

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

**IN THE MATTER OF**

██████████,

**APPELLANT,**

**AND**

**MONTGOMERY COUNTY  
GOVERNMENT,**

**EMPLOYER**

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**CASE NO. 20-08**

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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 Petition for Attorney’s Fees (Appellant’s Request). Appellant seeks \$27,303.02 in attorney’s fees and litigation costs in the amount of \$235.38. The total amount of attorney’s fees and costs requested for both her current attorney and Appellant’s previous attorney was \$27,538.40. The total attorney’s fees charged by Mr. ██████’s firm amounts to \$19,458.52, while the amount Appellant paid was \$17,368.52. The total amount Appellant paid to her previous attorneys, ██████, ██████ & ██████, for attorney’s fees and costs was \$7,844.80. As of June 24, 2022, Appellant had paid her attorneys a total of \$25,253.32.

The County objects to certain elements of Appellant’s Request, arguing that because Appellant only prevailed on one of the issues she appealed, that of Paid Time Off (PTO) that was denied, compensation for attorney’s fees should be reduced to reflect that partial success, if not denied entirely. The County also argues that Appellant is not entitled to fees related to the preparation of Appellant’s fee petition or for services which were incurred after the Board’s Supplemental Decision Concerning Enforcement of Settlement Agreement (June 15, 2022), other than 0.2 hours for her attorney to review the decision. *See* County Response, July 5, 2022, pp. 5-6, 9.

**BACKGROUND**

In 2015 Appellant entered into a settlement agreement with the County resolving an employment dispute that she had appealed to the Board. Pursuant to Montgomery County

Personnel Regulations (MCPR), § 35-15, the Board issued an Order accepting the settlement agreement into the record and retaining jurisdiction over any disputes concerning interpretation or enforcement. MSPB Case No. 15-24 (September 30, 2015).

A month after entering into the settlement agreement Appellant filed a motion with the Board to enforce the agreement, claiming that the County had breached the agreement by not giving her assigned parking in the Executive Office Building (EOB). The Board ruled on December 17, 2015, that there was no breach of the settlement agreement. MSPB Case No. 16-06 (2015).

In 2019 Appellant again sought to have the Board enforce the terms of the settlement agreement. In her 2019 enforcement request Appellant alleged that the County breached the 2015 settlement agreement by failing to remove certain documents from her personnel file and by failing to provide her with the proper salary and benefits. On June 8, 2020, the Board issued a Decision Concerning Enforcement of Settlement Agreement denying Appellant's request for enforcement. Appellant then filed a petition for judicial review in the Circuit Court for Montgomery County.

After receiving briefs and hearing oral argument the Circuit Court issued an opinion and order remanding the matter to the MSPB. ██████████ v. *Montgomery County*, Civil Case No. 482732-V, MSPB Case No. 20-08 (December 22, 2021). The Court:

1. affirmed the Board's ruling that *res judicata* barred Appellant's claim for a parking spot in the EOB parking lot;
2. affirmed the Board's ruling that *res judicata* barred Appellant's claim for paid time off (PTO) that had been rescinded before the Board issued its decision in MSPB Case No. 16-06 in December 2015;
3. reversed the Board's ruling that *res judicata* barred Appellant's claim for PTO not granted after the Board issued its decision in MSPB Case No. 16-06;
4. reversed the Board's ruling that Appellant's claims were untimely; and
5. affirmed the Board's decision that the County did not materially breach the Agreement regarding (a) the contents and maintenance of confidential personnel files, and (b) the proper calculation of Appellant's cost of living adjustments.

The Court remanded the matter to the Board to determine: (1) whether the County failed to grant PTO to Appellant in January 2016 and every six months thereafter; and, if so, (2) whether the County's failure to grant PTO was a material breach of the Agreement.

The parties briefed the two issues remanded by the Circuit Court. Appellant filed a brief, the County filed a response, and Appellant filed a reply brief. The Board then issued a Supplemental Decision Concerning Enforcement of Settlement Agreement on June 15, 2022.

