

**BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND**

IN THE MATTER OF

[REDACTED]

APPELLANT,

AND

**MONTGOMERY COUNTY
GOVERNMENT,**

EMPLOYER

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CASE NO. 15-27

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DECISION ON ATTORNEY'S FEE REQUEST

This is the Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's May 26, 2016, Request for Attorney's Fees (Appellant's Request).¹ Appellant's Request seeks \$14,750.00 in attorney's fees and costs. The appeal was considered and decided by the Board Chair, and Vice Chair. The Associate Member issued a separate concurring opinion.

Appellant is a Correctional Officer who was disciplined by being suspended for thirty (30) days and demoted in rank for excessive Internet usage while on duty. After a hearing, the Board issued a Final Decision and Order finding that the County had proven a violation of the County Internet usage policy by a preponderance of the evidence. Decision and Order, MSPB Case No. 15-27 (May 16, 2016). Taking into consideration the principles of progressive discipline and other mitigating factors, the Board upheld the 30-day suspension but rescinded the demotion. The Board found that because the penalty had been mitigated, the County was required to pay reasonable attorney's fees and costs. *Id.*, at 17.

The County objects to certain elements of Appellant's Request, arguing that because

¹ Appellant's Request was filed by Appellant's attorney before the MSPB [REDACTED] [REDACTED] also represented Appellant on judicial review in the Circuit Court. Subsequently, the Appellant informed the Board that [REDACTED] was no longer his attorney and that he was proceeding without representation. *See* Emails from Appellant to MSPB, August 23 and September 06, 2017.

Appellant only prevailed with regard to part of the penalty against him, compensation for attorney's fees should be reduced to reflect that partial success. The County also argues that Appellant is not entitled to fees which predate the filing of the Appeal or were incurred after the Board's final decision, and further suggested that the hourly billing rate was excessive. *See County Response*, June 6, 2016.

On June 20, 2016, subsequent to the pleadings concerning attorney's fees, Appellant filed a petition for judicial review of the Board's final decision with the Circuit Court for Montgomery County. Because a decision by the Circuit Court might have had an impact on the Board's determination of appropriate attorney's fees, the Board issued an order staying consideration of the attorney's fee issue until resolution of the petition for judicial review. Order, MSPB Case No. 15-27 (July 28, 2016). The May 16, 2016, decision of the Board was ultimately affirmed by Judge Nelson W. Rupp, Jr. [REDACTED] *v. Merit System Protection Board*, Circuit Court for Montgomery County, No. 422211-V, Docket Entry #22 (May 9, 2017) (Rupp, J.).

Consistent with its July 28, 2016, Order, the Board requested that by September 7, 2017, the parties provide: (1) verification that there had been a final disposition of the petition for judicial review; and (2) advise the Board whether there were any amendments to the fee request or the opposition thereto. *Letter to parties from MSPB Executive Director Martin*, August 24, 2017. The parties did not file any amendments.

APPROPRIATE REIMBURSEMENT FORMULA

The Montgomery County Code, § 33-14(c), provides the Board with remedial authority to "[o]rder the County to reimburse or pay all or part of the employee's reasonable attorney's fees." *See Montgomery County v. Jamsa*, 153 Md. App. 346, 355 (2003). In determining what constitutes a reasonable fee, § 33-14(c)(9) of the Code instructs that the Board consider the following factors:

- a. Time and labor required;
- b. The novelty and complexity of the case;
- c. The skill requisite to perform the legal service properly;
- d. The preclusion of other employment by the attorney due to the acceptance of the case;
- e. The customary fee;
- f. Whether the fee is fixed or contingent;
- g. Time limitations imposed by the client or the circumstances;
- h. The experience, reputation and ability of the attorneys; and
- i. Awards in similar cases.

Montgomery County Code, § 33-14(c)(9).

