionally, it held that Employee was not afforded one round of lateral competition. Further, the Board reasoned that because Agency failed to raise the Inadequate Performer argument on Petition for Appeal or in the Superior Court for the District of Columbia ("Superior Court"), Agency's Inadequate Performer argument exceeded the scope of the remand. Moreover, the Board found that Agency failed to show that it complied with Chapter 24 of the DPM regulations when processing Employee's RIF action. Accordingly, it upheld the AJ's decision to reverse Agency's action and denied Agency's Petition for Review.²

On August 31, 2015, Employee filed a Supplemental Memorandum in Support of an Award of Attorney's Fees and Costs. He requested that OEA adjudicate the motion for attorney's fees and costs for time incurred in Superior Court. Accordingly, Employee requested that OEA and Superior Court award attorney's fees and costs for litigation.³

The AJ issued an Addendum Decision on Attorney's Fees on November 3, 2015. She found that a determination was not made that Employee was the prevailing party in this matter. As a result, she dismissed the motion for attorney's fees without prejudice because it was

¹ *Initial Decision on Remand*, p. 5-10 (February 27, 2015).

² *Opinion and Order on Petition for Review*, p. 7-13 (July 21, 2015).

³ *Employee's Supplemental Memorandum in Support of an Award of Attorney's Fees and Costs*, p. 1-2 (August 31, 2015).

prematurely filed.⁴

On August 1, 2016, the Superior Court issued an order denying Employee's Motion for an Award of Attorney's Fees and Costs. The Court found that it lacked jurisdiction to award attorney's fees. Therefore, it remanded the matter to the OEA Administrative Judge to consider whether an increased fee award was proper in light of the fact that Employee prevailed in Superior Court; and whether any award of fees or costs to Employee at the administrative level was undercut by the time and effort spent litigating this matter in Superior Court.⁵

The AJ held a status conference and requested that both parties file briefs addressing the issues on remand. Employee explained that he was wrongly terminated and spent years seeking reinstatement. As a result, he incurred \$41,858.30 in attorney's fees and \$319.18 in costs in Superior Court. Employee argued that in *Andrew Jenkins v. D.C. Public Schools*, OEA Matter No. J-0050-91AF492, *Opinion and Order on Petition for Review* (March 18, 1994), the OEA Board held that it lacked jurisdiction under D.C. Official Code § 1-606.08 to award fees incurred in Superior Court to an appellant who prevailed. However, Employee explained that after *Jenkins* was decided, it was overruled by the D.C. Court of Appeals in *Metropolitan Police Department v. Stanley*, 951 A. 2d 65 (D.C. 2008). Employee stated that in *Stanley*, a case that originated in OEA, the D.C. Court of Appeals declared that the responsibility to award fees should be placed on the trial court where the case arose, so the value of the service could be estimated in its entirety. Moreover, Employee provided that D.C. Official Code § 1-606.08 states that "the Hearing Examiner or the Arbitrator 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." He explained that the plain language in the statute gave OEA jurisdiction to

⁴*Addendum Decision on Attorney Fees*, p. 2-3 (November 3, 2015).

⁵*District of Columbia Public Schools v. District of Columbia Office of Employee Appeals*, 2015 CA 6565 P(MPA) (D.C. Super. Ct. August 1, 2016).

award all fees incurred in the matter, including fees incurred in Superior Court. Accordingly, Employee reasoned that the AJ should grant his Motion for Attorney's Fees in full.⁶

In its brief, Agency argued that Employee was not entitled to attorney's fees incurred in Superior Court. Agency explained that in *Jenkins*, OEA held that it did not have jurisdiction to grant attorney's fees for work done before any court or tribunal other than OEA. It contended that Employee's claim that *Stanley* overturned *Jenkins* is incorrect. Agency provided that the holding in *Stanley* stated that a reviewing court should not determine the attorney fees for hours generated at the trial court. Further, it stated that the D.C. Court of Appeals determined that it is not in the position to issue judgements on attorney fees for work not incurred at the D.C. Court of Appeals. Moreover, Agency provided that in *Channavajjal M. Prasad v. Commission on Mental Health Services*, OEA Matter No. 1601-0158-00A08 (March 13, 2009), the AJ cited to *Jenkins* and reaffirmed OEA's position that it does not have jurisdiction to grant attorney fees for work done before any court other than OEA. Accordingly, Agency asked that the attorney's fees requested by Employee for work incurred before Superior Court be denied.⁷

On December 6, 2016, Employee filed a supplemental authority notice. He explained that in a 2015 decision, the Superior Court held in *Bryant v. Office of Employee Appeals*, Case No. 2009 CA 6181 P (D.C. Super. Ct. June 16, 2015), that "petitioners who prevail in the Office of Employee Appeals . . . are entitled to attorney's fees for work done on appeal to the Superior Court and the Court of Appeals; and the amount of these fees is a factual matter for the OEA to decide." According to Employee, in *Bryant*, the Court concluded that a prevailing employee may be entitled to attorney's fees for work performed on appeal as part of employee's entitlement under D.C. Official Code § 1-606.08. It was his position that the Court held that

⁶ *Employee's Brief on Attorney's Fees Incurred in Superior Court*, p. 1-14 (November 1, 2016).

