THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
PAULA EDMISTON Employee	OEA Matter No. 1601-0057-07R16
v.	Date of Issuance: December 12, 2016
METROPOLITAN POLICE DEPARTMENT Agency	Senior Administrative Judge Joseph E. Lim, Esq.

Ted Williams, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

2nd INITIAL DECISION ON REMAND

PROCEDURAL BACKGROUND

On March 7, 2007, Employee, a former Captain in the Police force, filed a Petition for Appeal with the Office of Employee Appeals ("OEA") from Agency's final decision removing her from her position. After an attempted October 25, 2007, mediation,[1] I issued an Initial Decision ("ID") on April 30, 2008.[2] The ID reduced the penalty from a termination back to the Agency's original proposed penalty of demotion. On appeal, the OEA Board upheld the ID on January 25, 2010.[3]

Upon appeal, the Superior Court of the District of Columbia reversed the ID's final order and remanded the case to the undersigned to reconsider Employee's motion for summary judgment, consistent with its opinion.[4]

On August 8, 2014, I issued an Initial Decision on Remand ("IDR") ruling on Employee's Motion for Summary Judgment and upholding Agency's penalty of termination. This IDR was appealed, and on June 8, 2016, the Superior Court of the District of Columbia reversed the IDR and remanded the matter back to the undersigned for reconsideration of

1 Notice of Mediation/Settlement Conference (October 4, 2007).
2 *Edminston v. DC Metropolitan Police Dept.*, OEA Matter No. 1601-0057-07 (April 30, 2008).
3 *Edminston v. DC Metropolitan Police Dept.*, OEA Matter No. 1601-0057-07, *Opinion & Order on Petition for Review* (January 25, 2010).
4 *DC Metropolitan Police Dept. v. DC OEA & Edminston*, Case Number 2008 CA 004804 (D.C. Super. Ct., Oct. 9, 2013).

Employee's motion for summary judgment, consistent with its opinion.[5]

I granted the parties' request for a stay of the proceedings pending the D.C. Superior Court's ruling on a similar issue on an unrelated case. Subsequently, after several conferences held with the parties, I ordered the parties to submit their legal briefs by November 15, 2016. The record is closed.

JURISDICTION

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

ISSUES

1. Whether MPD General Order 120.21 supersedes the applicable version of 6-B DCMR § 1613.2.

2. What is the proper penalty for Employee in this matter.

FINDINGS OF FACT

Based on the record and the stipulated facts, the following facts are undisputed:

1. Paula Edmiston ("Employee") was appointed to the Metropolitan Police Department ("MPD" or "Agency") in 1984 and on April 1, 2006, Employee held the rank of Captain with the MPD, Second District.

2. At an Agency-sponsored event on April 1, 2006, Employee told fellow officers about her remarks to a female cashier at the grocery store and then to a fellow patron at another grocery.[6] When subsequently confronted by her superiors, Employee denied the charges and implicated a fellow officer.

3. Effective April 13, 2006, Agency issued General Order ("G.O.") 120.21 regarding disciplinary procedures and processes. With regard to adverse action appeals, that G.O. provided, *inter alia*, that the Chief of Police ("COP") or his delegate may: 1) remand a case for an alternative process, as he/she deems appropriate; and 2) impose a higher penalty than recommended by the the Hearing Tribunal, or the Assistant Chief of Human Services. (G.O. 120.21, p. 17).

4. G.O. 120.21 replaced G.O. 1202.1, which was essentially similar to the new order, but had no provision allowing the COP to impose a penalty higher than the one initially recommended.

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5 *DC Metropolitan Police Dept. v. DC OEA & Edminston*, Case Number 2014 CA 007504 (D.C. Super. Ct., Jun. 8, 2016).

6 Employee called the cashier a faggot and threatened to kick a patron's faggot ass. *See* Final Notice of Adverse Action dated July 25, 2006.

5. DCMR § 1613.2 states, in part, "the deciding official ... in no event shall he or she increase the penalty."

6. At all relevant times, 6-B DCMR § 1613.2 was in effect.[7] The full text of this particular regulation is as follows:

> 1613 Duties and Responsibilities of Deciding Official: General Discipline
>
> 1613.1 The deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision.
>
> 1613.2 The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, but in no event shall he or she increase the penalty.

7. On June 2, 2006, pursuant to G.O 120.21, Assistant Chief of Human Services ("ACHS") Shannon Cockett served Employee with a proposed Notice of Adverse Action ("Notice") to demote Employee to the rank of lieutenant based on three charges of misconduct: (1) Conduct unbecoming an officer; (2) Failure to obey orders or directives; and (3) Willfully and knowingly making untruthful statements.[8] Each charge contained specifications to support it.

8. This Notice was issued forty-four business days from April 1, 2006, the day Agency learned of Employee's conduct. Agency does not allege that it undertook a criminal investigation of the incident.

9. The Proposed Notice advised Employee that she had fifteen (15) days to respond to the charges and specifications and that if she failed to respond, a decision regarding the charges and specifications would be based upon the evidence of record.

10. On June 23, 2006, Employee submitted a response to the Proposed Notice.

11. On July 25, 2006, following a review of the documents submitted by Employee through counsel, Assistant Chief of Human Resources Cockett served Employee with a Final Notice of Adverse Action ("Final Notice"), demoting her to the rank of lieutenant, based upon a preponderance of evidence that Employee was guilty of the charged misconduct. The six-page document listed 26 findings and contained a conclusion that Employee was guilty of the charges and specifications listed in the Notice. The Final Notice stated: For the cited violations, you will be demoted to the rank of "Lieutenant."

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7 Also found in 47 D.C. Reg. 7094, § 1613.2. (September 1, 2000).
8 Notice of Proposed Adverse Action.

12. The July 25, 2006, Final Notice advised Employee that she could appeal to the COP, and she had the right to appeal her adverse action to the OEA within 30 days of the final agency action.

13. On August 8, 2006, Employee chose to appeal the demotion to the COP asking that the demotion be reversed or the penalty mitigated.

14. On August 29, 2006, COP Charles H. Ramsey denied Employee's appeal, and further recommended that Employee be discharged.[9] Additionally, the COP remanded the adverse action for a hearing before a police trial board (Hearing Tribunal or Trial Board or Adverse Action Panel or Panel), "if Employee so elected."[10] The first paragraph acknowledged receipt of the appeal. The second paragraph said:

> After a thorough review of the record developed in this matter and your letter of August 8, 2006, I am denying your appeal. I have carefully reviewed the facts and circumstances surrounding the very serious charges and specifications in this case and have determined that there were no mitigating factors. Additionally, I have reviewed your work performance, disciplinary history and commendations. Based upon this review, I am recommending that you be discharged.

The third paragraph stated that the matter was to be scheduled for a hearing before the Trial Board "if you so elect," and the final paragraph stated that the letter constituted final Agency action in the matter.

15. Assistant Chief Cockett arranged for service of the Chief of Police's August 29, 2006, letter on Capt. Edmiston via a memo, also dated August 29, 2006, which characterized the decision of the Chief of Police as deciding that "the penalty should be amended from demotion to Removal."[11]

16. On August 31, 2006, Employee, through counsel, elected to have a hearing before a Trial Board Panel. On October 27, November 3, and November 27, 2006, Employee received a full evidentiary hearing before the Panel, which found Employee guilty of all three charges, and the underlying specifications, and unanimously recommended that Employee be terminated.[12]

17. On January 10, 2007, based on the Panel's recommendation, Agency issued a second Final Notice of Adverse Action notifying Employee she had been found guilty of all the charges and specification included in the Proposed Notice and that her removal from MPD would be effective March 2, 2007. The Notice further informed Employee that she could appeal the decision to the COP.

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9 Letter from Charles H. Ramsey, Chief of Police, to John V. Berry, Esq. dated August 29, 2006.
10 *Id.*
11 Memorandum dated August 29, 2006 to Inspector Second District from Assistant Chief Office of Human Services.
12 Parties' Proposed Stipulations of Fact. (October 14, 2016).

18. By letter dated February 1, 2007, Employee appealed to Acting Chief of Police Cathy Lanier.[13] On February 23, 2007, the COP denied Employee's appeal.[14]

19. Employee was charged with "Conduct Unbecoming an Officer," "Failure to obey orders or directives issued by the Chief of Police," and "Willfully and knowingly making an untruthful statement." She was removed from her position effective March 2, 2007.

20. On March 7, 2007, Employee filed a Petition for Appeal with the OEA.

21. On April 30, 2008, I issued an Initial Decision (ID) which modified Employee's penalty from a termination to a demotion.[15] Based on Employee's motion for summary judgment and Agency's response thereto, the ID held that Agency did not violate the 90-day rule,[16] and that Agency's General Order 120.21 was not retroactive, and thus, the proper penalty was not termination but the Agency's original proposed penalty of demotion.

22. On June 2, 2008, Employee appealed my ID with the OEA Board (Board) while Agency filed an appeal with the D.C. Superior Court on July 3, 2008. On June 9, 2009, the D.C. Superior Court dismissed Agency's petition without prejudice pending the outcome of the OEA Board's decision.

23. On January 25, 2010, the Board rejected Employee's sole argument that she should have been granted a de novo hearing on the issue of her demotion.[17] The Board held that the Administrative Judge properly exercised his discretion to deny a de novo hearing based on the submissions of the parties and the applicable law. Reiterating that the judge has discretion on whether or not to grant a hearing, and based on the fact that the parties were given due process at a hearing at the Agency, the Board denied Employee's petition for review. The Board also held that Agency's appeal was untimely. Agency appealed this decision to the D.C. Superior Court on February 22, 2010.

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13 *Id.*

14 *Id.*

15 *Edminston v. DC Metropolitan Police Dept.*, OEA Matter No. 1601-0057-07 (April 30, 2008).

16 The Police and Firefighters Disciplinary Action Procedures Act, Title V, Section 502, of the Omnibus Public Safety Agency Reform Amendment Act of 2004, D.C. Official Code § 5-1031 (2005 Supp.), states:

> Commencement of corrective or adverse action.
> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.

17 *Edminston v. DC Metropolitan Police Dept.*, OEA Matter No. 1601-0057-07, *Opinion & Order on Petition for Review* (January 25, 2010).

24. On October 9, 2013, Superior Court Judge Judith Macaluso remanded the matter back to OEA for reconsideration of Employee's motion for summary judgment consistent with the Court's opinion that Agency's change of its appellate rules was not retroactive as one of the potential penalties had always included the ultimate one of termination.[18] The Court held that because one of the potential penalties had always been termination, and that the rule change under Agency's General Order 120.21 involved secondary conduct (Employee's prosecution of an appeal), and not a primary conduct (an expansion of causes of action and damages against a defendant's already completed primary conduct), the rule change was not retroactive at all. Thus, the Court concluded that Police Chief Ramsey had the authority under amended MPD regulations to increase the recommended penalty for Employee.

25. On August 8, 2014, I issued an Initial Decision on Remand (IDR)[19] wherein I again held that Agency's action did not violate the 90-day rule and thus its action was timely. I also upheld Employee's termination since Agency's change of its appellate rules did not raise retroactivity issues and thus the Chief of Police could properly increase Employee's proposed penalty from a demotion to a termination.

26. On September 9, 2014, Employee appealed the IDR to the D.C. Superior Court.

27. On June 8, 2016, Superior Court Judge Robert Okum reversed the IDR and remanded this matter back to OEA to make a determination as to whether MPD General Order 120.21 supersedes the applicable version of 6-B DCMR § 1613.2 which can now be found at 47 D.C. Reg. 7094, § 1613.2.[20]

ANALYSIS AND CONCLUSION

Whether MPD General Order 120.21 supersedes the applicable version of 6-B DCMR § 1613.2

The sole issue that the Superior Court under Judge Okum remanded this matter for this Office to address was whether the police chief had authority to increase Employee's penalty under MPD General Order 120.21 despite its conflict with 6-B DCMR § 1613.2 which can now be found at 47 D.C. Reg. 7094, § 1613.2. In other words, whether 6-B DCMR § 1613.2 specifically prohibited the decision maker from increasing the penalty, and if so, whether this regulation superseded MPD's General Order 120.21.

Agency's response to the issue takes a different tack. First, Agency points out that after Employee's receipt of Agency's Notice of Proposed Adverse Action proposing her demotion from Captain to Lieutenant, it was Employee who appealed the notice to then COP Charles Ramsey. COP Ramsey denied the appeal and recommended termination. Agency pointed out that COP Ramsey did not impose termination as a penalty, but merely recommended it.

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18 *DC Metropolitan Police Dept. v. D.C. O.E.A. & Edminston.*, Case No. 2008CA 004804 P(MPA)(Oct. 9, 2013).
19 *Edminston v. DC Metropolitan Police Dept.*, OEA Matter No. 1601-0057-07R14 (Aug. 8, 2014).
20 *Edminston v. DC Metropolitan Police Dept.,et. al.*, Case No. 2014 CA 007504 P(MPA)(Jun. 8, 2016).

Nevertheless, COP Ramsey acceded to Employee's election that she be granted an evidentiary hearing before a Trial Board Panel. After a three day hearing, the Panel notified Employee that it found her guilty of all three charges and specifications, and unanimously recommended that Employee be terminated.

Employee appealed the Panel's decision to the new COP, Cathy Lanier, who denied her appeal on February 23, 2007, and sustained the panel's recommendation of termination.

Based on these facts, Agency argues that MPD General Order 120.21 did not conflict with 6-B DCMR § 1613.2 because COP Ramsey was not the deciding official as envisioned by § 1613.2, but merely the appeals official. Agency goes on to state that the Panel was not required to recommend termination as a penalty, but was free to recommended a lesser penalty after determining that Employee committed misconduct. Agency then concludes that since COP Ramsey did not violate 6-B DCMR § 1613.2, the penalty of termination should be affirmed. Agency later repeats this argument after pointing out that only those provision of G.O. 120.21 that conflicted with 6 B DCMR § 1613 are superseded by the regulation.

Employee argues that Agency had no legal authority to change Assistant Chief Cockett's findings on the charges and increase the penalty from a demotion to a termination. Employee complains that Agency's brief is not responsive to the question presented by the Superior Court as Judge Okun had already concluded that COP Ramsey increased Employee's penalty. Employee points out that there is no question that G.O. 120.21 conflicts with 6 B DCMR § 1613 and that a regulation supersedes a G.O.

Agency's argument is disingenuous in pointing out that COP Ramsey was not the deciding official since he did not impose the higher penalty of termination. While that much is true, what Agency fails to point out is the fact that the deciding official who did impose the higher penalty of termination over the original proposed penalty of a demotion was then COP Lanier.

As the undisputed facts of this case bears out, in Agency's proposed June 2, 2006, Notice of Adverse Action, ACHS Shannon Cockett recommended that Employee be demoted to the rank of lieutenant. While COP Ramsey ordered a hearing before a Panel, it was COP Lanier who acted as a deciding official in imposing a termination upon Employee.

6-B DCMR § 1613 states as follows:[21]

1613. Duties and Responsibilities of Deciding Official: General Discipline

1613.1 The deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision.

21 Chapter 16, General Discipline and Grievances, 47 D.C.Reg. 7094 (September 1, 2000)

1613.2 The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, ***but in no event shall he or she increase the penalty.*** (emphasis added).

As noted in the statement of facts above, G.O. 120.21 provided, *inter alia*, that the COP or his delegate may: 1) remand a case for an alternative process, as he/she deems appropriate; and 2) ***impose a higher penalty than recommended by*** the the Hearing Tribunal, or ***the Assistant Chief of Human Services.*** (emphasis added).

It is evident that 6-B DCMR § 1613 conflicts with G.O. 120.21. In contrast to the G.O., the regulation limits the COP's choice of the severest penalty he or she can impose to the one recommended by the Assistant Chief of Human Services. Here, ACHS Cocket recommended a demotion, and COP Lanier may not impose the more severe penalty of termination.

. Superior Court Judge Okum's order stated in part, "An agency's internal general orders or procedures do not override statutes and regulations.[22] Courts in this jurisdiction have held that 'an MPD General Order essentially served the purpose of an internal operating manual, and does not have the force or effect of a statue or an administrative regulation."[23] In addition, OEA itself recently concluded that an MPD general order that conflict with a municipal regulation was superseded by that municipal regulation, as 'statutes and regulations take precedence over an agency's internal procedures.'[24]

On August 4, 2016, in the case of *District of Columbia vs. Public Employee Relations Board, et.al.,* the Court of Appeals, in part, cited *District of Columbia v. Henderson*, 710 A.2d 874, 877 (D.C. 1998) (noting that an MPD General Order cannot override a regulation).

Thus, to answer Judge Okun's query, 6-B DCMR § 1613.2 supersedes MPD's General Order 120.21. 6-B DCMR § 1613.2 specifically prohibited the decision maker from increasing the penalty, and thus the police chief as the ultimate decision maker had no legal authority to increase Employee's penalty under MPD General Order 120.21.

What is the proper penalty for Employee in this matter.

The next issue to be dealt with is Agency's choice of penalty. Employee's contention that she was innocent of the charges, was refuted by her fellow officers in a police trial board hearing. Employee was given her due process rights as she was able to confront and cross-examine her accusers. The Trial Board unanimously found her guilty of all charges, and recommended termination.

22 See *District of Columbia v. Henderson,* 710 A.2d 874, 877 (D.C. 1998, *Nunnally v. DC Metro Police Dep't,* 80 A.3d 1004, 1012 (D.C. 2013).
23 *Nunnally*, 80 A.3d at 1012.
24 *In the Matter of Wilberto Flores v. Metro. Police Dep't,* OEA Matter No. 1601-0131-11, at pp. 6-7 (Mar. 29, 2016).

This Office's review of an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's workforce is a matter entrusted to the agency, not to this Office. When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). Indeed, this Office's scope of review is limited to a determination of whether the penalty is within the range allowed by the table of penalties, whether the penalty is based on relevant *Douglas* factors, and whether there is a clear error of judgment. *Taggert v. Metropolitan Police Department*, OEA Matter No. 2405-0113-92R94 (Jan. 9, 1998).

I cannot modify Agency's penalty unless it is so harsh as to amount to an abuse of discretion. *Employee v. Agency*, OEA Matter No. 1601-0012-82, 30 D.C. Reg. 352 (1983). Based on the Agency's Table of Penalties, the range of penalties for conduct unbecoming an officer, insubordination, or making an untruthful statement, all range from suspension to termination, even for a first offender.[25] Based on this standard, my review of the record taken as a whole, demonstrates that there is substantial evidence in the record to support the penalty of demotion. Here, Agency's decision to impose the penalty of termination constituted an abuse of discretion because the original penalty was increased in violation of the regulation. For the foregoing reasons, I conclude that the agency's decision to select removal as the appropriate penalty for Employee's infractions must be modified to a demotion.

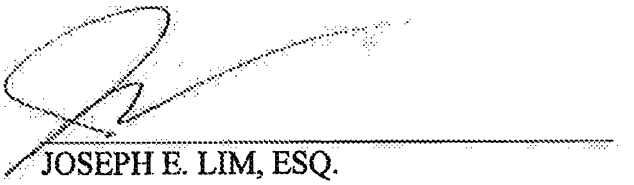
ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of terminating Employee is **REVERSED**; and

2. Agency shall reinstate and immediately demote Employee to the rank of lieutenant; reimburse her all back-pay and benefits lost as a result of her termination; and

3. Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.



JOSEPH E. LIM, ESQ.
Senior Administrative Judge

25 *See* MPD General Order 120.21. Attachment A: Table of Offenses and Penalties (April 13, 2006).

NOTICE OF APPEALS RIGHTS

This is an Initial Decision that will become a final decision of the Office of Employee Appeals unless either party to this proceeding files a Petition for Review with the office. A Petition for Review must be filed within thirty-five (35) calendar days, including holidays and weekends, of the issuance date of the Initial Decision in the case.

All Petitions for Review must set forth objections to the Initial Decision and establish that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed;

2. The decision of the presiding official is based on an erroneous interpretation of statute, regulation, or policy;

3. The finding of the presiding official are not based on substantial evidence; or

4. The Initial Decision did not address all the issues of law and fact properly raised in the appeal.

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with Administrative Assistant, D.C. Office of Employee Appeals, 1100 4th St., SW., Suite 620E, Washington, D.C. 20024. Four (4) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review may file their response within thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review.

Instead of filing a Petition for Review with the Office, either party may file a Petition for Review in the Superior Court of the District of Columbia. Either party may also appeal a decision on Petition for Review (also known as an Opinion and Order 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.

CERTIFICATE OF SERVICE

I certify that the attached 2ND **INITIAL DECISION ON REMAND** was sent by regular mail on this day to:

Paula Edmiston
5711 Plata Street
Clinton, MD 20735

Ted Williams, Esq.
1200 G Street, NW
Suite 800
Washington, DC 20005

Frank McDougald, Esq.
Office of the Attorney General
For the District of Columbia
441 4th Street, NW
Suite 1180N
Washington, DC 20001

Katrina Hill
Clerk

December 12, 2016
Date

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

METROPOLITAN POLICE DEPARTMENT c/o Office of the Attorney General for D.C. 441 Fourth Street, N.W. Suite 1180 North Washington, D.C. 20001 Petitioner, v. GOVERNMENT OF THE DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS 955 L'Enfant Plaza Suite 2500 Washington, D.C. 20024 Respondent.	2017 CA 008130 P(MPA)

PETITION FOR REVIEW OF AGENCY DECISION

A. Notice is hereby given that the Metropolitan Police Department ("Petitioner" or "Department") appeals to the Superior Court of the District of Columbia from the Opinion and Order on Remand, dated November 7, 2017, and all rulings encompassed therein, issued by the Office of Employee Appeals ("OEA" or "Respondent") in the matter of Paula Edmiston v. Metropolitan Police Department, OEA Matter No.: 1601-0057-07R16. A copy of the November 7, 2017 Opinion and Order on Remand ("Opinion and Order") and the 2nd Initial Decision on Remand ("SIDR") dated December 12, 2016, are attached to this Petition for Review as Attachments 1 and 2 respectively. The Petitioner seeks to have the Opinion and Order reversed and its decision to terminate Paula Edmiston ("Employee") upheld.

Description of Judgment, Order or Decision:

Employee was appointed to the Department in 1984 and on April 1, 2006, she held the rank of captain. On June 2, 2006, Employee was issued a Notice of Proposed Adverse Action ("Proposed Notice") in which she was advised that the Department was proposing to reduce her rank to lieutenant based on acts of misconduct she committed on April 1, 2006. In a Final Notice of Adverse Action ("Final Notice") dated July 23, 2006, Employee was informed that she had been found guilty of committing acts of misconduct and would be reduced to the rank of lieutenant. Employee appealed the Final Notice to the Chief of Police ("COP") who, on August 28, 2006, issued a decision denying Employee's appeal and also proposed the penalty of termination for the misconduct committed by Employee. In the decision of the COP, Employee was informed that she could elect to have an evidentiary hearing where the charges of misconduct would be considered by a three-member panel ("Panel"). Employee elected to have an evidentiary hearing and following the hearing, the Panel issued a decision wherein Employee was found guilty of misconduct. The Panel recommended that Employee be terminated and she was terminated effective March 2, 2007.

Employee appealed her termination to OEA, and on April 30, 2015, an Initial Decision was issued which reversed the Agency's termination action on the ground that the COP did not have the authority to substitute the penalty of termination for demotion because the General Order relied upon by the COP was not in effect when the action against Employee commenced. Ultimately, an appeal to the District of Columbia Superior Court resulted in a decision dated October 9, 2013, that concluded that the General Order relied upon by the COP could be retroactively applied and thus authorized the COP to change the proposed penalty of suspension to termination. Accordingly, the matter was remanded to the OEA for further

proceedings and on August 8, 2014, an Initial Decision on Remand ("IDR") was issued which affirmed Employee's termination.

Employee appealed the IDR to the Superior Court, and on June 8, 2016, the Court issued an Order remanding the matter to OEA for the purpose of determining "whether MPD General Order 12 0.21 supersedes applicable version of 6-B DCMR § 1613.2, which can now be found at 47 D.C. Reg. 7094, § 1613.2." Order at 11. On remand, after the parties submitted briefs, the SIDR was issued which reversed Employee's termination. The Department appealed the SIDR to the OEA Board and on November 7, 2017, the OEA Board issued the Opinion and Order on Remand which affirmed the SIDR. Petitioner contends that the November 7, 2017 Opinion and Order on Remand is contrary to law and should be reversed.

B. Address of Respondent

District of Columbia Office of Employee Appeals

Serve on: Lasheka Brown, Esq.
General Counsel
Office of Employee Appeals
955 L'Enfant Plaza
Suite 2500
Washington, D.C. 20024

C. Names and addresses of all other parties to the agency proceeding:

Petitioner: Metropolitan Police Department
c/o Frank Mc Dougald
Assistant Attorney General
441 Fourth Street, N.W., 1180 North
Washington, D.C. 20001

Employee: Ted J. Williams, Esq.
Counsel for Paula Edmiston
1200 G Street, NW
Suite 800
Washington, D.C. 20005

D. Names and addresses of parties to be served:

Name	Address
1. District of Columbia Office of Employee Appeals	Lasheka Brown, Esq. General Counsel Office of Employee Appeals 955 L'Enfant Plaza Suite 2500 Washington, D.C. 20024
2. Paula Edmiston	Ted J. Williams, Esq. Counsel for Edmiston 1200 G Street, NW Suite 800 Washington, D.C. 20005

E. Copies of the November 7, 2017 Opinion and Order on Remand and the December 12, 2016 Second Initial Decision on Remand are attached to this Petition.

Respectfully submitted,

KARL A. RACINE
Attorney General for the
District of Columbia

Nadine C. Wilburn
Chief Counsel and Senior Advisor
Personnel, Labor and Employment Division

/s/ Andrea G. Comentale
ANDREA G. COMENTALE, D.C. Bar # 405073
Chief
Personnel and Labor Relations Section

/s/ Frank Mc Dougald
FRANK MC DOUGALD, D.C. Bar # 213927
Assistant Attorney General
441 4th Street, N.W.
Washington, D.C. 20001
Rm. 1180S
(202) 724-7309 Voice
(202) 347-8922 Facsimile
e-mail: frank.mcdougald@dc.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Review of Agency Decision, with attachments, was sent by certified mail, return receipt requested to:

Lasheka Brown, Esq.
General Counsel
Office of Employee Appeals
955 L'Enfant Plaza
Washington, D.C. 20005

Ted J. Williams, Esq.
Counsel for Paula Edmiston
1200 G Street, NW
Suite 800
Washington, D.C. 20005

/s/ Frank Mc Dougald
Frank Mc Dougald
Assistant Attorney General

ATTACHMENT 1

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
PAULA EDMISTON, Employee	OEA Matter No.: 1601-0057-07R16
v.	Date of Issuance: November 7, 2017
METROPOLITAN POLICE DEPARTMENT, Agency	

OPINION AND ORDER
ON
REMAND

This matter was previously before the Board. Paula Edmiston ("Employee") was a captain with the Metropolitan Police Department ("Agency"). On June 2, 2006, the Assistant Chief of Human Services ("ACHS"), Shannon Cockett, served Employee with a Proposed Notice of Adverse Action and recommended that she be demoted to the rank of lieutenant. Employee was charged with conduct unbecoming of an officer, failure to obey orders, and willfully and knowingly making an untruthful statement. The charges stemmed from two events in 2006, wherein Employee made disrespectful comments to a cashier at a grocery store regarding the cashier's race and national origin. Employee subsequently made disparaging remarks to a male patron at another grocery store pertaining to his sexual orientation. Agency conducted an

administrative review and issued its Final Notice of Adverse Action on July 25, 2006. The notice stated that that Employee was guilty of all three charges based on the preponderance of the evidence. As a result, Employee was demoted to the rank of lieutenant.

Thereafter, Employee appealed her demotion to former Chief of Police, Charles Ramsey. On August 29, 2006, Chief Ramsey denied Employee's appeal and recommended that her punishment be increased from demotion to removal. Employee elected to have the adverse action reviewed by a panel of police officers ("Trial Panel"). The Trial Panel found Employee guilty of all three charges and recommended that she be terminated. Employee appealed the Trial Panel's decision to Acting Chief of Police, Cathy Lanier. However, Employee's appeal was denied on February 23, 2007 and her termination became effective on March 2, 2007.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on March 7, 2007. Two issues were presented to the Administrative Judge ("AJ") for adjudication: whether Agency commenced its adverse action in a timely manner and whether Agency had the authority to increase the proposed penalty from demotion to removal. The AJ issued his Initial Decision on April 30, 2008. With respect to the timeliness issue, the AJ held that Agency did not violate D.C. Official Code § 5-1031, commonly referred to as the 90-day rule. The rule prohibits adverse actions from commencing against members of the Metropolitan Police Department more than ninety days, not including Saturdays, Sundays, or legal holidays, after the date Agency knew, or should have known, of the act or occurrence allegedly constituting cause.[2] According to the AJ, Chief Ramsey's August 29, 2006 letter to Employee did not trigger the 90-day time period because the notice did not identify itself as a proposed notice of adverse action and did

[1] *Petition for Appeal* (March 7, 2007).
[2] The AJ noted that the statute contains an exception for acts subject to criminal investigations; however there was no pending criminal investigation pending against Employee.

not contain the charges and specifications required of such a notice. Hence, the AJ determined that Agency's June 2, 2006 proposed notice to Employee was well within the 90-day deadline.

With respect to the Chief's authority to increase Employee's proposed penalty, the AJ stated that Employee's "right not to have her proposed penalty increased was impaired by Agency's retroactive use of [the General Order].[3] He further provided the following:

> When the underlying events occurred on April 1, 2006, GO-PER-120-21 was not in place, and the Chief of Police was not authorized to increase punishment. The enactment of the new General Order—if held to apply to the punishment imposed on the Employee—would increase the Employee's liability for past conduct because she would be subject to a removal rather than a mere demotion. Under Landgraf and the District of Columbia administrative agency cases following it, the Employee's punishment cannot be increased by means of the General Order applied retroactively to conduct occurring before its enactment.

Based on the foregoing, the AJ held that Chief Ramsey improperly increased Employee's penalty from demotion to removal. Therefore, he reversed Agency's adverse action and held that the correct remedy was to reinstate Employee's demotion.[4]

Thereafter, Employee filed a Petition for Review with OEA's Board.[5] Her sole argument in the petition was that the AJ "lacked the power to *sua sponte* demote [Employee] without permitting her the opportunity to petition OEA for a de novo evidentiary hearing."[6] In its Opinion and Order on Petition for Review, the Board highlighted OEA Rule 625.1, which

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[3] Effective April 13, 2006, Agency issued General Order ("GO") 120.21, which addresses disciplinary procedures and processes. With regard to adverse action appeals, the GO provided that the Chief of Police or his delegate may: 1) remand a case for an alternative process, as he/she deems appropriate; and 2) impose a higher penalty than recommended by the Assistant Chief of Human Services.

[4] *Initial Decision* (April 30, 2008).

[5] While Employee's Petition for Review was pending before OEA's Board, Agency filed a Petition for Review in D.C. Superior Court. Agency also filed an Opposition to Employee's June 2, 2008 Petition for Review with OEA on July 17, 2008. However, D.C. Superior Court dismissed Agency's petition without prejudice pending the outcome of the Board's decision. On July 9, 2009, Agency filed a Motion for Extension of Time to File Petition for Review of Agency Decision. The parties subsequently requested to stay the matter pending before OEA, and subsequently requested that the stay be lifted on August 26, 2009. The request was granted.

[6] *Petition for Review*, p. 8 (June 2, 2008).

provides that a party may request the opportunity for an evidentiary hearing; however, it is within the AJ's discretion to grant such a request. The Board agreed with the AJ's assessment that an evidentiary hearing was not warranted based on the issues presented by the parties. Furthermore, the Board held that the AJ did not abuse his discretion by deciding this matter based solely on the documents of record. As a result, Employee's Petition for Review was denied and the AJ's Initial Decision was upheld.[7]

Agency subsequently filed an appeal with D.C. Superior Court. On October 9, 2013, the Honorable Judge Judith Macaluso issued an Order Reversing Agency Decision, in part. In her analysis, Judge Macaluso, stated that "Chief Ramsey had the authority under amended MPD regulations to increase the recommended penalty for the Petitioner." Therefore, the matter was remanded to the AJ for reconsideration consistent with the Order.[8]

On August 8, 2014, the AJ issued his Initial Decision on Remand. He reiterated his previous finding that Agency did not violate the 90-day rule. However, the AJ reversed his original decision with respect to Agency's ability to increase a proposed penalty and concluded that it did not abuse its discretion by terminating Employee.[9] Consequently, Agency's termination action was upheld.

Employee appealed the Initial Decision on Remand to D.C. Superior Court on September 9, 2015, wherein she asserted that the AJ's decision should be reversed because the GO that the Chief of Police relied upon in imposing a higher penalty was superseded by D.C. Municipal Regulation ("DCMR") § 1613.2. In its June 8, 2016 Order, the Court discussed three issues:

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[7] *Opinion and Order on Petition for Review* (January 25, 2010). The Board also denied Agency's Motion for Extension of Time to File Petition for Review of Agency Decision because it failed to file its petition within the thirty-five day deadline as required by D.C. Official Code § 1-606.03(c).
[8] *District of Columbia Metropolitan Police Department v. Office of Employee Appeals*, 2008 CA 004804 P(MPA) (D.C. Super. Ct. 2013).
[9] *Initial Decision on Remand* (August 8, 2014).

whether the argument raised by Employee in her petition regarding DCMR § 1613.2 was being raised for the first time; whether the law of the case doctrine prohibited the Court from making a determination with respect to the aforementioned issue; and whether DCMR § 1613.2 prohibited the Chief of Police from increasing Employee's penalty. In its analysis, the Court provided that Employee's argument was properly preserved for appeal. It further stated that the law of the case doctrine was inapplicable in this matter. Regarding the last issue, the Court agreed with Employee's contention that the AJ did not properly analyze whether Agency's GO could supersede a municipal regulation. Therefore, the matter was remanded to the AJ "in order for OEA to make a determination as to whether MPD General Order 120.21 supersedes [the] applicable version of 6-B DCMR § 1613.2...."[10]

Thereafter, the parties were ordered to address the issue identified in the Court's June 8, 2016 Order.[11] In its Remand Brief, Agency argued that its action of reducing Employee's rank to lieutenant was done so in accordance with GO 120.21 and that it did not violate DCMR § 1613.2. It further stated that the Chief of Police "in denying Employee's appeal, did not increase the penalty. Instead the [Chief] 'remand[ed] the case for an alternative process,' a trial board and recommendation of termination." Agency further questioned the applicability of DCMR § 1613.2 to the instant matter because it believed that Chief Ramsey was the appeals official, not the deciding official. In addition, it posited that the language contained in § 1613.2 and GO 120.21 was "congruent and harmonious in allowing a matter to be remanded for further consideration." As a result, Agency reiterated its position that Employee's termination was appropriate.[12]

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[10] *Edmiston v. Office of Employee Appeals*, 2014 CA 007504 P(MPA) (D.C. Super. Ct. 2014).
[11] *Post-Conference Briefing Order* (November 9, 2016).
[12] *Agency's Brief Following Remand from the District of Columbia Superior Court* (November 10, 2016). *Also See Agency's Reply to Employee's Brief on Remand in Response to the Superior Court Decision* (December 2, 2016).

In response, Employee contended that the Chief of Police lacked the authority to amend the Assistant Chief of Police's findings and increase the penalty. According to Employee, Agency's General Orders are merely internal guidelines that do not supersede District regulations. She further stated that the Chief of Police was limited to promulgating orders which are consistent with District law. Consequently, Employee requested that Agency's termination action be reversed.[13]

The AJ issued his Second Initial Decision on Remand on December 12, 2016. He disagreed with Agency's argument that DCMR § 1613.2 and GO 120.21 were congruent because Chief Ramsey was not the deciding official as envisioned by the regulations. According to the AJ, while Chief Ramsey remanded the matter for a hearing before the Trial Panel, it was Chief Lanier who ultimately acted as a deciding official in this case. He further stated that it was evident that § 1613.2 and GO 120.21 contained conflicting language and that an agency's internal orders cannot override municipal regulations. Thus, in response to Superior Court's Order, the AJ concluded that Chief Lanier, acting as the ultimate decision maker, was legally prohibited from increasing the proposed penalty levied against Employee from demotion to termination. As a result, the AJ determined that the imposed penalty of termination was an abuse of discretion and that there was substantial evidence in the record to support the penalty of demotion. Consequently, Agency's termination action was reversed and Employee was ordered to be reinstated and demoted to the rank of lieutenant.[14]

[13] *Employee's Brief on Remand in Response to the Superior Court's Decision* (November 14, 2016). Employee subsequently filed a Reply Brief to Agency's November 10, 2016 submission, wherein she argued that Agency's brief was non-responsive to the question presented by D.C. Superior Court in its Remand Order. In addition, Employee restated her position that MPD's General Order was inconsistent with DCMR § 1613.2. *Employee's Reply Brief* (December 1, 2016).

[14] *Second Initial Decision on Remand* (December 12, 2016).

Agency filed a Petition for Review with OEA's Board on January 17, 2017. It insists that the Second Initial Decision on Remand was based on an erroneous interpretation of DCMR § 1613.2 because the evidence shows that neither Chief Ramsey nor Chief Lanier increased the penalty of termination. According to Agency, the penalty of termination was recommended by the Trial Panel and imposed by the deciding official, Assistant Chief Cockett. Agency does not dispute that statutes and regulations override internal general orders. However, it argues that regulations and statutes supersede internal general orders only to the extent that the specific provision is in conflict with the regulation. Thus, Agency believes that Chief Ramsey acted in accordance with GO 120.21(VI)(L)(4) when he remanded Employee's case for an alternative process and that the subsection he relied upon does not conflict with § 1613.2. Consequently, it opines that Employee's termination was proper and requests that the Petition for Review be granted.[15]

In response, Employee submits that Agency's Remand Brief and Petition for Review are not responsive to the question presented by D.C. Superior Court. Employee states that Agency's arguments go beyond the purview of the specific order to be addressed on remand. She further argues that Agency's attempts to make semantical distinctions regarding Chief Ramsey's actions are "meaningless" because Judge Okun has already concluded that Ramsey increased Employee's penalty. Moreover, Employee reiterates her argument that the Chief of Police is the deciding official for every Agency disciplinary action. As a result, she contends that the language contained in GO 120.21 directly conflicts with DCMR § 1613.2 and that the maximum penalty Agency could impose was a demotion. Therefore, Employee asks this Board to deny Agency's Petition for Review.

[15] *Agency's Petition for Review* (January 17, 2017).

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
>
> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
>
> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
>
> (c) The findings of the Administrative Judge are not based on substantial evidence; or
>
> (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

D.C. Superior Court's Instructions on Remand

In his June 8, 2016, Order, the Honorable Judge Robert Okun remanded this matter to the AJ to specifically address the following question: "[d]id District of Columbia Regulation § 1613.2 prohibit *Chief Ramsey* from increasing Petitioner's penalty?" (emphasis added). According to Judge Okun, the AJ failed to address the issue of whether Agency's GO was superseded by the relevant DCMR regulation. He went on to state that "[t]he court finds nothing in the administrative record or the IDR to suggest that OEA concluded that General Order 120.21 granted Chief Ramsey the authority to act in a way prohibited by the municipal regulations of the District of Columbia."[16] As such, Agency's argument that the penalty of termination was actually recommended by the Trial Panel and imposed by the deciding official, Assistant Chief Cockett, is non responsive to the question presented on remand because it exceeds the purview of Judge Okun's instructions. Accordingly, D.C. Superior Court has already determined that the

[16] *Edmiston v. Office of Employee Appeals*, 2014 CA 007504 P(MPA) at 11.

Chief of Police acted as the final decision maker in this case. Therefore, we must determine if the AJ's findings regarding the conflict between GO 120.21 and DCMR § 1613.2 are supported by substantial evidence and if they were based on an erroneous interpretation of statute or regulation.[17]

General Order 120.21 and D.C. Municipal Regulation § 1613.2

At the time Employee committed the misconduct, Agency's GO 1201.1 was the current internal order in place. GO 1201.1 authorized the Chief of Police to sustain a proposed penalty, reduce it, or remand the matter for further consideration. Under 1201.1, the penalty imposed could not be increased from the penalty originally proposed. On April 13, 2006, less than two weeks after the alleged acts occurred, but before Agency issued its final notice to Employee, GO 120.21 was enacted to replace its predecessor.[18] GO 120.21(VI) states the following in part:

> H. Notice of Proposed Adverse Action.
>
> > (1) The Assistant Chief…shall issue a Notice of Proposed Adverse Action. The member shall be given an opportunity to respond to the notice, in writing, within fifteen (15) business days, and the Assistant Chief, OHS, shall consider the member's response before rendering a written decision.
> >
> > (2) The Notice of Proposed Adverse Action issued by the Assistant Chief…shall include:
> >
> > a. Charges

[17] It important to distinguish between a proposing official and a deciding official. In *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227 (D.C. 1998), the D.C. Court of Appeals sought to clearly define the term "penalty proposed" within the parameters of § 1614.4, a previous, but similar, version of § 1613.2. The Court deferred to OEA's interpretation of the term, holding that the penalty proposed refers to the initial penalty suggested by the proposing official, not the recommendation of the assigned disinterested designee. In Agency's June 2, 2006 Notice of Proposed Adverse Action, Assistant Chief of Police, Shannon Cockett, recommended that Employee be demoted to the rank of lieutenant. Thus, the proposing official in this case was Assistant Chief Cockett, not the Trial Panel, as Agency suggests. In contrast, DCMR § 1699 defines the term deciding official as the individual who issues a final decision on a disciplinary action in accordance with § 1623. Moreover, Agency's own GO 120.21 IV(A) states that "[t]he Chief of Police is the designated final authority with respect to discipline." Part B further provides that the "Chief of Police shall *review and decide* all appeals of disciplinary actions. The decision of the Chief of Police, or his/her designee, any appeals of Corrective Actions shall be the final administrative review of these actions."