In *Manor Country Club v. Flaa*, 387 Md. 297 (2005), the Court of Appeals considered an attorney's fee dispute which was governed by the provisions of Montgomery County Code § 27-7(k)(1). The provisions of §27-7(k)(1) then in effect were identical to § 33-14(c)(9), which is controlling on the Board. The *Flaa* Court noted that the factors set forth in *Johnson v. Georgia*

Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), *overruled on other grounds*, *Blanchard v. Bergeron*, 489 U.S. 87 (1989), were “in large part, comparable to the factors of Montgomery County Code § 27-7(k)(1)” for determining an appropriate attorney’s fees award. 387 Md. at 313.²

In *Friolo v. Frankel*, 403 Md. 443, 460 (2008), the Court of Appeals cited both *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Flaa* for the proposition that the degree of success is a factor to be considered in determining the proper amount of an award of attorney’s fees. *See* MSPB Case No. 00-13 (2000). In this case, the County does seek to reduce the award of attorney’s fees based on Appellants’ degree of success.

ANALYSIS AND CONCLUSIONS

Appropriate Hourly Rate

The Board has consistently looked to the United States District Court for the District of Maryland Local Rules for guidance in determining an appropriate hourly rate for attorney’s fees, as well as considering the nature and complexity of the case.³ *See* MSPB Case No. 14-33 (2016); MSPB Case No. 14-17 (2014); MSPB Case No. 13-07 (2013); MSPB Case No. 13-04 (2013); MSPB Case No. 13-02 (2013); MSPB Case No. 11-03 (2011); MSPB Case No. 11-04 (2011); MSPB Case No. 10-19 (2010); MSPB Case No. 07-17 (2008); MSPB Case No. 06-03 (2010). Those guidelines are “intended solely to provide practical guidance.” United States District Court for the District of Maryland Local Rules, Appendix B at 127.⁴ Accordingly, the Board looks to those guidelines as recommendations, but is not bound to conform to them without further analysis.

Appellant’s attorney, a member of the Maryland Bar since 1997, billed at an hourly rate of \$250. She asserts that the submitted rate is reasonable and fair, and reflects the customary rates for local practitioners of comparable experience. Appellant’s Request at 2. The County acknowledges that the District Court guidelines provide a suggested hourly rate for lawyers with Appellant’s attorney’s experience of between \$275 and \$425, but suggests that a quasi-judicial administrative hearing before the Board is not the equivalent of a trial before the U.S. District Court. County Response at 3. The County further argues that Appellant’s attorney failed to provide a copy of a fee agreement. *Id.*

Appellant’s attorney attached copies of twelve invoices with Appellant’s Request, and stated that each was submitted to Appellant for payment. The total amount of attorney’s fees and costs was \$14,750. A review of the documentation reveals that Appellant’s attorney consistently

² The Court of Appeals in *Flaa* noted that the *Johnson* factors were later adopted by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *See* 387 Md. at 313.

³ Appendix B of the United States District Court for the District of Maryland Local Rules (July 1, 2016), is available at: <http://www.mdd.uscourts.gov/sites/mdd/files/LocalRules.pdf>.

⁴ Under those guidelines, the suggested rate for lawyers admitted to the bar for fifteen to nineteen years is \$275 - \$425. United States District Court for the District of Maryland Local Rules, Appendix B at 127.

billed at an hourly rate of \$250, and that as of May 25, 2016, Appellant had paid his attorney \$14,475.⁵

The hourly billing rate actually charged by an attorney is credible evidence that the rate is consistent with the local market rate, because the client freely agreed to pay that rate. MSPB Case No. 14-33 (2016). *See Willis v. U.S. Postal Service*, 245 F.3d 1333, 1340 (2001). Where an attorney and a client have agreed upon a specific fee for legal services in a Board case, we presume that the amount agreed upon represents a reasonable fee. MSPB Case No. 14-33 (2016). *See Martinez v. U.S. Postal Service*, 89 M.S.P.R. 152, 160-61 (2001); *Gensburg v. Department of Veterans Affairs*, 85 M.S.P.R. 198, 206 (2000). That presumption is, of course, rebuttable based upon the factors we are required to consider under Montgomery County Code, § 33-14(c)(9). Among those factors is the customary fee for such services and the experience, reputation, and ability of the attorney.

Appellant's counsel is an experienced employment lawyer with 20 years of litigation experience. She was a partner with the reputable law firm of Lord & Whip and a Chief Solicitor with the Baltimore City Office of Law. As the Chief of the Office of Legal Affairs for the Baltimore Police Department, she represented the Police Department in employment matters. Her experience is impressive and pertinent to representation of the Appellant in this case. Appellant's attorney's resume indicates numerous honors and professional activities, including published articles and presentations, that suggest that she has a good reputation in the legal community. The Board had the opportunity to observe, and was favorably impressed by, the work product, preparation, and litigation ability of Appellant's attorney. *See Johnson*, 488 F.2d at 718-19. It is unlikely that another attorney could have obtained a more positive result for Appellant. We thus conclude that the hourly rate of \$250 is reasonable and appropriate.

