Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/Protective Services Division Labor Committee	
Petitioner	PERB Case No. 18-U-01
v.	Opinion No. 1839
District of Columbia Department of General Services	
Respondent	

DECISION AND ORDER ON REMAND

I. Statement of the Case

On October 9, 2017, the Fraternal Order of Police/Protective Services Division Labor Committee (FOP) filed an Unfair Labor Practice Complaint (Complaint) against the Department of General Services (DGS). FOP alleged that DGS violated D.C. Official Code § 1-617.04(a)(1) and (5) of the Comprehensive Merit Personnel Act (CMPA) by unilaterally implementing a change in its past practice of providing free worksite parking.[1] FOP argued that the parking policy was a mandatory subject of bargaining and that DGS failed to bargain in good faith.[2] FOP requested that the Board order DGS to return to the *status quo* of providing free parking; reimburse employees for their financial losses; and pay FOP's costs and attorney fees, pursuant to the Federal Back Pay Act.[3]

Accordingly, a hearing was held on January 9, 2019. On April 29, 2019, the Hearing Examiner issued his first Report and Recommendations (First Report). The Hearing Examiner found that DGS violated the CMPA by unilaterally implementing a change in the parking policy, and by failing to negotiate with FOP upon request.[4] The Hearing Examiner recommended the Board order DGS to return to the past practice of providing free worksite parking; reimburse the

[1] Complaint at 2.
[2] Complaint at 2.
[3] Complaint at 2 (citing 5 U.S.C.A. § 5596).
[4] First Report at 24-25.

bargaining unit employees for the parking expenses they incurred; bargain in good faith with FOP over changing the past practice; and pay FOP's reasonable costs.[5] The Hearing Examiner instructed the parties to file supplemental briefs regarding the Board's authority to award attorney fees under the Federal Back Pay Act.[6]

On February 22, 2020, the Board issued Opinion No. 1739, adopting the Hearing Examiner's recommendation, and finding that DGS violated D.C. Official Code § 1-617.04(a)(1) and (5) of the CMPA.[7] In Opinion No. 1739, the Board also found that an award of attorney fees was an available remedy within the Board's jurisdiction in accordance with the Federal Back Pay Act and the CMPA.[8] Therefore, the Board overturned its prior precedents and remanded the attorney fees issues to the Hearing Examiner for further consideration.[9]

On March 9, 2020, DGS filed a Motion for Reconsideration (Motion), requesting that the Board reconsider its decision in Opinion No. 1739. DGS argued that "long-standing PERB precedent, as well as fundamental rules of statutory construction, compel[led] reversal."[10] DGS argued that the Board's decision was contrary to law because the CMPA "does not provide PERB with the jurisdictional authority to award attorney fees…."[11] DGS also argued that the Board based its decision on a flawed public policy analysis.[12]

On June 17, 2020, the Board issued Opinion No. 1749, denying DGS's Motion for failure to raise any new arguments.[13] Accordingly, the Board remanded the matter to the Hearing Examiner to "make factual findings and conclusions as to whether an award of attorney fees [wa]s in the interest of justice and, if it [wa]s, whether the amount of attorney fees requested [wa]s appropriate."[14] On July 29, 2020, FOP submitted its brief regarding attorney fees. On July 16, 2020, the Office of the Attorney General for the District of Columbia (OAG) filed an appeal of the Board's decision regarding attorney fees with the D.C. Superior Court.[15] On August 31, 2020, DGS filed a response, as well as a motion for the Board to hold the attorney fees determination in abeyance, pending the court's decision on appeal. The Board granted DGS's motion and held the attorney fees determination in abeyance.