[18] In D.C. Superior Court's first Order Reversing Agency Decision, Judge Macaluso determined that the Chief of Police correctly applied GO 120.21 to Employee's case because that was the internal regulation that was in place at the time she filed her appeal.

b. Specifications(s)
c. The proposed action; and
d. A copy of the investigative report

L. Adverse Action Appeals

(4) When an appeal is made, the appropriate papers shall be forwarded to the Chief of Police, who may affirm or modify the findings and/or the penalty imposed, remand the case to a previous step in the process, or remand the case for an alternative process, as he/she deems appropriate.

(5) The Chief of Police *may impose a higher penalty than recommended* by the Hearing Tribunal, *or the Assistant Chief, OHS.* (emphasis added)

In contrast, Chapter 16 of the District of Columbia Regulations (formally 47 D.C. Reg. 7094 (September 1, 2000)) limits a deciding official to the following:

Duties and Responsibilities of the Proposing Official: General Discipline

1607.1 The proposing official shall issue the advance written notice proposing corrective or adverse action against an employee, as provided for in §§ 1608.1 and 1608.2.

1613.1 The deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision.

1613.2 The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, *but in no event shall he or she increase the penalty.* (emphasis added).

Accordingly, under GO 120.21, the Chief of Police is permitted to impose a higher penalty than was recommended by the proposing official. Conversely, under DCMR § 1613.2, the deciding official is prohibited from increasing the penalty recommended by the proposing official. As a general rule, statutes and regulations take precedence over an agency's internal procedures. In *Nunnally v. D.C. Metropolitan Police Department*, 80 A.3d 1004 (D.C. 2013), the

D.C. Court of Appeals held that an MPD General Order "essentially serves the purpose of an internal operating manual," and "do[es] not have the force or effect of a statute or an administrative regulation...."[19] Moreover, in *Flores v. Metropolitan Police Department*, OEA Matter No. 1601-0131-11, *Opinion and Order on Petition for Review* (March 29, 2016), this Board held that Agency's General Order 120.21 is an internal guideline that is superseded by a conflicting municipal regulation.

Based on the foregoing, this Board finds that the AJ correctly determined that DCMR § 1613.2 supersedes Agency's internal operating procedure, GO 120.21. After Employee appealed the proposing official's recommendation of demotion, the Chief of Police was permitted to sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice. Instead, former Chief Ramsey issued a letter on August 29, 2006 in response to Employee's proposed demotion in which he both denied her appeal and increased the penalty to termination. Chief Ramsey further designated the letter as the "final Agency action in this matter." As such, Chief Ramsey impermissibly increased the proposed penalty in violation of § 1613.2. There is no language in GO 120.21 which grants the Chief of Police the authority to act in a way that is prohibited by the municipal regulations of the District of Columbia. Therefore, the AJ correctly held that Agency erred in imposing the penalty of termination. Accordingly, the Initial Decision is based on substantial evidence and was not an erroneous interpretation of statute or regulation. Consequently, Agency's Petition for Review must be denied.

[19] *Id.* (Quoting *Wanzer v. District of Columbia*, 580 A.2d 127, 133 (D.C.1990)). *See also District of Columbia v. Henderson*, 710 A.2d 874, 877 (D.C. 1998).

ORDER

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

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

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.

CERTIFICATE OF SERVICE

I certify that the attached **OPINION AND ORDER** was sent by regular mail on this day to:

Paula Edmiston
5711 Plata Street
Clinton, MD 20735

Frank McDougald, Esq.
Office of the Attorney General
For the District of Columbia
441 4th St., NW
Room 1180N
Washington, DC 20001

Ted Williams, Esq.
1200 G Street, NW
Suite 800
Washington, DC 20005

Marc L. Wilhite, Esq.
Pressler & Senftle
1432 K Street NW
12th Floor
Washington, DC 20005

Katrina Hill
Clerk

November 7, 2017
Date

ATTACHMENT 2

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
PAULA EDMISTON Employee	OEA Matter No. 1601-0057-07R16
v.	Date of Issuance: December 12, 2016
METROPOLITAN POLICE DEPARTMENT Agency	Senior Administrative Judge Joseph E. Lim, Esq.

Ted Williams, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

2nd INITIAL DECISION ON REMAND

PROCEDURAL BACKGROUND

On March 7, 2007, Employee, a former Captain in the Police force, filed a Petition for Appeal with the Office of Employee Appeals ("OEA") from Agency's final decision removing her from her position. After an attempted October 25, 2007, mediation,[1] I issued an Initial Decision ("ID") on April 30, 2008.[2] The ID reduced the penalty from a termination back to the Agency's original proposed penalty of demotion. On appeal, the OEA Board upheld the ID on January 25, 2010.[3]

Upon appeal, the Superior Court of the District of Columbia reversed the ID's final order and remanded the case to the undersigned to reconsider Employee's motion for summary judgment, consistent with its opinion.[4]

On August 8, 2014, I issued an Initial Decision on Remand ("IDR") ruling on Employee's Motion for Summary Judgment and upholding Agency's penalty of termination. This IDR was appealed, and on June 8, 2016, the Superior Court of the District of Columbia reversed the IDR and remanded the matter back to the undersigned for reconsideration of

1 Notice of Mediation/Settlement Conference (October 4, 2007).
2 *Edminston v. DC Metropolitan Police Dept.*, OEA Matter No. 1601-0057-07 (April 30, 2008).
3 *Edminston v. DC Metropolitan Police Dept.*, OEA Matter No. 1601-0057-07, *Opinion & Order on Petition for Review* (January 25, 2010).
4 *DC Metropolitan Police Dept. v. DC OEA & Edminston*, Case Number 2008 CA 004804 (D.C. Super. Ct., Oct. 9, 2013).

Employee's motion for summary judgment, consistent with its opinion.[5]

I granted the parties' request for a stay of the proceedings pending the D.C. Superior Court's ruling on a similar issue on an unrelated case. Subsequently, after several conferences held with the parties, I ordered the parties to submit their legal briefs by November 15, 2016. The record is closed.

JURISDICTION

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

ISSUES

1. Whether MPD General Order 120.21 supersedes the applicable version of 6-B DCMR § 1613.2.

2. What is the proper penalty for Employee in this matter.

FINDINGS OF FACT

Based on the record and the stipulated facts, the following facts are undisputed:

1. Paula Edmiston ("Employee") was appointed to the Metropolitan Police Department ("MPD" or "Agency") in 1984 and on April 1, 2006, Employee held the rank of Captain with the MPD, Second District.

2. At an Agency-sponsored event on April 1, 2006, Employee told fellow officers about her remarks to a female cashier at the grocery store and then to a fellow patron at another grocery.[6] When subsequently confronted by her superiors, Employee denied the charges and implicated a fellow officer.

3. Effective April 13, 2006, Agency issued General Order ("G.O.") 120.21 regarding disciplinary procedures and processes. With regard to adverse action appeals, that G.O. provided, *inter alia*, that the Chief of Police ("COP") or his delegate may: 1) remand a case for an alternative process, as he/she deems appropriate; and 2) impose a higher penalty than recommended by the the Hearing Tribunal, or the Assistant Chief of Human Services. (G.O. 120.21, p. 17).

4. G.O. 120.21 replaced G.O. 1202.1, which was essentially similar to the new order, but had no provision allowing the COP to impose a penalty higher than the one initially recommended.

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5 *DC Metropolitan Police Dept. v. DC OEA & Edminston*, Case Number 2014 CA 007504 (D.C. Super. Ct., Jun. 8, 2016).

6 Employee called the cashier a faggot and threatened to kick a patron's faggot ass. *See* Final Notice of Adverse Action dated July 25, 2006.

5. DCMR § 1613.2 states, in part, "the deciding official ... in no event shall he or she increase the penalty."

6. At all relevant times, 6-B DCMR § 1613.2 was in effect.[7] The full text of this particular regulation is as follows:

> 1613 Duties and Responsibilities of Deciding Official: General Discipline
>
> 1613.1 The deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision.
>
> 1613.2 The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, but in no event shall he or she increase the penalty.

7. On June 2, 2006, pursuant to G.O 120.21, Assistant Chief of Human Services ("ACHS") Shannon Cockett served Employee with a proposed Notice of Adverse Action ("Notice") to demote Employee to the rank of lieutenant based on three charges of misconduct: (1) Conduct unbecoming an officer; (2) Failure to obey orders or directives; and (3) Willfully and knowingly making untruthful statements.[8] Each charge contained specifications to support it.

8. This Notice was issued forty-four business days from April 1, 2006, the day Agency learned of Employee's conduct. Agency does not allege that it undertook a criminal investigation of the incident.

9. The Proposed Notice advised Employee that she had fifteen (15) days to respond to the charges and specifications and that if she failed to respond, a decision regarding the charges and specifications would be based upon the evidence of record.

10. On June 23, 2006, Employee submitted a response to the Proposed Notice.

11. On July 25, 2006, following a review of the documents submitted by Employee through counsel, Assistant Chief of Human Resources Cockett served Employee with a Final Notice of Adverse Action ("Final Notice"), demoting her to the rank of lieutenant, based upon a preponderance of evidence that Employee was guilty of the charged misconduct. The six-page document listed 26 findings and contained a conclusion that Employee was guilty of the charges and specifications listed in the Notice. The Final Notice stated: For the cited violations, you will be demoted to the rank of "Lieutenant."

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7 Also found in 47 D.C. Reg. 7094, § 1613.2. (September 1, 2000).
8 Notice of Proposed Adverse Action.

12. The July 25, 2006, Final Notice advised Employee that she could appeal to the COP, and she had the right to appeal her adverse action to the OEA within 30 days of the final agency action.

13. On August 8, 2006, Employee chose to appeal the demotion to the COP asking that the demotion be reversed or the penalty mitigated.

14. On August 29, 2006, COP Charles H. Ramsey denied Employee's appeal, and further recommended that Employee be discharged.[9] Additionally, the COP remanded the adverse action for a hearing before a police trial board (Hearing Tribunal or Trial Board or Adverse Action Panel or Panel), "if Employee so elected."[10] The first paragraph acknowledged receipt of the appeal. The second paragraph said:

> After a thorough review of the record developed in this matter and your letter of August 8, 2006, I am denying your appeal. I have carefully reviewed the facts and circumstances surrounding the very serious charges and specifications in this case and have determined that there were no mitigating factors. Additionally, I have reviewed your work performance, disciplinary history and commendations. Based upon this review, I am recommending that you be discharged.

The third paragraph stated that the matter was to be scheduled for a hearing before the Trial Board "if you so elect," and the final paragraph stated that the letter constituted final Agency action in the matter.

15. Assistant Chief Cockett arranged for service of the Chief of Police's August 29, 2006, letter on Capt. Edmiston via a memo, also dated August 29, 2006, which characterized the decision of the Chief of Police as deciding that "the penalty should be amended from demotion to Removal."[11]

16. On August 31, 2006, Employee, through counsel, elected to have a hearing before a Trial Board Panel. On October 27, November 3, and November 27, 2006, Employee received a full evidentiary hearing before the Panel, which found Employee guilty of all three charges, and the underlying specifications, and unanimously recommended that Employee be terminated.[12]

17. On January 10, 2007, based on the Panel's recommendation, Agency issued a second Final Notice of Adverse Action notifying Employee she had been found guilty of all the charges and specification included in the Proposed Notice and that her removal from MPD would be effective March 2, 2007. The Notice further informed Employee that she could appeal the decision to the COP.

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9 Letter from Charles H. Ramsey, Chief of Police, to John V. Berry, Esq. dated August 29, 2006.
10 *Id.*
11 Memorandum dated August 29, 2006 to Inspector Second District from Assistant Chief Office of Human Services.
12 Parties' Proposed Stipulations of Fact. (October 14, 2016).

18. By letter dated February 1, 2007, Employee appealed to Acting Chief of Police Cathy Lanier.[13] On February 23, 2007, the COP denied Employee's appeal.[14]

19. Employee was charged with "Conduct Unbecoming an Officer," "Failure to obey orders or directives issued by the Chief of Police," and "Willfully and knowingly making an untruthful statement." She was removed from her position effective March 2, 2007.

20. On March 7, 2007, Employee filed a Petition for Appeal with the OEA.

21. On April 30, 2008, I issued an Initial Decision (ID) which modified Employee's penalty from a termination to a demotion.[15] Based on Employee's motion for summary judgment and Agency's response thereto, the ID held that Agency did not violate the 90-day rule,[16] and that Agency's General Order 120.21 was not retroactive, and thus, the proper penalty was not termination but the Agency's original proposed penalty of demotion.

22. On June 2, 2008, Employee appealed my ID with the OEA Board (Board) while Agency filed an appeal with the D.C. Superior Court on July 3, 2008. On June 9, 2009, the D.C. Superior Court dismissed Agency's petition without prejudice pending the outcome of the OEA Board's decision.

23. On January 25, 2010, the Board rejected Employee's sole argument that she should have been granted a de novo hearing on the issue of her demotion.[17] The Board held that the Administrative Judge properly exercised his discretion to deny a de novo hearing based on the submissions of the parties and the applicable law. Reiterating that the judge has discretion on whether or not to grant a hearing, and based on the fact that the parties were given due process at a hearing at the Agency, the Board denied Employee's petition for review. The Board also held that Agency's appeal was untimely. Agency appealed this decision to the D.C. Superior Court on February 22, 2010.

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13 *Id.*

14 *Id.*

15 *Edminston v. DC Metropolitan Police Dept.*, OEA Matter No. 1601-0057-07 (April 30, 2008).

16 The Police and Firefighters Disciplinary Action Procedures Act, Title V, Section 502, of the Omnibus Public Safety Agency Reform Amendment Act of 2004, D.C. Official Code § 5-1031 (2005 Supp.), states:

> Commencement of corrective or adverse action.
> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.

17 *Edminston v. DC Metropolitan Police Dept.*, OEA Matter No. 1601-0057-07, *Opinion & Order on Petition for Review* (January 25, 2010).

24. On October 9, 2013, Superior Court Judge Judith Macaluso remanded the matter back to OEA for reconsideration of Employee's motion for summary judgment consistent with the Court's opinion that Agency's change of its appellate rules was not retroactive as one of the potential penalties had always included the ultimate one of termination.[18] The Court held that because one of the potential penalties had always been termination, and that the rule change under Agency's General Order 120.21 involved secondary conduct (Employee's prosecution of an appeal), and not a primary conduct (an expansion of causes of action and damages against a defendant's already completed primary conduct), the rule change was not retroactive at all. Thus, the Court concluded that Police Chief Ramsey had the authority under amended MPD regulations to increase the recommended penalty for Employee.

25. On August 8, 2014, I issued an Initial Decision on Remand (IDR)[19] wherein I again held that Agency's action did not violate the 90-day rule and thus its action was timely. I also upheld Employee's termination since Agency's change of its appellate rules did not raise retroactivity issues and thus the Chief of Police could properly increase Employee's proposed penalty from a demotion to a termination.

26. On September 9, 2014, Employee appealed the IDR to the D.C. Superior Court.

27. On June 8, 2016, Superior Court Judge Robert Okum reversed the IDR and remanded this matter back to OEA to make a determination as to whether MPD General Order 120.21 supersedes the applicable version of 6-B DCMR § 1613.2 which can now be found at 47 D.C. Reg. 7094, § 1613.2.[20]

ANALYSIS AND CONCLUSION

Whether MPD General Order 120.21 supersedes the applicable version of 6-B DCMR § 1613.2

The sole issue that the Superior Court under Judge Okum remanded this matter for this Office to address was whether the police chief had authority to increase Employee's penalty under MPD General Order 120.21 despite its conflict with 6-B DCMR § 1613.2 which can now be found at 47 D.C. Reg. 7094, § 1613.2. In other words, whether 6-B DCMR § 1613.2 specifically prohibited the decision maker from increasing the penalty, and if so, whether this regulation superseded MPD's General Order 120.21.

Agency's response to the issue takes a different tack. First, Agency points out that after Employee's receipt of Agency's Notice of Proposed Adverse Action proposing her demotion from Captain to Lieutenant, it was Employee who appealed the notice to then COP Charles Ramsey. COP Ramsey denied the appeal and recommended termination. Agency pointed out that COP Ramsey did not impose termination as a penalty, but merely recommended it.

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18 *DC Metropolitan Police Dept. v. D.C. O.E.A. & Edminston.*, Case No. 2008CA 004804 P(MPA)(Oct. 9, 2013).
19 *Edminston v. DC Metropolitan Police Dept.*, OEA Matter No. 1601-0057-07R14 (Aug. 8, 2014).
20 *Edminston v. DC Metropolitan Police Dept.,et. al.*, Case No. 2014 CA 007504 P(MPA)(Jun. 8, 2016).

Nevertheless, COP Ramsey acceded to Employee's election that she be granted an evidentiary hearing before a Trial Board Panel. After a three day hearing, the Panel notified Employee that it found her guilty of all three charges and specifications, and unanimously recommended that Employee be terminated.

Employee appealed the Panel's decision to the new COP, Cathy Lanier, who denied her appeal on February 23, 2007, and sustained the panel's recommendation of termination.

Based on these facts, Agency argues that MPD General Order 120.21 did not conflict with 6-B DCMR § 1613.2 because COP Ramsey was not the deciding official as envisioned by § 1613.2, but merely the appeals official. Agency goes on to state that the Panel was not required to recommend termination as a penalty, but was free to recommended a lesser penalty after determining that Employee committed misconduct. Agency then concludes that since COP Ramsey did not violate 6-B DCMR § 1613.2, the penalty of termination should be affirmed. Agency later repeats this argument after pointing out that only those provision of G.O. 120.21 that conflicted with 6 B DCMR § 1613 are superseded by the regulation.

Employee argues that Agency had no legal authority to change Assistant Chief Cockett's findings on the charges and increase the penalty from a demotion to a termination. Employee complains that Agency's brief is not responsive to the question presented by the Superior Court as Judge Okun had already concluded that COP Ramsey increased Employee's penalty. Employee points out that there is no question that G.O. 120.21 conflicts with 6 B DCMR § 1613 and that a regulation supersedes a G.O.

Agency's argument is disingenuous in pointing out that COP Ramsey was not the deciding official since he did not impose the higher penalty of termination. While that much is true, what Agency fails to point out is the fact that the deciding official who did impose the higher penalty of termination over the original proposed penalty of a demotion was then COP Lanier.

As the undisputed facts of this case bears out, in Agency's proposed June 2, 2006, Notice of Adverse Action, ACHS Shannon Cockett recommended that Employee be demoted to the rank of lieutenant. While COP Ramsey ordered a hearing before a Panel, it was COP Lanier who acted as a deciding official in imposing a termination upon Employee.

6-B DCMR § 1613 states as follows:[21]

1613. Duties and Responsibilities of Deciding Official: General Discipline

1613.1 The deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision.

21 Chapter 16, General Discipline and Grievances, 47 D.C.Reg. 7094 (September 1, 2000)

1613.2 The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, ***but in no event shall he or she increase the penalty.*** (emphasis added).

As noted in the statement of facts above, G.O. 120.21 provided, *inter alia*, that the COP or his delegate may: 1) remand a case for an alternative process, as he/she deems appropriate; and 2) ***impose a higher penalty than recommended by*** the the Hearing Tribunal, or ***the Assistant Chief of Human Services.*** (emphasis added).

It is evident that 6-B DCMR § 1613 conflicts with G.O. 120.21. In contrast to the G.O., the regulation limits the COP's choice of the severest penalty he or she can impose to the one recommended by the Assistant Chief of Human Services. Here, ACHS Cocket recommended a demotion, and COP Lanier may not impose the more severe penalty of termination.

. Superior Court Judge Okum's order stated in part, "An agency's internal general orders or procedures do not override statutes and regulations.[22] Courts in this jurisdiction have held that 'an MPD General Order essentially served the purpose of an internal operating manual, and does not have the force or effect of a statue or an administrative regulation."[23] In addition, OEA itself recently concluded that an MPD general order that conflict with a municipal regulation was superseded by that municipal regulation, as 'statutes and regulations take precedence over an agency's internal procedures.'[24]

On August 4, 2016, in the case of *District of Columbia vs. Public Employee Relations Board, et.al.,* the Court of Appeals, in part, cited *District of Columbia v. Henderson*, 710 A.2d 874, 877 (D.C. 1998) (noting that an MPD General Order cannot override a regulation).

Thus, to answer Judge Okun's query, 6-B DCMR § 1613.2 supersedes MPD's General Order 120.21. 6-B DCMR § 1613.2 specifically prohibited the decision maker from increasing the penalty, and thus the police chief as the ultimate decision maker had no legal authority to increase Employee's penalty under MPD General Order 120.21.

What is the proper penalty for Employee in this matter.

The next issue to be dealt with is Agency's choice of penalty. Employee's contention that she was innocent of the charges, was refuted by her fellow officers in a police trial board hearing. Employee was given her due process rights as she was able to confront and cross-examine her accusers. , The Trial Board unanimously found her guilty of all charges, and recommended termination.

22 See *District of Columbia v. Henderson,* 710 A.2d 874, 877 (D.C. 1998, *Nunnally v. DC Metro Police Dep't,* 80 A.3d 1004, 1012 (D.C. 2013).
23 *Nunnally*, 80 A.3d at 1012.
24 *In the Matter of Wilberto Flores v. Metro. Police Dep't,* OEA Matter No. 1601-0131-11, at pp. 6-7 (Mar. 29, 2016).

This Office's review of an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's workforce is a matter entrusted to the agency, not to this Office. When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). Indeed, this Office's scope of review is limited to a determination of whether the penalty is within the range allowed by the table of penalties, whether the penalty is based on relevant *Douglas* factors, and whether there is a clear error of judgment. *Taggert v. Metropolitan Police Department*, OEA Matter No. 2405-0113-92R94 (Jan. 9, 1998).

I cannot modify Agency's penalty unless it is so harsh as to amount to an abuse of discretion. *Employee v. Agency*, OEA Matter No. 1601-0012-82, 30 D.C. Reg. 352 (1983). Based on the Agency's Table of Penalties, the range of penalties for conduct unbecoming an officer, insubordination, or making an untruthful statement, all range from suspension to termination, even for a first offender.[25] Based on this standard, my review of the record taken as a whole, demonstrates that there is substantial evidence in the record to support the penalty of demotion. Here, Agency's decision to impose the penalty of termination constituted an abuse of discretion because the original penalty was increased in violation of the regulation. For the foregoing reasons, I conclude that the agency's decision to select removal as the appropriate penalty for Employee's infractions must be modified to a demotion.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of terminating Employee is **REVERSED**; and

2. Agency shall reinstate and immediately demote Employee to the rank of lieutenant; reimburse her all back-pay and benefits lost as a result of her termination; and

3. Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

25 *See* MPD General Order 120.21. Attachment A: Table of Offenses and Penalties (April 13, 2006).

NOTICE OF APPEALS RIGHTS

This is an Initial Decision that will become a final decision of the Office of Employee Appeals unless either party to this proceeding files a Petition for Review with the office. A Petition for Review must be filed within thirty-five (35) calendar days, including holidays and weekends, of the issuance date of the Initial Decision in the case.

All Petitions for Review must set forth objections to the Initial Decision and establish that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed;

2. The decision of the presiding official is based on an erroneous interpretation of statute, regulation, or policy;

3. The finding of the presiding official are not based on substantial evidence; or

4. The Initial Decision did not address all the issues of law and fact properly raised in the appeal.

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with Administrative Assistant, D.C. Office of Employee Appeals, 1100 4th St., SW., Suite 620E, Washington, D.C. 20024. Four (4) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review may file their response within thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review.

Instead of filing a Petition for Review with the Office, either party may file a Petition for Review in the Superior Court of the District of Columbia. Either party may also appeal a decision on Petition for Review (also known as an Opinion and Order 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.

CERTIFICATE OF SERVICE

I certify that the attached 2ND **INITIAL DECISION ON REMAND** was sent by regular mail on this day to:

Paula Edmiston
5711 Plata Street
Clinton, MD 20735

Ted Williams, Esq.
1200 G Street, NW
Suite 800
Washington, DC 20005

Frank McDougald, Esq.
Office of the Attorney General
For the District of Columbia
441 4th Street, NW
Suite 1180N
Washington, DC 20001

Katrina Hill
Clerk

December 12, 2016
Date

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Telephone: (202) 879-1133 • Website: www.dccourts.gov

METROPOLITAN POLICE DEPARTMENT
Vs.
TED WILLIAMS et al

C.A. No. 2017 CA 008130 P(MPA)

INITIAL ORDER AND ADDENDUM

Pursuant to D.C. Code § 11-906 and District of Columbia Superior Court Rule of Civil Procedure ("Super. Ct. Civ. R.") 40-I, it is hereby **ORDERED** as follows:

(1) Effective this date, this case has assigned to the individual calendar designated below. All future filings in this case shall bear the calendar number and the judge's name beneath the case number in the caption. On filing any motion or paper related thereto, one copy (for the judge) must be delivered to the Clerk along with the original.

(2) Within 60 days of the filing of the complaint, plaintiff must file proof of serving on each defendant: copies of the summons, the complaint, and this Initial Order and Addendum. As to any defendant for whom such proof of service has not been filed, the Complaint will be dismissed without prejudice for want of prosecution unless the time for serving the defendant has been extended as provided in Super. Ct. Civ. R. 4(m).

(3) Within 21 days of service as described above, except as otherwise noted in Super. Ct. Civ. R. 12, each defendant must respond to the complaint by filing an answer or other responsive pleading. As to the defendant who has failed to respond, a default and judgment will be entered unless the time to respond has been extended as provided in Super. Ct. Civ. R. 55(a).

(4) At the time and place noted below, all counsel and unrepresented parties shall appear before the assigned judge at an initial scheduling and settlement conference to discuss the possibilities of settlement and to establish a schedule for the completion of all proceedings, including, normally, either mediation, case evaluation, or arbitration. Counsel shall discuss with their clients **prior** to the conference whether the clients are agreeable to binding or non-binding arbitration. **This order is the only notice that parties and counsel will receive concerning this Conference.**

(5) Upon advice that the date noted below is inconvenient for any party or counsel, the Quality Review Branch (202) 879-1750 may continue the Conference **once**, with the consent of all parties, to either of the two succeeding Fridays. Request must be made not less than seven business days before the scheduling conference date.
No other continuance of the conference will be granted except upon motion for good cause shown.

(6) Parties are responsible for obtaining and complying with all requirements of the General Order for Civil cases, each judge's Supplement to the General Order and the General Mediation Order. Copies of these orders are available in the Courtroom and on the Court's website http://www.dccourts.gov/.

Chief Judge Robert E. Morin

Case Assigned to: Judge ELIZABETH WINGO
Date: December 7, 2017
Initial Conference: 9:30 am, Friday, March 09, 2018
Location: Courtroom A-47
515 5th Street NW
WASHINGTON, DC 20001

ADDENDUM TO INITIAL ORDER AFFECTING ALL MEDICAL MALPRACTICE CASES

In accordance with the Medical Malpractice Proceedings Act of 2006, D.C. Code § 16-2801, et seq. (2007 Winter Supp.), "[a]fter an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery or, if all parties agree[,] with only limited discovery that will not interfere with the completion of mediation within 30 days of the Initial Scheduling and Settlement Conference ("ISSC"), prior to any further litigation in an effort to reach a settlement agreement. The early mediation schedule shall be included in the Scheduling Order following the ISSC. Unless all parties agree, the stay of discovery shall not be more than 30 days after the ISSC." D.C. Code § 16-2821.

To ensure compliance with this legislation, on or before the date of the ISSC, the Court will notify all attorneys and *pro se* parties of the date and time of the early mediation session and the name of the assigned mediator. Information about the early mediation date also is available over the internet at https://www:dccourts.gov/pa/. To facilitate this process, all counsel and *pro se* parties in every medical malpractice case are required to confer, jointly complete and sign an EARLY MEDIATION FORM, which must be filed no later than ten (10) calendar days prior to the ISSC. D.C. Code § 16-2825 Two separate Early Mediation Forms are available. Both forms may be obtained at www.dccourts.gov/medmalmediation. One form is to be used for early mediation with a mediator from the multi-door medical malpractice mediator roster; the second form is to be used for early mediation with a private mediator. Both forms also are available in the Multi-Door Dispute Resolution Office, Suite 2900, 410 E Street, N.W. Plaintiff's counsel is responsible for eFiling the form and is required to e-mail a courtesy copy to earlymedmal@dcsc.gov. *Pro se* Plaintiffs who elect not to eFile may file by hand in the Multi-Door Dispute Resolution Office.

A roster of medical malpractice mediators available through the Court's Multi-Door Dispute Resolution Division, with biographical information about each mediator, can be found at www.dccourts.gov/medmalmediation/mediatorprofiles. All individuals on the roster are judges or lawyers with at least 10 years of significant experience in medical malpractice litigation. D.C. Code § 16-2823(a). If the parties cannot agree on a mediator, the Court will appoint one. D.C. Code § 16-2823(b).

The following persons are required by statute to attend personally the Early Mediation Conference: (1) all parties; (2) for parties that are not individuals, a representative with settlement authority; (3) in cases involving an insurance company, a representative of the company with settlement authority; and (4) attorneys representing each party with primary responsibility for the case. D.C. Code § 16-2824.

No later than ten (10) days after the early mediation session has terminated, Plaintiff must eFile with the Court a report prepared by the mediator, including a private mediator, regarding: (1) attendance; (2) whether a settlement was reached; or, (3) if a settlement was not reached, any agreements to narrow the scope of the dispute, limit discovery, facilitate future settlement, hold another mediation session, or otherwise reduce the cost and time of trial preparation. D.C. Code§ 16-2826. Any Plaintiff who is *pro se* may elect to file the report by hand with the Civil Actions Branch. The forms to be used for early mediation reports are available at www.dccourts.gov/medmalmediation.

Chief Judge Robert E. Morin

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

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Superior Court of the
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Washington, D.C.

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955 L'Enfant Plaza, S.W.
Suite 2500
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(202)727-0004
FAX (202)727-5631

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

METROPOLITAN POLICE DEPARTMENT, Petitioner, v. D.C. OFFICE OF EMPLOYEE APPEALS, Respondent, PAULA EDMISTON, Intervenor.	Case No. 2017 CA 008130 P(MPA) Judge Elizabeth Wingo

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Paula Edmiston v. Metropolitan Police Department,* OEA Matter No. 1601-0057-07R16. The record consists of two volumes containing sixty-two (62) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist

LASHEKA BROWN BASSEY NOTARY PUBLIC MY COMMISSION EXPIRES 6/14/2021 DISTRICT OF COLUMBIA

District of Columbia: SS
Subscribed and sworn to before me
this 9th day of February, 2018

Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, Petitioner v. DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS, Respondent.	Case No. 2017 CA 008130 P(MPA) Judge Elizabeth Wingo **Next Event: Status Hearing** Friday, November 16, 2018

OFFICE OF EMPLOYEE APPEALS' STATEMENT IN LIEU OF BRIEF

Pursuant to the Hearing Notice that was entered on October 17, 2018, Respondent Office of Employee Appeals submits that it relies on the final decision of its Board in the matter of *Paula Edmiston v. Metropolitan Police Department* OEA Matter Number 1601-0057-07R16 (November 7, 2017), as its statement in lieu of brief. The final decision is attached hereto as Exhibit #1.

Respectfully submitted,

Lasheka Brown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024
202.727.0738
Lasheka.Brown@dc.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2018, the forgoing Respondent Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system, CaseFileXpress.com to the following:

Frank J. McDougald
Counsel for Petitioner

Ted J. Williams
Counsel for Intervenor

Respectfully submitted,

Lasheka Brown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024
202.727.0738
Lasheka.Brown@dc.gov

Exhibit 1

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
PAULA EDMISTON, Employee	
v.	OEA Matter No.: 1601-0057-07R16
METROPOLITAN POLICE DEPARTMENT, Agency	Date of Issuance: November 7, 2017

OPINION AND ORDER
ON
REMAND

This matter was previously before the Board. Paula Edmiston ("Employee") was a captain with the Metropolitan Police Department ("Agency"). On June 2, 2006, the Assistant Chief of Human Services ("ACHS"), Shannon Cockett, served Employee with a Proposed Notice of Adverse Action and recommended that she be demoted to the rank of lieutenant. Employee was charged with conduct unbecoming of an officer, failure to obey orders, and willfully and knowingly making an untruthful statement. The charges stemmed from two events in 2006, wherein Employee made disrespectful comments to a cashier at a grocery store regarding the cashier's race and national origin. Employee subsequently made disparaging remarks to a male patron at another grocery store pertaining to his sexual orientation. Agency conducted an

administrative review and issued its Final Notice of Adverse Action on July 25, 2006. The notice stated that that Employee was guilty of all three charges based on the preponderance of the evidence. As a result, Employee was demoted to the rank of lieutenant.

Thereafter, Employee appealed her demotion to former Chief of Police, Charles Ramsey. On August 29, 2006, Chief Ramsey denied Employee's appeal and recommended that her punishment be increased from demotion to removal. Employee elected to have the adverse action reviewed by a panel of police officers ("Trial Panel"). The Trial Panel found Employee guilty of all three charges and recommended that she be terminated. Employee appealed the Trial Panel's decision to Acting Chief of Police, Cathy Lanier. However, Employee's appeal was denied on February 23, 2007 and her termination became effective on March 2, 2007.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on March 7, 2007. Two issues were presented to the Administrative Judge ("AJ") for adjudication: whether Agency commenced its adverse action in a timely manner and whether Agency had the authority to increase the proposed penalty from demotion to removal. The AJ issued his Initial Decision on April 30, 2008. With respect to the timeliness issue, the AJ held that Agency did not violate D.C. Official Code § 5-1031, commonly referred to as the 90-day rule. The rule prohibits adverse actions from commencing against members of the Metropolitan Police Department more than ninety days, not including Saturdays, Sundays, or legal holidays, after the date Agency knew, or should have known, of the act or occurrence allegedly constituting cause.[2] According to the AJ, Chief Ramsey's August 29, 2006 letter to Employee did not trigger the 90-day time period because the notice did not identify itself as a proposed notice of adverse action and did

[1] *Petition for Appeal* (March 7, 2007).
[2] The AJ noted that the statute contains an exception for acts subject to criminal investigations; however there was no pending criminal investigation pending against Employee.

not contain the charges and specifications required of such a notice. Hence, the AJ determined that Agency's June 2, 2006 proposed notice to Employee was well within the 90-day deadline.

With respect to the Chief's authority to increase Employee's proposed penalty, the AJ stated that Employee's "right not to have her proposed penalty increased was impaired by Agency's retroactive use of [the General Order].[3] He further provided the following:

> When the underlying events occurred on April 1, 2006, GO-PER-120-21 was not in place, and the Chief of Police was not authorized to increase punishment. The enactment of the new General Order—if held to apply to the punishment imposed on the Employee—would increase the Employee's liability for past conduct because she would be subject to a removal rather than a mere demotion. Under Landgraf and the District of Columbia administrative agency cases following it, the Employee's punishment cannot be increased by means of the General Order applied retroactively to conduct occurring before its enactment.

Based on the foregoing, the AJ held that Chief Ramsey improperly increased Employee's penalty from demotion to removal. Therefore, he reversed Agency's adverse action and held that the correct remedy was to reinstate Employee's demotion.[4]

Thereafter, Employee filed a Petition for Review with OEA's Board.[5] Her sole argument in the petition was that the AJ "lacked the power to *sua sponte* demote [Employee] without permitting her the opportunity to petition OEA for a de novo evidentiary hearing."[6] In its Opinion and Order on Petition for Review, the Board highlighted OEA Rule 625.1, which

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[3] Effective April 13, 2006, Agency issued General Order ("GO") 120.21, which addresses disciplinary procedures and processes. With regard to adverse action appeals, the GO provided that the Chief of Police or his delegate may: 1) remand a case for an alternative process, as he/she deems appropriate; and 2) impose a higher penalty than recommended by the Assistant Chief of Human Services.

[4] *Initial Decision* (April 30, 2008).

[5] While Employee's Petition for Review was pending before OEA's Board, Agency filed a Petition for Review in D.C. Superior Court. Agency also filed an Opposition to Employee's June 2, 2008 Petition for Review with OEA on July 17, 2008. However, D.C. Superior Court dismissed Agency's petition without prejudice pending the outcome of the Board's decision. On July 9, 2009, Agency filed a Motion for Extension of Time to File Petition for Review of Agency Decision. The parties subsequently requested to stay the matter pending before OEA, and subsequently requested that the stay be lifted on August 26, 2009. The request was granted.

[6] *Petition for Review*, p. 8 (June 2, 2008)

provides that a party may request the opportunity for an evidentiary hearing; however, it is within the AJ's discretion to grant such a request. The Board agreed with the AJ's assessment that an evidentiary hearing was not warranted based on the issues presented by the parties. Furthermore, the Board held that the AJ did not abuse his discretion by deciding this matter based solely on the documents of record. As a result, Employee's Petition for Review was denied and the AJ's Initial Decision was upheld.[7]

Agency subsequently filed an appeal with D.C. Superior Court. On October 9, 2013, the Honorable Judge Judith Macaluso issued an Order Reversing Agency Decision, in part. In her analysis, Judge Macaluso, stated that "Chief Ramsey had the authority under amended MPD regulations to increase the recommended penalty for the Petitioner." Therefore, the matter was remanded to the AJ for reconsideration consistent with the Order.[8]

On August 8, 2014, the AJ issued his Initial Decision on Remand. He reiterated his previous finding that Agency did not violate the 90-day rule. However, the AJ reversed his original decision with respect to Agency's ability to increase a proposed penalty and concluded that it did not abuse its discretion by terminating Employee.[9] Consequently, Agency's termination action was upheld.

Employee appealed the Initial Decision on Remand to D.C. Superior Court on September 9, 2015, wherein she asserted that the AJ's decision should be reversed because the GO that the Chief of Police relied upon in imposing a higher penalty was superseded by D.C. Municipal Regulation ("DCMR") § 1613.2. In its June 8, 2016 Order, the Court discussed three issues:

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[7] *Opinion and Order on Petition for Review* (January 25, 2010). The Board also denied Agency's Motion for Extension of Time to File Petition for Review of Agency Decision because it failed to file its petition within the thirty-five day deadline as required by D.C. Official Code § 1-606.03(c).
[8] *District of Columbia Metropolitan Police Department v. Office of Employee Appeals*, 2008 CA 004804 P(MPA) (D.C. Super. Ct. 2013).
[9] *Initial Decision on Remand* (August 8, 2014).

whether the argument raised by Employee in her petition regarding DCMR § 1613.2 was being raised for the first time; whether the law of the case doctrine prohibited the Court from making a determination with respect to the aforementioned issue; and whether DCMR § 1613.2 prohibited the Chief of Police from increasing Employee's penalty. In its analysis, the Court provided that Employee's argument was properly preserved for appeal. It further stated that the law of the case doctrine was inapplicable in this matter. Regarding the last issue, the Court agreed with Employee's contention that the AJ did not properly analyze whether Agency's GO could supersede a municipal regulation. Therefore, the matter was remanded to the AJ "in order for OEA to make a determination as to whether MPD General Order 120.21 supersedes [the] applicable version of 6-B DCMR § 1613.2...."[10]

Thereafter, the parties were ordered to address the issue identified in the Court's June 8, 2016 Order.[11] In its Remand Brief, Agency argued that its action of reducing Employee's rank to lieutenant was done so in accordance with GO 120.21 and that it did not violate DCMR § 1613.2. It further stated that the Chief of Police "in denying Employee's appeal, did not increase the penalty. Instead the [Chief] 'remand[ed] the case for an alternative process,' a trial board and recommendation of termination." Agency further questioned the applicability of DCMR § 1613.2 to the instant matter because it believed that Chief Ramsey was the appeals official, not the deciding official. In addition, it posited that the language contained in § 1613.2 and GO 120.21 was "congruent and harmonious in allowing a matter to be remanded for further consideration." As a result, Agency reiterated its position that Employee's termination was appropriate.[12]

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[10] *Edmiston v. Office of Employee Appeals*, 2014 CA 007504 P(MPA) (D.C. Super. Ct. 2014).
[11] *Post-Conference Briefing Order* (November 9, 2016).
[12] *Agency's Brief Following Remand from the District of Columbia Superior Court* (November 10, 2016). *Also See Agency's Reply to Employee's Brief on Remand in Response to the Superior Court Decision* (December 2, 2016).

In response, Employee contended that the Chief of Police lacked the authority to amend the Assistant Chief of Police's findings and increase the penalty. According to Employee, Agency's General Orders are merely internal guidelines that do not supersede District regulations. She further stated that the Chief of Police was limited to promulgating orders which are consistent with District law. Consequently, Employee requested that Agency's termination action be reversed.[13]

The AJ issued his Second Initial Decision on Remand on December 12, 2016. He disagreed with Agency's argument that DCMR § 1613.2 and GO 120.21 were congruent because Chief Ramsey was not the deciding official as envisioned by the regulations. According to the AJ, while Chief Ramsey remanded the matter for a hearing before the Trial Panel, it was Chief Lanier who ultimately acted as a deciding official in this case. He further stated that it was evident that § 1613.2 and GO 120.21 contained conflicting language and that an agency's internal orders cannot override municipal regulations. Thus, in response to Superior Court's Order, the AJ concluded that Chief Lanier, acting as the ultimate decision maker, was legally prohibited from increasing the proposed penalty levied against Employee from demotion to termination. As a result, the AJ determined that the imposed penalty of termination was an abuse of discretion and that there was substantial evidence in the record to support the penalty of demotion. Consequently, Agency's termination action was reversed and Employee was ordered to be reinstated and demoted to the rank of lieutenant.[14]

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[13] *Employee's Brief on Remand in Response to the Superior Court's Decision* (November 14, 2016). Employee subsequently filed a Reply Brief to Agency's November 10, 2016 submission, wherein she argued that Agency's brief was non-responsive to the question presented by D.C. Superior Court in its Remand Order. In addition, Employee restated her position that MPD's General Order was inconsistent with DCMR § 1613.2. *Employee's Reply Brief* (December 1, 2016).