The Board's supplemental decision found that the PTO was a material benefit of the agreement and that the County's failure to grant PTO was a material breach of the Agreement. The Board ordered the County to pay Appellant 30 hours of salary at Appellant's highest rate of pay, and in no event less than \$1,974.30.

### 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 (5<sup>th</sup> 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.<sup>1</sup>

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 seeks to reduce the award of attorney’s fees based on Appellant’s degree of success.

### ANALYSIS AND CONCLUSIONS

#### *Appropriate Hourly Rate*

The Board has consistently looked to the Local Rules of the United States District Court for the District of Maryland for guidance in determining an appropriate hourly rate for attorney’s fees, as well as considering the nature and complexity of the case.<sup>2</sup> *See, e.g.*, MSPB Case No. 18-02 (2018); MSPB Case No. 15-27 (2017); MSPB Case No. 14-33 (2016); MSPB Case No. 14-17 (2014); MSPB Case No. 13-07 (2013). Those guidelines are “intended solely to provide practical guidance.” United States District Court for the District of Maryland Local Rules, Appendix B at

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<sup>1</sup> 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.

<sup>2</sup> Appendix B of the United States District Court for the District of Maryland Local Rules (July 1, 2021), is available at: <http://www.mdd.uscourts.gov/sites/mdd/files/LocalRules.pdf>.

124. Accordingly, the Board looks to those guidelines as recommendations, but is not bound to conform to them without further analysis.

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. 18-02 (2018); MSPB Case No. 15-27 (2017); 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 current attorney, Mr. [REDACTED], attached copies of billing invoices with Appellant's Request. A review of the documentation reveals that Mr. [REDACTED] consistently billed at an hourly rate of \$350, and that his associate billed at an hourly rate of \$200. He asserts that the submitted rate is reasonable as he has been a member of the Maryland Bar since 2005 and is an experienced employment lawyer. Appellant's Request at 5. With regard to Mr. [REDACTED]'s hourly rate, the County simply acknowledges that the District Court guidelines provide a suggested hourly rate for lawyers admitted to the bar for fifteen to nineteen years is between \$275 and \$425, and that Mr. [REDACTED]'s rate of \$350 is within the range provided for in the guidelines. County Response at 8; United States District Court for the District of Maryland Local Rules, Appendix B at 125. The County does not appear to contest Mr. [REDACTED]'s hourly rate.

Mr. [REDACTED] is an experienced employment lawyer with a decade and a half of litigation experience. Exhibit 5. Furthermore, the Board was favorably impressed by the pleadings he submitted. MSPB Case No. 15-27 (2017). *See Johnson*, 488 F.2d at 718-19. It is unlikely that another attorney could have obtained a more positive result for Appellant. Finally, the County does not appear to object to Mr. [REDACTED]'s hourly rate of \$350. County Response at 8. We thus conclude that the hourly rate of \$350 is reasonable and appropriate for Mr. [REDACTED].

Appellant's current attorney also billed for the time of an associate, [REDACTED], at an hourly rate of \$200. Mr. [REDACTED]'s affidavit indicates that his firm typically bills between \$250 and \$295 per hour for Ms. [REDACTED]'s services. Exhibit 5. The U.S. District Court guidelines recommend that for attorneys with less than five years of experience the hourly rate should be \$150 to \$225. The County urges that this hourly rate should be reduced due to Ms. [REDACTED]'s inexperience as she has only been a member of the Bar since December 2020. Because the hourly rate is below the top end of the guideline and below her customary hourly rate as attested by Mr. [REDACTED], we conclude that \$200 per hour for Ms. [REDACTED]'s 1.7 hours of service is reasonable.

