

**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. 18-02

DECISION ON ATTORNEY'S FEES

This is the Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's January 10, 2018, Attorney's Fees Petition (Appellant's Request), seeking \$9,000.00 in attorney's fees and costs of \$45.89. Appellant's Request was considered and decided by the Board.

Appellant, a Liquor Store Assistant Manager, appealed the decision of the Department of Liquor Control (DLC), to dismiss him from employment effective August 14, 2017. The dismissal was based on allegations that Appellant consumed alcohol on the job, allowed employees to remove alcoholic beverages from the store without paying, and approved falsified timesheets. After hearings conducted on November 15 and December 7, 2017, the Board held that the County failed to prove that Appellant violated timecard and attendance policies, or policies on scheduling, but did violate County policy by consuming alcohol while on duty at a DLC store. Decision and Order, MSPB Case No. 18-02 (December 26, 2017); Supplemental Order, MSPB Case No. 18-02 (January 9, 2018). In its decision, the Board rescinded Appellant's dismissal from County employment, reinstated him to County service, but demoted him to the non-supervisory position of Liquor Store Clerk II. The Board found that because the penalty had been "significantly mitigated" the County was required to pay reasonable attorney's fees and costs. Decision and Order, MSPB Case No. 18-02, at 11.

The County objects to Appellant's counsel receiving full payment of attorney's fees, asserting that the requested fees should be reduced by 50% because Appellant "gained little" by continuation of the litigation after rejecting a settlement offer by the County on December 5, 2017, prior to the second and final day of hearings. County Response to Appellant Attorney's Fees Petition and Motion to Disclose Confidential Settlement Negotiations, January 22, 2018 (County Response). The County urges the Board to permit disclosure of the terms of the settlement offer that Appellant rejected in order to determine the reasonableness of the attorney's fees petition. The County does not oppose the award of \$45.89 in costs.

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.

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. The Court of Appeals further noted that the *Johnson* factors were later adopted by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *Id.*

In *Friolo v. Frankel*, 403 Md. 443, 460 (2008), the Court of Appeals cited both *Hensley v. Eckerhart* 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. 15-27 (2017); MSPB Case No. 00-13 (2000). In this case, the County seeks to reduce the award of attorney's fees based on Appellants' degree of success after he rejected a settlement offer.

ANALYSIS AND CONCLUSIONS

Disclosure and Relevance of the Settlement Discussions

The County urges the Board to permit disclosure of the terms of the settlement offer that Appellant rejected because, it believes, the settlement discussions will demonstrate that Appellant unnecessarily prolonged this litigation and gained little by doing so. County Response at 2. The County relies on MSPB Case No. 13-07 (2013) as precedent for disclosure of the settlement discussions and reduction in the number of hours billed.

We believe that ordering the disclosure of information concerning settlement negotiations is unnecessary under the facts of this case and would risk chilling negotiations in future cases, contrary to the public policies reflected in Maryland and federal law. *See* Md. Rule 5-408; Fed. R. Evid. 408. While the terms of a settlement agreement might be appropriately discoverable in certain circumstances, disclosure of negotiations leading up to a settlement agreement is usually inappropriate. *Porter Hayden Co. v. Bullinger*, 350 Md. 452, 469 (1998). Moreover, unlike MSPB Case No. 13-07, the Board did not consider (or even know) the terms of the proposed settlement agreement when fashioning its decision and remedy. We therefore deny the County's motion to disclose confidential settlement negotiations.

The timing of the settlement negotiations in the two cases are also much different. In MSPB Case No. 13-07, an employee filed an appeal with the Board upon receiving a Notice of Termination. However, the Notice of Termination was defective and the County advised the Board that it would be reissued. The Board then stayed the processing of the appeal until the County corrected and reissued the notice. Prior to reissuing a corrected notice, the County negotiated a settlement with the union, which the employee rejected. Approximately six weeks later, the corrected notice was issued and the litigation resumed. The Board ultimately awarded a remedy that was the essentially the same as that proposed in the settlement that the employee had rejected. In considering the subsequent petition for attorney's fees, the Board found that the appellant gained little more through litigation than what was offered to him by the County, and thus reduced the total amount of hours billed by one-third.