[14] *Second Initial Decision on Remand* (December 12, 2016).

Agency filed a Petition for Review with OEA's Board on January 17, 2017. It insists that the Second Initial Decision on Remand was based on an erroneous interpretation of DCMR § 1613.2 because the evidence shows that neither Chief Ramsey nor Chief Lanier increased the penalty of termination. According to Agency, the penalty of termination was recommended by the Trial Panel and imposed by the deciding official, Assistant Chief Cockett. Agency does not dispute that statutes and regulations override internal general orders. However, it argues that regulations and statutes supersede internal general orders only to the extent that the specific provision is in conflict with the regulation. Thus, Agency believes that Chief Ramsey acted in accordance with GO 120.21(VI)(L)(4) when he remanded Employee's case for an alternative process and that the subsection he relied upon does not conflict with § 1613.2. Consequently, it opines that Employee's termination was proper and requests that the Petition for Review be granted.[15]

In response, Employee submits that Agency's Remand Brief and Petition for Review are not responsive to the question presented by D.C. Superior Court. Employee states that Agency's arguments go beyond the purview of the specific order to be addressed on remand. She further argues that Agency's attempts to make semantical distinctions regarding Chief Ramsey's actions are "meaningless" because Judge Okun has already concluded that Ramsey increased Employee's penalty. Moreover, Employee reiterates her argument that the Chief of Police is the deciding official for every Agency disciplinary action. As a result, she contends that the language contained in GO 120.21 directly conflicts with DCMR § 1613.2 and that the maximum penalty Agency could impose was a demotion. Therefore, Employee asks this Board to deny Agency's Petition for Review.

[15] *Agency's Petition for Review* (January 17, 2017).

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
>
> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
>
> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
>
> (c) The findings of the Administrative Judge are not based on substantial evidence; or
>
> (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

D.C. Superior Court's Instructions on Remand

In his June 8, 2016, Order, the Honorable Judge Robert Okun remanded this matter to the AJ to specifically address the following question: "[d]id District of Columbia Regulation § 1613.2 prohibit *Chief Ramsey* from increasing Petitioner's penalty?" (emphasis added). According to Judge Okun, the AJ failed to address the issue of whether Agency's GO was superseded by the relevant DCMR regulation. He went on to state that "[t]he court finds nothing in the administrative record or the IDR to suggest that OEA concluded that General Order 120.21 granted Chief Ramsey the authority to act in a way prohibited by the municipal regulations of the District of Columbia."[16] As such, Agency's argument that the penalty of termination was actually recommended by the Trial Panel and imposed by the deciding official, Assistant Chief Cockett, is non responsive to the question presented on remand because it exceeds the purview of Judge Okun's instructions. Accordingly, D.C. Superior Court has already determined that the

[16] *Edmiston v. Office of Employee Appeals*, 2014 CA 007504 P(MPA) at 11.

Chief of Police acted as the final decision maker in this case. Therefore, we must determine if the AJ's findings regarding the conflict between GO 120.21 and DCMR § 1613.2 are supported by substantial evidence and if they were based on an erroneous interpretation of statute or regulation.[17]

General Order 120.21 and D.C. Municipal Regulation § 1613.2

At the time Employee committed the misconduct, Agency's GO 1201.1 was the current internal order in place. GO 1201.1 authorized the Chief of Police to sustain a proposed penalty, reduce it, or remand the matter for further consideration. Under 1201.1, the penalty imposed could not be increased from the penalty originally proposed. On April 13, 2006, less than two weeks after the alleged acts occurred, but before Agency issued its final notice to Employee, GO 120.21 was enacted to replace its predecessor.[18] GO 120.21(VI) states the following in part:

> H. Notice of Proposed Adverse Action.
>
> > (1) The Assistant Chief...shall issue a Notice of Proposed Adverse Action. The member shall be given an opportunity to respond to the notice, in writing, within fifteen (15) business days, and the Assistant Chief, OHS, shall consider the member's response before rendering a written decision.
> >
> > (2) The Notice of Proposed Adverse Action issued by the Assistant Chief...shall include:
> > a. Charges

[17] It important to distinguish between a proposing official and a deciding official. In *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227 (D.C. 1998), the D.C. Court of Appeals sought to clearly define the term "penalty proposed" within the parameters of § 1614.4, a previous, but similar, version of § 1613.2. The Court deferred to OEA's interpretation of the term, holding that the penalty proposed refers to the initial penalty suggested by the proposing official, not the recommendation of the assigned disinterested designee. In Agency's June 2, 2006 Notice of Proposed Adverse Action, Assistant Chief of Police, Shannon Cockett, recommended that Employee be demoted to the rank of lieutenant. Thus, the proposing official in this case was Assistant Chief Cockett, not the Trial Panel, as Agency suggests. In contrast, DCMR § 1699 defines the term deciding official as the individual who issues a final decision on a disciplinary action in accordance with § 1623. Moreover, Agency's own GO 120.21 IV(A) states that "[t]he Chief of Police is the designated final authority with respect to discipline." Part B further provides that the "Chief of Police shall *review and decide* all appeals of disciplinary actions. The decision of the Chief of Police, or his/her designee, any appeals of Corrective Actions shall be the final administrative review of these actions."

[18] In D.C. Superior Court's first Order Reversing Agency Decision, Judge Macaluso determined that the Chief of Police correctly applied GO 120.21 to Employee's case because that was the internal regulation that was in place at the time she filed her appeal.

b. Specifications(s)
c. The proposed action; and
d. A copy of the investigative report

L. Adverse Action Appeals

(4) When an appeal is made, the appropriate papers shall be forwarded to the Chief of Police, who may affirm or modify the findings and/or the penalty imposed, remand the case to a previous step in the process, or remand the case for an alternative process, as he/she deems appropriate.

(5) The Chief of Police *may impose a higher penalty than recommended* by the Hearing Tribunal, *or the Assistant Chief, OHS.* (emphasis added)

In contrast, Chapter 16 of the District of Columbia Regulations (formally 47 D.C. Reg. 7094 (September 1, 2000)) limits a deciding official to the following:

Duties and Responsibilities of the Proposing Official: General Discipline

1607.1 The proposing official shall issue the advance written notice proposing corrective or adverse action against an employee, as provided for in §§ 1608.1 and 1608.2.

1613.1 The deciding official, after considering the employee's response and the report and recommendation of the hearing officer pursuant to § 1612, when applicable, shall issue a final decision.

1613.2 The deciding official shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, *but in no event shall he or she increase the penalty.* (emphasis added).

Accordingly, under GO 120.21, the Chief of Police is permitted to impose a higher penalty than was recommended by the proposing official. Conversely, under DCMR § 1613.2, the deciding official is prohibited from increasing the penalty recommended by the proposing official. As a general rule, statutes and regulations take precedence over an agency's internal procedures. In *Nunnally v. D.C. Metropolitan Police Department*, 80 A.3d 1004 (D.C. 2013), the

D.C. Court of Appeals held that an MPD General Order "essentially serves the purpose of an internal operating manual," and "do[es] not have the force or effect of a statute or an administrative regulation...."[19] Moreover, in *Flores v. Metropolitan Police Department*, OEA Matter No. 1601-0131-11, *Opinion and Order on Petition for Review* (March 29, 2016), this Board held that Agency's General Order 120.21 is an internal guideline that is superseded by a conflicting municipal regulation.

Based on the foregoing, this Board finds that the AJ correctly determined that DCMR § 1613.2 supersedes Agency's internal operating procedure, GO 120.21. After Employee appealed the proposing official's recommendation of demotion, the Chief of Police was permitted to sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice. Instead, former Chief Ramsey issued a letter on August 29, 2006 in response to Employee's proposed demotion in which he both denied her appeal and increased the penalty to termination. Chief Ramsey further designated the letter as the "final Agency action in this matter." As such, Chief Ramsey impermissibly increased the proposed penalty in violation of § 1613.2. There is no language in GO 120.21 which grants the Chief of Police the authority to act in a way that is prohibited by the municipal regulations of the District of Columbia. Therefore, the AJ correctly held that Agency erred in imposing the penalty of termination. Accordingly, the Initial Decision is based on substantial evidence and was not an erroneous interpretation of statute or regulation. Consequently, Agency's Petition for Review must be denied.

[19] *Id.* (Quoting *Wanzer v. District of Columbia*, 580 A.2d 127, 133 (D.C.1990)). *See also District of Columbia v. Henderson*, 710 A.2d 874, 877 (D.C. 1998).

ORDER

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

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

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.

CERTIFICATE OF SERVICE

I certify that the attached **OPINION AND ORDER** was sent by regular mail on this day to:

Paula Edmiston
5711 Plata Street
Clinton, MD 20735

Frank McDougald, Esq.
Office of the Attorney General
For the District of Columbia
441 4th St., NW
Room 1180N
Washington, DC 20001

Ted Williams, Esq.
1200 G Street, NW
Suite 800
Washington, DC 20005

Marc L. Wilhite, Esq.
Pressler & Senftle
1432 K Street NW
12th Floor
Washington, DC 20005

Katrina Hill
Clerk

November 7, 2017
Date

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

Kevin D. Baldwin
Petitioner(s)
2429 Alabama Ave; SE, #303, Wash, DC 20020

v.

MPA NO. 17-0007980

Office of Employee Appeals (OEA)
Respondent(s)
1100 4th Street, SE, Suite 620 E, Wash, DC 20024

PETITION FOR REVIEW OF AGENCY DECISION

A. **Notice is hereby given that** Kevin D. Baldwin **appeals to the Superior Court of the District of Columbia from the order** Office of Employee Appeals (OEA) **(agency or official's name) issued on the** 13th **day of** Sept., **20** 16. **A copy of that order or decision is attached to this petition.**
Description of Judgment or Order: Denied

A concise statement of the Agency proceedings and the decision as to which review is sought and the nature of the relief requested by petitioner: Judgement was Based on erroneous case laws, Petitioner Seek Redress and Relife From Judgement

B. **Address of Respondent, Agency or Official:** Arien P. Cannon, Esq.
Administrative Judge, 1100 4th Street, SE; Suite 620 E
Washington, DC 20024

C. **Names and addresses of all other parties to the Agency's proceeding:**

D. **Names and address of parties or attorneys to be served:**

	NAME	ADDRESS
1.	Corey Argust	One Judiciary Square
2.	Assistant Attorney General	441 4th Street, NW
3.		Suite 1180 N
4.		Washington, DC 20001

E. **A copy of the Agency's decision or Order sought to be reviewed is attached.**

Kevin D. Baldwin
Print name of petitioner's attorney

Kevin D. Baldwin
Signature of petitioner's counsel or petitioner's signature

Address: 2429 Alabama Ave; SE #303, Wash. DC 20020
Bar No. _____ **Telephone No.** 202-210-5136

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Telephone: (202) 879-1133 • Website: www.dccourts.gov

KEVIN BALDWIN
Vs.
OFFICE OF EMPLOYEE APPEALS

C.A. No. 2017 CA 007980 P(MPA)

INITIAL ORDER AND ADDENDUM

Pursuant to D.C. Code § 11-906 and District of Columbia Superior Court Rule of Civil Procedure ("Super. Ct. Civ. R.") 40-I, it is hereby **ORDERED** as follows:

(1) Effective this date, this case has assigned to the individual calendar designated below. All future filings in this case shall bear the calendar number and the judge's name beneath the case number in the caption. On filing any motion or paper related thereto, one copy (for the judge) must be delivered to the Clerk along with the original.

(2) Within 60 days of the filing of the complaint, plaintiff must file proof of serving on each defendant: copies of the summons, the complaint, and this Initial Order and Addendum. As to any defendant for whom such proof of service has not been filed, the Complaint will be dismissed without prejudice for want of prosecution unless the time for serving the defendant has been extended as provided in Super. Ct. Civ. R. 4(m).

(3) Within 21 days of service as described above, except as otherwise noted in Super. Ct. Civ. R. 12, each defendant must respond to the complaint by filing an answer or other responsive pleading. As to the defendant who has failed to respond, a default and judgment will be entered unless the time to respond has been extended as provided in Super. Ct. Civ. R. 55(a).

(4) At the time and place noted below, all counsel and unrepresented parties shall appear before the assigned judge at an initial scheduling and settlement conference to discuss the possibilities of settlement and to establish a schedule for the completion of all proceedings, including, normally, either mediation, case evaluation, or arbitration. Counsel shall discuss with their clients **prior** to the conference whether the clients are agreeable to binding or non-binding arbitration. **This order is the only notice that parties and counsel will receive concerning this Conference.**

(5) Upon advice that the date noted below is inconvenient for any party or counsel, the Quality Review Branch (202) 879-1750 may continue the Conference **once**, with the consent of all parties, to either of the two succeeding Fridays. Request must be made not less than seven business days before the scheduling conference date.
No other continuance of the conference will be granted except upon motion for good cause shown.

(6) Parties are responsible for obtaining and complying with all requirements of the General Order for Civil cases, each judge's Supplement to the General Order and the General Mediation Order. Copies of these orders are available in the Courtroom and on the Court's website http://www.dccourts.gov/.

Chief Judge Robert E. Morin

Case Assigned to: Judge ROBERT R RIGSBY
Date: December 1, 2017
Initial Conference: 10:00 am, Friday, March 02, 2018
Location: Courtroom 516
500 Indiana Avenue N.W.
WASHINGTON, DC 20001

ADDENDUM TO INITIAL ORDER AFFECTING ALL MEDICAL MALPRACTICE CASES

In accordance with the Medical Malpractice Proceedings Act of 2006, D.C. Code § 16-2801, et seq. (2007 Winter Supp.), "[a]fter an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery or, if all parties agree[,] with only limited discovery that will not interfere with the completion of mediation within 30 days of the Initial Scheduling and Settlement Conference ("ISSC"), prior to any further litigation in an effort to reach a settlement agreement. The early mediation schedule shall be included in the Scheduling Order following the ISSC. Unless all parties agree, the stay of discovery shall not be more than 30 days after the ISSC." D.C. Code § 16-2821.

To ensure compliance with this legislation, on or before the date of the ISSC, the Court will notify all attorneys and *pro se* parties of the date and time of the early mediation session and the name of the assigned mediator. Information about the early mediation date also is available over the internet at https://www:dccourts.gov/pa/. To facilitate this process, all counsel and *pro se* parties in every medical malpractice case are required to confer, jointly complete and sign an EARLY MEDIATION FORM, which must be filed no later than ten (10) calendar days prior to the ISSC. D.C. Code § 16-2825 Two separate Early Mediation Forms are available. Both forms may be obtained at www.dccourts.gov/medmalmediation. One form is to be used for early mediation with a mediator from the multi-door medical malpractice mediator roster; the second form is to be used for early mediation with a private mediator. Both forms also are available in the Multi-Door Dispute Resolution Office, Suite 2900, 410 E Street, N.W. Plaintiff's counsel is responsible for eFiling the form and is required to e-mail a courtesy copy to earlymedmal@dcsc.gov. *Pro se* Plaintiffs who elect not to eFile may file by hand in the Multi-Door Dispute Resolution Office.

A roster of medical malpractice mediators available through the Court's Multi-Door Dispute Resolution Division, with biographical information about each mediator, can be found at www.dccourts.gov/medmalmediation/mediatorprofiles. All individuals on the roster are judges or lawyers with at least 10 years of significant experience in medical malpractice litigation. D.C. Code § 16-2823(a). If the parties cannot agree on a mediator, the Court will appoint one. D.C. Code § 16-2823(b).

The following persons are required by statute to attend personally the Early Mediation Conference: (1) all parties; (2) for parties that are not individuals, a representative with settlement authority; (3) in cases involving an insurance company, a representative of the company with settlement authority; and (4) attorneys representing each party with primary responsibility for the case. D.C. Code § 16-2824.

No later than ten (10) days after the early mediation session has terminated, Plaintiff must eFile with the Court a report prepared by the mediator, including a private mediator, regarding: (1) attendance; (2) whether a settlement was reached; or, (3) if a settlement was not reached, any agreements to narrow the scope of the dispute, limit discovery, facilitate future settlement, hold another mediation session, or otherwise reduce the cost and time of trial preparation. D.C. Code§ 16-2826. Any Plaintiff who is *pro se* may elect to file the report by hand with the Civil Actions Branch. The forms to be used for early mediation reports are available at www.dccourts.gov/medmalmediation.

Chief Judge Robert E. Morin

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0070-12
KEVIN BALDWIN, Employee	
	Date of Issuance: January 13, 2015
v.	
DEPARTMENT OF YOUTH REHABILITATION SERVICES, Agency	
	Arien P. Cannon, Esq. Administrative Judge

Kevin Baldwin, *Pro se*
Corey P. Argust, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 27, 2012, Kevin Baldwin ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") challenging the Department of Youth Rehabilitation Services' ("Agency" or "DYRS") decision to terminate him. At the time of his termination, Employee worked as a Youth Development Representative ("YDR"). The effective date of Employee's termination was the close of business on January 31, 2012.

I was assigned this matter in August 2013. A Status Conference was held on March 28, 2014. Based upon the representation of the parties at the Status Conference, a Prehearing Conference was convened with the anticipation of going forward with an Evidentiary Hearing. An Evidentiary Hearing was held on August 12, 2014, where both parties presented documentary and testimonial evidence. Both parties filed written closing briefs. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee.
2. If so, was the penalty of termination appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

SUMMARY OF TESTIMONY

On August 12, 2014, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their position.

Agency's Case-in-Chief

Captain Steven Baynes ("Captain Baynes") *Tr. 19-107*

Captain Baynes is the Chief of Residential Programs and Services with Agency. In this capacity, Captain Baynes oversees the operations at both of Agency's secure facilities, Youth Services Center and the long-term facility, New Beginnings Youth Development Center. Captain Baynes has worked with Agency for over three and a half years. Prior to becoming the Chief of Residential Programs and Services, Captain Baynes was Superintendent at the New Beginnings facility for approximately two years. His duties here included overseeing the operations and therapeutic services provided at New Beginnings. In this capacity, Captain Baynes was also the supervisor of the Youth Development Representatives ("YDR").

YDRs are responsible for the safety and security of the youth in the custody of Agency. The position description that explains the duties and responsibilities of YDRs was entered as

Agency Exhibit 1. Baynes testified that YDRs are governed by Agency's Use of Force policy, which was entered as Agency Exhibit 2. He testified that the Use of Force policy establishes that YDRs "shall not strike or lay hand upon any youth, unless it be in defense of themselves, other employees, or youth, to prevent escape or serious injury to personnel or destruction of property, or to quell a disturbance not otherwise controllable. In such cases, only that amount of force necessary to accomplish the desired results shall be used. Excessive force shall not be tolerated. Corporal punishment or any deliberate physical abuse is absolutely forbidden."[1] Baynes stated that the use of excessive force "halts the rehabilitative process" and is "just contrary to what we believe."[2]

Captain Baynes also testified regarding Agency's policies on the documentation of unusual incidents by YDRs. Agency's Reporting Unusual Incidents policy was entered as Agency Exhibit 3. Baynes testified that Agency's policy requires YDRs to accurately communicate information regarding serious incidents involving youth and that it is important for YDRs to accurately document incidents to ensure the safety of youth and facilitate Agency's investigation of serious incidents. [3]

Baynes further articulated that YDRs receive training on Agency's Use of Force and Reporting Unusual Incidents policies and that Agency documents the type of training that each YDR receives. The Employee Transcript documenting the training of Employee received from Agency was entered as Agency Exhibit 4. Baynes explained that the Employee Transcript documented that on June 16, 2010, Employee completed training in Safe Crisis Management, and that on August 25, 2010, Employee completed training in Report Writing. He testified that at the Safe Crisis Management training, YDRs learn "de-escalation techniques on how to de-escalate a youth."[4] Part of the curriculum utilized at the training was the Safe Crisis Management Workbook, which was entered as Agency Exhibit 5. Baynes explained that Agency's policy is that "excessive force should not be utilized for any incidents where there could be lesser force used."[5]

Baynes identified the surveillance recording of the incident involving Employee and a youth in Unit A-200 at Agency's Youth Service Center, which was entered as Agency Exhibit 6. Baynes testified that beginning at approximately the 17:32:00 mark, the recording shows a youth who had a broom removed from his hands by another YDR, eventually pick up a plastic chair. He testified that after the youth picked up the plastic chair, Employee grabbed the youth by the neck, causing the plastic chair to drop, and slammed the back of the youth's head into non-breakable windows on the wall. After slamming the youth into the wall the first time, Baynes testified that, "still grabbing [the youth] by the neck," Employee slammed the youth "into the wall with a lot of force" a second time.[6] Baynes explained that it is inappropriate to grab a youth by the neck, that "none of [Agency's] training techniques teaches that," and that slamming the

[1] Tr. at 25.
[2] Tr. at 26.
[3] Tr. at 28.
[4] Tr. at 31-32.
[5] Tr. at 34.
[6] Tr. at 40.

back of a youth's head into a wall is "never appropriate."[7] In particular, Baynes noted that at the point in the recording that Baldwin grabbed the youth by the neck and caused the plastic chair to drop, at approximately the 17:33:14 mark, the youth did not present a legitimate threat. Further, even if the youth had presented a legitimate threat and was making verbal threats toward Baldwin, the force used was not appropriate. Accordingly, Baynes testified that Employee's use of force violated Agency's Use of Force policy because it was excessive.

Baynes then identified the Incident Assessment Report completed by the medical personnel who treated the youth at Agency's Youth Service Center, which was entered as Agency Exhibit 7. He testified that the youth was sent to Washington Hospital Center for a CT scan and to evaluate possible sutures wounds.

Baynes also identified the Incident Notification Form submitted by Employee regarding the December 17, 2010 incident, which was entered as Agency Exhibit 8. The Incident Notification Form stated:

> [The youth] had picked up a broom at that time this writer and [another DYRS employee] was trying to persuade [the youth] to put the broom down and to go into his room. Pursuant to Safe Crisis Management, emergency intervention was need it [*sic*] when [the youth] made a threatening gesture with the broom becoming a threat to self and staff. While attempting to disarm [the youth] of the broom he continued to be combative and it appeared he hit his head on the wall.[8]

Baynes testified that the statement in the Incident Notification Form by Employee, which stated that Safe Crisis Management techniques were needed to respond to the youth making a threatening gesture with the broom was inaccurate because at the point Employee initiated physical force, the broom had already been removed from the youth's hands. Further, Baynes explained that the Incident Notification Form was inaccurate because Employee omitted that he used physical force by grabbing the youth's neck and slamming the youth into the wall twice. As a result, Baynes testified that the Incident Notification Form completed by Employee violated Agency's Reporting Unusual Incidents policy because the report was inaccurate and the youth never made a threatening gesture with the broom. He also stated that emergency intervention was not necessary to remove the broom from the youth.

On February 23, 2011, Employee was charged with simple assault and attempted second degree cruelty to children. The documentation of the criminal charges filed against Employee was entered as Agency Exhibit 9. On March 8, 2011, Agency's Office of Internal Integrity issued a Project Hands Investigative Report concerning Employee's use of force on December 17, 2010. The Project Hands Investigative Report was entered as Agency Exhibit 10. Baynes testified that he agreed with the Project Hands Investigative Report's conclusions that Employee's actions violated Agency's Use of Force and Reporting Unusual Incidents policies.

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[7] Tr. at 39-40.

[8] Agency's Exhibit 7.

As a result of the conclusions reached in the Project Hands Investigative Report, Agency issued an Advance Written Notice of Proposed Removal to Employee on July 25, 2011, which was entered as Agency Exhibit 11. Agency proposed removal based on the following charges: (1) neglect of duty, incompetence, and misfeasance; (2) any act which constitutes a criminal offense; and (3) violation of DYRS policies on Reporting of Unusual Incidents and Use of Force. On August 29, 2011, the Hearing Officer who conducted an administrative review of Agency's proposed removal issued a Report of the Hearing Officer in which she found that Agency established by a preponderance of the evidence that there was cause for removal and that removal was within the range of appropriate penalties. The Report of the Hearing Officer was entered as Agency Exhibit 12. On January 19, 2012, Agency issued a Notice of Final Decision on Proposed Removal, sustaining the proposed action, and removing Employee effective January 31, 2012. The Notice of Final Decision on Proposed Removal was entered as Agency Exhibit 13. Captain Baynes testified that he agreed with Agency's decision to remove Employee because he "ha[d] no confidence that [Employee] would keep the safety and security of the youth."[9] He explained that Employee's actions interfered with Agency's operations and were contrary to its purpose and mission.[10]

On cross-examination, Baynes testified that he has been trained in Safe Crisis Management and that part of the training includes learning to deflect punches and restraining techniques. He testified that in the surveillance recording of the incident, he did not believe that neither the "broom nor th[e] chair looked like it was being used as a weapon" by the youth.[11]

When asked about documentation of the youth's injuries, Baynes explained "that the facility medical team evaluated [the youth] and determined that his injury was sufficient enough to be sent to Washington Hospital Center."[12] He concluded that the youth suffered physical injuries based "on the report that . . . the medical team evaluated [the youth] at the Youth Services Center and the medical team determined that [the youth] needed to go to the ER at the Washington Hospital Center due to possible head trauma, which means that the youth was injured."[13]

Baynes testified that the amount of youth-on-staff assaults occurring at Agency's facilities is "at the standard of any other facility . . . throughout the country."[14] He further stated that whether or not an employee is disciplined for use of force against a youth depends on the level of force used by the employee in the specific situation and whether the use of force was in self-defense. Baynes stated that Agency does not train YDRs to disregard protocol under any circumstances.

Tony Newman ("Newman") Tr. 108-157

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[9] Tr. at 61-62.
[10] Tr. at 62.
[11] Tr. at 70.
[12] Tr. at 82.
[13] Tr. at 88.
[14] Tr. at 92.

Newman testified in relevant part that: he is currently employed by Agency as the Program Manager for the Risk Management Office and Quality Assurance, and he previously held the position of Internal Integrity Officer and Program Manager for Agency's Office of Internal Integrity (December 2013—June 2014). Newman testified that the Office of Internal Integrity holds youth hearings taken against the youth and conducts internal investigations. He explained that Project Hands internal investigations concern allegations of abuse or neglect by staff against youth. Newman testified that essentially there is a "firewall" between the Office of Internal Integrity and Agency so that the Office of Internal Integrity can independently conduct internal investigations.[15]

Newman further testified regarding Agency's Use of Force policy as it pertains to the timeline for completing Project Hands investigations; specifically Agency's Exhibit 2, Roman Numeral V, B(6). Newman described the time line goal for a Project Hands investigation under this section as a traditional goal, but that the timeline is not mandatory and that many factors might prolong the completion of a Project Hands investigation. Newman testified that Agency "is under a consent decree and there are certain goals that the agency has to hit in order to comply with what we called the Jerry M Lawsuit and that becomes the Jerry M Work Plan and with respect to that, one of the work plan targets/goals for [the Office of Internal Integrity] is all Project Hands cases must be adjudicated within 35 days of – from the time there's notice of it."[16] The Jerry M Work Plan was entered as Agency Exhibit 14.

Newman testified that criminal investigations by the Metropolitan Police Department, investigations by the Child and Family Services Agency, and uncooperative or untruthful witnesses are some of the reasons why the 35-day target may not be possible. If MPD is investigating the same case as a Project Hands incident, then the 35-day target is tolled until the completion of MPD's investigation.[17] He further testified that with respect to the Project Hands investigation of Employee's use of force against the youth, interactions between Agency and Child and Family Services Agency Social Worker, Donna Wright, and Metropolitan Police Department Detective Lowell Grier, caused a delay in the completion of the investigation. Newman testified that when the Metropolitan Police Department initiated a criminal investigation of Employee's actions, Agency was required to put its Project Hands investigation on hold until the criminal investigation was completed. MPD became involved in this case few days after the incident took place.

With regard to the conclusions reached in the Project Hands investigation, Newman testified that he agreed with the conclusion that Employee's use of force against the youth was an "egregious" violation of Agency's Use of Force policy.[18] He further testified that he agreed with the conclusion that Employee's Incident Notification Form violated Agency's Reporting Unusual Incidents policy because the report was "untruthful relative to the [surveillance] video."[19] Newman believed that Employee inaccurately asserted that the youth was making a threatening gesture with the broom, failed to make any mention of the youth holding the chair, and

[15] Tr. at 111.
[16] Tr. at 114-115
[17] *See* Tr. at 118.
[18] Tr. at 129-130.
[19] Tr. at 113.

misleadingly indicated that the youth "accidentally bumped his head." Newman asserted that the Incident Notification Form completed by Employee (Agency's Exhibit 8), contained a "series of inaccuracies that basically goes to deception of and violation of the policy."[20]

Newman further testified that he believed Employee should be terminated for his misconduct. Furthermore, Newman believed that Employee's actions were inconsistent with the expectations of Agency's staff and the objectives of the Agency in terms of its rehabilitation goals. Newman stated that Employee's actions interfered with the efficiency and the operations of the agency and exposed Agency to potential liability.

On cross-examination, Newman testified that he was familiar with Safe Crisis Management training and confirmed that he did not receive Safe Crisis Management training from the Office of Professional Development. He is familiar with Safe Crisis Management because he supervises investigators who are trained in Safe Crisis Management. He testified that an individual from the "Training Department" did not have to view the surveillance recording of the incident involving Employee and the youth to conclude that Employee's use of force violated Agency's Use of Force policy. Newman testified that the investigators completing the Project Hands investigation had training in Safe Crisis Management and, as a result, could conclude that Employee's actions violated Agency's Use of Force policy. Newman further testified that the youth's action in picking up the chair "was not a threat that required the application of the force necessary to disarm the chair."[21]

Newman stated that verbal threats made by the youth in Agency's custody would not justify the use of force that was displayed in this incident.

Employee's Case-in-Chief

Kevin Baldwin ("Employee") Tr. 158-178

Employee testified in relevant part that: on December 17, 2010, he responded to a call from Unit A200 to assist in directing a group of youths to their rooms. Employee testified that one of the youths in Unit A200 picked up a broom and became very agitated that the youths were being told to go to their rooms. He testified that once the youth grabbed the chair, he "determined that it was time for hands-on."[22] Employee then grabbed the youth and "put him on the wall but everything was controlled..." He testified that the youth began to cry and he attempted to "try to keep [the youth] on – on the wall."[23] Employee further testified that he was having a hard time keeping up with the youth and keeping him on the wall because of his "[bad] knee" and the other staff members did not want to get involved.

Employee also testified in regards to completing the Incident Notification Form, which he stated in relevant part:

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[20] Tr. at 142.
[21] Tr. at 151-152.
[22] Tr. at 160.
[23] Tr. at 161.

> [A]fter the incident was over, I got my boys back to – to the unit, I'm trying to write my report. The phone keep [sic] ringing. I got to keep jumping up and going to the phone, go back to the front door, come back to the phone, go back to my report, and I probably missed my place in my report as to far as what was [sic] – you know, it wasn't no attempt to lie or, you know, to put something misleading in my report.[24]

Employee believed that the youth picking up the broom "call[ed] for emergency intervention, and during our training, they said forget protocol[.]"[25] He testified that he had "been involved in – in numerous take-downs and none of them been [sic] by procedures/policies. None of them."[26] Employee further stated that the procedures do not work in the "real world" and that the Training Manual does not address the proper procedures for dealing with a kid who has a weapon.

On cross-examination, Employee testified that even after the youth released the broom to another YDR, "Emergency Intervention" was needed because the youth had initially picked up the broom and "[t]hat means I can go hands-on now."[27] Employee stated that the youth then picked up a chair and was crying, at which point Employee pushed the youth against the wall to control him because he kept resisting Employee.

Employee had experience with the Incident Notification Form and he understood that completing these reports when necessary was a part of his job. Employee also stated that he let the youth involved in this incident vent when he was told to go to his room but when the youth picked up the broom, "[t]hat changed everything." Employee testified that when completing the Incident Notification Form, he was relieved of his supervision duties, taken off his unit, and sent to the break room to complete his report of the incident. Employee concluded by saying that none of the take-downs he has performed were "text[book]" examples because the kids make it difficult to get close to them.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Undisputed Facts

On December 17, 2010, Employee was called to Unit A-200 to help de-escalate an incident stemming from youths threats of violence and their refusal to return to their rooms for the night. Employee got into a confrontation with a youth and the incident was capture via surveillance camera inside of the unit. As a result of the confrontation, the youth was transported to Washington Hospital Center for medical treatment. Subsequent to the incident, Employee submitted a written statement detailing his version of the confrontation. On February 23, 2011, Employee was charged with simple assault and attempted second degree cruelty to children. These charges were ultimately dismissed.

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[24] Tr. at 161-162.
[25] Tr. at 162.
[26] Tr. at 164.
[27] Tr. at 167.

On January 19 2012, Agency issued its Notice of Final Decision on Proposed Removal. Employee's termination became effective on January 31, 2012.

Whether Agency's adverse action was taken for cause

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, *placement on enforced leave*, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

Chapter 16, Section 1603.3 of the District Personnel Manual ("DPM") sets forth the definitions of cause for which disciplinary actions may be taken against Career Service employees of the District of Columbia government. Employee's termination was based on Section 1603.3: (f) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty, incompetence, and misfeasance; (h) Any act which constitutes a criminal offense whether or not the act results in a conviction: attempted second degree cruelty to children and simple assault; and (f) Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: violation of DYRS Reporting of Unusual Incident Policy; violation of DYRS Use of Force Policy; and violation of DYRS and District Employee Conduct policies.

Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty, incompetence, and misfeasance.

Neglect of Duty

The District's personnel regulations provide that there is a neglect of duty in the following instances: (1) failure to follow instructions or observe precautions regarding safety; (2) failure to carry out assigned tasks; or (3) careless or negligent work habits.[28] Here, Employee, as a Youth Development Representative ("YDR"), was responsible for the safety and security of the youth in the custody of Agency. YDRs are governed by Agency's Use of Force policy, which was entered as Agency Exhibit 2. The Use of Force policy establishes that YDRs "shall not strike or lay hand upon any youth, unless it be in defense of themselves, other employees, or youth, to prevent escape or serious injury to personnel or destruction of property,

[28] *See* D.C. Mun. Regs. tit. 16 § 1619.1(6)(c). Table of Appropriate Penalties.

or to quell a disturbance not otherwise controllable. In such cases, only that amount of force necessary to accomplish the desired results shall be used.[29]

The undersigned was able to watch the surveillance video that captured the confrontation between Employee and the youth at the Evidentiary Hearing and several times while this matter has been under consideration.[30] Although there is no audio with the surveillance footage, the image is clear. At approximately the 17:32 mark in the video, the youth picks up a broom, which was eventually removed by another staff member at Agency without a physical confrontation. While the other staff member was removing the broom from the youth, it appears that Employee and the youth are also engaging in a verbal exchange. As the youth walks away from the situation, Employee uses his legs to slide a chair to block off the youth's pathway. It is unclear at this point what Employee's intentions are with the youth. The youth then walks away from Employee and aggressively picks up a chair, but does not swing it. Immediately after the youth picks up the chair, Employee grabs the youth by the neck and slams him into a glass window, causing the chair to drop, and eventually alongside the wall into a corner. After being slammed into the corner, the youth fell to the ground and immediately grabbed the back of his head.

Employee raised the argument that Newman and Captain Baynes were not qualified to determine whether the force he used was excessive because neither of them were trained in Safe Crisis Management. However, Newman testified that an individual from the "Training Department" did not have to view the surveillance recording for Agency to conclude that Employee's use of force violated Agency's Use of Force policy. Newman testified that the investigators completing the Project Hands investigation had training in Safe Crisis Management and, as a result, could conclude that Employee's actions violated Agency's Use of Force policy. As such, I give great deference to the investigators and upper management at Agency who determined that Employee's actions constituted excessive force.

While the youth may have acted in an aggressive manner, I do not find that the force used by Employee was necessary to quell the situation. I also find that Employee aggravated the circumstances when he slide the chair to block off the youth's path from walking away after the broom was taken away. Accordingly, I find that Employee neglected his duty when he failed to follow instructions and safety precautions regarding the safety of the youth and used excessive force.

Incompetence

The District's personnel regulations provide that incompetence includes the following: (1) careless work performance; (2) serious or repeated mistakes after giving appropriate counseling or training; or (3) failing to complete assignment timely.[31] Here, Employee believed that the situation called for emergency intervention. While Employee may have believed this to be the case, Agency disagreed, and after review of the evidence presented, I concur that emergency intervention was not needed in this matter.

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[29] Agency's Exhibit 2, Section II, A.
[30] Agency's Exhibit 6.
[31] *See* D.C. Mun. Regs. tit. 16 § 1619.1(6)(e). Table of Appropriate Penalties.

There was ample testimony provided regarding the protocol employed by YDRs when dealing with the youth. Employee stated that he was instructed to "forget" protocol in times where emergency intervention was needed. Employee testified that he believed emergency intervention was needed when the youth picked up the broom. However, the video demonstrates that the broom was released by the youth with little resistance and that Employee followed the youth and placed a chair in front of the youth, cornering him off. Based upon the review of the video, perhaps Employee believed that emergency intervention was needed when the youth picked up the chair in an aggressive manner. While this may have posed a threat to Employee, the force used was not necessary to quell the disturbance. Also, based on the video evidence, Employee does not seem to employ any de-escalation techniques, but rather seems to further agitate the youth. It is clear that a lesser amount of force should have been used to quell the situation, rather than the forced used by Employee, which resulted in the youth suffering injuries to his head. Therefore, I find that Employee was careless in his work performance and Agency has satisfied its burden that Employee was incompetent in applying its Use of Force Policy.

Misfeasance

The District's personnel regulations provide that misfeasance includes: (1) careless work performance; (2) failure to investigate a complaint; (3) providing misleading or inaccurate information to superiors; (4) dishonesty; (5) unauthorized use of government resources, or (6) using or authorizing the use of government resources for other than official business.[32] Here, Agency cites Employee for misfeasance for providing misleading or inaccurate information in his Unusual Incident Report. Based on a complete review of the evidence, I do not find that Employee provided misleading or inaccurate information.

Employee's Incident Notification Form states the following:

> [The youth] had picked up a broom at that time this writer and [another DYRS employee] was trying to persuade [the youth] to put the broom down and to go into his room. Pursuant to Safe Crisis Management, emergency intervention was need it [*sic*] when [the youth] made a threatening gesture with the broom becoming a threat to self and staff. While attempting to disarm [the youth] of the broom he continued to be combative and it appeared he hit his head on the wall.[33]

Employee repeats that the youth picked up the broom, and makes a threatening gesture with it. While the evidence does not support that the youth made a threatening gesture with the broom, it does support that the chair was picked up in a manner that could be perceived as a threatening gesture. Employee does not mention the chair being picked up by the youth in his written statement; however, I do not find that this fact was omitted intentionally. In fact, I find that if Employee had included that the youth picked up the chair, it would have enhanced his argument that "emergency intervention" was needed, considering the manner in which the chair was picked up. Perhaps while trying to recall the events play-by-play, Employee meant to write "while attempting to disarm the *chair*," and not the *broom*, he confused the two objects.

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[32] *See* D.C. Mun. Regs. tit. 16 § 1619.1(6)(f). Table of Appropriate Penalties.
[33] Agency's Exhibit 7.

Employee does write that "[w]hile attempting to disarm" the youth, he hit his head on the wall. Although Employee was not very descriptive in how he went about attempting to disarm the youth, I do not find that his statement was contrary to the events that unfolded. Certainly, Employee may have provided a more detailed narrative of the events in which he used force on the youth; however, I do not find that Agency met its burden in citing Employee for misfeasance.

Any act which constitutes a criminal offense whether or not the act results in a conviction: attempted second degree cruelty to children and simple assault.

I find that Agency had cause to take adverse action against Employee for any act which constitutes a criminal offense whether or not the act results in a conviction. Here, Employee was charged with simple assault and attempted second degree cruelty to children.[34] It is uncontroverted that Employee was charged with attempted second degree cruelty to children and simple assault, even though the charges were ultimately dismissed. D.C. Mun. Reg. tit. 16 § 1619.1(8) (Table of Appropriate Penalties) provides that a conviction is not needed to sustain an adverse action based on this cause. An agency may act on the arrest if the arrest is related to the job.[35] It is clear that Employee's arrest and criminal charges were work-related. Accordingly, I find that Agency has met its burden to take adverse action against Employee for this cause.

Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: violation of DYRS Reporting of Unusual Incident Policy; violation of DYRS Use of Force Policy; and violation of DYRS and District Employee Conduct policies.

This cause of action is similar to the previously discussed charges of "misfeasance" and "neglect of duty." Based on the above discussion on misfeasance, I do not find that Agency had cause to take adverse action against Employee. However, based on the above discussion on neglect of duty, I find that Employee violated Agency's Use of Force Policy.