Appellant's previous attorneys in this matter were [REDACTED] and [REDACTED] of the law firm [REDACTED], [REDACTED] & [REDACTED]. Mr. [REDACTED] billed Appellant at \$350 per hour while Mr. [REDACTED] was billed at \$250 per hour. Mr. [REDACTED] has been a member of the Bar since 2009. Exhibit 3. Mr. [REDACTED] primarily represented Appellant during 2019 when he had been a member of the bar for 10 years. While we have previously held that where an attorney and a client have agreed upon a specific fee, we presume that the amount agreed upon is reasonable, we also held that the

presumption is rebuttable based upon the other factors we are required to consider under Montgomery County Code, § 33-14(c)(9), including experience and ability. MSPB Case No. 18-02 (2018). Here we consider that the U.S. District Court guidelines suggest that lawyers admitted to the bar for nine to fourteen years should be compensated an hourly rate between \$225 and \$350. While Mr. ██████ may be a capable attorney, his experience level at the time he worked on this case suggests that his hourly rate should be set below the maximum of the range. We find that his hourly rate should be \$300.

Mr. ██████ was admitted to the Bar in 2017, and his involvement with this matter took place when he had less than three years at the Bar. While he has experience as an employment law attorney, his hourly rate of \$250 is above the \$150 - \$225 range for attorneys with his experience level as suggested by the U.S. District Court guidelines. Exhibits 1 and 4. In light of his normal billing rate and the range of the guidelines for attorneys at his experience level we find that his hourly rate should be at \$225 per hour.

The County objects to time charged by ██████, ██████ & ██████ for services provided by unidentified individuals. County Response at 4. However, Appellant points out that these charges are for paralegal services at an hourly rate of \$135. That rate is well within the \$95 to \$150 range recommended by the U.S. District Court in Appendix B, and well below the 2019-20 hourly rate of \$173 for paralegal charges provided for in the United States Attorney's Office for the District of Columbia Matrix. Exhibits 1 and 2. We see no reason to disallow these reasonable paralegal charges.

### ***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. MSPB Case No. 18-02 (2018); MSPB Case No. 15-27 (2017). *See 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 for 89.6 hours of attorney time. Exhibits 6 and 7. The County argues against the reasonableness of the number of attorney hours expended.

Appellant argues that the amount of attorney time charged is reasonable given the work required to pursue the agreement enforcement case initially before the Board, then at the Circuit Court on judicial review, and again before the Board on remand. Appellant's Request at 6-8. Appellant further contends that the novelty and complexity of the legal issues also required significant effort. Appellant's Request at 8-9.

The County argues that the "legal issues are neither novel nor complex and Appellant should not be rewarded for arguments that were eventually deemed unsuccessful by both the Board and the Circuit Court." County Response at 6.

Appellant's attorneys did not represent her in 2015 when the original appeal and settlement were resolved. Instead, they were retained to represent her in 2019. This required them to familiarize themselves with the settlement agreement, prior pleadings and decisions in this matter, and the various legal issues raised during the litigation. They point out that they had to prepare and

file at least six pleadings, four filed with the Board and two with the Circuit Court. Appellant's Request at 8. We agree with Appellant that there was some level of complexity to the various issues raised in this case. Appellant points out that among the issues that required legal research and analysis were interpretation of the settlement agreement, including the term "benefit"; whether and how the doctrines of *res judicata*, laches, and timeliness applied; and whether there was a material breach of the agreement. *Id.* Further, it was necessary to interpret and apply various provisions of the settlement agreement and County personnel regulations to the specific facts.