Number of Hours Billed

The burden of establishing the reasonableness of the hours claimed in an attorney fee request is on the party moving for an award of attorney fees. *Hensley v. Eckerhart*, 461 U.S. at 437; *Casali v. Department of the Treasury*, 81 M.S.P.R. 347 (1999). One factor the Board must consider in awarding attorney fees is the time and labor required – *i.e.*, the number of hours reasonably expended. Montgomery County Code, § 33-14(c)(9)(a). The County argues against the reasonableness of the hours sought in this matter. Appellant is seeking an award for a total of 58.9 hours of attorney time, which was billed by and paid to Appellant's counsel.

Appellant believes that the amount of time charged is reasonable given the complexity of the case due to the necessary information technology analysis, the novelty of the issues, and the legal analysis concerning correctional officer standards of conduct. Appellant's Request at 1-2. As discussed above, Appellant provided billing records in the form of detailed invoices to support the fee request.

⁵ Appellant made five payments from May 12, 2015, to February 17, 2016. The balance due as of May 25, 2016, was \$275.

The County argues that it "is impossible to know how much time was necessary on this case as it is impossible to tell what time Appellant's counsel actually spent working on the case." County Response at 2. We disagree. The invoices contain an adequate description of the nature of Appellant's attorney's activities, how much time was expended, and the dates on which the services occurred. The Board finds that the issues in this case were challenging and that the time spent was adequately documented and reasonably necessary to achieve the partially successful outcome.

The County objected to any fees related to services performed prior to the filing of the Appeal on March 6, 2015. County Response at 2-3. The Board does not agree that such fees are unrecoverable. The Board may award attorney fees for services rendered to the Appellant prior to issuance of the Notice of Disciplinary Action and the Appeal. It is to be expected that an employee served with a Statement of Charges would seek legal counsel and that counsel may attempt to forestall or mitigate any disciplinary action. If this were not so, the Board would lack the authority to appropriately compensate Appellant for all or part of his reasonable attorney fees incurred, as intended by § 33-14(c)(9) of the County Code. *See Mudrich v. Department of Agriculture*, 92 M.S.P.R. 413 (2002) ("Services rendered in connection with an agency action subject to the Board's jurisdiction are compensable even though the services were provided prior to the filing of the appeal"); *Lizut v. Department of Army*, 27 M.S.P.R. 611, 614 (1985) ("an award may compensate for services rendered in connection with an agency action subject to the Board's jurisdiction, even though the services were provided prior to the filing of the appeal in attempts to dissuade the agency from taking its proposed action"); *McBride v. Department of Agriculture*, 3 M.S.P.R. 495, 497 (1980) ("Board has jurisdiction to award attorney fees for services rendered to the appellant prior to issuance of the agency's final decision").

The County asserts that Appellant's request should be reduced, as reimbursement is only allowed for hours directly related to the Appeal. County Response at 4. However, the County does not specify which and how many hours should be excluded under this principle. We must therefore assume that the County is referring to services provided prior to the Appeal. As discussed above, to the extent the County's objection is to the time spent after the Statement of Charges, but prior to the Appeal, we find that the County's position lacks merit.

The County further claims that fees charged from December 2, 2015, after Appellant's final pleading was filed, should not be compensable. Those hours appear on the May 25, 2016, invoice, the final invoice submitted by Appellant. A total of 1.1 hours of attorney time is reflected on that invoice. After reviewing the description of the services rendered we agree that there should be no compensation for the 0.9 hours of time reviewing and responding to emails from Appellant, as there is no explanation of how that effort is related to the Appeal. However, we believe it appropriate that compensation be provided for the 0.2 hours of time Appellant's attorney spent reviewing the Board's final decision. It should go without saying that it is appropriate for an attorney to read the Board's final decision as part of representing a client in an appeal. We presume the County would not object to the time an attorney spent reading the appeal in a case where, for example, doing so resulted in the attorney formulating and pursuing a successful motion for reconsideration.