Office of Internal Integrity, ("Project Hands") Timely Investigative Findings

Employee asserts that Agency violated its own ten (10) business day rule by failing to timely complete its investigative findings surrounding this matter. Newman testified regarding Agency's Use of Force policy as it pertains to the timeline for completing Project Hands investigations; specifically Agency's Exhibit 2, Roman Numeral V, B(6). Newman described the time line for a Project Hands investigation under this section as a traditional goal, but that the timeline is not mandatory and that many factors might prolong the completion of a Project Hands investigation.

Newman also elaborated that Agency "is under a consent decree and there are certain goals that the agency has to hit in order to comply with what [is] called the Jerry M Lawsuit and that becomes the Jerry M Work Plan and with respect to that, one of the work plan targets/goals for [the Office of Internal Integrity] is all Project Hands cases must be adjudicated within 35

[34] *See* Agency's Exhibit 9.
[35] *See* D.C. Mun. Reg. tit. 16 § 1619.1(8) (Table of Appropriate Penalties).

Appropriateness of penalty

As discussed above, I do not find that Agency proved by a preponderance of the evidence that Employee's actions amount to misfeasance. However, I do find that Agency met its burden of proof in establishing that it had cause to take adverse action against Employee for neglect of duty, incompetence, and acts which constitute a criminal offense, whether or not the act results in a conviction, and violation of DYRS Use of Force Policy.

In assessing the appropriateness of the penalty, the Office of Employee Appeals is limited to ensuring that "managerial discretion has been legitimately invoked and properly exercised."[40] When an Agency's charge is upheld, the Office of Employee Appeals has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[41]

Chapter 16 of the District Personnel Manual ("DPM") establishes a Table of Appropriate Penalties by which Agencies are instructed as to the level of punishment permissible for a specific cause. It reads, in relevant part:

CAUSES SPECIFICATIONS/GENERAL CONSIDERATIONS	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
6. Any On Duty or Employment-Related Act or Omission that Interferes with the Efficiency and Integrity of Government Operations:			
(c) Neglect of Duty: Failure to follow instructions or observe precautions regarding safety; failure by a supervisor to investigate a complaint; failure to carry out assigned tasks; careless or negligent work habits.	Reprimand to Removal	Suspension for 15 days to Removal	Suspension for 30 days to Removal or Reduction in Grade
(e) Incompetence: Includes careless work performance; serious or repeated mistakes after given appropriate counseling or training; failing to complete assignment timely.	Suspension for 5 – 15 days	Suspension for 20 – 30 days	Reduction in Grade to Removal
(f) Misfeasance: Includes careless work performance, failure to investigate a complaint, providing	Suspension for 15 days	Suspension for 20 – 30 days	Removal

[40] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).
[41] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).

misleading or inaccurate information to superiors; dishonesty; unauthorized use of government resources for other than official business.			
7. Any Other On-Duty or Employment-Related Reasons for Corrective or Adverse Action that is not Arbitrary or Capricious:			
"Catchall" phrase; may include any activities for which the investigation can sustain that it is not "*de minimis*" . . .	Reprimand to Suspension for up to 15 days	Suspension for 20 – 30 days	Removal
8. Any Act which Constitutes a Criminal Offense whether or not the Act Results in a Conviction:			
Conviction not needed; may act on the arrest if the arrest is related to the job. Proof Needed: Arrest record	Suspension for 10 days to Removal	Removal	N/A

The DPM's Table of Penalties, sections 6(c) and 8 cover neglect of duty and acts which constitute a criminal offense. The range of penalty for these offenses alone, permit removal of an employee for a first offense. I do not find that Agency exceeded the limits of reasonableness with the penalty imposed against Employee. Accordingly, in light of the testimony and evidence presented, I find that Agency's penalty of removal was appropriate based on the neglect of duty, incompetence, and acts which constitute a criminal offense charges.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's removal of Employee is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached **INITIAL DECISION** was sent by regular mail this day to:

Kevin Baldwin
2429 Alabama Ave, SE
303
Washington, DC 20020

Corey P. Argust, Esq.
Assistant Attorney General
Personnel and Labor Relations Section
441 4th St., NW Suite 1060N
Washington, DC 20001

Katrina Hill
Clerk

January 13, 2015
Date

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

REPLY TO:
955 L'Enfant Plaza, S.W.
Suite 2500
Washington, DC 20024
(202)727-0004
FAX (202)727-5631

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

KEVIN BALDWIN, Petitioner, v. D.C. OFFICE OF EMPLOYEE APPEALS, Respondent.	Case No. 2017 CA 007980 P(MPA) Judge Robert R. Rigsby

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Kevin Baldwin v. Department of Youth Rehabilitation Services,* OEA Matter No. 1601-0070-12. The record consists of two volumes containing thirty-three (33) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist

LASHEKA BROWN BASSEY NOTARY PUBLIC MY COMMISSION EXPIRES 6/14/2021 DISTRICT OF COLUMBIA

District of Columbia: SS
Subscribed and Sworn to before me
this 20th day of February, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

Superior Court of the District of Columbia

CIVIL DIVISION- CIVIL ACTIONS BRANCH

INFORMATION SHEET

ROBERT JOHNSON

vs

D.C. OFFICE OF EMPLOYEE APPEALS

jCase Number:

Date: 12/1/2017

☐ One of the defendants is being sued in their official capacity.

Name: *(Please Print)* FREDERIC W. SCHWARTZ, JR.	Relationship to Lawsuit
Firm Name: LAW OFFICE OF FREDERIC SCHWARTZ JR.	☒ Attorney for Plaintiff
Telephone No.: 202 463-0880 Six digit Unified Bar No.: 997137	☐ Self (Pro Se)
	☐ Other:

TYPE OF CASE: (Non-Jury) 6 Person Jury 12 Person Jury

Demand: $ Other:

PENDING CASE(S) RELATED TO THE ACTION BEING FILED

Case No.: _____ Judge: _____ Calendar #:

Case No.: _____ Judge: _____ Calendar#:

NATURE OF SUIT: *(Check One Box Only)*

A. CONTRACTS

01 Breach of Contract
02 Breach of Warranty
06 Negotiable Instrument
07 Personal Property
13 Employment Discrimination
15 Special Education Fees

COLLECTION CASES

14 Under $25,000 Pltf. Grants Consent
17 OVER $25,000 Pltf. Grants Consent
27 Insurance/Subrogation Over $25,000 Pltf. Grants Consent
07 Insurance/Subrogation Under $25,000 Pltf. Grants Consent
28 Motion to Confirm Arbitration Award (Collection Cases Only)

16 Under $25,000 Consent Denied
18 OVER $25,000 Consent Denied
26 Insurance/Subrogation Over $25,000 Consent Denied
34 Insurance/Subrogation Under $25,000 Consent Denied

B. PROPERTY TORTS

01 Automobile
02 Conversion
Damage 07 Shoplifting, D.C. Code § 27-102 (a)
03 Destruction of Private Property
04 Property
05 Trespass

SEE REVERSE SIDE AND CHECK HERE IF USED

Information Sheet, Continued

C. OTHERS

- ☐ 01 Accounting
- ☐ 02 Att. Before Judgment
- ☐ 05 Ejectment
- ☐ 09 Special Writ/Warrants (DC Code § 11-941)
- ☐ 10 Traffic Adjudication
- ☐ 11 Writ of Replevin
- ☐ 12 Enforce Mechanics Lien
- ☐ 16 Declaratory Judgment
- ☐ 17 Merit Personnel Act (OEA) (D.C. Code Title 1, Chapter 6)
- 18 Product Liability
- 24 Application to Confirm, Modify, Vacate Arbitration Award (DC Code § 16-4401)
- 29 Merit Personnel Act (OHR)
- 31 Housing Code Regulations
- 32 Qui Tam
- ☐ 33 Whistleblower

II.

- ☐ 03 Change of Name
- ☐ 06 Foreign Judgment/Domestic
- ☐ 08 Foreign Judgment/International
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- ☐ 14 Correction of Marriage Certificate
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- 19 Enter Administrative Order as Judgment [D.C. Code § 2-1802.03 (h) or 32-151 9 (a)]
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- 21 Petition for Subpoena [Rule 28-I (b)]
- 22 Release Mechanics Lien
- 23 Rule 27(a)(1) (Perpetuate Testimony)
- 24 Petition for Structured Settlement
- 25 Petition for Liquidation
- ☐ 26 Petition for Civil Asset Forfeiture (Vehicle)
- ☐ 27 Petition for Civil Asset Forfeiture (Currency)
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- ☐ 04 Condemnation (Eminent Domain)
- ☐ 10 Mortgage Foreclosure/Judicial Sale
- ☐ 11 Petition for Civil Asset Forfeiture (RP)
- 08 Quiet Title
- 25 Liens: Tax / Water Consent Granted
- 30 Liens: Tax / Water Consent Denied
- 31 Tax Lien Bid Off Certificate Consent Granted

Attorney's Signature

12/1/2017
Date

Superior Court of the District of Columbia
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000 Washington, D.C. 20001
Telephone: (202) 879-1133 Website: www.dccourts.gov

ROBERT JOHNSON
Plaintiff

vs.

Case Number _____

D.C. OFFICE OE EMPLOYEE APPEALS
Defendant

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve an Answer to the attached Complaint, either personally or through an attorney, within twenty one (21) days after service of this summons upon you, exclusive of the day of service. If you are being sued as an officer or agency of the United States Government or the District of Columbia Government, you have sixty (60) days after service of this summons to serve your Answer. A copy of the Answer must be mailed to the attorney for the plaintiff who is suing you. The attorney's name and address appear below. If plaintiff has no attorney, a copy of the Answer must be mailed to the plaintiff at the address stated on this Summons.

You are also required to file the original Answer with the Court in Suite 5000 at 500 Indiana Avenue, N.W., between 8:30 a.m. and 5:00 p.m., Mondays through Fridays or between 9:00 a.m. and 12:00 noon on Saturdays. You may file the original Answer with the Court either before you serve a copy of the Answer on the plaintiff or within seven (7) days after you have served the plaintiff. If you fail to file an Answer, judgment by default may be entered against you for the relief demanded in the complaint.

Frederic Schwartz
Name of Plaintiff's Attorney

1701 Pennsylvania Ave., NW., Suite 200 Washington, DC 20006
Address

202 463-0880
Telephone

Clerk of the Court

By _____
Deputy Clerk

Date _____

如需翻译,请打电话 (202) 879-4828 Veuillez appeler au (202) 879-4828 pour une traduction Để có một bài dịch, hãy gọi (202) 879-4828
번역을 원하시면, (202) 879-4828로 전화주십시요 የአማርኛ ትርጉም ለማግኘት (202) 879-4828 ይደውሉ

IMPORTANT: IF YOU FAIL TO FILE AN ANSWER WITHIN THE TIME STATED ABOVE, OR IF, AFTER YOU ANSWER, YOU FAIL TO APPEAR AT ANY TIME THE COURT NOTIFIES YOU TO DO SO, A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY DAMAGES OR OTHER RELIEF DEMANDED IN THE COMPLAINT. IF THIS OCCURS, YOUR WAGES MAY BE ATTACHED OR WITHHELD OR PERSONAL PROPERTY OR REAL ESTATE YOU OWN MAY BE TAKEN AND SOLD TO PAY THE JUDGMENT. IF YOU INTEND TO OPPOSE THIS ACTION, *DO NOT FAIL TO ANSWER WITHIN THE REQUIRED TIME.*

If you wish to talk to a lawyer and feel that you cannot afford to pay a fee to a lawyer, promptly contact one of the offices of the Legal Aid Society (202-628-1161) or the Neighborhood Legal Services (202-279-5100) for help or come to Suite 5000 at 500 Indiana Avenue, N.W., for more information concerning places where you may ask for such help.

See reverse side for Spanish translation
Vea al dorso la traducción al español

TRIBUNAL SUPERIOR DEL DISTRITO DE COLUMBIA
DIVISIÓN CIVIL
Sección de Acciones Civiles
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Teléfono: (202) 879-1133 Sitio web: www.dccourts.gov

_____
Demandante

contra

Número de Caso: _____

_____
Demandado

CITATORIO

Al susodicho Demandado:

Por la presente se le cita a comparecer y se le require entregar una Contestación a la Demanda adjunta, sea en persona o por medio de un abogado, en el plazo de veintiún (21) días contados después que usted haya recibido este citatorio, excluyendo el día mismo de la entrega del citatorio. Si usted está siendo demandado en calidad de oficial o agente del Gobierno de los Estados Unidos de Norteamérica o del Gobierno del Distrito de Columbia, tiene usted sesenta (60) días, contados después que usted haya recibido este citatorio, para entregar su Contestación. Tiene que enviarle por correo una copia de su Contestación al abogado de la parte demandante. El nombre y dirección del abogado aparecen al final de este documento. Si el demandado no tiene abogado, tiene que enviarle al demandante una copia de la Contestación por correo a la dirección que aparece en este Citatorio.

A usted también se le require presentar la Contestación original al Tribunal en la Oficina 5000, sito en 500 Indiana Avenue, N.W., entre las 8:30 a.m. y 5:00 p.m., de lunes a viernes o entre las 9:00 a.m. y las 12:00 del mediodía los sábados. Usted puede presentar la Contestación original ante el Juez ya sea antes que usted le entregue al demandante una copia de la Contestación o en el plazo de siete (7) días de haberle hecho la entrega al demandante. Si usted incumple con presentar una Contestación, podría dictarse un fallo en rebeldía contra usted para que se haga efectivo el desagravio que se busca en la demanda.

SECRETARIO DEL TRIBUNAL

_____
Nombre del abogado del Demandante

Por: _____
Subsecretario

_____
Dirección

_____

Fecha _____

_____
Teléfono

如需翻译,请打电话 (202) 879-4828 Veuillez appeler au (202) 879-4828 pour une traduction Để có một bài dịch, hãy gọi (202) 879-4828

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IMPORTANTE: SI USTED INCUMPLE CON PRESENTAR UNA CONTESTACIÓN EN EL PLAZO ANTES MENCIONADO O, SI LUEGO DE CONTESTAR, USTED NO COMPARECE CUANDO LE AVISE EL JUZGADO, PODRÍA DICTARSE UN FALLO EN REBELDÍA CONTRA USTED PARA QUE SE LE COBRE LOS DAÑOS Y PERJUICIOS U OTRO DESAGRAVIO QUE SE BUSQUE EN LA DEMANDA. SI ESTO OCURRE, PODRÍA RETENÉRSELE SUS INGRESOS, O PODRÍA TOMÁRSELE SUS BIENES PERSONALES O BIENES RAÍCES Y SER VENDIDOS PARA PAGAR EL FALLO. SI USTED PRETENDE OPONERSE A ESTA ACCIÓN, *NO DEJE DE CONTESTAR LA DEMANDA DENTRO DEL PLAZO EXIGIDO*.

Si desea conversar con un abogado y le parece que no puede pagarle a uno, llame pronto a una de nuestras oficinas del Legal Aid Society (202-628-1161) o el Neighborhood Legal Services (202-279-5100) para pedir ayuda o venga a la Oficina 5000 del 500 Indiana Avenue, N.W., para informarse sobre otros lugares donde puede pedirayuda al respecto.

Vea al dorso el original en inglés
See reverse side for English original

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

ROBERT JOHNSON
c/o Frederic Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

Petitioner

v. : MPA. No.

D.C. OFFICE OF EMPLOYEE APPEALS, :
955 L'Enfant Plaza, SW
Suite 2500
Washington, DC 20024

Respondent

PETITION FOR REVIEW

Notice is hereby given that Robert Johnson appeals to the Superior Court of the District of Columbia from the Order of the Hon. Lois Hochhauser, Esq., Administrative Judge, D.C. Office of Employee Appeals (OEA) which became final on November 30, 2017. A copy of that Decision, which reduced the attorney fees due Mr. Johnson's attorney, is attached.

The Administrative Judge's determination is arbitrary, capricious, and in violation of law.

Consequently, the OEA determination must be reversed.

The address of the OEA is: 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024

The following party participated in the OEA proceeding, and is to be served along with the OEA General Counsel who is also listed:

Andrea Comentale, Esq., 441 4th St., NW, Suite 1180N, Washington, DC 20001.

General Counsel, OEA, 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024

Respectfully Submitted,

/s/ Frederic W. Schwartz, Jr.

Frederic W. Schwartz, Jr.
Law Office of Frederic W. Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ROBERT JOHNSON Employee	OEA Matter No. 1601-0016-A09R15A17
v.	Date of Issuance: November 6, 2017
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT Agency	Lois Hochhauser, Esq. Administrative Judge

Andrea Comantale, Esq., Agency Representative
Frederic Schwartz, Jr., Esq., Employee Representative

CORRECTED[1] ADDENDUM DECISION ON ATTORNEY FEES POST-REMAND

PROCEDURAL BACKGROUND AND CHRONOLOGY

Robert Johnson, Employee, filed a petition with the Office of Employee Appeals (OEA) on November 28, 2005, appealing the decision of the D.C. Fire and Emergency Medical Services Department, Agency, to suspend him for 20 days without pay. The matter was assigned to this Administrative Judge (AJ) on January 26, 2006. The parties were given an extensive period of time to negotiate a resolution, but were unsuccessful. The evidentiary hearing took place on June 2 and July 5, 2006.

In the *Initial Decision* (ID), issued on February 12, 2007, the AJ reversed the adverse action and directed Agency to restore to Employee all salary and benefits lost as a result of the suspension. Agency's petition for review was denied by this Board on May 6, 2009. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06, *Opinion and Order on Petition for Review* (May 6, 2009).

Frederic Schwartz, Jr., Esq. entered his appearance as Employee representative on or about November 22, 2006, replacing Clarissa Edwards, Esq., who had represented Employee until that

[1] The only correction to the October 26, 2017 *Decision*, is in the "Order" section on page 7, where the amount of the award was incorrect due to a typographical error. It was corrected and is now consistent with the sum stated in the line preceding the "Order" section. In addition, some superfluous language was deleted at the end of the "Order" section.

time. On June 1, 2009, Mr. Schwartz[2] filed a motion, seeking an award of $16,065.00 in legal fees based on 37.8 hours and an hourly rate of $425. Ms. Edwards subsequently moved for an award of fees. Agency filed objections only to Mr. Schwartz's request.

In October 2009, this matter was reassigned to Senior Administrative Judge Joseph Lim,[3] who considered the fee requests. On February 16, 2010,[4] Judge Lim issued an *Addendum Decision* in which he determined that Employee was the prevailing party and that an award of legal fees was in the interest of justice. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Addendum Decision on Attorney's Fees* (February 16, 2010). Judge Lim found that Mr. Schwartz merited the hourly rate of $425, then the maximum hourly rate on the Laffey Matrix,[5] and awarded to attorneys in practice for more than 31 years who had substantial expertise and experience. He also considered Mr. Schwartz's explanations of how his time was expended to be sufficient.

Judge Lim concluded, however, that Mr. Schwartz's claim of 37.8 hours was "excessive for the degree of difficulty and the amount of legal service time required," pointing out that an attorney awarded the highest hourly rate is presumed to have the "prior experience and expertise" in the area and should expend less time than an attorney with less experience and expertise. He noted that Mr. Schwartz had, "handled numerous appeals before [OEA]." Judge Lim explained that reached this decision by comparing Mr. Schwartz's request with requests filed with this Office by attorneys with "comparable experience" the degree of legal complexity presented in the matter, and also Judge Lim's "years of experience as a plaintiff's attorney." He reduced the hours to 12.1 hours, which resulted an award of $5,142.50 in fees.[6]

Mr. Schwartz filed a *Petition for Review* with the District of Columbia Superior Court on March 17, 2010, claiming that Judge Lim's decision should be reversed because counsel was entitled to the hour claimed and fees sought. He contended that the matter should be considered "under the more stringent *de novo* standard," arguing that he was entitled to a *de novo* review since Judge Lim had not presided over the evidentiary hearing and therefore was not in a position to decide on his fees. In his July 5, 2015 *Order*, the Honorable Erik Christian rejected counsel's arguments, concluding that counsel was not entitled to a *de novo* review. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, Case No. 2010 CA 001732 P(MPA (July 6, 2015). He determined that although Judge Lim did not preside over the evidentiary hearing, his decision was entitled to "deference," because OEA Judges are "in the best position to determine the reasonableness of the ... attorney hours spent on a case, not the reviewing Court."[7] Judge Christian

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[2] In this *Decision*, for the sake of clarity and expediency, the AJ will again digress from the protocol of identifying Employee as the party or movant, but rather will instead refer to Mr. Schwartz as the movant when referring to attorney fees matters. Unless otherwise stated, "counsel" and "attorney," refer to Mr. Schwartz.

[3] The reassignment was a result of this AJ's decision to recuse herself from all matters in which Agency was a party, following her appointment to chair a Board in which Agency participated.

[4] The *Corrected Addendum Decision* was issued on February 19, 2010. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Corrected Addendum Decision* (February 19, 2010).

[5] *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4(D.C. Cir. 1984), *cert den.* 472 U.S. 1021 (1985).

[6] Ms. Edwards also sought an award of attorney fees. Agency did not object to her request. Judge Lim approved the time and hourly rate sought, and awarded her the sum of $5,532.14, as requested.

[7] He noted, however, that "the presiding official ...is more intimately familiar with the circumstances of the appeal, and may be in the best position to determine the reasonableness of the attorney's fee request."

stated, however, that he could not review the matter because there was insufficient support provided for Judge Lim's decision. The Court remanded the matter to OEA for "the limited purpose" of obtaining "substantial evidence" from the AJ to support any reduction of time, stating that the record could be reopened if needed. He stated that the AJ could still conclude that the hours claimed by Mr. Schwartz were "unreasonable," and could leave the award unchanged.

This AJ was again available to hear this matter when it was remanded to this Office. Based in part on the Court's comment that the AJ who presided at the evidentiary hearing may be in the best position to rule on fee requests, and in part on other demands on Judge Lim's time, the remand was reassigned to her on August 12, 2015. By Order dated September 11, 2015, she advised the parties that the matter was reassigned to her and that she would need time to review the entire record in order to determine how to proceed. She directed the parties to use the intervening time to engage in settlement negotiations. Settlement efforts continued over an extended period of time, but proved unsuccessful; and oral argument was scheduled for September 21 2016.

At the September 21, 2016 proceeding, the parties presented oral argument. In addition, the AJ discussed a number of matters with the parties to ensure they were all in accord. Wither regard to the scope of her review, the AJ determined, and the parties agreed, that given the limited nature of the remand, she would abide by the decisions reached by Judge Lim, and accepted by Judge Christian, *i.e.,* that Employee was the prevailing party and was entitled to an award of attorney fees in the interest of justice, that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix, and that counsel's explanations of his work were sufficient.[8] She also determined, and the parties agreed, that her review was limited to the fees that were the subject of the remand.[9] Mr. Schwartz, who had filed additional fee requests, confirmed that he had withdrawn the request related to work performed before the D.C. Superior Court. He then withdrew the request for fees regarding legal work before OEA postdating the fees that were the subject of the remand. The AJ stated that Mr. Schwartz could file a request for an award for fees after this matter was concluded.

In the *Addendum Decision on Attorney Fees on Remand* (ADR), issued on October 26, 2016, this AJ, for reasons discussed in the ADR, did not award Mr. Schwartz the 37.8 hours claimed, but increased the time awarded from 12.1 to 27 hours. The fees awarded was not $16,512.05, as sought by Mr. Schwartz, but did increase from $5,142.50 as awarded by Judge Lim to $12,015, 00. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09R15, *Addendum Decision on Attorney's Fees on Remand* (February 16, 2010).

On December 22, 2016, Mr. Schwartz filed a motion for an award of fees, seeking $8,520.00 in fees based on 15 hours of legal work performed between October 6, 2015 and September 21, 2016, at an hourly rate of $568.00. Agency filed objections on January 21, 2017. The matter was referred, with the consent of the parties, to mediation in March 2017. When mediation proved unsuccessful, the AJ issued an Order, directing the parties to advise her by July 11, 2017, if they wanted to present oral argument and/or file supplemental pleadings on the matter; and that if they did not, the record would close. Both parties responded in the negative to both options, and the record closed on July 11, 2017

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[8] The AJ informed the parties that although she might not agree with all of the determinations, she was bound by them, since, given of the limited nature of the remand, they were not subject to review.

[9] The AJ determined, and the parties agreed, that she could review the entire fee request, not just the time reduced since the hours claimed for work performed on one day might relate to a claim on another day.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.08 (2001).

ISSUES

Is Mr. Schwartz entitled to an award of fees? If so, what is the appropriate amount?

ANALYSIS, FINDINGS AND CONCLUSIONS

The decisions made by Judge Lim and accepted by Judge Christian, *i.e.*, that Employee was the prevailing party in the matter before OEA, that an award of legal fees was in the interest of justice, and that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix were not part of the Court's remand and were not reviewed. Agency did not object to the hourly rate sought by Mr. Schwartz of $568.00, which represents the highest rate on the Laffey Matrix for work performed in 2015 and 2016. Mr. Schwartz is awarded the hourly rate of $568.00.

Agency argued that since Mr. Schwartz did not receive the full relief sought before Judge Christian or this AJ, he cannot be considered the prevailing party. Mr. Schwartz disagreed, citing *Settlemire v. District of Columbia*, 898 A2d 902 (D.C. 2006), and *Buchkannon Bd. and Care Home v. West Virginia Department of Health & Human Res.* 532 U.S. 598 (3002), for the proposition that he is entitled to "prevailing party" status since he was successful in some of his arguments.

Judge Christian did not reverse Judge Lim's decision. He denied counsel the *de novo* review that he sought and rejected his argument that Judge Lim could not award fees. The Court stated that Judge Lim's decision was entitled to "deference." Judge Christian ordered a limited remand, directing only that sufficient reasons be given by the AJ to support his decisions to enable the Court to conduct its review. Indeed, the Court stated that the AJ could reach the same decision and leave the fee award unchanged.[10] If Judge Lim had heard the matter on remand, he could have provided the additional explanations sought by the Court, left the award unchanged. However, this AJ could not provide the rationale for another AJ's decisions, and had to undertake her own assessment. Although this resulted in an increased award, this certainly did mean that this AJ determined the remanded award was incorrect. A third AJ could reach yet another decision, since fee awards are not based on a mathematical formula. AJs must adhere to guidance and standards articulated in such cases as *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission*, 123 A.3d 170 (2015), there is still adequate room for different results, since the decisions reflect the experience and expertise of the individual AJ.[11]

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[10] Counsel's contention that Judge Lim could not assess fees because he had not presided over the hearing was unconvincing for an additional reason. Mr. Schwartz entered his appearance after the evidentiary hearing, but was responsible for the closing brief. He claimed that he was able to thoroughly familiarize himself with the record and prepare the brief in about 12 hours. Since Mr. Schwartz was able to fully familiarize himself with the underlying record and legal issues, which in this matter was neither complex nor lengthy, it is difficult to understand why he was certain that Judge Lim, who has decades of experience and expertise in this area and is a respected Senior Administrative Judge, having presided over countless evidentiary hearings and fee petitions during his tenure at OEA, would be unable to achieve the same result.

[11] The AJ will not review her experience and expertise in analyzing fee requests since she did so in the ADR.

A separate analysis regarding a claim for the award of attorney fees is required when the "degree of success...obtained on [an] attorney fee motion is not the same as the degree of success...obtained on the underlying appeal." *Guy v. Department of Army*, 2012 MSPB 54 (2012). In this matter, Employee was successful in his appeal, and was awarded all of the relief sought, in the *Initial Decision.* As noted above, Mr. Schwartz did not achieve the same level of success either before Judge Christian or before this AJ. He did, however, achieve "a significant part" of the relief sought in both matters, and is therefore entitled to an award of fees. After completing this "separate analysis" the AJ can either reduce the amount of the award by the number of issues on which counsel did not prevail; or can award the amount she considers to be a "fair result," without reducing the award based on the number of issues on which the claimant was not successful, in whole or in part. *Farrar v. Hobby*, 113 S. Ct. 566 (1973). The AJ has chosen this second option.

The determination of the reasonableness of fees is a balancing act. Although the movant is not required to detail the precise time spent on a matter or even the precise activity, the attorney must provide sufficient detail to allow an informed assessment to be made. In *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983), the Supreme Court directed attorneys to exercise "billing judgment" and stated that fees would not be awarded for time found to be "excessive, redundant or otherwise unnecessary." *See also, Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985). In addition, the Laffey Matrix increases the hourly rate awarded based on the attorney's experience and expertise based on the assumption it will take that attorney less time to complete a task than the attorney with less expertise and experience, who is awarded a lower hourly rate.

In *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission,* 123 A.3d 170 (2015), the District of Columbia Court of Appeals articulated the standard of determining reasonableness of fees, citing a long line of cases beginning with *Hensley*, and including *Hampton Court,* 599 A.2d, 1116 and *Copeland v. Marshall,* 641 F2d 880 (D.D.Cir. 1980). The movant has the burden of establishing the reasonableness of the fees sought, and must submit evidence supporting the claim of hours worked, and excluding unnecessary time... *Casali v. Department of Treasury*, 81 MSPR 237 (1999). The AJ must identify hours that were rejected and "articulate the reasons for their elimination. *Rumsey, v. Department of Justice*, 2016 MSPB 28 (2016). The "application must be sufficiently detailed to permit the [AJ] to make an independent determination whether or not the hours claimed are justified, but also, that "it was not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted." *Copeland*, 63 F.2d at 891.

D.C. Municipal Regulations, Title 6, Section 634.3, places the burden of production on the claimant, who must "submit reasonable evidence or documentation to support the number of hours expended by the attorney on the appeal." During oral argument, the AJ reviewed Mr. Schwartz's fee request with him, explaining why she did not consider it adequate, and advising him of the additional information that would be required if he filed another fee. Despite her directive, the fee request now under consideration mirrored the prior submission, lacking sufficient information. The AJ offered counsel the opportunity to supplement his submission either in writing or at oral argument, but counsel declined both options. *Rumsey v. Department of Justice*, 2016 MSPB 28 (2016). Therefore, the AJ based on her decision on the request which is presented *verbatim* below:

Date	Activity	Hours
10/6, 10/8/2015	Research, draft Post-Remand Memo	3.1
4/6-7/2016	Research Legis. Hist.	3.9
4/23, 4/25/16	Research, draft submission	4.1
9/13/16	Research, draft Responses to ALJ Order	2.4
9/21/16	Prepare for, attend Hearing	1.5

Agency argued that Mr. Schwartz should not be compensated for work related to his Superior Court appeal, since that fee request was withdrawn, and that some of the time claimed "was unreasonable due to their length and [the] fact that they were unnecessary." Finally it contended that the 2.4 hours billed by Mr. Schwartz on September 13, 2016 was "unnecessary and therefore unreasonable," since he submitted "a 14 page document with factual and procedural information despite the fact" that he was only asked to submit the August 22 Order to which he was responding only directed the parties to "outlines of their arguments." Mr. Schwartz maintained that the research and drafting of his October 23 submission was necessary, since "a full review of recent cases in the area especially *Tenants of 701 Jefferson Street, NW v. District of Columbia*" was required.

In reviewing the fee request, the AJ assessed whether counsel met the burden of establishing that the hours claimed were reasonable and whether the work performed was necessary. DCMR, Title 6, Section 634.3 requires attorneys seeking fees to submit "reasonable evidence or documentation to support the number of hours expended." *See, e.g., Hampton Courts Tenants Association v. D.C. Rental Housing Commission*, 599 A.2d 1113 (D.C. 1991). An AJ must "identify" hours that were reduced based on inadequate documentation, and "articulate the reasons for their elimination." *Crumbaker v. Merit Systems Protection Board*, 781 F.2d 191, 195 (Fed. Cir 1986), modified on other grounds, 827 F.2d 761 (Fed Cir. 1987).

3.1 hours (10/6, 10/8/15) "Research, draft Post-Remand Memo": Mr. Schwartz claimed this time was spent researching and drafting a memorandum which the AJ assumes was the one filed on October 13, 2015. However, in her Order of September 11, 2015, the AJ advised the parties that she had been reassigned the matter and that she would need time to review the record in order to determine how to proceed. She directed the parties to use the intervening time to try to resolve the matter. She did not request that any submissions be filed, stating specifically, that she needed to review the record before deciding how to proceed. The submission was not relevant and was not considered. In addition, it included a request for additional fees, although the only fees considered on remand were those reviewed by Judge Lim. Mr. Schwartz subsequently withdrew the fee request, but even if he had not, it would not have been considered. In sum, the work was unnecessary and submitted despite the AJ's directive to await her instructions after she completed her review. For these reasons, the claim of 3.1 hours is denied.

3.9 hours (4/6-4/7/2016) "Research Legis. Hist:" Mr. Schwartz did not explain the legislative history he was researching, and why the research was necessary. Assuming the research was needed to prepare his April 25 submission, then it appears to be duplicative, since the submission below also claims time for research, and there was no evidence of extensive research. Counsel is required to explain what was researched and its relevance. For these reasons, the AJ concludes that he failed to meet his burden of production because he did not provide "reasonable evidence or documentation to support the number of hours expended" as required by DCMR, Title 6, Section 634.3. For these reasons, the claim for 3.9 hours is denied.

4.1 hours (4/23, 4/25/16) Research, draft submission: This submission focused on three issues: OEA's authority to award fees for work done before the Superior Court, Employee's status as prevailing party, and reasons that an award of fees was warranted in the interest of justice. However, as already discussed, the remand did not include additional fees, and the other two issues had already been resolved. Arguments regarding work performed before the Superior Court were irrelevant, since the remand did not include those fees. However, counsel did reference *Tenants of 710 Street N.W. v. District of Columbia Rental Housing Commission*, which was issued in August 2015. *Infra* at 5. The discussion of this decision was not the primary focus of the submission, and the AJ determines about no more than one-third of the total expended should be awarded for work that was relevant to this matter. For these reasons, she awards 1.4 hours.

2.4 hours (9/13/16) Research, draft Responses to ALJ Order: This submission was in response to the August 22, 2016 Order which directed the parties to "submit outlines" of the arguments that they would present at oral argument. The AJ finds that the submission was responsive, addressing the challenged items and summarizing the arguments counsel would raise. The AJ concludes that the claim for 2.4 hours should be awarded in full.

1.5 hours (9/21/16) prepare for, attend Hearing: The AJ finds that the time claimed to prepare for and attend the September 21, 2016 proceeding was reasonable. She concludes that the 1.5 hours sought should be awarded.

Based on this analysis, counsel will be compensated for 5.3 hours at an hourly rate of $568, for a total award of $3,010.40.[12]

ORDER

It is hereby

ORDERED: Agency pay Employee, within 45 calendar days from the date of issuance of this Addendum Decision, the sum of $3,010.40 for legal fees payable to Frederick Schwartz, Jr..

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge

[12] The AJ will not reduce the award, since she "has discretion to make an equitable judgment as to what reduction is appropriate. *Hensley* at 436-37. The award "does not so shock the conscience" and any further reduction would not "fairly reflect [counsel's] "degree of success." *Rumsey* at 20.

CERTIFICATE OF SERVICE

I certify that the attached **CORRECTED ADDENDUM DECISIONON ATTORNEY FEES POST-REMAND** was sent by regular mail on this day to:

Robert Johnson
1826 4th Street NW
Washington, DC 20001

Andrea Comentale, Esq.
Section Chief
Personnel and Labor Relations Section
441 4th St., NW Suite 1180N
Washington, DC 20001

Frederic W. Schwartz, Esq.
1701 Pennsylvania Ave, NW
Suite 200
Washington, DC 20006

Katrina Hill
Clerk

November 6, 2017
Date

Superior Court of the District of Columbia
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000 Washington, D.C. 20001
Telephone: (202) 879-1133 Website: www.dccourts.gov

ROBERT JOHNSON
Plaintiff

vs.

Case Number _____

D.C. OFFICE OE EMPLOYEE APPEALS
Defendant

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve an Answer to the attached Complaint, either personally or through an attorney, within twenty one (21) days after service of this summons upon you, exclusive of the day of service. If you are being sued as an officer or agency of the United States Government or the District of Columbia Government, you have sixty (60) days after service of this summons to serve your Answer. A copy of the Answer must be mailed to the attorney for the plaintiff who is suing you. The attorney's name and address appear below. If plaintiff has no attorney, a copy of the Answer must be mailed to the plaintiff at the address stated on this Summons.

You are also required to file the original Answer with the Court in Suite 5000 at 500 Indiana Avenue, N.W., between 8:30 a.m. and 5:00 p.m., Mondays through Fridays or between 9:00 a.m. and 12:00 noon on Saturdays. You may file the original Answer with the Court either before you serve a copy of the Answer on the plaintiff or within seven (7) days after you have served the plaintiff. If you fail to file an Answer, judgment by default may be entered against you for the relief demanded in the complaint.

Frederic Schwartz
Name of Plaintiff's Attorney

1701 Pennsylvania Ave., NW., Suite 200 Washington, DC 20006
Address

202 463-0880
Telephone

Clerk of the Court

By _____
Deputy Clerk

Date _____

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IMPORTANT: IF YOU FAIL TO FILE AN ANSWER WITHIN THE TIME STATED ABOVE, OR IF, AFTER YOU ANSWER, YOU FAIL TO APPEAR AT ANY TIME THE COURT NOTIFIES YOU TO DO SO, A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY DAMAGES OR OTHER RELIEF DEMANDED IN THE COMPLAINT. IF THIS OCCURS, YOUR WAGES MAY BE ATTACHED OR WITHHELD OR PERSONAL PROPERTY OR REAL ESTATE YOU OWN MAY BE TAKEN AND SOLD TO PAY THE JUDGMENT. IF YOU INTEND TO OPPOSE THIS ACTION, *DO NOT FAIL TO ANSWER WITHIN THE REQUIRED TIME.*

If you wish to talk to a lawyer and feel that you cannot afford to pay a fee to a lawyer, promptly contact one of the offices of the Legal Aid Society (202-628-1161) or the Neighborhood Legal Services (202-279-5100) for help or come to Suite 5000 at 500 Indiana Avenue, N.W., for more information concerning places where you may ask for such help.

See reverse side for Spanish translation
Vea al dorso la traducción al español

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Teléfono: (202) 879-1133 Sitio web: www.dccourts.gov

_____
Demandante

contra

Número de Caso: _____

_____
Demandado

CITATORIO

Al susodicho Demandado:

Por la presente se le cita a comparecer y se le require entregar una Contestación a la Demanda adjunta, sea en persona o por medio de un abogado, en el plazo de veintiún (21) días contados después que usted haya recibido este citatorio, excluyendo el día mismo de la entrega del citatorio. Si usted está siendo demandado en calidad de oficial o agente del Gobierno de los Estados Unidos de Norteamérica o del Gobierno del Distrito de Columbia, tiene usted sesenta (60) días, contados después que usted haya recibido este citatorio, para entregar su Contestación. Tiene que enviarle por correo una copia de su Contestación al abogado de la parte demandante. El nombre y dirección del abogado aparecen al final de este documento. Si el demandado no tiene abogado, tiene que enviarle al demandante una copia de la Contestación por correo a la dirección que aparece en este Citatorio.

A usted también se le require presentar la Contestación original al Tribunal en la Oficina 5000, sito en 500 Indiana Avenue, N.W., entre las 8:30 a.m. y 5:00 p.m., de lunes a viernes o entre las 9:00 a.m. y las 12:00 del mediodía los sábados. Usted puede presentar la Contestación original ante el Juez ya sea antes que usted le entregue al demandante una copia de la Contestación o en el plazo de siete (7) días de haberle hecho la entrega al demandante. Si usted incumple con presentar una Contestación, podría dictarse un fallo en rebeldía contra usted para que se haga efectivo el desagravio que se busca en la demanda.

SECRETARIO DEL TRIBUNAL

_____
Nombre del abogado del Demandante

Por: _____
Subsecretario

_____
Dirección

_____

Fecha _____

_____
Teléfono

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IMPORTANTE: SI USTED INCUMPLE CON PRESENTAR UNA CONTESTACIÓN EN EL PLAZO ANTES MENCIONADO O, SI LUEGO DE CONTESTAR, USTED NO COMPARECE CUANDO LE AVISE EL JUZGADO, PODRÍA DICTARSE UN FALLO EN REBELDÍA CONTRA USTED PARA QUE SE LE COBRE LOS DAÑOS Y PERJUICIOS U OTRO DESAGRAVIO QUE SE BUSQUE EN LA DEMANDA. SI ESTO OCURRE, PODRÍA RETENÉRSELE SUS INGRESOS, O PODRÍA TOMÁRSELE SUS BIENES PERSONALES O BIENES RAÍCES Y SER VENDIDOS PARA PAGAR EL FALLO. SI USTED PRETENDE OPONERSE A ESTA ACCIÓN, *NO DEJE DE CONTESTAR LA DEMANDA DENTRO DEL PLAZO EXIGIDO*.

Si desea conversar con un abogado y le parece que no puede pagarle a uno, llame pronto a una de nuestras oficinas del Legal Aid Society (202-628-1161) o el Neighborhood Legal Services (202-279-5100) para pedir ayuda o venga a la Oficina 5000 del 500 Indiana Avenue, N.W., para informarse sobre otros lugares donde puede pedirayuda al respecto.

Vea al dorso el original en inglés
See reverse side for English original

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

ROBERT JOHNSON
c/o Frederic Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

Petitioner

v. : MPA. No.

D.C. OFFICE OF EMPLOYEE APPEALS, :
955 L'Enfant Plaza, SW
Suite 2500
Washington, DC 20024

Respondent

PETITION FOR REVIEW

Notice is hereby given that Robert Johnson appeals to the Superior Court of the District of Columbia from the Order of the Hon. Lois Hochhauser, Esq., Administrative Judge, D.C. Office of Employee Appeals (OEA) which became final on November 30, 2017. A copy of that Decision, which reduced the attorney fees due Mr. Johnson's attorney, is attached.