The County also argues that because of redactions on the invoices it is "impossible to ascertain if . . . [the hours] are reasonable or even associated with the instant matter." County Response at 4. We find no reason to believe that Appellant's attorneys submitted, under oath, improper invoices reflecting hours worked on unrelated matters. While normally the Board's preference is for unredacted invoices, what Appellant's attorneys provided was adequate to ascertain the attorney time that 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 fees related to services performed preparing the attorney's fee petition. County Response at 5-6. The County argues that while the Board has discretion to order reimbursement for the time reasonably required to prepare a fee petition, such discretion should be exercised only "to accomplish the remedial objectives" of the Code and "only in unusual circumstances, such as, where there is a showing that a more extensive explanation is reasonably required to be documented in the fee application." County Response at 5, *citing* MSPB Case No. 00-09 (2005); MSPB Case No. 98-02 (1998). The County asserts that the fee petition was straight forward and does not meet this standard. *Id.*

In MSPB Case No. 98-02 (1998) the Board was troubled by the fact that 5.4 hours was expended to prepare the fee petition, while a total of 8.6 hours was needed to brief the merits of the case. In other words, the attorney's fee request amounted to 38% of the total attorney effort on the case. The Board deemed the time spent on preparation of the fee petition excessive. In this case, however, Appellant's fee petition required an explanation concerning the two law firms and four attorneys involved, as well as an argument concerning the Board's precedent concerning partial success. Moreover, the attorney time expended to prepare and file the petition for attorney's fees in this case was at most 6.2 hours out of a total request of 89.6 hours, or 7% of the total attorney effort. In addition, we note that 1.7 of the 6.2 hours of attorney work was performed at a significantly lower hourly rate by Ms. [REDACTED].

The second case cited by the County, MSPB Case No. 00-09 (2005), also involved a question of partial success and a reduction of the hours that should be reimbursed. There the Board granted the full request for hours spent preparing the fee petition.

We thus reject the County's contention that, except for 0.2 hours of attorney time spent reviewing the Board's supplemental decision, all the hours reflected on Invoice 1841 after the supplemental decision should be denied. In our view, the invoice reflects time considering and discussing Appellant's options, such as whether to seek further judicial review or move for reconsideration, and in preparing the fee petition. These are legitimate and reasonable expenditures of attorney time in the wake of a partial success. The Board concludes that in this matter the hours

related to communication with Appellant and preparation of the fee petition after the Board's supplemental decision are recoverable.

### ***The Degree of Success Achieved***

The County argues that because Appellant did not completely prevail in her appeal the amount of attorney's fees should be reduced. County Response at 8-9. The County Code, § 33-14(c), does provides the Board with the authority to allow reimbursement of "all *or part* of the employee's reasonable attorney's fees." (emphasis added). 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. 15-27 (2017); 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).

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. *See* MSPB Case No. 14-17 (2014) (full attorney's fees awarded because appellant had "achieved the overwhelming majority of the relief he has sought"). Here, however, the County prevailed on every issue other than the claim for PTO after January 1, 2016. The Board thus finds merit to the County's argument that Appellant only partially prevailed and that a reduction in the fees requested is appropriate.

In MSPB Case No. 13-02 (2013) the Board refused to grant the County's request for a demotion and a twenty-day suspension but 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. The Board concluded that reducing the number of hours billed by 25% was appropriate based upon degree of success. *See* MSPB Case No. 15-27 (2017) (Board rescinded appellant's demotion but upheld a 30-day suspension; attorney's fees reduced by 25%); MSPB Case No. 00-22 (2001) (discipline mitigated from discharge to demotion; fees reduced by 50%); MSPB Case No. 00-13 (2000) (four grade demotion mitigated to one grade and 10% pay reduction for 8 weeks; attorney's fees reduced by 50%).

In MSPB Case No. 00-09 (2005), where the appellant only prevailed on one of four grievances, the Board allowed reimbursement of only those attorney hours that were directly attributable to the grievance where the appellant prevailed.

In this case, Appellant made claims: for a parking spot in the EOB parking lot; for PTO rescinded before the Board issued its decision in MSPB Case No. 16-06 in December 2015; for PTO not granted after December 2015; that the County materially breached the settlement agreement by failing to properly maintain the confidentiality of her personnel files; and that the County improper calculated her cost-of-living adjustments.

The relief requested in Appellant's Amended Complaint, filed November 22, 2019, was: to increase her salary and benefits to at or above the M-3 level for the remainder of her employment; require the County to remove certain documents from her personnel file; provide Appellant with PTO as an M-3 benefit; restore 353 hours of PTO or, in the alternative, awarding

her \$23,206.00 for the PTO she was denied; and award Appellant \$2,951.12 for cost of living adjustments.

In Appellant's February 3, 2020, Response to the County's Opposition she suggested that the only appropriate remedy would be an extension of the terms of the settlement, to include providing the higher salary, recalculated cost of living adjustments, and PTO. Alternatively Appellant asked for payments of \$6,223.65 in PTO benefits and additional compensation of \$2,951.12 for missed COLA adjustments.

However, Appellant only prevailed on one claim, her entitlement to PTO from January 1, 2016, to the expiration of the settlement agreement. Most of those PTO hours were offset by the annual and sick leave she was given. In the end, her net recovery was monetary compensation of approximately \$2,000 for the 30 hours of PTO that exceeded her other leave earnings. The modest recovery contrasts unfavorably with both the amount sought for PTO benefits and the total amount of attorney's fees requested. We consider this factor as "reasonably related to a fair award of attorneys' fees." *Monmouth Meadows Homeowners Ass'n v. Hamilton*, 416 Md. 325, 337-38 (2010) ("Although fee awards may approach or even exceed the amount at issue, the relative size of the award is something to be evaluated."). See *Friolo v. Frankel*, 438 Md. 304, 323 (2014) (it is "not only appropriate, but necessary" to consider monetary relief obtained "in determining the level and degree of . . . success").

We conclude that based upon the modest degree of success in this case that it is reasonable and appropriate for the number of hours billed to be reduced to 25% of the total hours billed prior to the Circuit Court's decision of December 22, 2021. Because on remand from the Circuit Court Appellant prevailed on the PTO issue before the Board attorney hours subsequent to the Circuit Court's order of December 22, 2021, shall be fully compensable. Accordingly, the request for attorney's fees incurred prior to the Circuit Court's order will be reduced by 75%, while the hours billed for services after the Court's order shall be fully compensated.

As discussed above, the hourly rates of attorney ██████ shall be \$300 per hour, resulting in compensable fees of attorney ██████ at \$225 per hour, and paralegals at \$135 per hour. Attorney ██████ billed a total of **8** hours, attorney ██████ billed **19.6** hours, and the paralegals billed **1.4** hours. Reducing the billing hours by 75% results in adjusted total compensable hours of **2** at \$300 an hour for attorney ██████ (**\$600**) and **4.9** hours at \$225 per hour for attorney ██████ (**\$1,102.50**), for a total of **\$1,702.50**. After accounting for discounts indicated on the invoices for the paralegals the total billed amount was \$144.50, which is reduced by 75% to **\$36.13**. The adjusted total of compensable attorney's fees for ██████, ██████ r & ██████ is thus **\$1,738.63**.

The hourly rate for attorney ██████ shall remain at \$350, but the **40.85** hours he billed for services prior to December 22, 2021, shall be reduced by 75%, resulting in a total of **10.2** compensable hours billed and attorney's fees of **\$3,570.00**. The **14.9** hours of attorney time billed by Mr. ██████ and Ms. ██████ (at \$200 an hour) subsequent to the Circuit Court's order remanding the case to the Board shall be fully compensable in the amount of **\$4,960.00**. The adjusted total of compensable attorney's fees for ██████ is thus **\$8,530.00**.<sup>3</sup>

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<sup>3</sup> The total hours for all attorneys omit invoiced hours indicated as discounted and not billed to Appellant.



**ORDER**

Based upon the foregoing analysis and finding that a hearing on this matter is unnecessary, the County is hereby **ORDERED** to reimburse Appellant for **\$10,268.63** in attorney's fees and **\$235.38** in costs for a total amount of **\$10,504.01**.

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 of this Order 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

November 28, 2022

  
Harriet E. Davidson  
Chair