Our decision in MSPB Case No. 13-07 is thus readily distinguishable from this matter and provides little support for the County's position. Unlike in that case, here the County does not contend that it offered Appellant the relief he ultimately obtained well before the litigation began, or even the start of the first day of hearings. Rejecting the County's settlement offer cannot be characterized as unreasonably delaying resolution of this case when agreeing to it would have resulted in Appellant losing his job.

After the hearing began and the Board had already heard from two witnesses, the parties engaged in further discussions. Tr. (Nov. 15) at 155-60. The parties represented that they were close to an agreement, but that the County needed time to obtain further information. The Board then granted the request of the parties to postpone the hearing until December 7, 2017. On December 5, 2017, the County advised the Board's Executive Director by email that the day before it had provided Appellant with information he needed to make a decision on the County's most

recent settlement offer. The settlement offer was subsequently rejected by Appellant later that same day. County Response at 1.

We do not find that it was unreasonable for Appellant to reject a settlement offer late in the litigation, *i.e.*, two days before the second and final day of hearings. This is especially true when, due in part to the effectiveness of his counsel, Appellant may have reasonably believed that his prospects for complete success had significantly improved.

The County also cites federal court decisions that have considered settlement offers in determining appropriate fees. However, in those cases fees were reduced only when a plaintiff *unreasonably* rejected settlements that would have provided superior relief to what was ultimately obtained through continued litigation. Maryland law is much the same. *See Friolo v. Frankel*, 438 Md. 304, 325 (2014) (“a party should not be permitted to increase a fee award by prolonging the litigation as a result of making unreasonable settlement demands or rejecting reasonable settlement offers.”).¹ However, given that the County’s more generous offer did not come until after Appellant’s counsel had prepared for and begun the hearing, Appellant cannot be accused of unreasonably prolonging the litigation. Appellant reasonably decided to take his chances and vigorously pursue his case to conclusion. The County “could have avoided liability for the bulk of the attorney’s fees for which they now find themselves liable by making a reasonable settlement offer in a timely manner.” *City of Riverside v. Rivera*, 477 U.S. 561, 580 n. 11 (1986), *citing Copeland v. Marshall*, 641 F.2d 880, 904 (D.C. Cir. 1980) (*en banc*) (“The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.”). Accordingly, the fact that Appellant rejected a settlement offer only to receive essentially the same relief from the Board does not warrant, in this instance, any reduction to his attorney’s fees.

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.² *See* MSPB Case No. 15-27 (2017); MSPB Case No. 14-33 (2016); MSPB Case No. 14-17 (2014). Those guidelines are “intended solely to provide practical guidance.” United States District Court for the District of Maryland Local Rules, Appendix B at 127.³ Accordingly, the Board looks to those guidelines as recommendations, but is not bound to conform to them without further analysis.

Appellant’s primary attorney in this case is an associate with [REDACTED]. He has been a member of the Virginia Bar since the summer of 2014, asserts that he normally bills at

¹Although, we note that there is no Maryland equivalent to an “offer of judgment” under Fed. R. Civ. P. 68. *See Friolo v. Frankel*, 438 Md. at 324 n.8.

²Appendix B of the Local Rules of the United States District Court for the District of Maryland, July 1, 2016, (March 2018 Supplement), is available online at: <http://www.mdd.uscourts.gov/sites/mdd/files/LocalRules-2016-ExpeditedLARAMendments.pdf>.

³Under those guidelines, the suggested rate for lawyers admitted to the bar for less than five years is \$150 - \$225. United States District Court for the District of Maryland Local Rules, Appendix B at 127.

an hourly rate of \$300, and that Appellant agreed to a fee arrangement at that hourly rate.⁴ Appellant's Request at 6-7. In recognition that the District Court guidelines provide a suggested hourly rate of between \$150 and \$225 for lawyers with Appellant's attorney's level of experience, the requested rate is \$225. Appellant asserts that the submitted rate is reasonable and fair, and reflects the customary rates for local practitioners of comparable experience. Appellant's Request at 7; Exhibit 2 (Declaration of [REDACTED]), ¶3. Despite performing some work on the case, the firm's principal did not submit a request for her hours. Appellant's Request at 7.