On April 12, 2022, the Superior Court issued an Order granting DGS's petition for review and remanding the matter to PERB, with instructions to provide a "reasoned analysis" for overturning the Board's precedent regarding the Board's authority to grant attorney fees.[16]

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[5] First Report at 25-26.
[6] First Report at 26 (citing 5 U.S.C. §§ 5596, *et seq*. and 7701).
[7] *FOP/PSD Labor Comm. v. DGS*, 67 D.C. Reg. 7031, Slip Op. No. 1739 at 15, PERB Case No. 18-U-01 (2020).
[8] *Id*. at 2.
[9] *Id*. at 15.
[10] Motion at 4.
[11] Motion at 5.
[12] Motion at 9-10.
[13] *FOP/PSD Labor Comm. v. DGS*, 67 D.C. Reg. 8544, Slip Op. No. 1749, PERB Case No. 18-U-01 (2020).
[14] *Id*. at 1.
[15] *DGS v. PERB*, Case No. 2020 CA 003165 P(MPA) (D.C. Super. Ct. March 24, 2022).
[16] *Id*. at 7-8.

On July 12, 2022, the parties submitted their briefs on remand. On October 31, 2022, the Hearing Examiner issued his second Report and Recommendations (Second Report). The Hearing Examiner found that the Board had authority to award attorney fees based on the Federal Back Pay Act; the D.C. Court of Appeals' holding in *Zenian v. OEA*;[17] and the "jump back" provision in D.C. Official Code § 1-611.04(e) of the CMPA.[18] The Hearing Examiner recommended that the Board award FOP attorney fees "in the interest of justice," pursuant to the Federal Back Pay Act and the criteria set forth in the Merit Systems Protection Board case, *Allen v. U.S. Postal Service*.[19]

For the reasons stated herein, the Board adopts the Hearing Examiner's recommendations on remand[20] from the Superior Court, and awards FOP the attorney fees and costs it requests.

II. Hearing Examiner's Report and Recommendations on Remand

In his Second Report, the Hearing Examiner sought to:

(1) "[P]rovide a reasoned analysis for the conclusion that the [DPM] is not a new compensation system that superseded the [Federal Back Pay Act] or that the Board's 'make whole' remedial authority includes the authority to award attorney fees…;"[21]

(2) Determine whether FOP is entitled to attorney fees, in the interest of justice;[22] and

(3) Determine whether the sum FOP requested in attorney fees was appropriate.[23]

The Hearing Examiner discussed the Superior Court's standard of deference to PERB, as established in the court's remand Order. The Hearing Examiner found that pursuant to the Order, the court must "defer to an agency's interpretation of the statute it administers, as long [as] that interpretation is reasonable and not plainly wrong or inconsistent with its legislative purpose."[24] The Hearing Examiner found that the Order established the Board's authority to "change its statutory interpretation by providing cogent reasons and reasoned analysis for the change."[25]

A. The Board's authority to award attorney fees

The Hearing Examiner considered the briefs the parties submitted on remand from the Superior Court. In its brief (DGS Remand Brief), DGS argued that the Board has held for decades that it has the authority to award reasonable costs under D.C. Official Code § 1-606.08, but not

[17] 598 A.2d 1161, 1166 (D.C. 1991). Second Report at 18.
[18] Second Report at 8, 18.
[19] 2 MSPR 420, 434-35 (1985). Second Report at 8, 26, 28, 31.
[20] Neither party filed Exceptions to the Hearing Examiner's Report and Recommendations on Remand.
[21] Second Report at 2 (quoting *DGS*, Case No. 2020 CA 003165 P(MPA) at 3).
[22] Second Report at 3 (citing *DGS*, Case No. 2020 CA 003165 P(MPA) at 8).
[23] Second Report at 19.
[24] Second Report at 7 (quoting *DGS*, Case No. 2020 CA 003165 P(MPA) at 8 (citing *Zenian*, 598 A.2d at 1168)).
[25] Second Report at 7.

attorney fees.[26] DGS asserted that there was "no cogent rationale" for the Board to change its interpretation of the CMPA based solely on the Court of Appeals' holding in *Zenian*.[27] DGS also argued that the DPM "supplanted the [Federal Back Pay Act] in 2005 as a new compensation system with no express authority that permits the [Board to] award…attorney fees…."[28] In its brief (FOP Remand Brief), FOP argued that "the 2005 revisions of the DPM did not constitute a new compensation system pursuant to D.C. [Official] Code § 1-611.04."[29] FOP asserted that the "Federal Office of Personnel Management (OPM) classification and compensation system remains in place since the time when DC employees were Federal employees."[30] Further, FOP argued that under the "jump back" provision of D.C. Official Code § 1-611.04(e), District employees were entitled to "the rights found in the [Federal Back Pay Act] for attorney fees when back pay is awarded in an unfair labor practice charge."[31]