The Administrative Judge's determination is arbitrary, capricious, and in violation of law.

Consequently, the OEA determination must be reversed.

The address of the OEA is: 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024

The following party participated in the OEA proceeding, and is to be served along with the OEA General Counsel who is also listed:

Andrea Comentale, Esq., 441 4th St., NW, Suite 1180N, Washington, DC 20001.

General Counsel, OEA, 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024

Respectfully Submitted,

/s/ Frederic W. Schwartz, Jr.

Frederic W. Schwartz, Jr.
Law Office of Frederic W. Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ROBERT JOHNSON Employee	OEA Matter No. 1601-0016-A09R15A17
v.	Date of Issuance: November 6, 2017
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT Agency	Lois Hochhauser, Esq. Administrative Judge

Andrea Comantale, Esq., Agency Representative
Frederic Schwartz, Jr., Esq., Employee Representative

CORRECTED[1] ADDENDUM DECISION ON ATTORNEY FEES POST-REMAND

PROCEDURAL BACKGROUND AND CHRONOLOGY

Robert Johnson, Employee, filed a petition with the Office of Employee Appeals (OEA) on November 28, 2005, appealing the decision of the D.C. Fire and Emergency Medical Services Department, Agency, to suspend him for 20 days without pay. The matter was assigned to this Administrative Judge (AJ) on January 26, 2006. The parties were given an extensive period of time to negotiate a resolution, but were unsuccessful. The evidentiary hearing took place on June 2 and July 5, 2006.

In the *Initial Decision* (ID), issued on February 12, 2007, the AJ reversed the adverse action and directed Agency to restore to Employee all salary and benefits lost as a result of the suspension. Agency's petition for review was denied by this Board on May 6, 2009. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06, *Opinion and Order on Petition for Review* (May 6, 2009).

Frederic Schwartz, Jr., Esq. entered his appearance as Employee representative on or about November 22, 2006, replacing Clarissa Edwards, Esq., who had represented Employee until that

[1] The only correction to the October 26, 2017 *Decision*, is in the "Order" section on page 7, where the amount of the award was incorrect due to a typographical error. It was corrected and is now consistent with the sum stated in the line preceding the "Order" section. In addition, some superfluous language was deleted at the end of the "Order" section.

time. On June 1, 2009, Mr. Schwartz[2] filed a motion, seeking an award of $16,065.00 in legal fees based on 37.8 hours and an hourly rate of $425. Ms. Edwards subsequently moved for an award of fees. Agency filed objections only to Mr. Schwartz's request.

In October 2009, this matter was reassigned to Senior Administrative Judge Joseph Lim,[3] who considered the fee requests. On February 16, 2010,[4] Judge Lim issued an *Addendum Decision* in which he determined that Employee was the prevailing party and that an award of legal fees was in the interest of justice. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Addendum Decision on Attorney's Fees* (February 16, 2010). Judge Lim found that Mr. Schwartz merited the hourly rate of $425, then the maximum hourly rate on the Laffey Matrix,[5] and awarded to attorneys in practice for more than 31 years who had substantial expertise and experience. He also considered Mr. Schwartz's explanations of how his time was expended to be sufficient.

Judge Lim concluded, however, that Mr. Schwartz's claim of 37.8 hours was "excessive for the degree of difficulty and the amount of legal service time required," pointing out that an attorney awarded the highest hourly rate is presumed to have the "prior experience and expertise" in the area and should expend less time than an attorney with less experience and expertise. He noted that Mr. Schwartz had, "handled numerous appeals before [OEA]." Judge Lim explained that reached this decision by comparing Mr. Schwartz's request with requests filed with this Office by attorneys with "comparable experience" the degree of legal complexity presented in the matter, and also Judge Lim's "years of experience as a plaintiff's attorney." He reduced the hours to 12.1 hours, which resulted an award of $5,142.50 in fees.[6]

Mr. Schwartz filed a *Petition for Review* with the District of Columbia Superior Court on March 17, 2010, claiming that Judge Lim's decision should be reversed because counsel was entitled to the hour claimed and fees sought. He contended that the matter should be considered "under the more stringent *de novo* standard," arguing that he was entitled to a *de novo* review since Judge Lim had not presided over the evidentiary hearing and therefore was not in a position to decide on his fees. In his July 5, 2015 *Order*, the Honorable Erik Christian rejected counsel's arguments, concluding that counsel was not entitled to a *de novo* review. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, Case No. 2010 CA 001732 P(MPA (July 6, 2015). He determined that although Judge Lim did not preside over the evidentiary hearing, his decision was entitled to "deference," because OEA Judges are "in the best position to determine the reasonableness of the ... attorney hours spent on a case, not the reviewing Court."[7] Judge Christian

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[2] In this *Decision*, for the sake of clarity and expediency, the AJ will again digress from the protocol of identifying Employee as the party or movant, but rather will instead refer to Mr. Schwartz as the movant when referring to attorney fees matters. Unless otherwise stated, "counsel" and "attorney," refer to Mr. Schwartz.

[3] The reassignment was a result of this AJ's decision to recuse herself from all matters in which Agency was a party, following her appointment to chair a Board in which Agency participated.

[4] The *Corrected Addendum Decision* was issued on February 19, 2010. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Corrected Addendum Decision* (February 19, 2010).

[5] *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4(D.C. Cir. 1984), *cert den.* 472 U.S. 1021 (1985).

[6] Ms. Edwards also sought an award of attorney fees. Agency did not object to her request. Judge Lim approved the time and hourly rate sought, and awarded her the sum of $5,532.14, as requested.

[7] He noted, however, that "the presiding official ...is more intimately familiar with the circumstances of the appeal, and may be in the best position to determine the reasonableness of the attorney's fee request."

stated, however, that he could not review the matter because there was insufficient support provided for Judge Lim's decision. The Court remanded the matter to OEA for "the limited purpose" of obtaining "substantial evidence" from the AJ to support any reduction of time, stating that the record could be reopened if needed. He stated that the AJ could still conclude that the hours claimed by Mr. Schwartz were "unreasonable," and could leave the award unchanged.

This AJ was again available to hear this matter when it was remanded to this Office. Based in part on the Court's comment that the AJ who presided at the evidentiary hearing may be in the best position to rule on fee requests, and in part on other demands on Judge Lim's time, the remand was reassigned to her on August 12, 2015. By Order dated September 11, 2015, she advised the parties that the matter was reassigned to her and that she would need time to review the entire record in order to determine how to proceed. She directed the parties to use the intervening time to engage in settlement negotiations. Settlement efforts continued over an extended period of time, but proved unsuccessful; and oral argument was scheduled for September 21 2016.

At the September 21, 2016 proceeding, the parties presented oral argument. In addition, the AJ discussed a number of matters with the parties to ensure they were all in accord. Wither regard to the scope of her review, the AJ determined, and the parties agreed, that given the limited nature of the remand, she would abide by the decisions reached by Judge Lim, and accepted by Judge Christian, *i.e.*, that Employee was the prevailing party and was entitled to an award of attorney fees in the interest of justice, that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix, and that counsel's explanations of his work were sufficient.[8] She also determined, and the parties agreed, that her review was limited to the fees that were the subject of the remand.[9] Mr. Schwartz, who had filed additional fee requests, confirmed that he had withdrawn the request related to work performed before the D.C. Superior Court. He then withdrew the request for fees regarding legal work before OEA postdating the fees that were the subject of the remand. The AJ stated that Mr. Schwartz could file a request for an award for fees after this matter was concluded.

In the *Addendum Decision on Attorney Fees on Remand* (ADR), issued on October 26, 2016, this AJ, for reasons discussed in the ADR, did not award Mr. Schwartz the 37.8 hours claimed, but increased the time awarded from 12.1 to 27 hours. The fees awarded was not $16,512.05, as sought by Mr. Schwartz, but did increase from $5,142.50 as awarded by Judge Lim to $12,015, 00. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09R15, *Addendum Decision on Attorney's Fees on Remand* (February 16, 2010).

On December 22, 2016, Mr. Schwartz filed a motion for an award of fees, seeking $8,520.00 in fees based on 15 hours of legal work performed between October 6, 2015 and September 21, 2016, at an hourly rate of $568.00. Agency filed objections on January 21, 2017. The matter was referred, with the consent of the parties, to mediation in March 2017. When mediation proved unsuccessful, the AJ issued an Order, directing the parties to advise her by July 11, 2017, if they wanted to present oral argument and/or file supplemental pleadings on the matter; and that if they did not, the record would close. Both parties responded in the negative to both options, and the record closed on July 11, 2017

[8] The AJ informed the parties that although she might not agree with all of the determinations, she was bound by them, since, given of the limited nature of the remand, they were not subject to review.
[9] The AJ determined, and the parties agreed, that she could review the entire fee request, not just the time reduced since the hours claimed for work performed on one day might relate to a claim on another day.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.08 (2001).

ISSUES

Is Mr. Schwartz entitled to an award of fees? If so, what is the appropriate amount?

ANALYSIS, FINDINGS AND CONCLUSIONS

The decisions made by Judge Lim and accepted by Judge Christian, *i.e.*, that Employee was the prevailing party in the matter before OEA, that an award of legal fees was in the interest of justice, and that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix were not part of the Court's remand and were not reviewed. Agency did not object to the hourly rate sought by Mr. Schwartz of $568.00, which represents the highest rate on the Laffey Matrix for work performed in 2015 and 2016. Mr. Schwartz is awarded the hourly rate of $568.00.

Agency argued that since Mr. Schwartz did not receive the full relief sought before Judge Christian or this AJ, he cannot be considered the prevailing party. Mr. Schwartz disagreed, citing *Settlemire v. District of Columbia*, 898 A2d 902 (D.C. 2006), and *Buchkannon Bd. and Care Home v. West Virginia Department of Health & Human Res.* 532 U.S. 598 (3002), for the proposition that he is entitled to "prevailing party" status since he was successful in some of his arguments.

Judge Christian did not reverse Judge Lim's decision. He denied counsel the *de novo* review that he sought and rejected his argument that Judge Lim could not award fees. The Court stated that Judge Lim's decision was entitled to "deference." Judge Christian ordered a limited remand, directing only that sufficient reasons be given by the AJ to support his decisions to enable the Court to conduct its review. Indeed, the Court stated that the AJ could reach the same decision and leave the fee award unchanged.[10] If Judge Lim had heard the matter on remand, he could have provided the additional explanations sought by the Court, left the award unchanged. However, this AJ could not provide the rationale for another AJ's decisions, and had to undertake her own assessment. Although this resulted in an increased award, this certainly did mean that this AJ determined the remanded award was incorrect. A third AJ could reach yet another decision, since fee awards are not based on a mathematical formula. AJs must adhere to guidance and standards articulated in such cases as *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission*, 123 A.3d 170 (2015), there is still adequate room for different results, since the decisions reflect the experience and expertise of the individual AJ.[11]

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[10] Counsel's contention that Judge Lim could not assess fees because he had not presided over the hearing was unconvincing for an additional reason. Mr. Schwartz entered his appearance after the evidentiary hearing, but was responsible for the closing brief. He claimed that he was able to thoroughly familiarize himself with the record and prepare the brief in about 12 hours. Since Mr. Schwartz was able to fully familiarize himself with the underlying record and legal issues, which in this matter was neither complex nor lengthy, it is difficult to understand why he was certain that Judge Lim, who has decades of experience and expertise in this area and is a respected Senior Administrative Judge, having presided over countless evidentiary hearings and fee petitions during his tenure at OEA, would be unable to achieve the same result.

[11] The AJ will not review her experience and expertise in analyzing fee requests since she did so in the ADR.

A separate analysis regarding a claim for the award of attorney fees is required when the "degree of success...obtained on [an] attorney fee motion is not the same as the degree of success...obtained on the underlying appeal." *Guy v. Department of Army*, 2012 MSPB 54 (2012). In this matter, Employee was successful in his appeal, and was awarded all of the relief sought, in the *Initial Decision*. As noted above, Mr. Schwartz did not achieve the same level of success either before Judge Christian or before this AJ. He did, however, achieve "a significant part" of the relief sought in both matters, and is therefore entitled to an award of fees. After completing this "separate analysis" the AJ can either reduce the amount of the award by the number of issues on which counsel did not prevail; or can award the amount she considers to be a "fair result," without reducing the award based on the number of issues on which the claimant was not successful, in whole or in part. *Farrar v. Hobby*, 113 S. Ct. 566 (1973). The AJ has chosen this second option.

The determination of the reasonableness of fees is a balancing act. Although the movant is not required to detail the precise time spent on a matter or even the precise activity, the attorney must provide sufficient detail to allow an informed assessment to be made. In *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), the Supreme Court directed attorneys to exercise "billing judgment" and stated that fees would not be awarded for time found to be "excessive, redundant or otherwise unnecessary." *See also, Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985). In addition, the Laffey Matrix increases the hourly rate awarded based on the attorney's experience and expertise based on the assumption it will take that attorney less time to complete a task than the attorney with less expertise and experience, who is awarded a lower hourly rate.

In *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission*, 123 A.3d 170 (2015), the District of Columbia Court of Appeals articulated the standard of determining reasonableness of fees, citing a long line of cases beginning with *Hensley*, and including *Hampton Court*, 599 A.2d, 1116 and *Copeland v. Marshall*, 641 F2d 880 (D.D.Cir. 1980). The movant has the burden of establishing the reasonableness of the fees sought, and must submit evidence supporting the claim of hours worked, and excluding unnecessary time... *Casali v. Department of Treasury*, 81 MSPR 237 (1999). The AJ must identify hours that were rejected and "articulate the reasons for their elimination. *Rumsey, v. Department of Justice*, 2016 MSPB 28 (2016). The "application must be sufficiently detailed to permit the [AJ] to make an independent determination whether or not the hours claimed are justified, but also, that "it was not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted." *Copeland*, 63 F.2d at 891.

D.C. Municipal Regulations, Title 6, Section 634.3, places the burden of production on the claimant, who must "submit reasonable evidence or documentation to support the number of hours expended by the attorney on the appeal." During oral argument, the AJ reviewed Mr. Schwartz's fee request with him, explaining why she did not consider it adequate, and advising him of the additional information that would be required if he filed another fee. Despite her directive, the fee request now under consideration mirrored the prior submission, lacking sufficient information. The AJ offered counsel the opportunity to supplement his submission either in writing or at oral argument, but counsel declined both options. *Rumsey v. Department of Justice*, 2016 MSPB 28 (2016). Therefore, the AJ based on her decision on the request which is presented *verbatim* below:

Date	Activity	Hours
10/6, 10/8/2015	Research, draft Post-Remand Memo	3.1
4/6-7/2016	Research Legis. Hist.	3.9
4/23, 4/25/16	Research, draft submission	4.1
9/13/16	Research, draft Responses to ALJ Order	2.4
9/21/16	Prepare for, attend Hearing	1.5

Agency argued that Mr. Schwartz should not be compensated for work related to his Superior Court appeal, since that fee request was withdrawn, and that some of the time claimed "was unreasonable due to their length and [the] fact that they were unnecessary." Finally it contended that the 2.4 hours billed by Mr. Schwartz on September 13, 2016 was "unnecessary and therefore unreasonable," since he submitted "a 14 page document with factual and procedural information despite the fact" that he was only asked to submit the August 22 Order to which he was responding only directed the parties to "outlines of their arguments." Mr. Schwartz maintained that the research and drafting of his October 23 submission was necessary, since "a full review of recent cases in the area especially *Tenants of 701 Jefferson Street, NW v. District of Columbia*" was required.

In reviewing the fee request, the AJ assessed whether counsel met the burden of establishing that the hours claimed were reasonable and whether the work performed was necessary. DCMR, Title 6, Section 634.3 requires attorneys seeking fees to submit "reasonable evidence or documentation to support the number of hours expended." *See, e.g., Hampton Courts Tenants Association v. D.C. Rental Housing Commission*, 599 A.2d 1113 (D.C. 1991). An AJ must "identify" hours that were reduced based on inadequate documentation, and "articulate the reasons for their elimination." *Crumbaker v. Merit Systems Protection Board*, 781 F.2d 191, 195 (Fed. Cir 1986), modified on other grounds, 827 F.2d 761 (Fed Cir. 1987).

3.1 hours (10/6, 10/8/15) "Research, draft Post-Remand Memo": Mr. Schwartz claimed this time was spent researching and drafting a memorandum which the AJ assumes was the one filed on October 13, 2015. However, in her Order of September 11, 2015, the AJ advised the parties that she had been reassigned the matter and that she would need time to review the record in order to determine how to proceed. She directed the parties to use the intervening time to try to resolve the matter. She did not request that any submissions be filed, stating specifically, that she needed to review the record before deciding how to proceed. The submission was not relevant and was not considered. In addition, it included a request for additional fees, although the only fees considered on remand were those reviewed by Judge Lim. Mr. Schwartz subsequently withdrew the fee request, but even if he had not, it would not have been considered. In sum, the work was unnecessary and submitted despite the AJ's directive to await her instructions after she completed her review. For these reasons, the claim of 3.1 hours is denied.

3.9 hours (4/6-4/7/2016) "Research Legis. Hist:" Mr. Schwartz did not explain the legislative history he was researching, and why the research was necessary. Assuming the research was needed to prepare his April 25 submission, then it appears to be duplicative, since the submission below also claims time for research, and there was no evidence of extensive research. Counsel is required to explain what was researched and its relevance. For these reasons, the AJ concludes that he failed to meet his burden of production because he did not provide "reasonable evidence or documentation to support the number of hours expended" as required by DCMR, Title 6, Section 634.3. For these reasons, the claim for 3.9 hours is denied.

4.1 hours (4/23, 4/25/16) Research, draft submission: This submission focused on three issues: OEA's authority to award fees for work done before the Superior Court, Employee's status as prevailing party, and reasons that an award of fees was warranted in the interest of justice. However, as already discussed, the remand did not include additional fees, and the other two issues had already been resolved. Arguments regarding work performed before the Superior Court were irrelevant, since the remand did not include those fees. However, counsel did reference *Tenants of 710 Street N.W. v. District of Columbia Rental Housing Commission*, which was issued in August 2015. *Infra* at 5. The discussion of this decision was not the primary focus of the submission, and the AJ determines about no more than one-third of the total expended should be awarded for work that was relevant to this matter. For these reasons, she awards 1.4 hours.

2.4 hours (9/13/16) Research, draft Responses to ALJ Order: This submission was in response to the August 22, 2016 Order which directed the parties to "submit outlines" of the arguments that they would present at oral argument. The AJ finds that the submission was responsive, addressing the challenged items and summarizing the arguments counsel would raise. The AJ concludes that the claim for 2.4 hours should be awarded in full.

1.5 hours (9/21/16) prepare for, attend Hearing: The AJ finds that the time claimed to prepare for and attend the September 21, 2016 proceeding was reasonable. She concludes that the 1.5 hours sought should be awarded.

Based on this analysis, counsel will be compensated for 5.3 hours at an hourly rate of $568, for a total award of $3,010.40.[12]

ORDER

It is hereby

ORDERED: Agency pay Employee, within 45 calendar days from the date of issuance of this Addendum Decision, the sum of $3,010.40 for legal fees payable to Frederick Schwartz, Jr..

FOR THE OFFICE:

for Lois Hochhauser, Esq.
Administrative Judge

[12] The AJ will not reduce the award, since she "has discretion to make an equitable judgment as to what reduction is appropriate. *Hensley* at 436-37. The award "does not so shock the conscience" and any further reduction would not "fairly reflect [counsel's] "degree of success." *Rumsey* at 20.

CERTIFICATE OF SERVICE

I certify that the attached **CORRECTED ADDENDUM DECISIONON ATTORNEY FEES POST-REMAND** was sent by regular mail on this day to:

Robert Johnson
1826 4th Street NW
Washington, DC 20001

Andrea Comentale, Esq.
Section Chief
Personnel and Labor Relations Section
441 4th St., NW Suite 1180N
Washington, DC 20001

Frederic W. Schwartz, Esq.
1701 Pennsylvania Ave, NW
Suite 200
Washington, DC 20006

Katrina Hill
Clerk

November 6, 2017
Date

Superior Court of the District of Columbia
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000 Washington, D.C. 20001
Telephone: (202) 879-1133 Website: www.dccourts.gov

ROBERT JOHNSON
Plaintiff

vs.

Case Number _____

D.C. OFFICE OE EMPLOYEE APPEALS
Defendant

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve an Answer to the attached Complaint, either personally or through an attorney, within twenty one (21) days after service of this summons upon you, exclusive of the day of service. If you are being sued as an officer or agency of the United States Government or the District of Columbia Government, you have sixty (60) days after service of this summons to serve your Answer. A copy of the Answer must be mailed to the attorney for the plaintiff who is suing you. The attorney's name and address appear below. If plaintiff has no attorney, a copy of the Answer must be mailed to the plaintiff at the address stated on this Summons.

You are also required to file the original Answer with the Court in Suite 5000 at 500 Indiana Avenue, N.W., between 8:30 a.m. and 5:00 p.m., Mondays through Fridays or between 9:00 a.m. and 12:00 noon on Saturdays. You may file the original Answer with the Court either before you serve a copy of the Answer on the plaintiff or within seven (7) days after you have served the plaintiff. If you fail to file an Answer, judgment by default may be entered against you for the relief demanded in the complaint.

Frederic Schwartz
Name of Plaintiff's Attorney

1701 Pennsylvania Ave., NW., Suite 200 Washington, DC 20006
Address

202 463-0880
Telephone

Clerk of the Court

By _____
Deputy Clerk

Date _____

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IMPORTANT: IF YOU FAIL TO FILE AN ANSWER WITHIN THE TIME STATED ABOVE, OR IF, AFTER YOU ANSWER, YOU FAIL TO APPEAR AT ANY TIME THE COURT NOTIFIES YOU TO DO SO, A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY DAMAGES OR OTHER RELIEF DEMANDED IN THE COMPLAINT. IF THIS OCCURS, YOUR WAGES MAY BE ATTACHED OR WITHHELD OR PERSONAL PROPERTY OR REAL ESTATE YOU OWN MAY BE TAKEN AND SOLD TO PAY THE JUDGMENT. IF YOU INTEND TO OPPOSE THIS ACTION, *DO NOT FAIL TO ANSWER WITHIN THE REQUIRED TIME.*

If you wish to talk to a lawyer and feel that you cannot afford to pay a fee to a lawyer, promptly contact one of the offices of the Legal Aid Society (202-628-1161) or the Neighborhood Legal Services (202-279-5100) for help or come to Suite 5000 at 500 Indiana Avenue, N.W., for more information concerning places where you may ask for such help.

See reverse side for Spanish translation
Vea al dorso la traducción al español

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Sección de Acciones Civiles
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Teléfono: (202) 879-1133 Sitio web: www.dccourts.gov

_____
Demandante

contra

Número de Caso: _____

_____
Demandado

CITATORIO

Al susodicho Demandado:

Por la presente se le cita a comparecer y se le require entregar una Contestación a la Demanda adjunta, sea en persona o por medio de un abogado, en el plazo de veintiún (21) días contados después que usted haya recibido este citatorio, excluyendo el día mismo de la entrega del citatorio. Si usted está siendo demandado en calidad de oficial o agente del Gobierno de los Estados Unidos de Norteamérica o del Gobierno del Distrito de Columbia, tiene usted sesenta (60) días, contados después que usted haya recibido este citatorio, para entregar su Contestación. Tiene que enviarle por correo una copia de su Contestación al abogado de la parte demandante. El nombre y dirección del abogado aparecen al final de este documento. Si el demandado no tiene abogado, tiene que enviarle al demandante una copia de la Contestación por correo a la dirección que aparece en este Citatorio.

A usted también se le require presentar la Contestación original al Tribunal en la Oficina 5000, sito en 500 Indiana Avenue, N.W., entre las 8:30 a.m. y 5:00 p.m., de lunes a viernes o entre las 9:00 a.m. y las 12:00 del mediodía los sábados. Usted puede presentar la Contestación original ante el Juez ya sea antes que usted le entregue al demandante una copia de la Contestación o en el plazo de siete (7) días de haberle hecho la entrega al demandante. Si usted incumple con presentar una Contestación, podría dictarse un fallo en rebeldía contra usted para que se haga efectivo el desagravio que se busca en la demanda.

SECRETARIO DEL TRIBUNAL

_____
Nombre del abogado del Demandante

Por: _____
Subsecretario

_____
Dirección

_____

Fecha _____

_____
Teléfono

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IMPORTANTE: SI USTED INCUMPLE CON PRESENTAR UNA CONTESTACIÓN EN EL PLAZO ANTES MENCIONADO O, SI LUEGO DE CONTESTAR, USTED NO COMPARECE CUANDO LE AVISE EL JUZGADO, PODRÍA DICTARSE UN FALLO EN REBELDÍA CONTRA USTED PARA QUE SE LE COBRE LOS DAÑOS Y PERJUICIOS U OTRO DESAGRAVIO QUE SE BUSQUE EN LA DEMANDA. SI ESTO OCURRE, PODRÍA RETENÉRSELE SUS INGRESOS, O PODRÍA TOMÁRSELE SUS BIENES PERSONALES O BIENES RAÍCES Y SER VENDIDOS PARA PAGAR EL FALLO. SI USTED PRETENDE OPONERSE A ESTA ACCIÓN, *NO DEJE DE CONTESTAR LA DEMANDA DENTRO DEL PLAZO EXIGIDO*.

Si desea conversar con un abogado y le parece que no puede pagarle a uno, llame pronto a una de nuestras oficinas del Legal Aid Society (202-628-1161) o el Neighborhood Legal Services (202-279-5100) para pedir ayuda o venga a la Oficina 5000 del 500 Indiana Avenue, N.W., para informarse sobre otros lugares donde puede pedirayuda al respecto.

Vea al dorso el original en inglés
See reverse side for English original

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

ROBERT JOHNSON
c/o Frederic Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

Petitioner

v. : MPA. No.

D.C. OFFICE OF EMPLOYEE APPEALS, :
955 L'Enfant Plaza, SW
Suite 2500
Washington, DC 20024

Respondent

PETITION FOR REVIEW

Notice is hereby given that Robert Johnson appeals to the Superior Court of the District of Columbia from the Order of the Hon. Lois Hochhauser, Esq., Administrative Judge, D.C. Office of Employee Appeals (OEA) which became final on November 30, 2017. A copy of that Decision, which reduced the attorney fees due Mr. Johnson's attorney, is attached.

The Administrative Judge's determination is arbitrary, capricious, and in violation of law.

Consequently, the OEA determination must be reversed.

The address of the OEA is: 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024

The following party participated in the OEA proceeding, and is to be served along with the OEA General Counsel who is also listed:

Andrea Comentale, Esq., 441 4th St., NW, Suite 1180N, Washington, DC 20001.

General Counsel, OEA, 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024

Respectfully Submitted,

/s/ Frederic W. Schwartz, Jr.

Frederic W. Schwartz, Jr.
Law Office of Frederic W. Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ROBERT JOHNSON Employee	OEA Matter No. 1601-0016-A09R15A17
v.	Date of Issuance: November 6, 2017
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT Agency	Lois Hochhauser, Esq. Administrative Judge

Andrea Comantale, Esq., Agency Representative
Frederic Schwartz, Jr., Esq., Employee Representative

CORRECTED[1] ADDENDUM DECISION ON ATTORNEY FEES POST-REMAND

PROCEDURAL BACKGROUND AND CHRONOLOGY

Robert Johnson, Employee, filed a petition with the Office of Employee Appeals (OEA) on November 28, 2005, appealing the decision of the D.C. Fire and Emergency Medical Services Department, Agency, to suspend him for 20 days without pay. The matter was assigned to this Administrative Judge (AJ) on January 26, 2006. The parties were given an extensive period of time to negotiate a resolution, but were unsuccessful. The evidentiary hearing took place on June 2 and July 5, 2006.

In the *Initial Decision* (ID), issued on February 12, 2007, the AJ reversed the adverse action and directed Agency to restore to Employee all salary and benefits lost as a result of the suspension. Agency's petition for review was denied by this Board on May 6, 2009. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06, *Opinion and Order on Petition for Review* (May 6, 2009).

Frederic Schwartz, Jr., Esq. entered his appearance as Employee representative on or about November 22, 2006, replacing Clarissa Edwards, Esq., who had represented Employee until that

[1] The only correction to the October 26, 2017 *Decision*, is in the "Order" section on page 7, where the amount of the award was incorrect due to a typographical error. It was corrected and is now consistent with the sum stated in the line preceding the "Order" section. In addition, some superfluous language was deleted at the end of the "Order" section.

time. On June 1, 2009, Mr. Schwartz[2] filed a motion, seeking an award of $16,065.00 in legal fees based on 37.8 hours and an hourly rate of $425. Ms. Edwards subsequently moved for an award of fees. Agency filed objections only to Mr. Schwartz's request.

In October 2009, this matter was reassigned to Senior Administrative Judge Joseph Lim,[3] who considered the fee requests. On February 16, 2010,[4] Judge Lim issued an *Addendum Decision* in which he determined that Employee was the prevailing party and that an award of legal fees was in the interest of justice. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Addendum Decision on Attorney's Fees* (February 16, 2010). Judge Lim found that Mr. Schwartz merited the hourly rate of $425, then the maximum hourly rate on the Laffey Matrix,[5] and awarded to attorneys in practice for more than 31 years who had substantial expertise and experience. He also considered Mr. Schwartz's explanations of how his time was expended to be sufficient.

Judge Lim concluded, however, that Mr. Schwartz's claim of 37.8 hours was "excessive for the degree of difficulty and the amount of legal service time required," pointing out that an attorney awarded the highest hourly rate is presumed to have the "prior experience and expertise" in the area and should expend less time than an attorney with less experience and expertise. He noted that Mr. Schwartz had, "handled numerous appeals before [OEA]." Judge Lim explained that reached this decision by comparing Mr. Schwartz's request with requests filed with this Office by attorneys with "comparable experience" the degree of legal complexity presented in the matter, and also Judge Lim's "years of experience as a plaintiff's attorney." He reduced the hours to 12.1 hours, which resulted an award of $5,142.50 in fees.[6]

Mr. Schwartz filed a *Petition for Review* with the District of Columbia Superior Court on March 17, 2010, claiming that Judge Lim's decision should be reversed because counsel was entitled to the hour claimed and fees sought. He contended that the matter should be considered "under the more stringent *de novo* standard," arguing that he was entitled to a *de novo* review since Judge Lim had not presided over the evidentiary hearing and therefore was not in a position to decide on his fees. In his July 5, 2015 *Order*, the Honorable Erik Christian rejected counsel's arguments, concluding that counsel was not entitled to a *de novo* review. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, Case No. 2010 CA 001732 P(MPA (July 6, 2015). He determined that although Judge Lim did not preside over the evidentiary hearing, his decision was entitled to "deference," because OEA Judges are "in the best position to determine the reasonableness of the ... attorney hours spent on a case, not the reviewing Court."[7] Judge Christian

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[2] In this *Decision*, for the sake of clarity and expediency, the AJ will again digress from the protocol of identifying Employee as the party or movant, but rather will instead refer to Mr. Schwartz as the movant when referring to attorney fees matters. Unless otherwise stated, "counsel" and "attorney," refer to Mr. Schwartz.

[3] The reassignment was a result of this AJ's decision to recuse herself from all matters in which Agency was a party, following her appointment to chair a Board in which Agency participated.

[4] The *Corrected Addendum Decision* was issued on February 19, 2010. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Corrected Addendum Decision* (February 19, 2010).

[5] *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4(D.C. Cir. 1984), *cert den.* 472 U.S. 1021 (1985).

[6] Ms. Edwards also sought an award of attorney fees. Agency did not object to her request. Judge Lim approved the time and hourly rate sought, and awarded her the sum of $5,532.14, as requested.

[7] He noted, however, that "the presiding official ...is more intimately familiar with the circumstances of the appeal, and may be in the best position to determine the reasonableness of the attorney's fee request."

stated, however, that he could not review the matter because there was insufficient support provided for Judge Lim's decision. The Court remanded the matter to OEA for "the limited purpose" of obtaining "substantial evidence" from the AJ to support any reduction of time, stating that the record could be reopened if needed. He stated that the AJ could still conclude that the hours claimed by Mr. Schwartz were "unreasonable," and could leave the award unchanged.

This AJ was again available to hear this matter when it was remanded to this Office. Based in part on the Court's comment that the AJ who presided at the evidentiary hearing may be in the best position to rule on fee requests, and in part on other demands on Judge Lim's time, the remand was reassigned to her on August 12, 2015. By Order dated September 11, 2015, she advised the parties that the matter was reassigned to her and that she would need time to review the entire record in order to determine how to proceed. She directed the parties to use the intervening time to engage in settlement negotiations. Settlement efforts continued over an extended period of time, but proved unsuccessful; and oral argument was scheduled for September 21 2016.

At the September 21, 2016 proceeding, the parties presented oral argument. In addition, the AJ discussed a number of matters with the parties to ensure they were all in accord. Wither regard to the scope of her review, the AJ determined, and the parties agreed, that given the limited nature of the remand, she would abide by the decisions reached by Judge Lim, and accepted by Judge Christian, *i.e.*, that Employee was the prevailing party and was entitled to an award of attorney fees in the interest of justice, that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix, and that counsel's explanations of his work were sufficient.[8] She also determined, and the parties agreed, that her review was limited to the fees that were the subject of the remand.[9] Mr. Schwartz, who had filed additional fee requests, confirmed that he had withdrawn the request related to work performed before the D.C. Superior Court. He then withdrew the request for fees regarding legal work before OEA postdating the fees that were the subject of the remand. The AJ stated that Mr. Schwartz could file a request for an award for fees after this matter was concluded.

In the *Addendum Decision on Attorney Fees on Remand* (ADR), issued on October 26, 2016, this AJ, for reasons discussed in the ADR, did not award Mr. Schwartz the 37.8 hours claimed, but increased the time awarded from 12.1 to 27 hours. The fees awarded was not $16,512.05, as sought by Mr. Schwartz, but did increase from $5,142.50 as awarded by Judge Lim to $12,015, 00. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09R15, *Addendum Decision on Attorney's Fees on Remand* (February 16, 2010).

On December 22, 2016, Mr. Schwartz filed a motion for an award of fees, seeking $8,520.00 in fees based on 15 hours of legal work performed between October 6, 2015 and September 21, 2016, at an hourly rate of $568.00. Agency filed objections on January 21, 2017. The matter was referred, with the consent of the parties, to mediation in March 2017. When mediation proved unsuccessful, the AJ issued an Order, directing the parties to advise her by July 11, 2017, if they wanted to present oral argument and/or file supplemental pleadings on the matter; and that if they did not, the record would close. Both parties responded in the negative to both options, and the record closed on July 11, 2017

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[8] The AJ informed the parties that although she might not agree with all of the determinations, she was bound by them, since, given of the limited nature of the remand, they were not subject to review.

[9] The AJ determined, and the parties agreed, that she could review the entire fee request, not just the time reduced since the hours claimed for work performed on one day might relate to a claim on another day.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.08 (2001).

ISSUES

Is Mr. Schwartz entitled to an award of fees? If so, what is the appropriate amount?

ANALYSIS, FINDINGS AND CONCLUSIONS

The decisions made by Judge Lim and accepted by Judge Christian, *i.e.*, that Employee was the prevailing party in the matter before OEA, that an award of legal fees was in the interest of justice, and that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix were not part of the Court's remand and were not reviewed. Agency did not object to the hourly rate sought by Mr. Schwartz of $568.00, which represents the highest rate on the Laffey Matrix for work performed in 2015 and 2016. Mr. Schwartz is awarded the hourly rate of $568.00.

Agency argued that since Mr. Schwartz did not receive the full relief sought before Judge Christian or this AJ, he cannot be considered the prevailing party. Mr. Schwartz disagreed, citing *Settlemire v. District of Columbia*, 898 A2d 902 (D.C. 2006), and *Buchkannon Bd. and Care Home v. West Virginia Department of Health & Human Res.* 532 U.S. 598 (3002), for the proposition that he is entitled to "prevailing party" status since he was successful in some of his arguments.

Judge Christian did not reverse Judge Lim's decision. He denied counsel the *de novo* review that he sought and rejected his argument that Judge Lim could not award fees. The Court stated that Judge Lim's decision was entitled to "deference." Judge Christian ordered a limited remand, directing only that sufficient reasons be given by the AJ to support his decisions to enable the Court to conduct its review. Indeed, the Court stated that the AJ could reach the same decision and leave the fee award unchanged.[10] If Judge Lim had heard the matter on remand, he could have provided the additional explanations sought by the Court, left the award unchanged. However, this AJ could not provide the rationale for another AJ's decisions, and had to undertake her own assessment. Although this resulted in an increased award, this certainly did mean that this AJ determined the remanded award was incorrect. A third AJ could reach yet another decision, since fee awards are not based on a mathematical formula. AJs must adhere to guidance and standards articulated in such cases as *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission*, 123 A.3d 170 (2015), there is still adequate room for different results, since the decisions reflect the experience and expertise of the individual AJ.[11]

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[10] Counsel's contention that Judge Lim could not assess fees because he had not presided over the hearing was unconvincing for an additional reason. Mr. Schwartz entered his appearance after the evidentiary hearing, but was responsible for the closing brief. He claimed that he was able to thoroughly familiarize himself with the record and prepare the brief in about 12 hours. Since Mr. Schwartz was able to fully familiarize himself with the underlying record and legal issues, which in this matter was neither complex nor lengthy, it is difficult to understand why he was certain that Judge Lim, who has decades of experience and expertise in this area and is a respected Senior Administrative Judge, having presided over countless evidentiary hearings and fee petitions during his tenure at OEA, would be unable to achieve the same result.

[11] The AJ will not review her experience and expertise in analyzing fee requests since she did so in the ADR.

A separate analysis regarding a claim for the award of attorney fees is required when the "degree of success...obtained on [an] attorney fee motion is not the same as the degree of success...obtained on the underlying appeal." *Guy v. Department of Army*, 2012 MSPB 54 (2012). In this matter, Employee was successful in his appeal, and was awarded all of the relief sought, in the *Initial Decision.* As noted above, Mr. Schwartz did not achieve the same level of success either before Judge Christian or before this AJ. He did, however, achieve "a significant part" of the relief sought in both matters, and is therefore entitled to an award of fees. After completing this "separate analysis" the AJ can either reduce the amount of the award by the number of issues on which counsel did not prevail; or can award the amount she considers to be a "fair result," without reducing the award based on the number of issues on which the claimant was not successful, in whole or in part. *Farrar v. Hobby*, 113 S. Ct. 566 (1973). The AJ has chosen this second option.

The determination of the reasonableness of fees is a balancing act. Although the movant is not required to detail the precise time spent on a matter or even the precise activity, the attorney must provide sufficient detail to allow an informed assessment to be made. In *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983), the Supreme Court directed attorneys to exercise "billing judgment" and stated that fees would not be awarded for time found to be "excessive, redundant or otherwise unnecessary." *See also, Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985). In addition, the Laffey Matrix increases the hourly rate awarded based on the attorney's experience and expertise based on the assumption it will take that attorney less time to complete a task than the attorney with less expertise and experience, who is awarded a lower hourly rate.

In *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission,* 123 A.3d 170 (2015), the District of Columbia Court of Appeals articulated the standard of determining reasonableness of fees, citing a long line of cases beginning with *Hensley*, and including *Hampton Court,* 599 A.2d, 1116 and *Copeland v. Marshall,* 641 F2d 880 (D.D.Cir. 1980). The movant has the burden of establishing the reasonableness of the fees sought, and must submit evidence supporting the claim of hours worked, and excluding unnecessary time... *Casali v. Department of Treasury*, 81 MSPR 237 (1999). The AJ must identify hours that were rejected and "articulate the reasons for their elimination. *Rumsey, v. Department of Justice*, 2016 MSPB 28 (2016). The "application must be sufficiently detailed to permit the [AJ] to make an independent determination whether or not the hours claimed are justified, but also, that "it was not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted." *Copeland*, 63 F.2d at 891.

D.C. Municipal Regulations, Title 6, Section 634.3, places the burden of production on the claimant, who must "submit reasonable evidence or documentation to support the number of hours expended by the attorney on the appeal." During oral argument, the AJ reviewed Mr. Schwartz's fee request with him, explaining why she did not consider it adequate, and advising him of the additional information that would be required if he filed another fee. Despite her directive, the fee request now under consideration mirrored the prior submission, lacking sufficient information. The AJ offered counsel the opportunity to supplement his submission either in writing or at oral argument, but counsel declined both options. *Rumsey v. Department of Justice*, 2016 MSPB 28 (2016). Therefore, the AJ based on her decision on the request which is presented *verbatim* below:

Date	Activity	Hours
10/6, 10/8/2015	Research, draft Post-Remand Memo	3.1
4/6-7/2016	Research Legis. Hist.	3.9
4/23, 4/25/16	Research, draft submission	4.1
9/13/16	Research, draft Responses to ALJ Order	2.4
9/21/16	Prepare for, attend Hearing	1.5

Agency argued that Mr. Schwartz should not be compensated for work related to his Superior Court appeal, since that fee request was withdrawn, and that some of the time claimed "was unreasonable due to their length and [the] fact that they were unnecessary." Finally it contended that the 2.4 hours billed by Mr. Schwartz on September 13, 2016 was "unnecessary and therefore unreasonable," since he submitted "a 14 page document with factual and procedural information despite the fact" that he was only asked to submit the August 22 Order to which he was responding only directed the parties to "outlines of their arguments." Mr. Schwartz maintained that the research and drafting of his October 23 submission was necessary, since "a full review of recent cases in the area especially *Tenants of 701 Jefferson Street, NW v. District of Columbia*" was required.