Finally, the County argues that Appellant is not entitled to reimbursement for his attorney's travel time or parking expenses. County Response at 4. We find that under Board precedent compensation for mileage expenses and travel time is allowed. MSPB Case No. 13-04 (2013); MSPB Case No. 99-23 (2001). We agree, however, that Appellant's request for costs of \$25.00 to compensate for parking fees must be denied as neither the County Code nor the MSPB's regulations provide for parking reimbursement. MSPB Case No. 13-04 (2013).

The Degree of Success Achieved

The County argues that because Appellant did not completely prevail in his appeal the amount of attorney's fees should be reduced. County Response at 4. Under Maryland law and Board precedent, when an appellant partially prevails the Board will only award a portion of the fees sought. MSPB Case No. 13-02 (2013). *See Friolo v. Frankel*, 403 Md. 443 (2008) (degree of success is a crucial factoring determining a fee award); *Manor Club v. Flaa*, 387 Md. 297, 305 (2005). *See also, Hensley v. Eckerhart*, 461 U.S. at 436 (most critical factor in determining amount of attorney's fees is degree of success obtained).

The County proved violations of the County Internet usage policy by a preponderance of the evidence, and while the Board rescinded Appellant's demotion, it upheld the 30-day suspension. Decision and Order, MSPB Case No. 15-27 (May 16, 2016). The Board thus finds merit to the County's argument that Appellant only partially prevailed. However, while it is true that Appellant did not completely prevail in his appeal, he did achieve a degree of success. Under our precedent, if the degree of success is sufficiently high that it cannot reasonably be characterized as "partial" and the fees requested are modest, we will award the full amount of fees requested. For example, in MSPB Case No. 14-17 (2014), the Board rescinded an employee's dismissal and imposed a one grade demotion. The Board awarded full attorney's fees because the appellant had "achieved the overwhelming majority of the relief he has sought." The Board reasoned that the employee retaining his employment, albeit in a lesser position, was a sufficiently high degree of success that no reduction in the amount of fees sought was justified.

Where an appellant has a lesser degree of success than that achieved in MSPB Case No. 14-17 a reduction in the fees requested may be appropriate. In MSPB Case No. 13-02 the Board found that the County had proven a charge of Conduct Unbecoming. Although the Board refused to grant the County's request for a demotion and a twenty-day suspension, the Board did impose a ten-day suspension. The Board concluded that the ten-day suspension was a significant penalty, and clearly demonstrated that the Appellant did not completely prevail in his appeal. The Board concluded that reducing the number of hours billed by twenty-five percent (25%) was appropriate based upon degree of success.

The facts and ruling in MSPB Case No. 13-02 are indistinguishable from this case, and there is a significant difference between avoiding workplace "capital punishment" and a demotion. In both this case and MSPB Case No. 13-02 the County sought to demote and give substantial suspensions to the appellants. The Board in both cases found that the County had proven a violation of policy that warranted discipline, but rescinded the demotion and upheld a suspension. Under this precedent we conclude that based upon degree of success in this case the number of hours

billed should be reduced by twenty-five percent.⁶ Accordingly, the 58 hours of allowable attorney's fees sought by Appellant will be reduced by 25%, resulting in 43.5 total compensable hours.

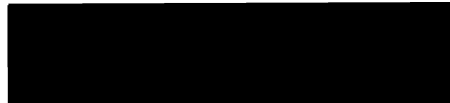
ORDER

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board finds that a total of 43.5 hours of attorney's fees shall be reimbursed at a rate of \$250 per hour. Accordingly, the County is hereby **ORDERED** to reimburse Appellant for attorney's fees in the total amount of **\$10,875.00**.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, § 33-15, *Judicial review and enforcement*, and MCPR, § 35-18, *Appeals to court of MSPB decisions*, within 30 days an appeal may be filed with the Circuit Court for Montgomery County, Maryland, in the manner prescribed under Chapter 200, Title 7 of the Maryland Rules.

For the Board

December 13, 2017



Charlotte Crutchfield
Chair

⁶ The Board is generally obligated to consider our own precedent. In attorney's fee matters, the County Code specifically requires consideration of "awards in similar cases." Montgomery County Code, § 33-14(c)(9)(i).