The Hearing Examiner discussed the application of the Federal Back Pay Act to District employees. The Federal Back Pay Act is part of the federal classification and compensation system which was enacted in 1966 (before the CMPA) and codified under 5 U.S.C. § 5596. The Hearing Examiner established that the express language of § 5596(a)(5) demonstrates that the Federal Back Pay Act applies to District employees.[32] The Hearing Examiner stated that "[t]he [Federal Back Pay Act] at § 5596(a) defines the agencies covered by the statute as follows: (a) for the purposes of this section, 'agency' means…the government of the District of Columbia."[33] The Hearing Examiner determined that the Federal Back Pay Act permits an award of attorney fees to an employee only where "the correction of a personnel action results in an entitlement to back pay, allowances or differentials."[34]

The Hearing Examiner discussed the CMPA, which was enacted in 1979 and codified under D.C. Official Code §§ 1-601.01 to 1-636.03. The CMPA was designed to "assure that the District of Columbia government [has] a modern flexible system of public personnel administration …."[35] The Hearing Examiner found that, "[p]ursuant to D.C. [Official] Code §§ 1-611.02(a) and 1-611.04(a), at the inception of home rule, the Mayor was to develop a new compensation system for all employees in the Career, Legal, Excepted, and Management Supervisory Services in consultation with employee organizations pursuant to D.C. [Official] Code § 1-611.04(c)."[36]

The Hearing Examiner found that in 2001, FOP and other labor organizations formed a committee and "began working collaboratively in consultation with the D.C. government to develop a new classification and compensation system referenced in D.C. [Official] Code §§ 1-

[26] Second Report at 8 (citing DGS Remand Brief at 7).
[27] Second Report at 9 (quoting DGS Remand Brief at 12).
[28] Second Report at 9 (citing DGS Remand Brief at 7-12).
[29] Second Report at 9 (citing FOP Remand Brief at 2).
[30] Second Report at 9 (citing FOP Remand Brief at 9).
[31] Second Report at 10 (citing FOP Remand Brief at 9-10).
[32] *See* Second Report at 10 (citing 5 U.S.C. § 5596(a)(5)).
[33] Second Report at 10.
[34] Second Report at 10 (citing 5 U.S.C. § 5596(b)(1)(A(i) and (ii)).
[35] D.C. Official Code § 1-601.02.
[36] Second Report at 12 (citing D.C. Official Code § 1-611.04) (internal quotations omitted).

611.02(a) and 1-611.04(a) which was a mandatory, statutory prerequisite to…establishing a new compensation system pursuant to D.C. [Official] Code § 1-611.04(c)."[37] The Hearing Examiner found that, between 2001 and 2017, the committee and the D.C. government endeavored to create and implement a new classification and compensation system for District employees.[38] However, the Hearing Examiner determined that a new system was never implemented, due to disagreement among the parties and financial factors.[39] The Hearing Examiner determined that "the D.C. employees' classification and compensation [have] continued to be administered pursuant to the Federal government system, also known as the OPM system, which remains in place and unchanged since the time DC acquired home rule."[40]

The Hearing Examiner addressed the "jump back" provision contained in D.C. Official Code § 1-611.04(e) of the CMPA. Under the "jump back" provision, "[u]ntil such time as a new compensation system is approved, the compensation system, including the salary and pay schedules, in effect on December 31, 1979, shall continue in effect: Provided, that pay adjustments shall be made in accordance with the policy stated in § 1-611.03."[41] The Hearing Examiner found that no new classification and compensation system was created for District employees and, therefore, they continue to have the rights found in the Federal Back Pay Act pursuant to the "jump back" provision of D.C. Official Code § 1-611.04(e)[42]