Appellant's attorney provided time records reflecting dates work was performed, the nature of the services, the amount of time worked, and the cost. Appellant's Request, Exhibit 1. The fee petition avers that the billing statement submitted as Exhibit 1 is accurate, was reviewed by the firm's principal, and reflects "all legal work performed from Appellant's initial consult through this fee petition." Appellant's Request at 3. According to Exhibit 1, the total number of hours billed was 38.5, which when multiplied by an hourly rate of \$225 results in total attorney's fees of \$8,662.50. Inexplicably, Appellant's Exhibit 2, ¶6, asserts that Appellant's attorney expended 40 hours of time on this case. The requested amount of \$9,000.00, would be the correct figure if 40 hours of attorney time were billed at the \$225 hourly rate. However, since there is no documentation or explanation provided for the inclusion of the additional 1.5 hours of attorney time in Appellant's calculations, any award of attorney's fees may only be based on the 38.5 hours that is documented.

As noted above, Appellant agreed to an hourly rate of \$300 for the services of [REDACTED]. 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. The County's response does not question whether the hourly rate requested is appropriate and reasonable for an attorney with Appellant's counsel's experience, reputation, and ability.

While Appellant's counsel does not have extensive experience as an employment lawyer, the Board had ample opportunity to observe his work product, preparation, and litigation ability. *See Johnson*, 488 F.2d at 718-19. We were sufficiently impressed and thus conclude that the hourly rate of \$225 is reasonable and appropriate.

Number of Hours Billed

The burden of establishing the reasonableness of the hours claimed in an attorney fee

⁴MD Code Ann., Business Occupations and Professions Article, §10-206(b)(5), provides that "an individual who is authorized by a county employee to represent the employee at any step of the county's grievance procedure" need not be a member of the Maryland Bar.

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). Appellant is seeking an award of 38.5 hours of attorney time. The County has not objected to the reasonableness of the number of hours required to litigate this case, except as to the hours expended as a result of Appellant's rejection of the County's settlement offer. As discussed above, we do not find that it was unreasonable for Appellant to refuse to accept the County's last settlement offer.

We agree with Appellant that the amount of time charged is reasonable given the nature of the case. Appellant's Request at 3-5. While the case did not involve especially complex legal issues, a careful investigation and analysis of the facts was necessary. Hearings were held on two separate days, six witnesses testified, and a number of documents, including videos, had to be reviewed and analyzed. Appellant's counsel clearly spent the time necessary to become familiar with the relevant facts and used that knowledge to effectively examine and cross examine witnesses, and make persuasive arguments.

As discussed above, Appellant provided billing records to support the fee request. The records 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. Having reviewed the billing records submitted by Appellant's counsel, the Board concludes that the time was adequately documented and appears well spent on activities necessary to the litigation and to achieve a successful outcome.

The Degree of Success Achieved

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. 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.

The ruling in MSPB Case No. 14-17 is indistinguishable from this case, as both cases involve an employee receiving a demotion while avoiding workplace "capital punishment." The Board is generally obligated to consider our own precedent, and in attorney's fee matters, the County Code specifically requires consideration of "awards in similar cases." Montgomery County Code, § 33-14(c)(9)(i). Accordingly, we find that although the relief awarded to Appellant was not complete, the degree of success achieved by Appellant's counsel in this case does not justify any reduction in the amount of attorney's fees sought.

ORDER

Based upon the foregoing analysis, and finding that a hearing on this matter is unnecessary, the Board **DENIES** the County's motion to disclose confidential settlement negotiations. The Board further finds that a total of 38.5 hours of attorney's fees shall be reimbursed at a rate of \$225 per hour. In addition, Appellant is entitled to \$45.89 in costs. Accordingly, the County is hereby **ORDERED** to reimburse Appellant for attorney's fees and costs in the total amount of **\$8,708.39**.

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
March 26, 2018



Angela Franco
Chair