In reviewing the fee request, the AJ assessed whether counsel met the burden of establishing that the hours claimed were reasonable and whether the work performed was necessary. DCMR, Title 6, Section 634.3 requires attorneys seeking fees to submit "reasonable evidence or documentation to support the number of hours expended." *See, e.g., Hampton Courts Tenants Association v. D.C. Rental Housing Commission*, 599 A.2d 1113 (D.C. 1991). An AJ must "identify" hours that were reduced based on inadequate documentation, and "articulate the reasons for their elimination." *Crumbaker v. Merit Systems Protection Board*, 781 F.2d 191, 195 (Fed. Cir 1986), modified on other grounds, 827 F.2d 761 (Fed Cir. 1987).

3.1 hours (10/6, 10/8/15) "Research, draft Post-Remand Memo": Mr. Schwartz claimed this time was spent researching and drafting a memorandum which the AJ assumes was the one filed on October 13, 2015. However, in her Order of September 11, 2015, the AJ advised the parties that she had been reassigned the matter and that she would need time to review the record in order to determine how to proceed. She directed the parties to use the intervening time to try to resolve the matter. She did not request that any submissions be filed, stating specifically, that she needed to review the record before deciding how to proceed. The submission was not relevant and was not considered. In addition, it included a request for additional fees, although the only fees considered on remand were those reviewed by Judge Lim. Mr. Schwartz subsequently withdrew the fee request, but even if he had not, it would not have been considered. In sum, the work was unnecessary and submitted despite the AJ's directive to await her instructions after she completed her review. For these reasons, the claim of 3.1 hours is denied.

3.9 hours (4/6-4/7/2016) "Research Legis. Hist:" Mr. Schwartz did not explain the legislative history he was researching, and why the research was necessary. Assuming the research was needed to prepare his April 25 submission, then it appears to be duplicative, since the submission below also claims time for research, and there was no evidence of extensive research. Counsel is required to explain what was researched and its relevance. For these reasons, the AJ concludes that he failed to meet his burden of production because he did not provide "reasonable evidence or documentation to support the number of hours expended" as required by DCMR, Title 6, Section 634.3. For these reasons, the claim for 3.9 hours is denied.

4.1 hours (4/23, 4/25/16) Research, draft submission: This submission focused on three issues: OEA's authority to award fees for work done before the Superior Court, Employee's status as prevailing party, and reasons that an award of fees was warranted in the interest of justice. However, as already discussed, the remand did not include additional fees, and the other two issues had already been resolved. Arguments regarding work performed before the Superior Court were irrelevant, since the remand did not include those fees. However, counsel did reference *Tenants of 710 Street N.W. v. District of Columbia Rental Housing Commission*, which was issued in August 2015. *Infra* at 5. The discussion of this decision was not the primary focus of the submission, and the AJ determines about no more than one-third of the total expended should be awarded for work that was relevant to this matter. For these reasons, she awards 1.4 hours.

2.4 hours (9/13/16) Research, draft Responses to ALJ Order: This submission was in response to the August 22, 2016 Order which directed the parties to "submit outlines" of the arguments that they would present at oral argument. The AJ finds that the submission was responsive, addressing the challenged items and summarizing the arguments counsel would raise. The AJ concludes that the claim for 2.4 hours should be awarded in full.

1.5 hours (9/21/16) prepare for, attend Hearing: The AJ finds that the time claimed to prepare for and attend the September 21, 2016 proceeding was reasonable. She concludes that the 1.5 hours sought should be awarded.

Based on this analysis, counsel will be compensated for 5.3 hours at an hourly rate of $568, for a total award of $3,010.40.[12]

ORDER

It is hereby

ORDERED: Agency pay Employee, within 45 calendar days from the date of issuance of this Addendum Decision, the sum of $3,010.40 for legal fees payable to Frederick Schwartz, Jr..

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge

[12] The AJ will not reduce the award, since she "has discretion to make an equitable judgment as to what reduction is appropriate. *Hensley* at 436-37. The award "does not so shock the conscience" and any further reduction would not "fairly reflect [counsel's] "degree of success." *Rumsey* at 20.

CERTIFICATE OF SERVICE

I certify that the attached **CORRECTED ADDENDUM DECISIONON ATTORNEY FEES POST-REMAND** was sent by regular mail on this day to:

Robert Johnson
1826 4th Street NW
Washington, DC 20001

Andrea Comentale, Esq.
Section Chief
Personnel and Labor Relations Section
441 4th St., NW Suite 1180N
Washington, DC 20001

Frederic W. Schwartz, Esq.
1701 Pennsylvania Ave, NW
Suite 200
Washington, DC 20006

Katrina Hill
Clerk

November 6, 2017
Date

Superior Court of the District of Columbia
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000 Washington, D.C. 20001
Telephone: (202) 879-1133 Website: www.dccourts.gov

ROBERT JOHNSON
Plaintiff

vs.

Case Number _____

D.C. OFFICE OE EMPLOYEE APPEALS
Defendant

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve an Answer to the attached Complaint, either personally or through an attorney, within twenty one (21) days after service of this summons upon you, exclusive of the day of service. If you are being sued as an officer or agency of the United States Government or the District of Columbia Government, you have sixty (60) days after service of this summons to serve your Answer. A copy of the Answer must be mailed to the attorney for the plaintiff who is suing you. The attorney's name and address appear below. If plaintiff has no attorney, a copy of the Answer must be mailed to the plaintiff at the address stated on this Summons.

You are also required to file the original Answer with the Court in Suite 5000 at 500 Indiana Avenue, N.W., between 8:30 a.m. and 5:00 p.m., Mondays through Fridays or between 9:00 a.m. and 12:00 noon on Saturdays. You may file the original Answer with the Court either before you serve a copy of the Answer on the plaintiff or within seven (7) days after you have served the plaintiff. If you fail to file an Answer, judgment by default may be entered against you for the relief demanded in the complaint.

Frederic Schwartz
Name of Plaintiff's Attorney

1701 Pennsylvania Ave., NW., Suite 200 Washington, DC 20006
Address

202 463-0880
Telephone

Clerk of the Court

By _____
Deputy Clerk

Date _____

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IMPORTANT: IF YOU FAIL TO FILE AN ANSWER WITHIN THE TIME STATED ABOVE, OR IF, AFTER YOU ANSWER, YOU FAIL TO APPEAR AT ANY TIME THE COURT NOTIFIES YOU TO DO SO, A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY DAMAGES OR OTHER RELIEF DEMANDED IN THE COMPLAINT. IF THIS OCCURS, YOUR WAGES MAY BE ATTACHED OR WITHHELD OR PERSONAL PROPERTY OR REAL ESTATE YOU OWN MAY BE TAKEN AND SOLD TO PAY THE JUDGMENT. IF YOU INTEND TO OPPOSE THIS ACTION, *DO NOT FAIL TO ANSWER WITHIN THE REQUIRED TIME.*

If you wish to talk to a lawyer and feel that you cannot afford to pay a fee to a lawyer, promptly contact one of the offices of the Legal Aid Society (202-628-1161) or the Neighborhood Legal Services (202-279-5100) for help or come to Suite 5000 at 500 Indiana Avenue, N.W., for more information concerning places where you may ask for such help.

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Teléfono: (202) 879-1133 Sitio web: www.dccourts.gov

_____
Demandante

contra

Número de Caso: _____

_____
Demandado

CITATORIO

Al susodicho Demandado:

Por la presente se le cita a comparecer y se le require entregar una Contestación a la Demanda adjunta, sea en persona o por medio de un abogado, en el plazo de veintiún (21) días contados después que usted haya recibido este citatorio, excluyendo el día mismo de la entrega del citatorio. Si usted está siendo demandado en calidad de oficial o agente del Gobierno de los Estados Unidos de Norteamérica o del Gobierno del Distrito de Columbia, tiene usted sesenta (60) días, contados después que usted haya recibido este citatorio, para entregar su Contestación. Tiene que enviarle por correo una copia de su Contestación al abogado de la parte demandante. El nombre y dirección del abogado aparecen al final de este documento. Si el demandado no tiene abogado, tiene que enviarle al demandante una copia de la Contestación por correo a la dirección que aparece en este Citatorio.

A usted también se le require presentar la Contestación original al Tribunal en la Oficina 5000, sito en 500 Indiana Avenue, N.W., entre las 8:30 a.m. y 5:00 p.m., de lunes a viernes o entre las 9:00 a.m. y las 12:00 del mediodía los sábados. Usted puede presentar la Contestación original ante el Juez ya sea antes que usted le entregue al demandante una copia de la Contestación o en el plazo de siete (7) días de haberle hecho la entrega al demandante. Si usted incumple con presentar una Contestación, podría dictarse un fallo en rebeldía contra usted para que se haga efectivo el desagravio que se busca en la demanda.

SECRETARIO DEL TRIBUNAL

_____
Nombre del abogado del Demandante

Por: _____
Subsecretario

_____
Dirección

_____

Fecha _____

_____
Teléfono

如需翻译,请打电话 (202) 879-4828 Veuillez appeler au (202) 879-4828 pour une traduction Để có một bản dịch, hãy gọi (202) 879-4828
[illegible](202) 879-4828 የአማርኛ ትርጉም ለማግኘት (202) 879-4828 ይደውሉ

IMPORTANTE: SI USTED INCUMPLE CON PRESENTAR UNA CONTESTACIÓN EN EL PLAZO ANTES MENCIONADO O, SI LUEGO DE CONTESTAR, USTED NO COMPARECE CUANDO LE AVISE EL JUZGADO, PODRÍA DICTARSE UN FALLO EN REBELDÍA CONTRA USTED PARA QUE SE LE COBRE LOS DAÑOS Y PERJUICIOS U OTRO DESAGRAVIO QUE SE BUSQUE EN LA DEMANDA. SI ESTO OCURRE, PODRÍA RETENÉRSELE SUS INGRESOS, O PODRÍA TOMÁRSELE SUS BIENES PERSONALES O BIENES RAÍCES Y SER VENDIDOS PARA PAGAR EL FALLO. SI USTED PRETENDE OPONERSE A ESTA ACCIÓN, *NO DEJE DE CONTESTAR LA DEMANDA DENTRO DEL PLAZO EXIGIDO*.

Si desea conversar con un abogado y le parece que no puede pagarle a uno, llame pronto a una de nuestras oficinas del Legal Aid Society (202-628-1161) o el Neighborhood Legal Services (202-279-5100) para pedir ayuda o venga a la Oficina 5000 del 500 Indiana Avenue, N.W., para informarse sobre otros lugares donde puede pedirayuda al respecto.

Vea al dorso el original en inglés
See reverse side for English original

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

ROBERT JOHNSON
c/o Frederic Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

Petitioner

v. : MPA. No.

D.C. OFFICE OF EMPLOYEE APPEALS, :
955 L'Enfant Plaza, SW
Suite 2500
Washington, DC 20024

Respondent

PETITION FOR REVIEW

Notice is hereby given that Robert Johnson appeals to the Superior Court of the District of Columbia from the Order of the Hon. Lois Hochhauser, Esq., Administrative Judge, D.C. Office of Employee Appeals (OEA) which became final on November 30, 2017. A copy of that Decision, which reduced the attorney fees due Mr. Johnson's attorney, is attached.

The Administrative Judge's determination is arbitrary, capricious, and in violation of law.

Consequently, the OEA determination must be reversed.

The address of the OEA is: 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024

The following party participated in the OEA proceeding, and is to be served along with the OEA General Counsel who is also listed:

Andrea Comentale, Esq., 441 4th St., NW, Suite 1180N, Washington, DC 20001.

General Counsel, OEA, 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024

Respectfully Submitted,

/s/ Frederic W. Schwartz, Jr.

Frederic W. Schwartz, Jr.
Law Office of Frederic W. Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ROBERT JOHNSON Employee	OEA Matter No. 1601-0016-A09R15A17
v.	Date of Issuance: November 6, 2017
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT Agency	Lois Hochhauser, Esq. Administrative Judge

Andrea Comantale, Esq., Agency Representative
Frederic Schwartz, Jr., Esq., Employee Representative

CORRECTED[1] ADDENDUM DECISION ON ATTORNEY FEES POST-REMAND

PROCEDURAL BACKGROUND AND CHRONOLOGY

Robert Johnson, Employee, filed a petition with the Office of Employee Appeals (OEA) on November 28, 2005, appealing the decision of the D.C. Fire and Emergency Medical Services Department, Agency, to suspend him for 20 days without pay. The matter was assigned to this Administrative Judge (AJ) on January 26, 2006. The parties were given an extensive period of time to negotiate a resolution, but were unsuccessful. The evidentiary hearing took place on June 2 and July 5, 2006.

In the *Initial Decision* (ID), issued on February 12, 2007, the AJ reversed the adverse action and directed Agency to restore to Employee all salary and benefits lost as a result of the suspension. Agency's petition for review was denied by this Board on May 6, 2009. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06, *Opinion and Order on Petition for Review* (May 6, 2009).

Frederic Schwartz, Jr., Esq. entered his appearance as Employee representative on or about November 22, 2006, replacing Clarissa Edwards, Esq., who had represented Employee until that

[1] The only correction to the October 26, 2017 *Decision*, is in the "Order" section on page 7, where the amount of the award was incorrect due to a typographical error. It was corrected and is now consistent with the sum stated in the line preceding the "Order" section. In addition, some superfluous language was deleted at the end of the "Order" section.

time. On June 1, 2009, Mr. Schwartz[2] filed a motion, seeking an award of $16,065.00 in legal fees based on 37.8 hours and an hourly rate of $425. Ms. Edwards subsequently moved for an award of fees. Agency filed objections only to Mr. Schwartz's request.

In October 2009, this matter was reassigned to Senior Administrative Judge Joseph Lim,[3] who considered the fee requests. On February 16, 2010,[4] Judge Lim issued an *Addendum Decision* in which he determined that Employee was the prevailing party and that an award of legal fees was in the interest of justice. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Addendum Decision on Attorney's Fees* (February 16, 2010). Judge Lim found that Mr. Schwartz merited the hourly rate of $425, then the maximum hourly rate on the Laffey Matrix,[5] and awarded to attorneys in practice for more than 31 years who had substantial expertise and experience. He also considered Mr. Schwartz's explanations of how his time was expended to be sufficient.

Judge Lim concluded, however, that Mr. Schwartz's claim of 37.8 hours was "excessive for the degree of difficulty and the amount of legal service time required," pointing out that an attorney awarded the highest hourly rate is presumed to have the "prior experience and expertise" in the area and should expend less time than an attorney with less experience and expertise. He noted that Mr. Schwartz had, "handled numerous appeals before [OEA]." Judge Lim explained that reached this decision by comparing Mr. Schwartz's request with requests filed with this Office by attorneys with "comparable experience" the degree of legal complexity presented in the matter, and also Judge Lim's "years of experience as a plaintiff's attorney." He reduced the hours to 12.1 hours, which resulted an award of $5,142.50 in fees.[6]

Mr. Schwartz filed a *Petition for Review* with the District of Columbia Superior Court on March 17, 2010, claiming that Judge Lim's decision should be reversed because counsel was entitled to the hour claimed and fees sought. He contended that the matter should be considered "under the more stringent *de novo* standard," arguing that he was entitled to a *de novo* review since Judge Lim had not presided over the evidentiary hearing and therefore was not in a position to decide on his fees. In his July 5, 2015 *Order*, the Honorable Erik Christian rejected counsel's arguments, concluding that counsel was not entitled to a *de novo* review. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, Case No. 2010 CA 001732 P(MPA (July 6, 2015). He determined that although Judge Lim did not preside over the evidentiary hearing, his decision was entitled to "deference," because OEA Judges are "in the best position to determine the reasonableness of the ... attorney hours spent on a case, not the reviewing Court."[7] Judge Christian

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[2] In this *Decision*, for the sake of clarity and expediency, the AJ will again digress from the protocol of identifying Employee as the party or movant, but rather will instead refer to Mr. Schwartz as the movant when referring to attorney fees matters. Unless otherwise stated, "counsel" and "attorney," refer to Mr. Schwartz.

[3] The reassignment was a result of this AJ's decision to recuse herself from all matters in which Agency was a party, following her appointment to chair a Board in which Agency participated.

[4] The *Corrected Addendum Decision* was issued on February 19, 2010. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Corrected Addendum Decision* (February 19, 2010).

[5] *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4(D.C. Cir. 1984), *cert den.* 472 U.S. 1021 (1985).

[6] Ms. Edwards also sought an award of attorney fees. Agency did not object to her request. Judge Lim approved the time and hourly rate sought, and awarded her the sum of $5,532.14, as requested.

[7] He noted, however, that "the presiding official ...is more intimately familiar with the circumstances of the appeal, and may be in the best position to determine the reasonableness of the attorney's fee request."

stated, however, that he could not review the matter because there was insufficient support provided for Judge Lim's decision. The Court remanded the matter to OEA for "the limited purpose" of obtaining "substantial evidence" from the AJ to support any reduction of time, stating that the record could be reopened if needed. He stated that the AJ could still conclude that the hours claimed by Mr. Schwartz were "unreasonable," and could leave the award unchanged.

This AJ was again available to hear this matter when it was remanded to this Office. Based in part on the Court's comment that the AJ who presided at the evidentiary hearing may be in the best position to rule on fee requests, and in part on other demands on Judge Lim's time, the remand was reassigned to her on August 12, 2015. By Order dated September 11, 2015, she advised the parties that the matter was reassigned to her and that she would need time to review the entire record in order to determine how to proceed. She directed the parties to use the intervening time to engage in settlement negotiations. Settlement efforts continued over an extended period of time, but proved unsuccessful; and oral argument was scheduled for September 21 2016.

At the September 21, 2016 proceeding, the parties presented oral argument. In addition, the AJ discussed a number of matters with the parties to ensure they were all in accord. Wither regard to the scope of her review, the AJ determined, and the parties agreed, that given the limited nature of the remand, she would abide by the decisions reached by Judge Lim, and accepted by Judge Christian, *i.e.,* that Employee was the prevailing party and was entitled to an award of attorney fees in the interest of justice, that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix, and that counsel's explanations of his work were sufficient.[8] She also determined, and the parties agreed, that her review was limited to the fees that were the subject of the remand.[9] Mr. Schwartz, who had filed additional fee requests, confirmed that he had withdrawn the request related to work performed before the D.C. Superior Court. He then withdrew the request for fees regarding legal work before OEA postdating the fees that were the subject of the remand. The AJ stated that Mr. Schwartz could file a request for an award for fees after this matter was concluded.

In the *Addendum Decision on Attorney Fees on Remand* (ADR), issued on October 26, 2016, this AJ, for reasons discussed in the ADR, did not award Mr. Schwartz the 37.8 hours claimed, but increased the time awarded from 12.1 to 27 hours. The fees awarded was not $16,512.05, as sought by Mr. Schwartz, but did increase from $5,142.50 as awarded by Judge Lim to $12,015, 00. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09R15, *Addendum Decision on Attorney's Fees on Remand* (February 16, 2010).

On December 22, 2016, Mr. Schwartz filed a motion for an award of fees, seeking $8,520.00 in fees based on 15 hours of legal work performed between October 6, 2015 and September 21, 2016, at an hourly rate of $568.00. Agency filed objections on January 21, 2017. The matter was referred, with the consent of the parties, to mediation in March 2017. When mediation proved unsuccessful, the AJ issued an Order, directing the parties to advise her by July 11, 2017, if they wanted to present oral argument and/or file supplemental pleadings on the matter; and that if they did not, the record would close. Both parties responded in the negative to both options, and the record closed on July 11, 2017

[8] The AJ informed the parties that although she might not agree with all of the determinations, she was bound by them, since, given of the limited nature of the remand, they were not subject to review.
[9] The AJ determined, and the parties agreed, that she could review the entire fee request, not just the time reduced since the hours claimed for work performed on one day might relate to a claim on another day.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.08 (2001).

ISSUES

Is Mr. Schwartz entitled to an award of fees? If so, what is the appropriate amount?

ANALYSIS, FINDINGS AND CONCLUSIONS

The decisions made by Judge Lim and accepted by Judge Christian, *i.e.*, that Employee was the prevailing party in the matter before OEA, that an award of legal fees was in the interest of justice, and that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix were not part of the Court's remand and were not reviewed. Agency did not object to the hourly rate sought by Mr. Schwartz of $568.00, which represents the highest rate on the Laffey Matrix for work performed in 2015 and 2016. Mr. Schwartz is awarded the hourly rate of $568.00.

Agency argued that since Mr. Schwartz did not receive the full relief sought before Judge Christian or this AJ, he cannot be considered the prevailing party. Mr. Schwartz disagreed, citing *Settlemire v. District of Columbia*, 898 A2d 902 (D.C. 2006), and *Buchkannon Bd. and Care Home v. West Virginia Department of Health & Human Res.* 532 U.S. 598 (3002), for the proposition that he is entitled to "prevailing party" status since he was successful in some of his arguments.

Judge Christian did not reverse Judge Lim's decision. He denied counsel the *de novo* review that he sought and rejected his argument that Judge Lim could not award fees. The Court stated that Judge Lim's decision was entitled to "deference." Judge Christian ordered a limited remand, directing only that sufficient reasons be given by the AJ to support his decisions to enable the Court to conduct its review. Indeed, the Court stated that the AJ could reach the same decision and leave the fee award unchanged.[10] If Judge Lim had heard the matter on remand, he could have provided the additional explanations sought by the Court, left the award unchanged. However, this AJ could not provide the rationale for another AJ's decisions, and had to undertake her own assessment. Although this resulted in an increased award, this certainly did mean that this AJ determined the remanded award was incorrect. A third AJ could reach yet another decision, since fee awards are not based on a mathematical formula. AJs must adhere to guidance and standards articulated in such cases as *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission*, 123 A.3d 170 (2015), there is still adequate room for different results, since the decisions reflect the experience and expertise of the individual AJ.[11]

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[10] Counsel's contention that Judge Lim could not assess fees because he had not presided over the hearing was unconvincing for an additional reason. Mr. Schwartz entered his appearance after the evidentiary hearing, but was responsible for the closing brief. He claimed that he was able to thoroughly familiarize himself with the record and prepare the brief in about 12 hours. Since Mr. Schwartz was able to fully familiarize himself with the underlying record and legal issues, which in this matter was neither complex nor lengthy, it is difficult to understand why he was certain that Judge Lim, who has decades of experience and expertise in this area and is a respected Senior Administrative Judge, having presided over countless evidentiary hearings and fee petitions during his tenure at OEA, would be unable to achieve the same result.

[11] The AJ will not review her experience and expertise in analyzing fee requests since she did so in the ADR.

A separate analysis regarding a claim for the award of attorney fees is required when the "degree of success...obtained on [an] attorney fee motion is not the same as the degree of success...obtained on the underlying appeal." *Guy v. Department of Army*, 2012 MSPB 54 (2012). In this matter, Employee was successful in his appeal, and was awarded all of the relief sought, in the *Initial Decision.* As noted above, Mr. Schwartz did not achieve the same level of success either before Judge Christian or before this AJ. He did, however, achieve "a significant part" of the relief sought in both matters, and is therefore entitled to an award of fees. After completing this "separate analysis" the AJ can either reduce the amount of the award by the number of issues on which counsel did not prevail; or can award the amount she considers to be a "fair result," without reducing the award based on the number of issues on which the claimant was not successful, in whole or in part. *Farrar v. Hobby*, 113 S. Ct. 566 (1973). The AJ has chosen this second option.

The determination of the reasonableness of fees is a balancing act. Although the movant is not required to detail the precise time spent on a matter or even the precise activity, the attorney must provide sufficient detail to allow an informed assessment to be made. In *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983), the Supreme Court directed attorneys to exercise "billing judgment" and stated that fees would not be awarded for time found to be "excessive, redundant or otherwise unnecessary." *See also, Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985). In addition, the Laffey Matrix increases the hourly rate awarded based on the attorney's experience and expertise based on the assumption it will take that attorney less time to complete a task than the attorney with less expertise and experience, who is awarded a lower hourly rate.

In *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission,* 123 A.3d 170 (2015), the District of Columbia Court of Appeals articulated the standard of determining reasonableness of fees, citing a long line of cases beginning with *Hensley*, and including *Hampton Court,* 599 A.2d, 1116 and *Copeland v. Marshall,* 641 F2d 880 (D.D.Cir. 1980). The movant has the burden of establishing the reasonableness of the fees sought, and must submit evidence supporting the claim of hours worked, and excluding unnecessary time... *Casali v. Department of Treasury*, 81 MSPR 237 (1999). The AJ must identify hours that were rejected and "articulate the reasons for their elimination. *Rumsey, v. Department of Justice*, 2016 MSPB 28 (2016). The "application must be sufficiently detailed to permit the [AJ] to make an independent determination whether or not the hours claimed are justified, but also, that "it was not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted." *Copeland*, 63 F.2d at 891.

D.C. Municipal Regulations, Title 6, Section 634.3, places the burden of production on the claimant, who must "submit reasonable evidence or documentation to support the number of hours expended by the attorney on the appeal." During oral argument, the AJ reviewed Mr. Schwartz's fee request with him, explaining why she did not consider it adequate, and advising him of the additional information that would be required if he filed another fee. Despite her directive, the fee request now under consideration mirrored the prior submission, lacking sufficient information. The AJ offered counsel the opportunity to supplement his submission either in writing or at oral argument, but counsel declined both options. *Rumsey v. Department of Justice*, 2016 MSPB 28 (2016). Therefore, the AJ based on her decision on the request which is presented *verbatim* below:

Date	Activity	Hours
10/6, 10/8/2015	Research, draft Post-Remand Memo	3.1
4/6-7/2016	Research Legis. Hist.	3.9
4/23, 4/25/16	Research, draft submission	4.1
9/13/16	Research, draft Responses to ALJ Order	2.4
9/21/16	Prepare for, attend Hearing	1.5

Agency argued that Mr. Schwartz should not be compensated for work related to his Superior Court appeal, since that fee request was withdrawn, and that some of the time claimed "was unreasonable due to their length and [the] fact that they were unnecessary." Finally it contended that the 2.4 hours billed by Mr. Schwartz on September 13, 2016 was "unnecessary and therefore unreasonable," since he submitted "a 14 page document with factual and procedural information despite the fact" that he was only asked to submit the August 22 Order to which he was responding only directed the parties to "outlines of their arguments." Mr. Schwartz maintained that the research and drafting of his October 23 submission was necessary, since "a full review of recent cases in the area especially *Tenants of 701 Jefferson Street, NW v. District of Columbia"* was required.

In reviewing the fee request, the AJ assessed whether counsel met the burden of establishing that the hours claimed were reasonable and whether the work performed was necessary. DCMR, Title 6, Section 634.3 requires attorneys seeking fees to submit "reasonable evidence or documentation to support the number of hours expended." *See, e.g., Hampton Courts Tenants Association v. D.C. Rental Housing Commission*, 599 A.2d 1113 (D.C. 1991). An AJ must "identify" hours that were reduced based on inadequate documentation, and "articulate the reasons for their elimination." *Crumbaker v. Merit Systems Protection Board*, 781 F.2d 191, 195 (Fed. Cir 1986), modified on other grounds, 827 F.2d 761 (Fed Cir. 1987).

3.1 hours (10/6, 10/8/15) "Research, draft Post-Remand Memo": Mr. Schwartz claimed this time was spent researching and drafting a memorandum which the AJ assumes was the one filed on October 13, 2015. However, in her Order of September 11, 2015, the AJ advised the parties that she had been reassigned the matter and that she would need time to review the record in order to determine how to proceed. She directed the parties to use the intervening time to try to resolve the matter. She did not request that any submissions be filed, stating specifically, that she needed to review the record before deciding how to proceed. The submission was not relevant and was not considered. In addition, it included a request for additional fees, although the only fees considered on remand were those reviewed by Judge Lim. Mr. Schwartz subsequently withdrew the fee request, but even if he had not, it would not have been considered. In sum, the work was unnecessary and submitted despite the AJ's directive to await her instructions after she completed her review. For these reasons, the claim of 3.1 hours is denied.

3.9 hours (4/6-4/7/2016) "Research Legis. Hist:" Mr. Schwartz did not explain the legislative history he was researching, and why the research was necessary. Assuming the research was needed to prepare his April 25 submission, then it appears to be duplicative, since the submission below also claims time for research, and there was no evidence of extensive research. Counsel is required to explain what was researched and its relevance. For these reasons, the AJ concludes that he failed to meet his burden of production because he did not provide "reasonable evidence or documentation to support the number of hours expended" as required by DCMR, Title 6, Section 634.3. For these reasons, the claim for 3.9 hours is denied.

4.1 hours (4/23, 4/25/16) Research, draft submission: This submission focused on three issues: OEA's authority to award fees for work done before the Superior Court, Employee's status as prevailing party, and reasons that an award of fees was warranted in the interest of justice. However, as already discussed, the remand did not include additional fees, and the other two issues had already been resolved. Arguments regarding work performed before the Superior Court were irrelevant, since the remand did not include those fees. However, counsel did reference *Tenants of 710 Street N.W. v. District of Columbia Rental Housing Commission*, which was issued in August 2015. *Infra* at 5. The discussion of this decision was not the primary focus of the submission, and the AJ determines about no more than one-third of the total expended should be awarded for work that was relevant to this matter. For these reasons, she awards 1.4 hours.

2.4 hours (9/13/16) Research, draft Responses to ALJ Order: This submission was in response to the August 22, 2016 Order which directed the parties to "submit outlines" of the arguments that they would present at oral argument. The AJ finds that the submission was responsive, addressing the challenged items and summarizing the arguments counsel would raise. The AJ concludes that the claim for 2.4 hours should be awarded in full.

1.5 hours (9/21/16) prepare for, attend Hearing: The AJ finds that the time claimed to prepare for and attend the September 21, 2016 proceeding was reasonable. She concludes that the 1.5 hours sought should be awarded.

Based on this analysis, counsel will be compensated for 5.3 hours at an hourly rate of $568, for a total award of $3,010.40.[12]

ORDER

It is hereby

ORDERED: Agency pay Employee, within 45 calendar days from the date of issuance of this Addendum Decision, the sum of $3,010.40 for legal fees payable to Frederick Schwartz, Jr..

FOR THE OFFICE:

for Lois Hochhauser, Esq.
Administrative Judge

[12] The AJ will not reduce the award, since she "has discretion to make an equitable judgment as to what reduction is appropriate. *Hensley* at 436-37. The award "does not so shock the conscience" and any further reduction would not "fairly reflect [counsel's] "degree of success." *Rumsey* at 20.

CERTIFICATE OF SERVICE

I certify that the attached **CORRECTED ADDENDUM DECISIONON ATTORNEY FEES POST-REMAND** was sent by regular mail on this day to:

Robert Johnson
1826 4th Street NW
Washington, DC 20001

Andrea Comentale, Esq.
Section Chief
Personnel and Labor Relations Section
441 4th St., NW Suite 1180N
Washington, DC 20001

Frederic W. Schwartz, Esq.
1701 Pennsylvania Ave, NW
Suite 200
Washington, DC 20006

Katrina Hill
Clerk

November 6, 2017
Date

Superior Court of the District of Columbia

CIVIL DIVISION- CIVIL ACTIONS BRANCH

INFORMATION SHEET

ROBERT JOHNSON

vs

D.C. OFFICE OF EMPLOYEE APPEALS

jCase Number: 2017 CA 008080 P(MPA)

Date: 12/1/2017

☐ One of the defendants is being sued in their official capacity.

Name: *(Please Print)* FREDERIC W. SCHWARTZ, JR.	Relationship to Lawsuit
Firm Name: LAW OFFICE OF FREDERIC SCHWARTZ JR.	☒ Attorney for Plaintiff
Telephone No.: 202 463-0880 Six digit Unified Bar No.: 997137	☐ Self (Pro Se)
	☐ Other:

TYPE OF CASE: (Non-Jury) 6 Person Jury 12 Person Jury

Demand: $ Other:

PENDING CASE(S) RELATED TO THE ACTION BEING FILED

Case No.: _____ Judge: _____ Calendar #:

Case No.: _____ Judge: _____ Calendar#:

NATURE OF SUIT: *(Check One Box Only)*

A. CONTRACTS

01 Breach of Contract
02 Breach of Warranty
06 Negotiable Instrument
07 Personal Property
13 Employment Discrimination
15 Special Education Fees

COLLECTION CASES

14 Under $25,000 Pltf. Grants Consent
17 OVER $25,000 Pltf. Grants Consent
27 Insurance/Subrogation Over $25,000 Pltf. Grants Consent
07 Insurance/Subrogation Under $25,000 Pltf. Grants Consent
28 Motion to Confirm Arbitration Award (Collection Cases Only)

16 Under $25,000 Consent Denied
18 OVER $25,000 Consent Denied
26 Insurance/Subrogation Over $25,000 Consent Denied
34 Insurance/Subrogation Under $25,000 Consent Denied

B. PROPERTY TORTS

01 Automobile
02 Conversion
Damage 07 Shoplifting, D.C. Code § 27-102 (a)
03 Destruction of Private Property
04 Property
05 Trespass

SEE REVERSE SIDE AND CHECK HERE IF USED

Information Sheet, Continued

C. OTHERS

- ☐ 01 Accounting
- ☐ 02 Att. Before Judgment
- ☐ 05 Ejectment
- ☐ 09 Special Writ/Warrants (DC Code § 11-941)
- ☐ 10 Traffic Adjudication
- ☐ 11 Writ of Replevin
- ☐ 12 Enforce Mechanics Lien
- ☐ 16 Declaratory Judgment
- ☐ 17 Merit Personnel Act (OEA) (D.C. Code Title 1, Chapter 6)
- 18 Product Liability
- 24 Application to Confirm, Modify, Vacate Arbitration Award (DC Code § 16-4401)
- 29 Merit Personnel Act (OHR)
- 31 Housing Code Regulations
- 32 Qui Tam
- ☐ 33 Whistleblower

II.

- ☐ 03 Change of Name
- ☐ 06 Foreign Judgment/Domestic
- ☐ 08 Foreign Judgment/International
- ☐ 13 Correction of Birth Certificate
- ☐ 14 Correction of Marriage Certificate
- 15 Libel of Information
- 19 Enter Administrative Order as Judgment [D.C. Code § 2-1802.03 (h) or 32-151 9 (a)]
- 20 Master Meter (D.C. Code § 42-3301, et seq.)
- 21 Petition for Subpoena [Rule 28-I (b)]
- 22 Release Mechanics Lien
- 23 Rule 27(a)(1) (Perpetuate Testimony)
- 24 Petition for Structured Settlement
- 25 Petition for Liquidation
- ☐ 26 Petition for Civil Asset Forfeiture (Vehicle)
- ☐ 27 Petition for Civil Asset Forfeiture (Currency)
- ☐ 28 Petition for Civil Asset Forfeiture (Other)

D. REAL PROPERTY

- ☐ 09 Real Property-Real Estate
- ☐ 12 Specific Performance
- ☐ 04 Condemnation (Eminent Domain)
- ☐ 10 Mortgage Foreclosure/Judicial Sale
- ☐ 11 Petition for Civil Asset Forfeiture (RP)
- 08 Quiet Title
- 25 Liens: Tax / Water Consent Granted
- 30 Liens: Tax / Water Consent Denied
- 31 Tax Lien Bid Off Certificate Consent Granted

Attorney's Signature

12/1/2017
Date

Superior Court of the District of Columbia
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000 Washington, D.C. 20001
Telephone: (202) 879-1133 Website: www.dccourts.gov

ROBERT JOHNSON
Plaintiff

vs.

Case Number 2017 CA 008080 P(MPA

D.C. OFFICE OE EMPLOYEE APPEALS
Defendant

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve an Answer to the attached Complaint, either personally or through an attorney, within twenty one (21) days after service of this summons upon you, exclusive of the day of service. If you are being sued as an officer or agency of the United States Government or the District of Columbia Government, you have sixty (60) days after service of this summons to serve your Answer. A copy of the Answer must be mailed to the attorney for the plaintiff who is suing you. The attorney's name and address appear below. If plaintiff has no attorney, a copy of the Answer must be mailed to the plaintiff at the address stated on this Summons.

You are also required to file the original Answer with the Court in Suite 5000 at 500 Indiana Avenue, N.W., between 8:30 a.m. and 5:00 p.m., Mondays through Fridays or between 9:00 a.m. and 12:00 noon on Saturdays. You may file the original Answer with the Court either before you serve a copy of the Answer on the plaintiff or within seven (7) days after you have served the plaintiff. If you fail to file an Answer, judgment by default may be entered against you for the relief demanded in the complaint.

Frederic Schwartz
Name of Plaintiff's Attorney

1701 Pennsylvania Ave., NW., Suite 200 Washington, DC 20006
Address

202 463-0880
Telephone

Clerk of the Court

By _____
Deputy Clerk

Date 12/06/2017

如需翻译,请打电话 (202) 879-4828 Veuillez appeler au (202) 879-4828 pour une traduction Để có một bài dịch, hãy gọi (202) 879-4828
번역을 원하시면, (202) 879-4828로 전화주십시요 የአማርኛ ትርጉም ለማግኘት (202) 879-4828 ይደውሉ

IMPORTANT: IF YOU FAIL TO FILE AN ANSWER WITHIN THE TIME STATED ABOVE, OR IF, AFTER YOU ANSWER, YOU FAIL TO APPEAR AT ANY TIME THE COURT NOTIFIES YOU TO DO SO, A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY DAMAGES OR OTHER RELIEF DEMANDED IN THE COMPLAINT. IF THIS OCCURS, YOUR WAGES MAY BE ATTACHED OR WITHHELD OR PERSONAL PROPERTY OR REAL ESTATE YOU OWN MAY BE TAKEN AND SOLD TO PAY THE JUDGMENT. IF YOU INTEND TO OPPOSE THIS ACTION, *DO NOT FAIL TO ANSWER WITHIN THE REQUIRED TIME.*

If you wish to talk to a lawyer and feel that you cannot afford to pay a fee to a lawyer, promptly contact one of the offices of the Legal Aid Society (202-628-1161) or the Neighborhood Legal Services (202-279-5100) for help or come to Suite 5000 at 500 Indiana Avenue, N.W., for more information concerning places where you may ask for such help.

See reverse side for Spanish translation
Vea al dorso la traducción al español

TRIBUNAL SUPERIOR DEL DISTRITO DE COLUMBIA
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Sección de Acciones Civiles
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Teléfono: (202) 879-1133 Sitio web: www.dccourts.gov

_____
Demandante

contra

Número de Caso: _____

_____
Demandado

CITATORIO

Al susodicho Demandado:

Por la presente se le cita a comparecer y se le require entregar una Contestación a la Demanda adjunta, sea en persona o por medio de un abogado, en el plazo de veintiún (21) días contados después que usted haya recibido este citatorio, excluyendo el día mismo de la entrega del citatorio. Si usted está siendo demandado en calidad de oficial o agente del Gobierno de los Estados Unidos de Norteamérica o del Gobierno del Distrito de Columbia, tiene usted sesenta (60) días, contados después que usted haya recibido este citatorio, para entregar su Contestación. Tiene que enviarle por correo una copia de su Contestación al abogado de la parte demandante. El nombre y dirección del abogado aparecen al final de este documento. Si el demandado no tiene abogado, tiene que enviarle al demandante una copia de la Contestación por correo a la dirección que aparece en este Citatorio.

A usted también se le require presentar la Contestación original al Tribunal en la Oficina 5000, sito en 500 Indiana Avenue, N.W., entre las 8:30 a.m. y 5:00 p.m., de lunes a viernes o entre las 9:00 a.m. y las 12:00 del mediodía los sábados. Usted puede presentar la Contestación original ante el Juez ya sea antes que usted le entregue al demandante una copia de la Contestación o en el plazo de siete (7) días de haberle hecho la entrega al demandante. Si usted incumple con presentar una Contestación, podría dictarse un fallo en rebeldía contra usted para que se haga efectivo el desagravio que se busca en la demanda.

SECRETARIO DEL TRIBUNAL

_____
Nombre del abogado del Demandante

Por: _____
Subsecretario

_____
Dirección

_____

Fecha _____

_____
Teléfono

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IMPORTANTE: SI USTED INCUMPLE CON PRESENTAR UNA CONTESTACIÓN EN EL PLAZO ANTES MENCIONADO O, SI LUEGO DE CONTESTAR, USTED NO COMPARECE CUANDO LE AVISE EL JUZGADO, PODRÍA DICTARSE UN FALLO EN REBELDÍA CONTRA USTED PARA QUE SE LE COBRE LOS DAÑOS Y PERJUICIOS U OTRO DESAGRAVIO QUE SE BUSQUE EN LA DEMANDA. SI ESTO OCURRE, PODRÍA RETENÉRSELE SUS INGRESOS, O PODRÍA TOMÁRSELE SUS BIENES PERSONALES O BIENES RAÍCES Y SER VENDIDOS PARA PAGAR EL FALLO. SI USTED PRETENDE OPONERSE A ESTA ACCIÓN, *NO DEJE DE CONTESTAR LA DEMANDA DENTRO DEL PLAZO EXIGIDO*.

Si desea conversar con un abogado y le parece que no puede pagarle a uno, llame pronto a una de nuestras oficinas del Legal Aid Society (202-628-1161) o el Neighborhood Legal Services (202-279-5100) para pedir ayuda o venga a la Oficina 5000 del 500 Indiana Avenue, N.W., para informarse sobre otros lugares donde puede pedirayuda al respecto.

Vea al dorso el original en inglés
See reverse side for English original

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

ROBERT JOHNSON
c/o Frederic Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

Petitioner

2017 CA 008080 P(MPA)

v. : MPA. No.