⁷ *District of Columbia Public Schools' Objections to Employee's Petition for Attorney Fees and Costs Incurred in Superior Court*, p. 2-4 (December 5, 2016).

OEA was the proper forum to determine the award of attorney's fees.⁸

Agency filed a supplemental authority notice on December 9, 2016. It explained that in *Scott Sefton v. D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0109-13F15R16 (October 12, 2016), the AJ issued an order that denied Employee's Petition for Attorney's Fees for hours incurred before Superior Court. Even though the Court remanded the matter to OEA to immediately enter an award for attorney's fees and costs in favor of the Employee against Agency. Additionally, Agency argued that based on the reasoning in *Jenkins*, the AJ correctly concluded that OEA did not have jurisdiction to award attorney fees for work incurred before Superior Court. Accordingly, it asserted that Employee was only entitled to attorney fees incurred before OEA and posited that Employee go back to the Superior Court to be awarded attorney's fees and costs for work incurred before that court.⁹

Employee filed a Second Supplemental Motion for Attorney's Fees and Costs on December 23, 2016. He explained that since the OEA Board's Opinion and Order on Petition for Review was issued, his counsel spent an additional 56.9 hours working on this case and has incurred an additional \$45.00 in attorney's fees in Superior Court since filing his Supplemental Memorandum in Support of his Motion for Attorney's Fees. Accordingly, Employee requested that he be awarded \$ 107,078.90 in attorney's fees and \$236.31 in costs incurred in the OEA, and \$41,903.30 in attorney's fees and \$319.18 in costs incurred in the Superior Court for the District of Columbia.¹⁰

A new AJ was assigned to the case. He issued a Second Addendum Decision on Attorney's Fees and Costs on January 13, 2017. The AJ held that Employee was the prevailing

⁸ *Employee's Notice of Supplemental Authority*, p. 1-2 (December 6, 2016).

⁹ *District of Columbia Public Schools' Notice of Supplemental Authority*, p. 1-2 (December 9, 2016).

¹⁰ *Employee's Second Supplemental Memorandum in Support of Motion for Attorney's Fees and Costs*, p. 1-5 (December 23, 2016).

party, and in the interest of justice, attorney's fees were warranted. As it related to the *Jenkins* and *Stanley* matters, the AJ determined that the D.C. Court of Appeals made clear in *Stanley* that in order to recover attorney's fees for work completed on appeal, the prevailing party should submit the request to the trial court in which the proceeding arose. Furthermore, he held that appealing his matter to Superior Court is what led to Employee prevailing in the current case. Thus, the AJ explained that “. . . Agency cannot escape financial liability for attorney fees and costs when review before Superior Court presents itself in the normal course of litigation that originates before the OEA.” Therefore, he held that the ruling in *Stanley* is mandatory authority that must be followed.¹¹

As it related specifically to the fees, the AJ noted that Agency did not contest the hourly rates cited by Employee's counsel. He found that the rates were reasonable and allowable pursuant to the *Laffey* Matrix and the holdings in *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) and *Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985). As for Agency's argument that Employee's counsel's fees should be reduced based on the attorney's experience and work performed before Superior Court, the AJ reasoned that although Agency's improper action was corrected, it was necessary for Employee's counsel to withstand multiple levels of review before the AJ, OEA Board, and Superior Court. The AJ provided that this was a daunting task which required Employee's counsel to expend many hours researching, strategizing, and preparing. He determined that Agency's arguments for a reduction of hours did not account for the time and effort necessary to correct the RIF action. Therefore, the AJ awarded Employee attorney's fees and costs for a total of \$149,537.69, which included fees incurred at the OEA and Superior Court.¹²

¹¹ *Second Addendum Decision on Attorney's Fees*, p. 3-6 (January 13, 2017).

¹² The total is comprised of \$107,078.90 in attorney's fees and \$236.31 in costs incurred before the OEA and

On February 17, 2017, Agency filed a Petition for Review. It argued that in accordance with *Jenkins*, OEA has consistently held since 1994 that it does not have jurisdiction to award attorney's fees for work performed in the Superior Court. Agency claimed that the holding in *Stanley* provided that a reviewing court should not determine the attorney's fees for work incurred at the trial court level and that the D.C. Court of Appeals found that it was not in the position to issue an attorney's fee award for work performed outside of its court. According to Agency, the AJ in *Stanley* only awarded attorney's fees for work incurred at OEA and not Superior Court or the D.C. Court of Appeals. Furthermore, Agency contended that OEA did not award attorney's fees for work performed in the D.C. Court of Appeals in the matter of *Doney Olivieri v. District of Columbia Public Schools*, OEA Matter No. J-0137-03A09 (March 29, 2011). Agency, again, asserted that in *Sefton*, the AJ awarded attorney's fees for work performed at OEA but excluded the work incurred in Superior Court. It claimed that the AJ in the current case failed to consider the rulings in *Olivieri* and *Sefton*, and as a result, he misapplied the law in this matter. Finally, Agency explained that the AJ improperly made a sweeping finding on the issue of excessive fees instead of reviewing all of the entries to determine their reasonableness. Therefore, Agency requested that the Board deny Employee's request for fees incurred before Superior Court. Moreover, it sought to have the matter remanded for a review of its claims that portions of the fees requested are excessive.¹³

Employee filed his answer to Agency's Petition for Review on March 24, 2017. He asserted that pursuant to D.C. Official Code § 1-606.08, "if the appellant prevails and it is in the interest of justice, he or she is entitled to all reasonable fees." Employee explained that Agency relied heavily on *Jenkins* even though the D.C. Court of Appeals overruled the *Jenkins* holding

\$41,903.30 in attorney's fees and \$319.18 in costs incurred before the Superior Court. *Id.*, 4-8.

¹³*District of Columbia Public Schools' Petition for Review*, p. 4-12 (February 17, 2017).

in *Stanley*. Employee contended that historically, Superior Court used to award attorney's fees for work performed there. However, he provided that the plain language of D.C. Official Code § 1-606.08; the holding in *Stanley*; and the ruling in *Bryant* make it clear that OEA is the proper forum to award attorney's fees for work performed at OEA and the courts. Additionally, Employee argued that Agency failed to articulate which time entries it deemed excessive and that the AJ clearly reviewed all of the requested fees and determined that they were reasonable. Accordingly, Employee requested that the Board affirm the Second Addendum Decision.¹⁴

On November 7, 2017, the Board issued an Opinion and Order on Remand. It held that in *Department of Mental Health v. District of Columbia Office of Employee Appeals, et al.*, Case No. 2015 CA 007829 P(MPA)(D.C. Super. Ct. July 13, 2017), the Superior Court for the District of Columbia ruled that it has no statutory authority to award attorney's fees because the D.C. Official Code authorizes a Hearing Examiner to award attorney's fees. However, no authority was conferred upon the Superior Court to award fees related to the review of decisions made by OEA. This Board found this reasoning to be consistent with the ruling in *Stanley*, which requires that requests for attorney's fee originate at OEA. Thus, the Board ruled that the AJ's decision to award fees for work performed before OEA and Superior Court was proper. Finally, the Board determined that Employee's counsel offered a detailed account of the work performed on this case. As a result, it upheld the AJ's ruling that the fees requested were reasonable. Consequently, Agency's Petition for Review was denied.¹⁵

On December 5, 2017, Employee filed a Motion to the Office of Employee Appeals Board for an Award of Attorney's Fees and Costs. In it, he provides that he filed an attorney's fee petition with the AJ for all fees and costs. However, out of an abundance of caution, he filed

¹⁴*Employee's Answer to the Districts Petition for Review*, p. 6-17 (March 24, 2017).

¹⁵ *Webster Rogers v. D. C. Public Schools*, OEA Matter No. 2401-0255-10AF16, *Opinion and Order on Remand* (November 7, 2017).

the fee petition with the Board in the event the AJ determined that he did not have jurisdiction to award fees for work incurred before the OEA Board. Employee goes on to explain that he is the prevailing party in the matter and an award of attorney's fees and costs are warranted and in the interest of justice. Accordingly, Employee requests an award of \$7,952.40 in attorney's fees and \$274.03 in costs for work performed before the OEA Board.¹⁶

D.C. Official Code § 1-606.08 (a) provides that "the Hearing Examiner . . . 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." Thus, as is the statutory requirement and OEA's customary practice, all awards of attorney's fees are made by the Administrative Judge. As this Board provided in our Opinion and Order on Remand, the Superior Court for the District of Columbia held in *Department of Mental Health v. District of Columbia Office of Employee Appeals, et al.*, that the statute authorizes a Hearing Examiner to award attorney's fees; however, no authority was conferred upon the Superior Court to award fees related to the review of decisions made by OEA. The same logic applies to the OEA Board. D.C. Official Code § 1-606.08(a) does not bestow the authority to award attorney's fees to this body.

Moreover, the AJ issued a Third Addendum Decision on Attorney's Fees and Costs on April 5, 2018. The decision provides that Employee, through counsel, submitted an Unopposed Motion to Dismiss the Appeal with Prejudice on April 3, 2018. The motion explains that Employee moved to dismiss the appeal because the last remaining issue of attorney's fees and costs were fully settled, and there were no other outstanding issues to be adjudicated at OEA. Accordingly, the AJ dismissed the matter.¹⁷ Because all attorney's fees and costs were addressed within a settlement agreement between the parties, this motion to the Board is now moot. Thus,

¹⁶ *Employee's Motion to Office of Employee Appeals Board for Award of Attorney's Fees and Costs with Supporting Memorandum*, p. 1-15 (December 5, 2017).

¹⁷ *Third Addendum Decision on Attorney's Fees and Costs* (April 5, 2018).

we hereby dismiss Employee's motion for attorney's fees.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Motion to Award Attorney's Fees is **DISMISSED**.

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

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.