

**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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**CONCURRING OPINION
OF ASSOCIATE MEMBER KATOR**

I agree that our decision in this case is consistent with our prior decision in MSPB Case No. 13-02. In that case, we awarded only 75% of the fees sought in recognition that the appellant did not obtain complete relief before the Board. As in this case, the Board in 13-02 found that discipline was warranted but only a suspension, and not a demotion, was the appropriate penalty.

Neither in 13-02 nor in this case, however, do we explain how it is that 25% is the appropriate discount. We start from the proposition that the appellant did not obtain full relief, but we do not say, for example, that he only obtained 75% of the relief he sought. We demand precise and detailed records from attorneys to justify their fee requests yet our analysis in cases such as this lacks any of that precision and justification. To be sure, the Board is not expected to be “green-eyeshaded accountants,” but instead only to provide “rough justice” in making fee awards. *Fox v. Vice*, 563 U.S. 826, 838 (2011). “Rough justice” must be justice nonetheless. I do not believe that taking a metaphorical meat cleaver to the fee request is necessarily consistent with that end.

There is no argument here that any of the fees requested can be directly attributed to appellant’s ultimately unsuccessful effort to challenge his suspension; that is, had the County sought only to demote the appellant and not suspend him, he would have incurred exactly the same amount of fees and we would have required the County to pay them in full. Given that appellant would have incurred exactly the same amount of fees irrespective of whether the Board sustained

or reversed the suspension, it is difficult to find the justice in refusing to recompense Appellant for fees that were necessarily and reasonably incurred.

Our authority under Code § 33-14(c) is to “[o]rder the County to reimburse or pay all or part of the employee’s reasonable attorney’s fees.” And we must consider the degree of success in fashioning an appropriate attorney fee award. *Manor Country Club v. Flaa*, 387 Md. 297 (2005). But to say we must consider degree of success is not to say that we must discount the fees sought in every case in which the appellant does not completely prevail on every aspect of his case. Rather, the County must persuade us that a particular reduction in the fee requested is appropriate in light of the unique facts of each case.

We have held that when an appellant obtains the “lion’s share” (but not all) of the relief he seeks then a reduction for lack of complete success is not appropriate. *See* MSPB Case No. 14-17 (2014) (awarding full fees when Board reversed removal and mitigated penalty to a one grade demotion). Certainly, it is conceivable that an appellant who succeeded in having the Board reverse his demotion but still suffered a suspension could be deemed to have obtained the lion’s share of the relief he sought. Compared to a demotion, for example, a 30-day suspension could have an almost indiscernible effect on an employee’s career earnings.

The County has offered no rationale to justify any particular reduction in the fee sought. Rather, it has merely cited our precedent for the apparent proposition that when an appellant obtains a reversal of a demotion but is left with a suspension in place then fees will automatically be reduced by 25%. I think that is a misreading of our precedent. While I agree that the modest reduction in the fees sought here is appropriate in light of the unique facts of this case, in future cases I would expect the County to present a cogent argument for any specific proposed fee reduction.

December 13, 2017



Michael J. Kator
Associate Member