D.C. OFFICE OF EMPLOYEE APPEALS, :
955 L'Enfant Plaza, SW
Suite 2500
Washington, DC 20024

Respondent

PETITION FOR REVIEW

Notice is hereby given that Robert Johnson appeals to the Superior Court of the District of Columbia from the Order of the Hon. Lois Hochhauser, Esq., Administrative Judge, D.C. Office of Employee Appeals (OEA) which became final on November 30, 2017. A copy of that Decision, which reduced the attorney fees due Mr. Johnson's attorney, is attached.

The Administrative Judge's determination is arbitrary, capricious, and in violation of law.

Consequently, the OEA determination must be reversed.

The address of the OEA is: 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024

The following party participated in the OEA proceeding, and is to be served along with the OEA General Counsel who is also listed:

Andrea Comentale, Esq., 441 4th St., NW, Suite 1180N, Washington, DC 20001.

General Counsel, OEA, 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024

Respectfully Submitted,

/s/ Frederic W. Schwartz, Jr.

Frederic W. Schwartz, Jr.
Law Office of Frederic W. Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ROBERT JOHNSON Employee	OEA Matter No. 1601-0016-A09R15A17
v.	Date of Issuance: November 6, 2017
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT Agency	Lois Hochhauser, Esq. Administrative Judge

Andrea Comantale, Esq., Agency Representative
Frederic Schwartz, Jr., Esq., Employee Representative

CORRECTED[1] ADDENDUM DECISION ON ATTORNEY FEES POST-REMAND

PROCEDURAL BACKGROUND AND CHRONOLOGY

Robert Johnson, Employee, filed a petition with the Office of Employee Appeals (OEA) on November 28, 2005, appealing the decision of the D.C. Fire and Emergency Medical Services Department, Agency, to suspend him for 20 days without pay. The matter was assigned to this Administrative Judge (AJ) on January 26, 2006. The parties were given an extensive period of time to negotiate a resolution, but were unsuccessful. The evidentiary hearing took place on June 2 and July 5, 2006.

In the *Initial Decision* (ID), issued on February 12, 2007, the AJ reversed the adverse action and directed Agency to restore to Employee all salary and benefits lost as a result of the suspension. Agency's petition for review was denied by this Board on May 6, 2009. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06, *Opinion and Order on Petition for Review* (May 6, 2009).

Frederic Schwartz, Jr., Esq. entered his appearance as Employee representative on or about November 22, 2006, replacing Clarissa Edwards, Esq., who had represented Employee until that

[1] The only correction to the October 26, 2017 *Decision*, is in the "Order" section on page 7, where the amount of the award was incorrect due to a typographical error. It was corrected and is now consistent with the sum stated in the line preceding the "Order" section. In addition, some superfluous language was deleted at the end of the "Order" section.

time. On June 1, 2009, Mr. Schwartz[2] filed a motion, seeking an award of $16,065.00 in legal fees based on 37.8 hours and an hourly rate of $425. Ms. Edwards subsequently moved for an award of fees. Agency filed objections only to Mr. Schwartz's request.

In October 2009, this matter was reassigned to Senior Administrative Judge Joseph Lim,[3] who considered the fee requests. On February 16, 2010,[4] Judge Lim issued an *Addendum Decision* in which he determined that Employee was the prevailing party and that an award of legal fees was in the interest of justice. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Addendum Decision on Attorney's Fees* (February 16, 2010). Judge Lim found that Mr. Schwartz merited the hourly rate of $425, then the maximum hourly rate on the Laffey Matrix,[5] and awarded to attorneys in practice for more than 31 years who had substantial expertise and experience. He also considered Mr. Schwartz's explanations of how his time was expended to be sufficient.

Judge Lim concluded, however, that Mr. Schwartz's claim of 37.8 hours was "excessive for the degree of difficulty and the amount of legal service time required," pointing out that an attorney awarded the highest hourly rate is presumed to have the "prior experience and expertise" in the area and should expend less time than an attorney with less experience and expertise. He noted that Mr. Schwartz had, "handled numerous appeals before [OEA]." Judge Lim explained that reached this decision by comparing Mr. Schwartz's request with requests filed with this Office by attorneys with "comparable experience" the degree of legal complexity presented in the matter, and also Judge Lim's "years of experience as a plaintiff's attorney." He reduced the hours to 12.1 hours, which resulted an award of $5,142.50 in fees.[6]

Mr. Schwartz filed a *Petition for Review* with the District of Columbia Superior Court on March 17, 2010, claiming that Judge Lim's decision should be reversed because counsel was entitled to the hour claimed and fees sought. He contended that the matter should be considered "under the more stringent *de novo* standard," arguing that he was entitled to a *de novo* review since Judge Lim had not presided over the evidentiary hearing and therefore was not in a position to decide on his fees. In his July 5, 2015 *Order*, the Honorable Erik Christian rejected counsel's arguments, concluding that counsel was not entitled to a *de novo* review. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, Case No. 2010 CA 001732 P(MPA (July 6, 2015). He determined that although Judge Lim did not preside over the evidentiary hearing, his decision was entitled to "deference," because OEA Judges are "in the best position to determine the reasonableness of the ... attorney hours spent on a case, not the reviewing Court."[7] Judge Christian

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[2] In this *Decision*, for the sake of clarity and expediency, the AJ will again digress from the protocol of identifying Employee as the party or movant, but rather will instead refer to Mr. Schwartz as the movant when referring to attorney fees matters. Unless otherwise stated, "counsel" and "attorney," refer to Mr. Schwartz.

[3] The reassignment was a result of this AJ's decision to recuse herself from all matters in which Agency was a party, following her appointment to chair a Board in which Agency participated.

[4] The *Corrected Addendum Decision* was issued on February 19, 2010. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Corrected Addendum Decision* (February 19, 2010).

[5] *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4(D.C. Cir. 1984), *cert den.* 472 U.S. 1021 (1985).

[6] Ms. Edwards also sought an award of attorney fees. Agency did not object to her request. Judge Lim approved the time and hourly rate sought, and awarded her the sum of $5,532.14, as requested.

[7] He noted, however, that "the presiding official ...is more intimately familiar with the circumstances of the appeal, and may be in the best position to determine the reasonableness of the attorney's fee request."

stated, however, that he could not review the matter because there was insufficient support provided for Judge Lim's decision. The Court remanded the matter to OEA for "the limited purpose" of obtaining "substantial evidence" from the AJ to support any reduction of time, stating that the record could be reopened if needed. He stated that the AJ could still conclude that the hours claimed by Mr. Schwartz were "unreasonable," and could leave the award unchanged.

This AJ was again available to hear this matter when it was remanded to this Office. Based in part on the Court's comment that the AJ who presided at the evidentiary hearing may be in the best position to rule on fee requests, and in part on other demands on Judge Lim's time, the remand was reassigned to her on August 12, 2015. By Order dated September 11, 2015, she advised the parties that the matter was reassigned to her and that she would need time to review the entire record in order to determine how to proceed. She directed the parties to use the intervening time to engage in settlement negotiations. Settlement efforts continued over an extended period of time, but proved unsuccessful; and oral argument was scheduled for September 21 2016.

At the September 21, 2016 proceeding, the parties presented oral argument. In addition, the AJ discussed a number of matters with the parties to ensure they were all in accord. Wither regard to the scope of her review, the AJ determined, and the parties agreed, that given the limited nature of the remand, she would abide by the decisions reached by Judge Lim, and accepted by Judge Christian, *i.e.,* that Employee was the prevailing party and was entitled to an award of attorney fees in the interest of justice, that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix, and that counsel's explanations of his work were sufficient.[8] She also determined, and the parties agreed, that her review was limited to the fees that were the subject of the remand.[9] Mr. Schwartz, who had filed additional fee requests, confirmed that he had withdrawn the request related to work performed before the D.C. Superior Court. He then withdrew the request for fees regarding legal work before OEA postdating the fees that were the subject of the remand. The AJ stated that Mr. Schwartz could file a request for an award for fees after this matter was concluded.

In the *Addendum Decision on Attorney Fees on Remand* (ADR), issued on October 26, 2016, this AJ, for reasons discussed in the ADR, did not award Mr. Schwartz the 37.8 hours claimed, but increased the time awarded from 12.1 to 27 hours. The fees awarded was not $16,512.05, as sought by Mr. Schwartz, but did increase from $5,142.50 as awarded by Judge Lim to $12,015, 00. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09R15, *Addendum Decision on Attorney's Fees on Remand* (February 16, 2010).

On December 22, 2016, Mr. Schwartz filed a motion for an award of fees, seeking $8,520.00 in fees based on 15 hours of legal work performed between October 6, 2015 and September 21, 2016, at an hourly rate of $568.00. Agency filed objections on January 21, 2017. The matter was referred, with the consent of the parties, to mediation in March 2017. When mediation proved unsuccessful, the AJ issued an Order, directing the parties to advise her by July 11, 2017, if they wanted to present oral argument and/or file supplemental pleadings on the matter; and that if they did not, the record would close. Both parties responded in the negative to both options, and the record closed on July 11, 2017

[8] The AJ informed the parties that although she might not agree with all of the determinations, she was bound by them, since, given of the limited nature of the remand, they were not subject to review.
[9] The AJ determined, and the parties agreed, that she could review the entire fee request, not just the time reduced since the hours claimed for work performed on one day might relate to a claim on another day.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.08 (2001).

ISSUES

Is Mr. Schwartz entitled to an award of fees? If so, what is the appropriate amount?

ANALYSIS, FINDINGS AND CONCLUSIONS

The decisions made by Judge Lim and accepted by Judge Christian, *i.e.*, that Employee was the prevailing party in the matter before OEA, that an award of legal fees was in the interest of justice, and that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix were not part of the Court's remand and were not reviewed. Agency did not object to the hourly rate sought by Mr. Schwartz of $568.00, which represents the highest rate on the Laffey Matrix for work performed in 2015 and 2016. Mr. Schwartz is awarded the hourly rate of $568.00.

Agency argued that since Mr. Schwartz did not receive the full relief sought before Judge Christian or this AJ, he cannot be considered the prevailing party. Mr. Schwartz disagreed, citing *Settlemire v. District of Columbia*, 898 A2d 902 (D.C. 2006), and *Buchkannon Bd. and Care Home v. West Virginia Department of Health & Human Res.* 532 U.S. 598 (3002), for the proposition that he is entitled to "prevailing party" status since he was successful in some of his arguments.

Judge Christian did not reverse Judge Lim's decision. He denied counsel the *de novo* review that he sought and rejected his argument that Judge Lim could not award fees. The Court stated that Judge Lim's decision was entitled to "deference." Judge Christian ordered a limited remand, directing only that sufficient reasons be given by the AJ to support his decisions to enable the Court to conduct its review. Indeed, the Court stated that the AJ could reach the same decision and leave the fee award unchanged.[10] If Judge Lim had heard the matter on remand, he could have provided the additional explanations sought by the Court, left the award unchanged. However, this AJ could not provide the rationale for another AJ's decisions, and had to undertake her own assessment. Although this resulted in an increased award, this certainly did mean that this AJ determined the remanded award was incorrect. A third AJ could reach yet another decision, since fee awards are not based on a mathematical formula. AJs must adhere to guidance and standards articulated in such cases as *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission*, 123 A.3d 170 (2015), there is still adequate room for different results, since the decisions reflect the experience and expertise of the individual AJ.[11]

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[10] Counsel's contention that Judge Lim could not assess fees because he had not presided over the hearing was unconvincing for an additional reason. Mr. Schwartz entered his appearance after the evidentiary hearing, but was responsible for the closing brief. He claimed that he was able to thoroughly familiarize himself with the record and prepare the brief in about 12 hours. Since Mr. Schwartz was able to fully familiarize himself with the underlying record and legal issues, which in this matter was neither complex nor lengthy, it is difficult to understand why he was certain that Judge Lim, who has decades of experience and expertise in this area and is a respected Senior Administrative Judge, having presided over countless evidentiary hearings and fee petitions during his tenure at OEA, would be unable to achieve the same result.

[11] The AJ will not review her experience and expertise in analyzing fee requests since she did so in the ADR.

A separate analysis regarding a claim for the award of attorney fees is required when the "degree of success...obtained on [an] attorney fee motion is not the same as the degree of success...obtained on the underlying appeal." *Guy v. Department of Army*, 2012 MSPB 54 (2012). In this matter, Employee was successful in his appeal, and was awarded all of the relief sought, in the *Initial Decision.* As noted above, Mr. Schwartz did not achieve the same level of success either before Judge Christian or before this AJ. He did, however, achieve "a significant part" of the relief sought in both matters, and is therefore entitled to an award of fees. After completing this "separate analysis" the AJ can either reduce the amount of the award by the number of issues on which counsel did not prevail; or can award the amount she considers to be a "fair result," without reducing the award based on the number of issues on which the claimant was not successful, in whole or in part. *Farrar v. Hobby*, 113 S. Ct. 566 (1973). The AJ has chosen this second option.

The determination of the reasonableness of fees is a balancing act. Although the movant is not required to detail the precise time spent on a matter or even the precise activity, the attorney must provide sufficient detail to allow an informed assessment to be made. In *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), the Supreme Court directed attorneys to exercise "billing judgment" and stated that fees would not be awarded for time found to be "excessive, redundant or otherwise unnecessary." *See also, Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985). In addition, the Laffey Matrix increases the hourly rate awarded based on the attorney's experience and expertise based on the assumption it will take that attorney less time to complete a task than the attorney with less expertise and experience, who is awarded a lower hourly rate.

In *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission*, 123 A.3d 170 (2015), the District of Columbia Court of Appeals articulated the standard of determining reasonableness of fees, citing a long line of cases beginning with *Hensley*, and including *Hampton Court*, 599 A.2d, 1116 and *Copeland v. Marshall*, 641 F2d 880 (D.D.Cir. 1980). The movant has the burden of establishing the reasonableness of the fees sought, and must submit evidence supporting the claim of hours worked, and excluding unnecessary time... *Casali v. Department of Treasury*, 81 MSPR 237 (1999). The AJ must identify hours that were rejected and "articulate the reasons for their elimination. *Rumsey, v. Department of Justice*, 2016 MSPB 28 (2016). The "application must be sufficiently detailed to permit the [AJ] to make an independent determination whether or not the hours claimed are justified, but also, that "it was not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted." *Copeland*, 63 F.2d at 891.

D.C. Municipal Regulations, Title 6, Section 634.3, places the burden of production on the claimant, who must "submit reasonable evidence or documentation to support the number of hours expended by the attorney on the appeal." During oral argument, the AJ reviewed Mr. Schwartz's fee request with him, explaining why she did not consider it adequate, and advising him of the additional information that would be required if he filed another fee. Despite her directive, the fee request now under consideration mirrored the prior submission, lacking sufficient information. The AJ offered counsel the opportunity to supplement his submission either in writing or at oral argument, but counsel declined both options. *Rumsey v. Department of Justice*, 2016 MSPB 28 (2016). Therefore, the AJ based on her decision on the request which is presented *verbatim* below:

Date	Activity	Hours
10/6, 10/8/2015	Research, draft Post-Remand Memo	3.1
4/6-7/2016	Research Legis. Hist.	3.9
4/23, 4/25/16	Research, draft submission	4.1
9/13/16	Research, draft Responses to ALJ Order	2.4
9/21/16	Prepare for, attend Hearing	1.5

Agency argued that Mr. Schwartz should not be compensated for work related to his Superior Court appeal, since that fee request was withdrawn, and that some of the time claimed "was unreasonable due to their length and [the] fact that they were unnecessary." Finally it contended that the 2.4 hours billed by Mr. Schwartz on September 13, 2016 was "unnecessary and therefore unreasonable," since he submitted "a 14 page document with factual and procedural information despite the fact" that he was only asked to submit the August 22 Order to which he was responding only directed the parties to "outlines of their arguments." Mr. Schwartz maintained that the research and drafting of his October 23 submission was necessary, since "a full review of recent cases in the area especially *Tenants of 701 Jefferson Street, NW v. District of Columbia"* was required.

In reviewing the fee request, the AJ assessed whether counsel met the burden of establishing that the hours claimed were reasonable and whether the work performed was necessary. DCMR, Title 6, Section 634.3 requires attorneys seeking fees to submit "reasonable evidence or documentation to support the number of hours expended." *See, e.g., Hampton Courts Tenants Association v. D.C. Rental Housing Commission*, 599 A.2d 1113 (D.C. 1991). An AJ must "identify" hours that were reduced based on inadequate documentation, and "articulate the reasons for their elimination." *Crumbaker v. Merit Systems Protection Board*, 781 F.2d 191, 195 (Fed. Cir 1986), modified on other grounds, 827 F.2d 761 (Fed Cir. 1987).

3.1 hours (10/6, 10/8/15) "Research, draft Post-Remand Memo": Mr. Schwartz claimed this time was spent researching and drafting a memorandum which the AJ assumes was the one filed on October 13, 2015. However, in her Order of September 11, 2015, the AJ advised the parties that she had been reassigned the matter and that she would need time to review the record in order to determine how to proceed. She directed the parties to use the intervening time to try to resolve the matter. She did not request that any submissions be filed, stating specifically, that she needed to review the record before deciding how to proceed. The submission was not relevant and was not considered. In addition, it included a request for additional fees, although the only fees considered on remand were those reviewed by Judge Lim. Mr. Schwartz subsequently withdrew the fee request, but even if he had not, it would not have been considered. In sum, the work was unnecessary and submitted despite the AJ's directive to await her instructions after she completed her review. For these reasons, the claim of 3.1 hours is denied.

3.9 hours (4/6-4/7/2016) "Research Legis. Hist:" Mr. Schwartz did not explain the legislative history he was researching, and why the research was necessary. Assuming the research was needed to prepare his April 25 submission, then it appears to be duplicative, since the submission below also claims time for research, and there was no evidence of extensive research. Counsel is required to explain what was researched and its relevance. For these reasons, the AJ concludes that he failed to meet his burden of production because he did not provide "reasonable evidence or documentation to support the number of hours expended" as required by DCMR, Title 6, Section 634.3. For these reasons, the claim for 3.9 hours is denied.

4.1 hours (4/23, 4/25/16) Research, draft submission: This submission focused on three issues: OEA's authority to award fees for work done before the Superior Court, Employee's status as prevailing party, and reasons that an award of fees was warranted in the interest of justice. However, as already discussed, the remand did not include additional fees, and the other two issues had already been resolved. Arguments regarding work performed before the Superior Court were irrelevant, since the remand did not include those fees. However, counsel did reference *Tenants of 710 Street N.W. v. District of Columbia Rental Housing Commission*, which was issued in August 2015. *Infra* at 5. The discussion of this decision was not the primary focus of the submission, and the AJ determines about no more than one-third of the total expended should be awarded for work that was relevant to this matter. For these reasons, she awards 1.4 hours.

2.4 hours (9/13/16) Research, draft Responses to ALJ Order: This submission was in response to the August 22, 2016 Order which directed the parties to "submit outlines" of the arguments that they would present at oral argument. The AJ finds that the submission was responsive, addressing the challenged items and summarizing the arguments counsel would raise. The AJ concludes that the claim for 2.4 hours should be awarded in full.

1.5 hours (9/21/16) prepare for, attend Hearing: The AJ finds that the time claimed to prepare for and attend the September 21, 2016 proceeding was reasonable. She concludes that the 1.5 hours sought should be awarded.

Based on this analysis, counsel will be compensated for 5.3 hours at an hourly rate of $568, for a total award of $3,010.40.[12]

ORDER

It is hereby

ORDERED: Agency pay Employee, within 45 calendar days from the date of issuance of this Addendum Decision, the sum of $3,010.40 for legal fees payable to Frederick Schwartz, Jr..

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge

[12] The AJ will not reduce the award, since she "has discretion to make an equitable judgment as to what reduction is appropriate. *Hensley* at 436-37. The award "does not so shock the conscience" and any further reduction would not "fairly reflect [counsel's] "degree of success." *Rumsey* at 20.

CERTIFICATE OF SERVICE

I certify that the attached **CORRECTED ADDENDUM DECISIONON ATTORNEY FEES POST-REMAND** was sent by regular mail on this day to:

Robert Johnson
1826 4th Street NW
Washington, DC 20001

Andrea Comentale, Esq.
Section Chief
Personnel and Labor Relations Section
441 4th St., NW Suite 1180N
Washington, DC 20001

Frederic W. Schwartz, Esq.
1701 Pennsylvania Ave, NW
Suite 200
Washington, DC 20006

Katrina Hill
Clerk

November 6, 2017
Date

Superior Court of the District of Columbia
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000 Washington, D.C. 20001
Telephone: (202) 879-1133 Website: www.dccourts.gov

ROBERT JOHNSON
Plaintiff

vs.

Case Number 2017 CA 008080 P(MPA

D.C. OFFICE OE EMPLOYEE APPEALS
Defendant

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve an Answer to the attached Complaint, either personally or through an attorney, within twenty one (21) days after service of this summons upon you, exclusive of the day of service. If you are being sued as an officer or agency of the United States Government or the District of Columbia Government, you have sixty (60) days after service of this summons to serve your Answer. A copy of the Answer must be mailed to the attorney for the plaintiff who is suing you. The attorney's name and address appear below. If plaintiff has no attorney, a copy of the Answer must be mailed to the plaintiff at the address stated on this Summons.

You are also required to file the original Answer with the Court in Suite 5000 at 500 Indiana Avenue, N.W., between 8:30 a.m. and 5:00 p.m., Mondays through Fridays or between 9:00 a.m. and 12:00 noon on Saturdays. You may file the original Answer with the Court either before you serve a copy of the Answer on the plaintiff or within seven (7) days after you have served the plaintiff. If you fail to file an Answer, judgment by default may be entered against you for the relief demanded in the complaint.

Frederic Schwartz
Name of Plaintiff's Attorney

1701 Pennsylvania Ave., NW., Suite 200 Washington, DC 20006
Address

202 463-0880
Telephone

Clerk of the Court

By _____
Deputy Clerk

Date 12/06/2017

如需翻译,请打电话 (202) 879-4828 Veuillez appeler au (202) 879-4828 pour une traduction Để có một bài dịch, hãy gọi (202) 879-4828
번역을 원하시면, (202) 879-4828로 전화주십시요 የአማርኛ ትርጉም ለማግኘት (202) 879-4828 ይደውሉ

IMPORTANT: IF YOU FAIL TO FILE AN ANSWER WITHIN THE TIME STATED ABOVE, OR IF, AFTER YOU ANSWER, YOU FAIL TO APPEAR AT ANY TIME THE COURT NOTIFIES YOU TO DO SO, A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY DAMAGES OR OTHER RELIEF DEMANDED IN THE COMPLAINT. IF THIS OCCURS, YOUR WAGES MAY BE ATTACHED OR WITHHELD OR PERSONAL PROPERTY OR REAL ESTATE YOU OWN MAY BE TAKEN AND SOLD TO PAY THE JUDGMENT. IF YOU INTEND TO OPPOSE THIS ACTION, *DO NOT FAIL TO ANSWER WITHIN THE REQUIRED TIME.*

If you wish to talk to a lawyer and feel that you cannot afford to pay a fee to a lawyer, promptly contact one of the offices of the Legal Aid Society (202-628-1161) or the Neighborhood Legal Services (202-279-5100) for help or come to Suite 5000 at 500 Indiana Avenue, N.W., for more information concerning places where you may ask for such help.

See reverse side for Spanish translation
Vea al dorso la traducción al español

TRIBUNAL SUPERIOR DEL DISTRITO DE COLUMBIA
DIVISIÓN CIVIL
Sección de Acciones Civiles
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Teléfono: (202) 879-1133 Sitio web: www.dccourts.gov

_____
Demandante

contra

Número de Caso: _____

_____
Demandado

CITATORIO

Al susodicho Demandado:

Por la presente se le cita a comparecer y se le require entregar una Contestación a la Demanda adjunta, sea en persona o por medio de un abogado, en el plazo de veintiún (21) días contados después que usted haya recibido este citatorio, excluyendo el día mismo de la entrega del citatorio. Si usted está siendo demandado en calidad de oficial o agente del Gobierno de los Estados Unidos de Norteamérica o del Gobierno del Distrito de Columbia, tiene usted sesenta (60) días, contados después que usted haya recibido este citatorio, para entregar su Contestación. Tiene que enviarle por correo una copia de su Contestación al abogado de la parte demandante. El nombre y dirección del abogado aparecen al final de este documento. Si el demandado no tiene abogado, tiene que enviarle al demandante una copia de la Contestación por correo a la dirección que aparece en este Citatorio.

A usted también se le require presentar la Contestación original al Tribunal en la Oficina 5000, sito en 500 Indiana Avenue, N.W., entre las 8:30 a.m. y 5:00 p.m., de lunes a viernes o entre las 9:00 a.m. y las 12:00 del mediodía los sábados. Usted puede presentar la Contestación original ante el Juez ya sea antes que usted le entregue al demandante una copia de la Contestación o en el plazo de siete (7) días de haberle hecho la entrega al demandante. Si usted incumple con presentar una Contestación, podría dictarse un fallo en rebeldía contra usted para que se haga efectivo el desagravio que se busca en la demanda.

SECRETARIO DEL TRIBUNAL

_____
Nombre del abogado del Demandante

Por: _____
Subsecretario

_____
Dirección

_____

Fecha _____

_____
Teléfono

如需翻译,请打电话 (202) 879-4828 Veuillez appeler au (202) 879-4828 pour une traduction Để có một bài dịch, hãy gọi (202) 879-4828
번역을 원하시면 (202) 879-4828 የአማርኛ ትርጉም ለማግኘት (202) 879-4828 ይደውሉ

IMPORTANTE: SI USTED INCUMPLE CON PRESENTAR UNA CONTESTACIÓN EN EL PLAZO ANTES MENCIONADO O, SI LUEGO DE CONTESTAR, USTED NO COMPARECE CUANDO LE AVISE EL JUZGADO, PODRÍA DICTARSE UN FALLO EN REBELDÍA CONTRA USTED PARA QUE SE LE COBRE LOS DAÑOS Y PERJUICIOS U OTRO DESAGRAVIO QUE SE BUSQUE EN LA DEMANDA. SI ESTO OCURRE, PODRÍA RETENÉRSELE SUS INGRESOS, O PODRÍA TOMÁRSELE SUS BIENES PERSONALES O BIENES RAÍCES Y SER VENDIDOS PARA PAGAR EL FALLO. SI USTED PRETENDE OPONERSE A ESTA ACCIÓN, *NO DEJE DE CONTESTAR LA DEMANDA DENTRO DEL PLAZO EXIGIDO*.

Si desea conversar con un abogado y le parece que no puede pagarle a uno, llame pronto a una de nuestras oficinas del Legal Aid Society (202-628-1161) o el Neighborhood Legal Services (202-279-5100) para pedir ayuda o venga a la Oficina 5000 del 500 Indiana Avenue, N.W., para informarse sobre otros lugares donde puede pedirayuda al respecto.

Vea al dorso el original en inglés
See reverse side for English original

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

ROBERT JOHNSON
c/o Frederic Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

Petitioner

v. : MPA. No. 2017 CA 008080 P(MPA

D.C. OFFICE OF EMPLOYEE APPEALS, :
955 L'Enfant Plaza, SW
Suite 2500
Washington, DC 20024

Respondent

PETITION FOR REVIEW

Notice is hereby given that Robert Johnson appeals to the Superior Court of the District of Columbia from the Order of the Hon. Lois Hochhauser, Esq., Administrative Judge, D.C. Office of Employee Appeals (OEA) which became final on November 30, 2017. A copy of that Decision, which reduced the attorney fees due Mr. Johnson's attorney, is attached.

The Administrative Judge's determination is arbitrary, capricious, and in violation of law.

Consequently, the OEA determination must be reversed.

The address of the OEA is: 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024

The following party participated in the OEA proceeding, and is to be served along with the OEA General Counsel who is also listed:

Andrea Comentale, Esq., 441 4th St., NW, Suite 1180N, Washington, DC 20001.

General Counsel, OEA, 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024

Respectfully Submitted,

/s/ Frederic W. Schwartz, Jr.

Frederic W. Schwartz, Jr.
Law Office of Frederic W. Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ROBERT JOHNSON Employee	OEA Matter No. 1601-0016-A09R15A17
v.	Date of Issuance: November 6, 2017
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT Agency	Lois Hochhauser, Esq. Administrative Judge

Andrea Comantale, Esq., Agency Representative
Frederic Schwartz, Jr., Esq., Employee Representative

CORRECTED[1] ADDENDUM DECISION ON ATTORNEY FEES POST-REMAND

PROCEDURAL BACKGROUND AND CHRONOLOGY

Robert Johnson, Employee, filed a petition with the Office of Employee Appeals (OEA) on November 28, 2005, appealing the decision of the D.C. Fire and Emergency Medical Services Department, Agency, to suspend him for 20 days without pay. The matter was assigned to this Administrative Judge (AJ) on January 26, 2006. The parties were given an extensive period of time to negotiate a resolution, but were unsuccessful. The evidentiary hearing took place on June 2 and July 5, 2006.

In the *Initial Decision* (ID), issued on February 12, 2007, the AJ reversed the adverse action and directed Agency to restore to Employee all salary and benefits lost as a result of the suspension. Agency's petition for review was denied by this Board on May 6, 2009. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06, *Opinion and Order on Petition for Review* (May 6, 2009).

Frederic Schwartz, Jr., Esq. entered his appearance as Employee representative on or about November 22, 2006, replacing Clarissa Edwards, Esq., who had represented Employee until that

[1] The only correction to the October 26, 2017 *Decision*, is in the "Order" section on page 7, where the amount of the award was incorrect due to a typographical error. It was corrected and is now consistent with the sum stated in the line preceding the "Order" section. In addition, some superfluous language was deleted at the end of the "Order" section.

time. On June 1, 2009, Mr. Schwartz[2] filed a motion, seeking an award of $16,065.00 in legal fees based on 37.8 hours and an hourly rate of $425. Ms. Edwards subsequently moved for an award of fees. Agency filed objections only to Mr. Schwartz's request.

In October 2009, this matter was reassigned to Senior Administrative Judge Joseph Lim,[3] who considered the fee requests. On February 16, 2010,[4] Judge Lim issued an *Addendum Decision* in which he determined that Employee was the prevailing party and that an award of legal fees was in the interest of justice. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Addendum Decision on Attorney's Fees* (February 16, 2010). Judge Lim found that Mr. Schwartz merited the hourly rate of $425, then the maximum hourly rate on the Laffey Matrix,[5] and awarded to attorneys in practice for more than 31 years who had substantial expertise and experience. He also considered Mr. Schwartz's explanations of how his time was expended to be sufficient.

Judge Lim concluded, however, that Mr. Schwartz's claim of 37.8 hours was "excessive for the degree of difficulty and the amount of legal service time required," pointing out that an attorney awarded the highest hourly rate is presumed to have the "prior experience and expertise" in the area and should expend less time than an attorney with less experience and expertise. He noted that Mr. Schwartz had, "handled numerous appeals before [OEA]." Judge Lim explained that reached this decision by comparing Mr. Schwartz's request with requests filed with this Office by attorneys with "comparable experience" the degree of legal complexity presented in the matter, and also Judge Lim's "years of experience as a plaintiff's attorney." He reduced the hours to 12.1 hours, which resulted an award of $5,142.50 in fees.[6]

Mr. Schwartz filed a *Petition for Review* with the District of Columbia Superior Court on March 17, 2010, claiming that Judge Lim's decision should be reversed because counsel was entitled to the hour claimed and fees sought. He contended that the matter should be considered "under the more stringent *de novo* standard," arguing that he was entitled to a *de novo* review since Judge Lim had not presided over the evidentiary hearing and therefore was not in a position to decide on his fees. In his July 5, 2015 *Order*, the Honorable Erik Christian rejected counsel's arguments, concluding that counsel was not entitled to a *de novo* review. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, Case No. 2010 CA 001732 P(MPA (July 6, 2015). He determined that although Judge Lim did not preside over the evidentiary hearing, his decision was entitled to "deference," because OEA Judges are "in the best position to determine the reasonableness of the ... attorney hours spent on a case, not the reviewing Court."[7] Judge Christian

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[2] In this *Decision*, for the sake of clarity and expediency, the AJ will again digress from the protocol of identifying Employee as the party or movant, but rather will instead refer to Mr. Schwartz as the movant when referring to attorney fees matters. Unless otherwise stated, "counsel" and "attorney," refer to Mr. Schwartz.

[3] The reassignment was a result of this AJ's decision to recuse herself from all matters in which Agency was a party, following her appointment to chair a Board in which Agency participated.

[4] The *Corrected Addendum Decision* was issued on February 19, 2010. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Corrected Addendum Decision* (February 19, 2010).

[5] *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4(D.C. Cir. 1984), *cert den.* 472 U.S. 1021 (1985).

[6] Ms. Edwards also sought an award of attorney fees. Agency did not object to her request. Judge Lim approved the time and hourly rate sought, and awarded her the sum of $5,532.14, as requested.

[7] He noted, however, that "the presiding official ...is more intimately familiar with the circumstances of the appeal, and may be in the best position to determine the reasonableness of the attorney's fee request."

stated, however, that he could not review the matter because there was insufficient support provided for Judge Lim's decision. The Court remanded the matter to OEA for "the limited purpose" of obtaining "substantial evidence" from the AJ to support any reduction of time, stating that the record could be reopened if needed. He stated that the AJ could still conclude that the hours claimed by Mr. Schwartz were "unreasonable," and could leave the award unchanged.

This AJ was again available to hear this matter when it was remanded to this Office. Based in part on the Court's comment that the AJ who presided at the evidentiary hearing may be in the best position to rule on fee requests, and in part on other demands on Judge Lim's time, the remand was reassigned to her on August 12, 2015. By Order dated September 11, 2015, she advised the parties that the matter was reassigned to her and that she would need time to review the entire record in order to determine how to proceed. She directed the parties to use the intervening time to engage in settlement negotiations. Settlement efforts continued over an extended period of time, but proved unsuccessful; and oral argument was scheduled for September 21 2016.

At the September 21, 2016 proceeding, the parties presented oral argument. In addition, the AJ discussed a number of matters with the parties to ensure they were all in accord. Wither regard to the scope of her review, the AJ determined, and the parties agreed, that given the limited nature of the remand, she would abide by the decisions reached by Judge Lim, and accepted by Judge Christian, *i.e.*, that Employee was the prevailing party and was entitled to an award of attorney fees in the interest of justice, that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix, and that counsel's explanations of his work were sufficient.[8] She also determined, and the parties agreed, that her review was limited to the fees that were the subject of the remand.[9] Mr. Schwartz, who had filed additional fee requests, confirmed that he had withdrawn the request related to work performed before the D.C. Superior Court. He then withdrew the request for fees regarding legal work before OEA postdating the fees that were the subject of the remand. The AJ stated that Mr. Schwartz could file a request for an award for fees after this matter was concluded.

In the *Addendum Decision on Attorney Fees on Remand* (ADR), issued on October 26, 2016, this AJ, for reasons discussed in the ADR, did not award Mr. Schwartz the 37.8 hours claimed, but increased the time awarded from 12.1 to 27 hours. The fees awarded was not $16,512.05, as sought by Mr. Schwartz, but did increase from $5,142.50 as awarded by Judge Lim to $12,015, 00. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09R15, *Addendum Decision on Attorney's Fees on Remand* (February 16, 2010).

On December 22, 2016, Mr. Schwartz filed a motion for an award of fees, seeking $8,520.00 in fees based on 15 hours of legal work performed between October 6, 2015 and September 21, 2016, at an hourly rate of $568.00. Agency filed objections on January 21, 2017. The matter was referred, with the consent of the parties, to mediation in March 2017. When mediation proved unsuccessful, the AJ issued an Order, directing the parties to advise her by July 11, 2017, if they wanted to present oral argument and/or file supplemental pleadings on the matter; and that if they did not, the record would close. Both parties responded in the negative to both options, and the record closed on July 11, 2017

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[8] The AJ informed the parties that although she might not agree with all of the determinations, she was bound by them, since, given of the limited nature of the remand, they were not subject to review.

[9] The AJ determined, and the parties agreed, that she could review the entire fee request, not just the time reduced since the hours claimed for work performed on one day might relate to a claim on another day.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.08 (2001).

ISSUES

Is Mr. Schwartz entitled to an award of fees? If so, what is the appropriate amount?

ANALYSIS, FINDINGS AND CONCLUSIONS

The decisions made by Judge Lim and accepted by Judge Christian, *i.e.*, that Employee was the prevailing party in the matter before OEA, that an award of legal fees was in the interest of justice, and that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix were not part of the Court's remand and were not reviewed. Agency did not object to the hourly rate sought by Mr. Schwartz of $568.00, which represents the highest rate on the Laffey Matrix for work performed in 2015 and 2016. Mr. Schwartz is awarded the hourly rate of $568.00.

Agency argued that since Mr. Schwartz did not receive the full relief sought before Judge Christian or this AJ, he cannot be considered the prevailing party. Mr. Schwartz disagreed, citing *Settlemire v. District of Columbia*, 898 A2d 902 (D.C. 2006), and *Buchkannon Bd. and Care Home v. West Virginia Department of Health & Human Res.* 532 U.S. 598 (3002), for the proposition that he is entitled to "prevailing party" status since he was successful in some of his arguments.

Judge Christian did not reverse Judge Lim's decision. He denied counsel the *de novo* review that he sought and rejected his argument that Judge Lim could not award fees. The Court stated that Judge Lim's decision was entitled to "deference." Judge Christian ordered a limited remand, directing only that sufficient reasons be given by the AJ to support his decisions to enable the Court to conduct its review. Indeed, the Court stated that the AJ could reach the same decision and leave the fee award unchanged.[10] If Judge Lim had heard the matter on remand, he could have provided the additional explanations sought by the Court, left the award unchanged. However, this AJ could not provide the rationale for another AJ's decisions, and had to undertake her own assessment. Although this resulted in an increased award, this certainly did mean that this AJ determined the remanded award was incorrect. A third AJ could reach yet another decision, since fee awards are not based on a mathematical formula. AJs must adhere to guidance and standards articulated in such cases as *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission*, 123 A.3d 170 (2015), there is still adequate room for different results, since the decisions reflect the experience and expertise of the individual AJ.[11]

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[10] Counsel's contention that Judge Lim could not assess fees because he had not presided over the hearing was unconvincing for an additional reason. Mr. Schwartz entered his appearance after the evidentiary hearing, but was responsible for the closing brief. He claimed that he was able to thoroughly familiarize himself with the record and prepare the brief in about 12 hours. Since Mr. Schwartz was able to fully familiarize himself with the underlying record and legal issues, which in this matter was neither complex nor lengthy, it is difficult to understand why he was certain that Judge Lim, who has decades of experience and expertise in this area and is a respected Senior Administrative Judge, having presided over countless evidentiary hearings and fee petitions during his tenure at OEA, would be unable to achieve the same result.

[11] The AJ will not review her experience and expertise in analyzing fee requests since she did so in the ADR.

A separate analysis regarding a claim for the award of attorney fees is required when the "degree of success...obtained on [an] attorney fee motion is not the same as the degree of success...obtained on the underlying appeal." *Guy v. Department of Army*, 2012 MSPB 54 (2012). In this matter, Employee was successful in his appeal, and was awarded all of the relief sought, in the *Initial Decision*. As noted above, Mr. Schwartz did not achieve the same level of success either before Judge Christian or before this AJ. He did, however, achieve "a significant part" of the relief sought in both matters, and is therefore entitled to an award of fees. After completing this "separate analysis" the AJ can either reduce the amount of the award by the number of issues on which counsel did not prevail; or can award the amount she considers to be a "fair result," without reducing the award based on the number of issues on which the claimant was not successful, in whole or in part. *Farrar v. Hobby*, 113 S. Ct. 566 (1973). The AJ has chosen this second option.

The determination of the reasonableness of fees is a balancing act. Although the movant is not required to detail the precise time spent on a matter or even the precise activity, the attorney must provide sufficient detail to allow an informed assessment to be made. In *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), the Supreme Court directed attorneys to exercise "billing judgment" and stated that fees would not be awarded for time found to be "excessive, redundant or otherwise unnecessary." *See also, Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985). In addition, the Laffey Matrix increases the hourly rate awarded based on the attorney's experience and expertise based on the assumption it will take that attorney less time to complete a task than the attorney with less expertise and experience, who is awarded a lower hourly rate.

In *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission*, 123 A.3d 170 (2015), the District of Columbia Court of Appeals articulated the standard of determining reasonableness of fees, citing a long line of cases beginning with *Hensley*, and including *Hampton Court*, 599 A.2d, 1116 and *Copeland v. Marshall*, 641 F2d 880 (D.D.Cir. 1980). The movant has the burden of establishing the reasonableness of the fees sought, and must submit evidence supporting the claim of hours worked, and excluding unnecessary time... *Casali v. Department of Treasury*, 81 MSPR 237 (1999). The AJ must identify hours that were rejected and "articulate the reasons for their elimination. *Rumsey, v. Department of Justice*, 2016 MSPB 28 (2016). The "application must be sufficiently detailed to permit the [AJ] to make an independent determination whether or not the hours claimed are justified, but also, that "it was not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted." *Copeland*, 63 F.2d at 891.