The Hearing Examiner discussed the D.C. Court of Appeals' 1991 decision in *Zenian*, which addressed the "jump back" provision. In *Zenian*, the court found that the CMPA was designed to replace an existing personnel system which "'awkwardly meshed' the District personnel apparatus with the federal personnel system."[43] However, the court observed that "[t]he state of the law under the CMPA…has yet to become a model of luminous clarity."[44] The court held that pursuant to the "jump back" provision, the Federal Back Pay Act is incorporated into the CMPA.[45] Moreover, the court determined that attorney fees are available to District employees where the conditions in the Federal Back Pay Act are met.[46] The Hearing Examiner found that "the D.C. government has brought no further clarity to the CMPA classification and compensation system" since the Court of Appeals' decision in *Zenian*.[47] Thus, the Hearing Examiner concluded that the precedent set in *Zenian* is still controlling.[48]

The Hearing Examiner addressed the effect of the 2005 DPM amendment on the compensation system for District employees. The Hearing Examiner found that "as a matter of law…the 2005 DPM amendment failed to supersede D.C. employees' right to attorney fees and

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[37] Second Report at 12.
[38] Second Report at 12-13.
[39] Second Report at 12-15.
[40] Second Report at 15.
[41] Second Report at 11, fn. 13.
[42] Second Report at 15.
[43] Second Report at 10 (citing *Zenian*, 598 A.2d at 1163) (internal citations omitted).
[44] Second Report at 10 (citing *Zenian*, 598 A.2d at 1163).
[45] Second Report at 17-18 (citing *Zenian*, 598 A.2d at 1165).
[46] *See generally Zenian*, 598 A.2d 1161.
[47] Second Report at 11.
[48] *See* Second Report at 11.

costs pursuant to the [Federal Back Pay Act]."[49] The Hearing Examiner determined that "D.C. continues to use the same classification and compensation system developed by…OPM…harkening back to when D.C. employees were federal government employees."[50] The Hearing Examiner found that "the DPM amendments made no substantive changes to the existing classification and compensation system…pursuant to the statutory procedures required in D.C. [Official] Code § 1-611.04."[51] Therefore, the Hearing Examiner concluded that, due to the "jump back" provision in D.C. Official Code § 1-611.04(e), the Federal Back Pay Act provides a remedy under "the legally correct compensation and classification system for DC employees in Compensation Units 1 and 2…."[52]

In sum, the Hearing Examiner determined that "the DPM is not a new compensation system that superseded the [Federal Back Pay Act] and that the PERB's make whole remedial authority includes the authority to award attorney fees based on the [Federal Back Pay Act], the *Zenian*[53] precedent and the express language of D.C. [Official] Code § 1-611.04(e), also known as the 'jump back' provision of the [CMPA]."[54] Based on this determination, the Hearing Examiner found it unnecessary to resolve the question of whether "PERB has a source of authority independent of the [Federal Back Pay Act] to award attorney fees."[55]

B. The appropriateness of attorney fees in the case at hand

The Superior Court found that, in Opinion No. 1739, the Board "decided only whether it has authority to award attorney fees to FOP and did not decide whether to exercise that authority…."[56] The court invited the Board to decide whether an award of attorney fees to FOP would be "in the interest of justice."[57]

The Hearing Examiner analyzed this issue using the test established in *Allen v. U.S. Postal Service*.[58] The five criteria of the *Allen* test are:

1. Whether the Agency engaged in a prohibited personnel practice;
2. Whether the Agency action was clearly without merit or wholly unfounded, or the employee is substantially innocent of the charges;
3. Whether the Agency initiated the action in bad faith;
4. Whether the Agency committed a gross procedural error that prolonged the proceeding or severely prejudiced the employee;

[49] Second Report at 11.
[50] Second Report at 12.
[51] Second Report at 15.
[52] *See* Second Report at 11.
[53] 598 A.2d 1161.
[54] Second Report at 8.
[55] Second Report at 18.
[56] Second Report at 18 (quoting *DGS*, Case No. 2020 CA 003165 P(MPA) at 8).
[57] Second Report at 19 (citing *DGS*, Case No. 2020 CA 003165 P(MPA) at 8).
[58] 2 MSPR 420 (1985). