

In the Matter of Gary MacDonald, Mercer County

CSC Docket No. 2010-901

(Civil Service Commission, decided January 11, 2012)

Gary MacDonald, a County Correction Officer with Mercer County, represented by Christopher A. Gray, Esq., requests Civil Service Commission (Commission) resolution of a dispute concerning counsel fees due him as result of the attached decision, rendered on August 29, 2007, which modified four suspensions and reversed his removal.

By way of background, the appellant received five separate Final Notices of Disciplinary Action (FNDAs), which imposed three 15-day suspensions, a 25-day suspension, and a removal, effective March 16, 2004. The appellant appealed and the matters were heard at the Office of Administrative Law (OAL). The Administrative Law Judge (ALJ) recommended modifying the appellant's suspensions to 30 and 45 days and to reverse the appellant's removal, as the charges of the removal were not sustained. Upon its *de novo* review, the Merit System Board (Board) accepted and adopted the ALJ's Findings of Fact and Conclusions. The Board found that it was justified that the appellant was suspended, but modified the suspensions, and dismissed the appellant's appeal with respect to the suspensions. Regarding the removal, the Board reversed the removal and granted the appellant back pay, benefits and seniority from the end of his suspensions until his reinstatement to employment. Additionally, the Board granted the appellant counsel fees, but limited the fees to the legal services rendered regarding the appeal of the appellant's removal. The Board also advised the parties that they must inform the Board, in writing, if there is any dispute as to back pay and/or counsel fees within 60 days of issuance of the decision. *See In the Matter of Gary MacDonald* (MSB, decided August 29, 2007).

In a letter dated August 24, 2009, the appellant's counsel requested enforcement of the counsel fees award. He indicated that there had been good faith negotiations between Mercer County and himself since 2007. However, he stated that they "reached an absolute impasse" and Mercer County refused to pay the \$36,068.61 owed. The appellant's counsel submitted an invoice in that amount. It is noted that the invoice did not separately account for the services rendered for the removal appeal and included paralegal services. Additionally, there was a charge of \$9,200 for a January 16, 2004 invoice, which was not submitted. The entry indicated that the amount represents charges from an old billing system up to May 13, 2005.

In response, Mercer County, represented by Timothy Averell, Assistant County Counsel, indicated that the appellant did not request enforcement in a timely manner as two years has passed since the Board's decision. It stated that

the amount of counsel fees had been in dispute since shortly after the Board issued its decision in 2007. Thus, Mercer County requested that the Commission dismiss the matter. Nonetheless, it submitted that the appellant's attorney made no attempt to amend his bill to include only those services rendered for the removal appeal until April 15, 2009. At that time, the appellant's attorney offered to deduct 5% of his bill, stating that the thrust of his representation was to prevent the appellant's removal and the other charges were "incidental and meaningless without winning the removal cases." However, Mercer County maintained that the appellant's attorney addressed all five FNDAs in his briefs, and thus, the explanation that the thrust of his representation was for the removal appeal should not be accepted. Mercer County indicated that a reasonable amount of counsel fees in this matter should equate to 20% of the invoice. Further, Mercer County pointed out that the appellant's attorney included paralegal fees, which are not compensable under Civil Service rules. It also questioned certain entries on the invoice, including the amount of time the appellant's counsel took to draft a brief, a reply, and exceptions to the ALJ's decision. It also objected to the \$9,200 entry, as there was no specific explanation as to the services rendered.

The appellant's attorney replied with an affidavit from Stuart J. Alterman, Esq., who stated that the appellant agreed to be billed at a rate of \$200 per hour for services rendered by Alterman, a partner in the firm, and \$200 per hour for associate attorneys.¹ A written retainer agreement, however, was not executed. The appellant's attorney also presented an invoice regarding the \$9,200 entry, which included a breakdown of the services rendered but with no specific entries regarding the removal.

Subsequently, by letter dated March 11, 2010, staff of the Division of Merit System Practices and Labor Relations (MSPLR) requested that the appellant's counsel submit a specific breakdown of all the time spent and costs associated in defending the removal, including the date and description of the legal service provided and information regarding the individual attorney who worked on the matter. Staff also requested that work performed by paralegals be removed from the invoice as work performed by paralegals is not reimbursable under Civil Service rules. *See 33 N.J.R. 3895(a); In the Matter of Trust of Brown, 213 N.J. Super. 489, 493-494 (Law Div. 1986).* The appellant's attorney was asked to submit the information by March 25, 2010, and he was advised that the matter would be closed if the information was not provided since the Commission would be unable to render a determination. However, the appellant's attorney moved to a new office and the letter was returned. The appellant's attorney was contacted and the letter was sent via e-mail on April 1, 2010. He was given until April 15, 2010 to submit the

¹ The appellant was actually billed at a rate of \$175 per hour for legal services rendered by associate attorneys.

requested information. The appellant's attorney acknowledged receipt of the letter on April 1, 2010 and said in an e-mail, "Thanks, we will respond accordingly."

In response, Mercer County noted that the appellant's attorney did not submit the retainer agreement with the Policemen's Benevolent Association (PBA), which should be considered in reviewing the allowable billable rate.

In May 2010, the matter was closed due to the failure of the appellant's attorney to submit the requested information. However, six months later, by e-mail on November 17, 2010, the appellant's attorney asked whether a determination on the matter was rendered. On November 22, 2010, MSPLR staff called the appellant's attorney and left a message. The appellant's attorney did not return the telephone call. Rather, by letter dated June 23, 2011, he requested an update on the status of the request for counsel fees. In a letter dated July 7, 2011, MSPLR staff explained what had transpired, including that the appellant's attorney indicated that he would respond, and that the matter was closed because he did not actually submit the requested information. On September 6, 2011, the appellant's attorney asked to re-open the matter. He indicated that "It appears that this matter is becoming a contested case in itself regarding the outstanding counsel fees" and requested that it be referred to the OAL for a hearing to "straighten out the facts of what bills are appropriate and what should be paid by the County." The appellant's attorney further indicated that it was "very difficult to dissect" what services were rendered for which discipline.

MSPLR staff responded that the matter would be re-opened if an amended bill was submitted, which excluded the services of any paralegals who worked on the case. In addition, the appellant's attorney was asked to submit the union retainer agreement if his firm was retained through an agreement, such as a legal protection plan. Moreover, it was requested that the appellant's attorney submit a reasonable estimate of how much he believed his firm has billed in representing the appellant on his removal.

In reply, the appellant's attorney submits another affidavit from Alterman, who states that approximately 80% of his time was spent dealing with the removal charges. He provides an amended bill, which he indicates reflects only the services rendered after the removal charge was served and is "a full and complete bill for the professional services rendered by my firm in this matter." The bill also does not include work performed by paralegals. However, it is noted that the entries do not distinguish whether the work was performed for the suspension or removal charges. Alterman further submits that, during the OAL hearing, the appellant conceded to one of the suspension charges and only the penalty of that charge was argued. Alterman also contends that "[t]his case has not been submitted to any defense plan which would only provide for excess coverage." Moreover, Alterman claimed that Mercer County has repeatedly ignored attempts to resolve the matter and has

stopped trying to do so. It is noted that the amended bill totals \$34,516.61, which represents work performed by attorneys and \$171.61 in costs for copying and postage.

Mercer County responds that the appellant is obviously not entitled to be compensated for services rendered prior to the removal charges. Thus, those entries would not have been considered. Further, it takes exception to the claim that the remainder of the time was spent defending only the removal charges. Moreover, Mercer County contends that Alterman's explanation regarding a legal protection plan should be rejected. In that regard, it cites *In the Matter of Francesco Grupico and Roy McLeod* (CSC, decided September 16, 2009), where the Commission determined that the PBA's Legal Protection Plan constituted a specific fee agreement and the attorney who agreed to participate in the plan was only entitled to the hourly range agreed to in the plan despite the fact that the plan may have been considered a "secondary source of coverage for PBA members." Mercer County maintains that, even if the appellant's case was not submitted to the PBA plan because he was successful in defending the removal charges, the appellant's attorney should be bound to the rates agreed therein. Further, it reiterates that some of the entries in the bill submitted by the appellant's attorney are inflated. The appellant's attorney only cited one case, but the appellant was billed for "research." The appellant's attorney also spent a considerable amount of time drafting various submissions. In conclusion, Mercer County submits that the appellant's attorney has been given repeated opportunities to cure his deficient bill and provide documentation to substantiate its content. However, he failed to do so and the Commission should finally dismiss this matter.

In response, the appellant's attorney explains that the PBA Legal Protection Plan is only an "excess carrier" and there is no coverage under the plan because the removal was reversed and the Board granted counsel fees. Further, he notes that there were other entries which were removed in the amended bill "as a means of compromise with Mercer County." It is noted that the appellant's attorney still did not provide a copy of the plan.

CONCLUSION

Initially, the appellant's attorney requests a hearing in this matter. However, disputes over counsel fees are generally treated as reviews of the written record. *See N.J.S.A. 11A:2-6(b)*. Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C. 4A:2-1.1(d)*. No material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil Service*, 155 N.J. Super. 517 (App. Div. 1978). In that regard, the appellant essentially asks that the OAL calculate the amount of

counsel fees owed, which can be done on the written record without the necessity of a hearing. Therefore, there is not a sufficient basis to grant a hearing.