D.C. Municipal Regulations, Title 6, Section 634.3, places the burden of production on the claimant, who must "submit reasonable evidence or documentation to support the number of hours expended by the attorney on the appeal." During oral argument, the AJ reviewed Mr. Schwartz's fee request with him, explaining why she did not consider it adequate, and advising him of the additional information that would be required if he filed another fee. Despite her directive, the fee request now under consideration mirrored the prior submission, lacking sufficient information. The AJ offered counsel the opportunity to supplement his submission either in writing or at oral argument, but counsel declined both options. *Rumsey v. Department of Justice*, 2016 MSPB 28 (2016). Therefore, the AJ based on her decision on the request which is presented *verbatim* below:

Date	Activity	Hours
10/6, 10/8/2015	Research, draft Post-Remand Memo	3.1
4/6-7/2016	Research Legis. Hist.	3.9
4/23, 4/25/16	Research, draft submission	4.1
9/13/16	Research, draft Responses to ALJ Order	2.4
9/21/16	Prepare for, attend Hearing	1.5

Agency argued that Mr. Schwartz should not be compensated for work related to his Superior Court appeal, since that fee request was withdrawn, and that some of the time claimed "was unreasonable due to their length and [the] fact that they were unnecessary." Finally it contended that the 2.4 hours billed by Mr. Schwartz on September 13, 2016 was "unnecessary and therefore unreasonable," since he submitted "a 14 page document with factual and procedural information despite the fact" that he was only asked to submit the August 22 Order to which he was responding only directed the parties to "outlines of their arguments." Mr. Schwartz maintained that the research and drafting of his October 23 submission was necessary, since "a full review of recent cases in the area especially *Tenants of 701 Jefferson Street, NW v. District of Columbia*" was required.

In reviewing the fee request, the AJ assessed whether counsel met the burden of establishing that the hours claimed were reasonable and whether the work performed was necessary. DCMR, Title 6, Section 634.3 requires attorneys seeking fees to submit "reasonable evidence or documentation to support the number of hours expended." *See, e.g., Hampton Courts Tenants Association v. D.C. Rental Housing Commission*, 599 A.2d 1113 (D.C. 1991). An AJ must "identify" hours that were reduced based on inadequate documentation, and "articulate the reasons for their elimination." *Crumbaker v. Merit Systems Protection Board*, 781 F.2d 191, 195 (Fed. Cir 1986), modified on other grounds, 827 F.2d 761 (Fed Cir. 1987).

3.1 hours (10/6, 10/8/15) "Research, draft Post-Remand Memo": Mr. Schwartz claimed this time was spent researching and drafting a memorandum which the AJ assumes was the one filed on October 13, 2015. However, in her Order of September 11, 2015, the AJ advised the parties that she had been reassigned the matter and that she would need time to review the record in order to determine how to proceed. She directed the parties to use the intervening time to try to resolve the matter. She did not request that any submissions be filed, stating specifically, that she needed to review the record before deciding how to proceed. The submission was not relevant and was not considered. In addition, it included a request for additional fees, although the only fees considered on remand were those reviewed by Judge Lim. Mr. Schwartz subsequently withdrew the fee request, but even if he had not, it would not have been considered. In sum, the work was unnecessary and submitted despite the AJ's directive to await her instructions after she completed her review. For these reasons, the claim of 3.1 hours is denied.

3.9 hours (4/6-4/7/2016) "Research Legis. Hist:" Mr. Schwartz did not explain the legislative history he was researching, and why the research was necessary. Assuming the research was needed to prepare his April 25 submission, then it appears to be duplicative, since the submission below also claims time for research, and there was no evidence of extensive research. Counsel is required to explain what was researched and its relevance. For these reasons, the AJ concludes that he failed to meet his burden of production because he did not provide "reasonable evidence or documentation to support the number of hours expended" as required by DCMR, Title 6, Section 634.3. For these reasons, the claim for 3.9 hours is denied.

4.1 hours (4/23, 4/25/16) Research, draft submission: This submission focused on three issues: OEA's authority to award fees for work done before the Superior Court, Employee's status as prevailing party, and reasons that an award of fees was warranted in the interest of justice. However, as already discussed, the remand did not include additional fees, and the other two issues had already been resolved. Arguments regarding work performed before the Superior Court were irrelevant, since the remand did not include those fees. However, counsel did reference *Tenants of 710 Street N.W. v. District of Columbia Rental Housing Commission*, which was issued in August 2015. *Infra* at 5. The discussion of this decision was not the primary focus of the submission, and the AJ determines about no more than one-third of the total expended should be awarded for work that was relevant to this matter. For these reasons, she awards 1.4 hours.

2.4 hours (9/13/16) Research, draft Responses to ALJ Order: This submission was in response to the August 22, 2016 Order which directed the parties to "submit outlines" of the arguments that they would present at oral argument. The AJ finds that the submission was responsive, addressing the challenged items and summarizing the arguments counsel would raise. The AJ concludes that the claim for 2.4 hours should be awarded in full.

1.5 hours (9/21/16) prepare for, attend Hearing: The AJ finds that the time claimed to prepare for and attend the September 21, 2016 proceeding was reasonable. She concludes that the 1.5 hours sought should be awarded.

Based on this analysis, counsel will be compensated for 5.3 hours at an hourly rate of $568, for a total award of $3,010.40.[12]

ORDER

It is hereby

ORDERED: Agency pay Employee, within 45 calendar days from the date of issuance of this Addendum Decision, the sum of $3,010.40 for legal fees payable to Frederick Schwartz, Jr..

FOR THE OFFICE:

for Lois Hochhauser, Esq.
Administrative Judge

[12] The AJ will not reduce the award, since she "has discretion to make an equitable judgment as to what reduction is appropriate. *Hensley* at 436-37. The award "does not so shock the conscience" and any further reduction would not "fairly reflect [counsel's] "degree of success." *Rumsey* at 20.

CERTIFICATE OF SERVICE

I certify that the attached **CORRECTED ADDENDUM DECISIONON ATTORNEY FEES POST-REMAND** was sent by regular mail on this day to:

Robert Johnson
1826 4th Street NW
Washington, DC 20001

Andrea Comentale, Esq.
Section Chief
Personnel and Labor Relations Section
441 4th St., NW Suite 1180N
Washington, DC 20001

Frederic W. Schwartz, Esq.
1701 Pennsylvania Ave, NW
Suite 200
Washington, DC 20006

Katrina Hill
Clerk

November 6, 2017
Date

Superior Court of the District of Columbia
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000 Washington, D.C. 20001
Telephone: (202) 879-1133 Website: www.dccourts.gov

ROBERT JOHNSON
Plaintiff

vs.

Case Number _____

D.C. OFFICE OE EMPLOYEE APPEALS
Defendant

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve an Answer to the attached Complaint, either personally or through an attorney, within twenty one (21) days after service of this summons upon you, exclusive of the day of service. If you are being sued as an officer or agency of the United States Government or the District of Columbia Government, you have sixty (60) days after service of this summons to serve your Answer. A copy of the Answer must be mailed to the attorney for the plaintiff who is suing you. The attorney's name and address appear below. If plaintiff has no attorney, a copy of the Answer must be mailed to the plaintiff at the address stated on this Summons.

You are also required to file the original Answer with the Court in Suite 5000 at 500 Indiana Avenue, N.W., between 8:30 a.m. and 5:00 p.m., Mondays through Fridays or between 9:00 a.m. and 12:00 noon on Saturdays. You may file the original Answer with the Court either before you serve a copy of the Answer on the plaintiff or within seven (7) days after you have served the plaintiff. If you fail to file an Answer, judgment by default may be entered against you for the relief demanded in the complaint.

Frederic Schwartz
Name of Plaintiff's Attorney

1701 Pennsylvania Ave., NW., Suite 200 Washington, DC 20006
Address

202 463-0880
Telephone

Clerk of the Court

By _____
Deputy Clerk

Date _____

如需翻译,请打电话 (202) 879-4828 Veuillez appeler au (202) 879-4828 pour une traduction Để có một bài dịch, hãy gọi (202) 879-4828
번역을 원하시면, (202) 879-4828로 전화주십시오 የአማርኛ ትርጉም ለማግኘት (202) 879-4828 ይደውሉ

IMPORTANT: IF YOU FAIL TO FILE AN ANSWER WITHIN THE TIME STATED ABOVE, OR IF, AFTER YOU ANSWER, YOU FAIL TO APPEAR AT ANY TIME THE COURT NOTIFIES YOU TO DO SO, A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY DAMAGES OR OTHER RELIEF DEMANDED IN THE COMPLAINT. IF THIS OCCURS, YOUR WAGES MAY BE ATTACHED OR WITHHELD OR PERSONAL PROPERTY OR REAL ESTATE YOU OWN MAY BE TAKEN AND SOLD TO PAY THE JUDGMENT. IF YOU INTEND TO OPPOSE THIS ACTION, *DO NOT FAIL TO ANSWER WITHIN THE REQUIRED TIME.*

If you wish to talk to a lawyer and feel that you cannot afford to pay a fee to a lawyer, promptly contact one of the offices of the Legal Aid Society (202-628-1161) or the Neighborhood Legal Services (202-279-5100) for help or come to Suite 5000 at 500 Indiana Avenue, N.W., for more information concerning places where you may ask for such help.

See reverse side for Spanish translation
Vea al dorso la traducción al español

TRIBUNAL SUPERIOR DEL DISTRITO DE COLUMBIA
DIVISIÓN CIVIL
Sección de Acciones Civiles
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Teléfono: (202) 879-1133 Sitio web: www.dccourts.gov

_____
Demandante

contra

Número de Caso: _____

_____
Demandado

CITATORIO

Al susodicho Demandado:

Por la presente se le cita a comparecer y se le require entregar una Contestación a la Demanda adjunta, sea en persona o por medio de un abogado, en el plazo de veintiún (21) días contados después que usted haya recibido este citatorio, excluyendo el día mismo de la entrega del citatorio. Si usted está siendo demandado en calidad de oficial o agente del Gobierno de los Estados Unidos de Norteamérica o del Gobierno del Distrito de Columbia, tiene usted sesenta (60) días, contados después que usted haya recibido este citatorio, para entregar su Contestación. Tiene que enviarle por correo una copia de su Contestación al abogado de la parte demandante. El nombre y dirección del abogado aparecen al final de este documento. Si el demandado no tiene abogado, tiene que enviarle al demandante una copia de la Contestación por correo a la dirección que aparece en este Citatorio.

A usted también se le require presentar la Contestación original al Tribunal en la Oficina 5000, sito en 500 Indiana Avenue, N.W., entre las 8:30 a.m. y 5:00 p.m., de lunes a viernes o entre las 9:00 a.m. y las 12:00 del mediodía los sábados. Usted puede presentar la Contestación original ante el Juez ya sea antes que usted le entregue al demandante una copia de la Contestación o en el plazo de siete (7) días de haberle hecho la entrega al demandante. Si usted incumple con presentar una Contestación, podría dictarse un fallo en rebeldía contra usted para que se haga efectivo el desagravio que se busca en la demanda.

SECRETARIO DEL TRIBUNAL

_____
Nombre del abogado del Demandante

Por: _____
Subsecretario

_____
Dirección

_____

Fecha _____

_____
Teléfono

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IMPORTANTE: SI USTED INCUMPLE CON PRESENTAR UNA CONTESTACIÓN EN EL PLAZO ANTES MENCIONADO O, SI LUEGO DE CONTESTAR, USTED NO COMPARECE CUANDO LE AVISE EL JUZGADO, PODRÍA DICTARSE UN FALLO EN REBELDÍA CONTRA USTED PARA QUE SE LE COBRE LOS DAÑOS Y PERJUICIOS U OTRO DESAGRAVIO QUE SE BUSQUE EN LA DEMANDA. SI ESTO OCURRE, PODRÍA RETENÉRSELE SUS INGRESOS, O PODRÍA TOMÁRSELE SUS BIENES PERSONALES O BIENES RAÍCES Y SER VENDIDOS PARA PAGAR EL FALLO. SI USTED PRETENDE OPONERSE A ESTA ACCIÓN, *NO DEJE DE CONTESTAR LA DEMANDA DENTRO DEL PLAZO EXIGIDO*.

Si desea conversar con un abogado y le parece que no puede pagarle a uno, llame pronto a una de nuestras oficinas del Legal Aid Society (202-628-1161) o el Neighborhood Legal Services (202-279-5100) para pedir ayuda o venga a la Oficina 5000 del 500 Indiana Avenue, N.W., para informarse sobre otros lugares donde puede pedirayuda al respecto.

Vea al dorso el original en inglés
See reverse side for English original

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

ROBERT JOHNSON
c/o Frederic Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

Petitioner

v. : MPA. No.

D.C. OFFICE OF EMPLOYEE APPEALS, :
955 L'Enfant Plaza, SW
Suite 2500
Washington, DC 20024

Respondent

PETITION FOR REVIEW

Notice is hereby given that Robert Johnson appeals to the Superior Court of the District of Columbia from the Order of the Hon. Lois Hochhauser, Esq., Administrative Judge, D.C. Office of Employee Appeals (OEA) which became final on November 30, 2017. A copy of that Decision, which reduced the attorney fees due Mr. Johnson's attorney, is attached.

The Administrative Judge's determination is arbitrary, capricious, and in violation of law.

Consequently, the OEA determination must be reversed.

The address of the OEA is: 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024

The following party participated in the OEA proceeding, and is to be served along with the OEA General Counsel who is also listed:

Andrea Comentale, Esq., 441 4th St., NW, Suite 1180N, Washington, DC 20001.

General Counsel, OEA, 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024

Respectfully Submitted,

/s/ Frederic W. Schwartz, Jr.

Frederic W. Schwartz, Jr.
Law Office of Frederic W. Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ROBERT JOHNSON Employee	OEA Matter No. 1601-0016-A09R15A17
v.	Date of Issuance: November 6, 2017
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT Agency	Lois Hochhauser, Esq. Administrative Judge

Andrea Comantale, Esq., Agency Representative
Frederic Schwartz, Jr., Esq., Employee Representative

CORRECTED[1] ADDENDUM DECISION ON ATTORNEY FEES POST-REMAND

PROCEDURAL BACKGROUND AND CHRONOLOGY

Robert Johnson, Employee, filed a petition with the Office of Employee Appeals (OEA) on November 28, 2005, appealing the decision of the D.C. Fire and Emergency Medical Services Department, Agency, to suspend him for 20 days without pay. The matter was assigned to this Administrative Judge (AJ) on January 26, 2006. The parties were given an extensive period of time to negotiate a resolution, but were unsuccessful. The evidentiary hearing took place on June 2 and July 5, 2006.

In the *Initial Decision* (ID), issued on February 12, 2007, the AJ reversed the adverse action and directed Agency to restore to Employee all salary and benefits lost as a result of the suspension. Agency's petition for review was denied by this Board on May 6, 2009. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06, *Opinion and Order on Petition for Review* (May 6, 2009).

Frederic Schwartz, Jr., Esq. entered his appearance as Employee representative on or about November 22, 2006, replacing Clarissa Edwards, Esq., who had represented Employee until that

[1] The only correction to the October 26, 2017 *Decision*, is in the "Order" section on page 7, where the amount of the award was incorrect due to a typographical error. It was corrected and is now consistent with the sum stated in the line preceding the "Order" section. In addition, some superfluous language was deleted at the end of the "Order" section.

time. On June 1, 2009, Mr. Schwartz[2] filed a motion, seeking an award of $16,065.00 in legal fees based on 37.8 hours and an hourly rate of $425. Ms. Edwards subsequently moved for an award of fees. Agency filed objections only to Mr. Schwartz's request.

In October 2009, this matter was reassigned to Senior Administrative Judge Joseph Lim,[3] who considered the fee requests. On February 16, 2010,[4] Judge Lim issued an *Addendum Decision* in which he determined that Employee was the prevailing party and that an award of legal fees was in the interest of justice. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Addendum Decision on Attorney's Fees* (February 16, 2010). Judge Lim found that Mr. Schwartz merited the hourly rate of $425, then the maximum hourly rate on the Laffey Matrix,[5] and awarded to attorneys in practice for more than 31 years who had substantial expertise and experience. He also considered Mr. Schwartz's explanations of how his time was expended to be sufficient.

Judge Lim concluded, however, that Mr. Schwartz's claim of 37.8 hours was "excessive for the degree of difficulty and the amount of legal service time required," pointing out that an attorney awarded the highest hourly rate is presumed to have the "prior experience and expertise" in the area and should expend less time than an attorney with less experience and expertise. He noted that Mr. Schwartz had, "handled numerous appeals before [OEA]." Judge Lim explained that reached this decision by comparing Mr. Schwartz's request with requests filed with this Office by attorneys with "comparable experience" the degree of legal complexity presented in the matter, and also Judge Lim's "years of experience as a plaintiff's attorney." He reduced the hours to 12.1 hours, which resulted an award of $5,142.50 in fees.[6]

Mr. Schwartz filed a *Petition for Review* with the District of Columbia Superior Court on March 17, 2010, claiming that Judge Lim's decision should be reversed because counsel was entitled to the hour claimed and fees sought. He contended that the matter should be considered "under the more stringent *de novo* standard," arguing that he was entitled to a *de novo* review since Judge Lim had not presided over the evidentiary hearing and therefore was not in a position to decide on his fees. In his July 5, 2015 *Order*, the Honorable Erik Christian rejected counsel's arguments, concluding that counsel was not entitled to a *de novo* review. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, Case No. 2010 CA 001732 P(MPA (July 6, 2015). He determined that although Judge Lim did not preside over the evidentiary hearing, his decision was entitled to "deference," because OEA Judges are "in the best position to determine the reasonableness of the ... attorney hours spent on a case, not the reviewing Court."[7] Judge Christian

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[2] In this *Decision*, for the sake of clarity and expediency, the AJ will again digress from the protocol of identifying Employee as the party or movant, but rather will instead refer to Mr. Schwartz as the movant when referring to attorney fees matters. Unless otherwise stated, "counsel" and "attorney," refer to Mr. Schwartz.

[3] The reassignment was a result of this AJ's decision to recuse herself from all matters in which Agency was a party, following her appointment to chair a Board in which Agency participated.

[4] The *Corrected Addendum Decision* was issued on February 19, 2010. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Corrected Addendum Decision* (February 19, 2010).

[5] *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4(D.C. Cir. 1984), *cert den.* 472 U.S. 1021 (1985).

[6] Ms. Edwards also sought an award of attorney fees. Agency did not object to her request. Judge Lim approved the time and hourly rate sought, and awarded her the sum of $5,532.14, as requested.

[7] He noted, however, that "the presiding official ...is more intimately familiar with the circumstances of the appeal, and may be in the best position to determine the reasonableness of the attorney's fee request."

stated, however, that he could not review the matter because there was insufficient support provided for Judge Lim's decision. The Court remanded the matter to OEA for "the limited purpose" of obtaining "substantial evidence" from the AJ to support any reduction of time, stating that the record could be reopened if needed. He stated that the AJ could still conclude that the hours claimed by Mr. Schwartz were "unreasonable," and could leave the award unchanged.

This AJ was again available to hear this matter when it was remanded to this Office. Based in part on the Court's comment that the AJ who presided at the evidentiary hearing may be in the best position to rule on fee requests, and in part on other demands on Judge Lim's time, the remand was reassigned to her on August 12, 2015. By Order dated September 11, 2015, she advised the parties that the matter was reassigned to her and that she would need time to review the entire record in order to determine how to proceed. She directed the parties to use the intervening time to engage in settlement negotiations. Settlement efforts continued over an extended period of time, but proved unsuccessful; and oral argument was scheduled for September 21 2016.

At the September 21, 2016 proceeding, the parties presented oral argument. In addition, the AJ discussed a number of matters with the parties to ensure they were all in accord. Wither regard to the scope of her review, the AJ determined, and the parties agreed, that given the limited nature of the remand, she would abide by the decisions reached by Judge Lim, and accepted by Judge Christian, *i.e.*, that Employee was the prevailing party and was entitled to an award of attorney fees in the interest of justice, that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix, and that counsel's explanations of his work were sufficient.[8] She also determined, and the parties agreed, that her review was limited to the fees that were the subject of the remand.[9] Mr. Schwartz, who had filed additional fee requests, confirmed that he had withdrawn the request related to work performed before the D.C. Superior Court. He then withdrew the request for fees regarding legal work before OEA postdating the fees that were the subject of the remand. The AJ stated that Mr. Schwartz could file a request for an award for fees after this matter was concluded.

In the *Addendum Decision on Attorney Fees on Remand* (ADR), issued on October 26, 2016, this AJ, for reasons discussed in the ADR, did not award Mr. Schwartz the 37.8 hours claimed, but increased the time awarded from 12.1 to 27 hours. The fees awarded was not $16,512.05, as sought by Mr. Schwartz, but did increase from $5,142.50 as awarded by Judge Lim to $12,015, 00. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09R15, *Addendum Decision on Attorney's Fees on Remand* (February 16, 2010).

On December 22, 2016, Mr. Schwartz filed a motion for an award of fees, seeking $8,520.00 in fees based on 15 hours of legal work performed between October 6, 2015 and September 21, 2016, at an hourly rate of $568.00. Agency filed objections on January 21, 2017. The matter was referred, with the consent of the parties, to mediation in March 2017. When mediation proved unsuccessful, the AJ issued an Order, directing the parties to advise her by July 11, 2017, if they wanted to present oral argument and/or file supplemental pleadings on the matter; and that if they did not, the record would close. Both parties responded in the negative to both options, and the record closed on July 11, 2017

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[8] The AJ informed the parties that although she might not agree with all of the determinations, she was bound by them, since, given of the limited nature of the remand, they were not subject to review.

[9] The AJ determined, and the parties agreed, that she could review the entire fee request, not just the time reduced since the hours claimed for work performed on one day might relate to a claim on another day.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.08 (2001).

ISSUES

Is Mr. Schwartz entitled to an award of fees? If so, what is the appropriate amount?

ANALYSIS, FINDINGS AND CONCLUSIONS

The decisions made by Judge Lim and accepted by Judge Christian, *i.e.*, that Employee was the prevailing party in the matter before OEA, that an award of legal fees was in the interest of justice, and that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix were not part of the Court's remand and were not reviewed. Agency did not object to the hourly rate sought by Mr. Schwartz of $568.00, which represents the highest rate on the Laffey Matrix for work performed in 2015 and 2016. Mr. Schwartz is awarded the hourly rate of $568.00.

Agency argued that since Mr. Schwartz did not receive the full relief sought before Judge Christian or this AJ, he cannot be considered the prevailing party. Mr. Schwartz disagreed, citing *Settlemire v. District of Columbia*, 898 A2d 902 (D.C. 2006), and *Buchkannon Bd. and Care Home v. West Virginia Department of Health & Human Res.* 532 U.S. 598 (3002), for the proposition that he is entitled to "prevailing party" status since he was successful in some of his arguments.

Judge Christian did not reverse Judge Lim's decision. He denied counsel the *de novo* review that he sought and rejected his argument that Judge Lim could not award fees. The Court stated that Judge Lim's decision was entitled to "deference." Judge Christian ordered a limited remand, directing only that sufficient reasons be given by the AJ to support his decisions to enable the Court to conduct its review. Indeed, the Court stated that the AJ could reach the same decision and leave the fee award unchanged.[10] If Judge Lim had heard the matter on remand, he could have provided the additional explanations sought by the Court, left the award unchanged. However, this AJ could not provide the rationale for another AJ's decisions, and had to undertake her own assessment. Although this resulted in an increased award, this certainly did mean that this AJ determined the remanded award was incorrect. A third AJ could reach yet another decision, since fee awards are not based on a mathematical formula. AJs must adhere to guidance and standards articulated in such cases as *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission*, 123 A.3d 170 (2015), there is still adequate room for different results, since the decisions reflect the experience and expertise of the individual AJ.[11]

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[10] Counsel's contention that Judge Lim could not assess fees because he had not presided over the hearing was unconvincing for an additional reason. Mr. Schwartz entered his appearance after the evidentiary hearing, but was responsible for the closing brief. He claimed that he was able to thoroughly familiarize himself with the record and prepare the brief in about 12 hours. Since Mr. Schwartz was able to fully familiarize himself with the underlying record and legal issues, which in this matter was neither complex nor lengthy, it is difficult to understand why he was certain that Judge Lim, who has decades of experience and expertise in this area and is a respected Senior Administrative Judge, having presided over countless evidentiary hearings and fee petitions during his tenure at OEA, would be unable to achieve the same result.

[11] The AJ will not review her experience and expertise in analyzing fee requests since she did so in the ADR.

A separate analysis regarding a claim for the award of attorney fees is required when the "degree of success...obtained on [an] attorney fee motion is not the same as the degree of success...obtained on the underlying appeal." *Guy v. Department of Army*, 2012 MSPB 54 (2012). In this matter, Employee was successful in his appeal, and was awarded all of the relief sought, in the *Initial Decision.* As noted above, Mr. Schwartz did not achieve the same level of success either before Judge Christian or before this AJ. He did, however, achieve "a significant part" of the relief sought in both matters, and is therefore entitled to an award of fees. After completing this "separate analysis" the AJ can either reduce the amount of the award by the number of issues on which counsel did not prevail; or can award the amount she considers to be a "fair result," without reducing the award based on the number of issues on which the claimant was not successful, in whole or in part. *Farrar v. Hobby*, 113 S. Ct. 566 (1973). The AJ has chosen this second option.

The determination of the reasonableness of fees is a balancing act. Although the movant is not required to detail the precise time spent on a matter or even the precise activity, the attorney must provide sufficient detail to allow an informed assessment to be made. In *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983), the Supreme Court directed attorneys to exercise "billing judgment" and stated that fees would not be awarded for time found to be "excessive, redundant or otherwise unnecessary." *See also, Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985). In addition, the Laffey Matrix increases the hourly rate awarded based on the attorney's experience and expertise based on the assumption it will take that attorney less time to complete a task than the attorney with less expertise and experience, who is awarded a lower hourly rate.

In *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission,* 123 A.3d 170 (2015), the District of Columbia Court of Appeals articulated the standard of determining reasonableness of fees, citing a long line of cases beginning with *Hensley*, and including *Hampton Court,* 599 A.2d, 1116 and *Copeland v. Marshall,* 641 F2d 880 (D.D.Cir. 1980). The movant has the burden of establishing the reasonableness of the fees sought, and must submit evidence supporting the claim of hours worked, and excluding unnecessary time... *Casali v. Department of Treasury*, 81 MSPR 237 (1999). The AJ must identify hours that were rejected and "articulate the reasons for their elimination. *Rumsey, v. Department of Justice*, 2016 MSPB 28 (2016). The "application must be sufficiently detailed to permit the [AJ] to make an independent determination whether or not the hours claimed are justified, but also, that "it was not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted." *Copeland*, 63 F.2d at 891.

D.C. Municipal Regulations, Title 6, Section 634.3, places the burden of production on the claimant, who must "submit reasonable evidence or documentation to support the number of hours expended by the attorney on the appeal." During oral argument, the AJ reviewed Mr. Schwartz's fee request with him, explaining why she did not consider it adequate, and advising him of the additional information that would be required if he filed another fee. Despite her directive, the fee request now under consideration mirrored the prior submission, lacking sufficient information. The AJ offered counsel the opportunity to supplement his submission either in writing or at oral argument, but counsel declined both options. *Rumsey v. Department of Justice*, 2016 MSPB 28 (2016). Therefore, the AJ based on her decision on the request which is presented *verbatim* below:

Date	Activity	Hours
10/6, 10/8/2015	Research, draft Post-Remand Memo	3.1
4/6-7/2016	Research Legis. Hist.	3.9
4/23, 4/25/16	Research, draft submission	4.1
9/13/16	Research, draft Responses to ALJ Order	2.4
9/21/16	Prepare for, attend Hearing	1.5

Agency argued that Mr. Schwartz should not be compensated for work related to his Superior Court appeal, since that fee request was withdrawn, and that some of the time claimed "was unreasonable due to their length and [the] fact that they were unnecessary." Finally it contended that the 2.4 hours billed by Mr. Schwartz on September 13, 2016 was "unnecessary and therefore unreasonable," since he submitted "a 14 page document with factual and procedural information despite the fact" that he was only asked to submit the August 22 Order to which he was responding only directed the parties to "outlines of their arguments." Mr. Schwartz maintained that the research and drafting of his October 23 submission was necessary, since "a full review of recent cases in the area especially *Tenants of 701 Jefferson Street, NW v. District of Columbia"* was required.

In reviewing the fee request, the AJ assessed whether counsel met the burden of establishing that the hours claimed were reasonable and whether the work performed was necessary. DCMR, Title 6, Section 634.3 requires attorneys seeking fees to submit "reasonable evidence or documentation to support the number of hours expended." *See, e.g., Hampton Courts Tenants Association v. D.C. Rental Housing Commission*, 599 A.2d 1113 (D.C. 1991). An AJ must "identify" hours that were reduced based on inadequate documentation, and "articulate the reasons for their elimination." *Crumbaker v. Merit Systems Protection Board*, 781 F.2d 191, 195 (Fed. Cir 1986), modified on other grounds, 827 F.2d 761 (Fed Cir. 1987).

3.1 hours (10/6, 10/8/15) "Research, draft Post-Remand Memo": Mr. Schwartz claimed this time was spent researching and drafting a memorandum which the AJ assumes was the one filed on October 13, 2015. However, in her Order of September 11, 2015, the AJ advised the parties that she had been reassigned the matter and that she would need time to review the record in order to determine how to proceed. She directed the parties to use the intervening time to try to resolve the matter. She did not request that any submissions be filed, stating specifically, that she needed to review the record before deciding how to proceed. The submission was not relevant and was not considered. In addition, it included a request for additional fees, although the only fees considered on remand were those reviewed by Judge Lim. Mr. Schwartz subsequently withdrew the fee request, but even if he had not, it would not have been considered. In sum, the work was unnecessary and submitted despite the AJ's directive to await her instructions after she completed her review. For these reasons, the claim of 3.1 hours is denied.

3.9 hours (4/6-4/7/2016) "Research Legis. Hist:" Mr. Schwartz did not explain the legislative history he was researching, and why the research was necessary. Assuming the research was needed to prepare his April 25 submission, then it appears to be duplicative, since the submission below also claims time for research, and there was no evidence of extensive research. Counsel is required to explain what was researched and its relevance. For these reasons, the AJ concludes that he failed to meet his burden of production because he did not provide "reasonable evidence or documentation to support the number of hours expended" as required by DCMR, Title 6, Section 634.3. For these reasons, the claim for 3.9 hours is denied.

4.1 hours (4/23, 4/25/16) Research, draft submission: This submission focused on three issues: OEA's authority to award fees for work done before the Superior Court, Employee's status as prevailing party, and reasons that an award of fees was warranted in the interest of justice. However, as already discussed, the remand did not include additional fees, and the other two issues had already been resolved. Arguments regarding work performed before the Superior Court were irrelevant, since the remand did not include those fees. However, counsel did reference *Tenants of 710 Street N.W. v. District of Columbia Rental Housing Commission*, which was issued in August 2015. *Infra* at 5. The discussion of this decision was not the primary focus of the submission, and the AJ determines about no more than one-third of the total expended should be awarded for work that was relevant to this matter. For these reasons, she awards 1.4 hours.

2.4 hours (9/13/16) Research, draft Responses to ALJ Order: This submission was in response to the August 22, 2016 Order which directed the parties to "submit outlines" of the arguments that they would present at oral argument. The AJ finds that the submission was responsive, addressing the challenged items and summarizing the arguments counsel would raise. The AJ concludes that the claim for 2.4 hours should be awarded in full.

1.5 hours (9/21/16) prepare for, attend Hearing: The AJ finds that the time claimed to prepare for and attend the September 21, 2016 proceeding was reasonable. She concludes that the 1.5 hours sought should be awarded.

Based on this analysis, counsel will be compensated for 5.3 hours at an hourly rate of $568, for a total award of $3,010.40.[12]

ORDER

It is hereby

ORDERED: Agency pay Employee, within 45 calendar days from the date of issuance of this Addendum Decision, the sum of $3,010.40 for legal fees payable to Frederick Schwartz, Jr..

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge

[12] The AJ will not reduce the award, since she "has discretion to make an equitable judgment as to what reduction is appropriate. *Hensley* at 436-37. The award "does not so shock the conscience" and any further reduction would not "fairly reflect [counsel's] "degree of success." *Rumsey* at 20.

CERTIFICATE OF SERVICE

I certify that the attached **CORRECTED ADDENDUM DECISIONON ATTORNEY FEES POST-REMAND** was sent by regular mail on this day to:

Robert Johnson
1826 4th Street NW
Washington, DC 20001

Andrea Comentale, Esq.
Section Chief
Personnel and Labor Relations Section
441 4th St., NW Suite 1180N
Washington, DC 20001

Frederic W. Schwartz, Esq.
1701 Pennsylvania Ave, NW
Suite 200
Washington, DC 20006

Katrina Hill
Clerk

November 6, 2017
Date

Superior Court of the District of Columbia
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000 Washington, D.C. 20001
Telephone: (202) 879-1133 Website: www.dccourts.gov

ROBERT JOHNSON
Plaintiff

vs.

Case Number _____

D.C. OFFICE OE EMPLOYEE APPEALS
Defendant

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve an Answer to the attached Complaint, either personally or through an attorney, within twenty one (21) days after service of this summons upon you, exclusive of the day of service. If you are being sued as an officer or agency of the United States Government or the District of Columbia Government, you have sixty (60) days after service of this summons to serve your Answer. A copy of the Answer must be mailed to the attorney for the plaintiff who is suing you. The attorney's name and address appear below. If plaintiff has no attorney, a copy of the Answer must be mailed to the plaintiff at the address stated on this Summons.

You are also required to file the original Answer with the Court in Suite 5000 at 500 Indiana Avenue, N.W., between 8:30 a.m. and 5:00 p.m., Mondays through Fridays or between 9:00 a.m. and 12:00 noon on Saturdays. You may file the original Answer with the Court either before you serve a copy of the Answer on the plaintiff or within seven (7) days after you have served the plaintiff. If you fail to file an Answer, judgment by default may be entered against you for the relief demanded in the complaint.

Frederic Schwartz
Name of Plaintiff's Attorney

1701 Pennsylvania Ave., NW., Suite 200 Washington, DC 20006
Address

202 463-0880
Telephone

Clerk of the Court

By _____
Deputy Clerk

Date _____

如需翻译,请打电话 (202) 879-4828 Veuillez appeler au (202) 879-4828 pour une traduction Để có một bài dịch, hãy gọi (202) 879-4828
번역을 원하시면, (202) 879-4828로 전화주십시요 የአማርኛ ትርጉም ለማግኘት (202) 879-4828 ይደውሉ

IMPORTANT: IF YOU FAIL TO FILE AN ANSWER WITHIN THE TIME STATED ABOVE, OR IF, AFTER YOU ANSWER, YOU FAIL TO APPEAR AT ANY TIME THE COURT NOTIFIES YOU TO DO SO, A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY DAMAGES OR OTHER RELIEF DEMANDED IN THE COMPLAINT. IF THIS OCCURS, YOUR WAGES MAY BE ATTACHED OR WITHHELD OR PERSONAL PROPERTY OR REAL ESTATE YOU OWN MAY BE TAKEN AND SOLD TO PAY THE JUDGMENT. IF YOU INTEND TO OPPOSE THIS ACTION, *DO NOT FAIL TO ANSWER WITHIN THE REQUIRED TIME.*

If you wish to talk to a lawyer and feel that you cannot afford to pay a fee to a lawyer, promptly contact one of the offices of the Legal Aid Society (202-628-1161) or the Neighborhood Legal Services (202-279-5100) for help or come to Suite 5000 at 500 Indiana Avenue, N.W., for more information concerning places where you may ask for such help.

See reverse side for Spanish translation
Vea al dorso la traducción al español

TRIBUNAL SUPERIOR DEL DISTRITO DE COLUMBIA
DIVISIÓN CIVIL
Sección de Acciones Civiles
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Teléfono: (202) 879-1133 Sitio web: www.dccourts.gov

_____
Demandante

contra

Número de Caso: _____

_____
Demandado

CITATORIO

Al susodicho Demandado:

Por la presente se le cita a comparecer y se le require entregar una Contestación a la Demanda adjunta, sea en persona o por medio de un abogado, en el plazo de veintiún (21) días contados después que usted haya recibido este citatorio, excluyendo el día mismo de la entrega del citatorio. Si usted está siendo demandado en calidad de oficial o agente del Gobierno de los Estados Unidos de Norteamérica o del Gobierno del Distrito de Columbia, tiene usted sesenta (60) días, contados después que usted haya recibido este citatorio, para entregar su Contestación. Tiene que enviarle por correo una copia de su Contestación al abogado de la parte demandante. El nombre y dirección del abogado aparecen al final de este documento. Si el demandado no tiene abogado, tiene que enviarle al demandante una copia de la Contestación por correo a la dirección que aparece en este Citatorio.

A usted también se le require presentar la Contestación original al Tribunal en la Oficina 5000, sito en 500 Indiana Avenue, N.W., entre las 8:30 a.m. y 5:00 p.m., de lunes a viernes o entre las 9:00 a.m. y las 12:00 del mediodía los sábados. Usted puede presentar la Contestación original ante el Juez ya sea antes que usted le entregue al demandante una copia de la Contestación o en el plazo de siete (7) días de haberle hecho la entrega al demandante. Si usted incumple con presentar una Contestación, podría dictarse un fallo en rebeldía contra usted para que se haga efectivo el desagravio que se busca en la demanda.

SECRETARIO DEL TRIBUNAL

_____
Nombre del abogado del Demandante

Por: _____
Subsecretario

_____
Dirección

_____

Fecha _____

_____
Teléfono

加需翻译,请打电话 (202) 879-4828 Veuillez appeler au (202) 879-4828 pour une traduction Để có một bài dịch, hãy gọi (202) 879-4828

[illegible](202) 879-4828 የአማርኛ ትርጉም ለማግኘት (202) 879-4828 ይደውሉ

IMPORTANTE: SI USTED INCUMPLE CON PRESENTAR UNA CONTESTACIÓN EN EL PLAZO ANTES MENCIONADO O, SI LUEGO DE CONTESTAR, USTED NO COMPARECE CUANDO LE AVISE EL JUZGADO, PODRÍA DICTARSE UN FALLO EN REBELDÍA CONTRA USTED PARA QUE SE LE COBRE LOS DAÑOS Y PERJUICIOS U OTRO DESAGRAVIO QUE SE BUSQUE EN LA DEMANDA. SI ESTO OCURRE, PODRÍA RETENÉRSELE SUS INGRESOS, O PODRÍA TOMÁRSELE SUS BIENES PERSONALES O BIENES RAÍCES Y SER VENDIDOS PARA PAGAR EL FALLO. SI USTED PRETENDE OPONERSE A ESTA ACCIÓN, *NO DEJE DE CONTESTAR LA DEMANDA DENTRO DEL PLAZO EXIGIDO*.

Si desea conversar con un abogado y le parece que no puede pagarle a uno, llame pronto a una de nuestras oficinas del Legal Aid Society (202-628-1161) o el Neighborhood Legal Services (202-279-5100) para pedir ayuda o venga a la Oficina 5000 del 500 Indiana Avenue, N.W., para informarse sobre otros lugares donde puede pedirayuda al respecto.

Vea al dorso el original en inglés
See reverse side for English original

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

ROBERT JOHNSON
c/o Frederic Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

Petitioner

v. : MPA. No.

D.C. OFFICE OF EMPLOYEE APPEALS, :
955 L'Enfant Plaza, SW
Suite 2500
Washington, DC 20024

Respondent

PETITION FOR REVIEW

Notice is hereby given that Robert Johnson appeals to the Superior Court of the District of Columbia from the Order of the Hon. Lois Hochhauser, Esq., Administrative Judge, D.C. Office of Employee Appeals (OEA) which became final on November 30, 2017. A copy of that Decision, which reduced the attorney fees due Mr. Johnson's attorney, is attached.

The Administrative Judge's determination is arbitrary, capricious, and in violation of law.

Consequently, the OEA determination must be reversed.

The address of the OEA is: 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024

The following party participated in the OEA proceeding, and is to be served along with the OEA General Counsel who is also listed:

Andrea Comentale, Esq., 441 4th St., NW, Suite 1180N, Washington, DC 20001.

General Counsel, OEA, 955 L'Enfant Plaza, SW, Suite 2500, Washington, DC 20024

Respectfully Submitted,

/s/ Frederic W. Schwartz, Jr.

Frederic W. Schwartz, Jr.
Law Office of Frederic W. Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ROBERT JOHNSON Employee	OEA Matter No. 1601-0016-A09R15A17
v.	Date of Issuance: November 6, 2017
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT Agency	Lois Hochhauser, Esq. Administrative Judge

Andrea Comantale, Esq., Agency Representative
Frederic Schwartz, Jr., Esq., Employee Representative

CORRECTED[1] ADDENDUM DECISION ON ATTORNEY FEES POST-REMAND

PROCEDURAL BACKGROUND AND CHRONOLOGY

Robert Johnson, Employee, filed a petition with the Office of Employee Appeals (OEA) on November 28, 2005, appealing the decision of the D.C. Fire and Emergency Medical Services Department, Agency, to suspend him for 20 days without pay. The matter was assigned to this Administrative Judge (AJ) on January 26, 2006. The parties were given an extensive period of time to negotiate a resolution, but were unsuccessful. The evidentiary hearing took place on June 2 and July 5, 2006.

In the *Initial Decision* (ID), issued on February 12, 2007, the AJ reversed the adverse action and directed Agency to restore to Employee all salary and benefits lost as a result of the suspension. Agency's petition for review was denied by this Board on May 6, 2009. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06, *Opinion and Order on Petition for Review* (May 6, 2009).

Frederic Schwartz, Jr., Esq. entered his appearance as Employee representative on or about November 22, 2006, replacing Clarissa Edwards, Esq., who had represented Employee until that

[1] The only correction to the October 26, 2017 *Decision*, is in the "Order" section on page 7, where the amount of the award was incorrect due to a typographical error. It was corrected and is now consistent with the sum stated in the line preceding the "Order" section. In addition, some superfluous language was deleted at the end of the "Order" section.