With regard to the timeliness of this request, the appellant's attorney did not request enforcement for two years. Mercer County submits that there was a dispute soon after the Board rendered its decision in 2007 and asks that this matter be dismissed as untimely. In its decision, the Board advised the parties to inform the Board, in writing, if there was any dispute as to counsel fees within 60 days of issuance of the decision. However, there is no jurisdictional statutory timeline within which a party is required to request enforcement. *See In the Matter of Joanne Annacone* (MSB, decided April 9, 2008). *N.J.A.C.* 4A:2-1.1(b) provides that an appeal must be filed within 20 days after the appellant has notice or reasonably should have known of the decision, situation or action being appealed, and *N.J.A.C.* 4A:1-1.2(c) provides that a rule may be relaxed for good cause. Although Mercer County requests a dismissal for the untimely request of the appellant's attorney, it also did not inform the Board that there was a dispute within the specified time frame. Furthermore, the record demonstrates that the parties did in fact attempt to reach a settlement during the two years. Thus, under these circumstances, the Commission finds good cause to review the matter. *See e.g., In the Matter of Daniel Soto* (MSB, decided August 12, 2003), *aff'd*, Docket No. A-0404-03T5 (App. Div. November 8, 2004) (Board accepted as timely similar request from an employee five years after decision he sought to enforce, where there was evidence that he made repeated efforts to resolve the matter with the appointing authority during the intervening time period).

However, the Commission must express its displeasure over the handling of this matter by the appellant's attorney. He acknowledged that he would respond to the requested information on April 1, 2010, but he failed to submit the information within the time given. Thus, the matter was closed. Further, more than seven months passed before the appellant's attorney contacted MSPLR on November 17, 2010, asking for the status of the case, despite knowing that he did not provide a single piece of information as requested in MSPLR's March 11, 2010 letter. Although staff called the appellant's attorney on November 22, 2010 to discuss his e-mail, the appellant's attorney did not return the call. The appellant's attorney then allowed another seven months to pass and did not contact the Commission until June 23, 2011.

With regard to the merits of the present case, *N.J.S.A.* 11A:2-22 provides that reasonable counsel fees may be awarded to an employee as provided by rule. *N.J.A.C.* 4A:2-2.12(a) indicates that the Commission shall award partial or full reasonable counsel fees incurred in proceedings before it and incurred in major disciplinary proceedings at the departmental level where an employee has prevailed on all or substantially all of the primary issues in an appeal of major disciplinary action before the Commission. Additionally, *N.J.A.C.* 4A:2-2.12(c) provides fee

ranges for different categories of attorneys, based on the attorney's experience. *N.J.A.C.* 4A:2-2.12(d) states that, if an attorney has signed a specific fee agreement with the employee or the employee's negotiations representative, the fee ranges set forth in *N.J.A.C.* 4A:2-2.12(c) may be adjusted. *N.J.A.C.* 4A:2-2.12(e) indicates that the recommended fee ranges may be adjusted, based on the circumstances of a particular matter, taking into account the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to performing the legal service properly, the fee customarily charged in the locality for similar legal services, the nature and length of the professional relationship with the employee, and the experience, reputation and ability of the attorney performing the services.

Further, *N.J.A.C.* 4A:2-2.12(g) provides that reasonable out-of-pocket costs shall be awarded, including, but not limited to, costs associated with expert and subpoena fees and out-of-State travel expenses. Costs associated with normal office overhead shall not be awarded. These costs include photocopying expenses and expenses associated with the transmittal of documents through use of Federal Express or a messenger service. *See e.g., In the Matter of Monica Malone*, 381 *N.J. Super.* 344 (App. Div. 2005).

The appellant's attorney is requesting \$34,516.61 in counsel fees and contends that approximately 80% of his law firm's time was spent dealing with the removal charges. Mercer County objects to this percentage, contending that the appellant's attorney spent an equal amount of time defending the five FNDAs. Thus, it submits that the appellant's attorney should only be entitled to, at best, 20% of what was billed. It also questions the content of the invoice, claiming that some of time billed appears to be inflated. However, as to the latter, Alterman submits an affidavit, swearing that the contents of the invoice represents a "full and complete bill." Apart from Mercer County's assertions, there is no evidence which would contradict the accuracy and truthfulness of the bill. Nonetheless, the appellant cannot be awarded counsel fees for the reasons set forth below.

The appellant's attorney argues that the PBA's Legal Protection Plan is inapplicable in this case since the removal was reversed. He also does not provide a copy of the agreement. However, it has been established that participation in the PBA's Legal Protection Plan constitutes a specific fee agreement and an attorney is only entitled to the hourly rate agreed to in the plan despite the assertion of the appellant's attorney in the instant matter that the plan is only an "excess carrier." *See Francesco Grupico and Roy McLeod, supra.* Therefore, as requested by MSPLR staff and Mercer County, the agreement should have been presented to the Commission in order for it to properly calculate the hourly rate pursuant to *N.J.A.C.* 4A:2-2.12(c) and *N.J.A.C.* 4A:2-2.12(d). Consequently, the Commission is unable to determine the amount of counsel fees in this matter and must deny the instant request. However, the Commission notes that even if a copy were submitted, the appellant's attorney has not persuasively shown that the thrust of

his representation was to defend the removal charges. The appellant was issued five FNDAs, each containing serious charges. The ALJ reviewed all of the charges and the testimony associated with the charges. The appellant's attorney should have made an effort to provide a further breakdown of the invoice that he submitted to reflect the work performed on the removal appeal, but he failed to do so. Accordingly, the request for enforcement is denied.

ORDER

Therefore, it is ordered that this request be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.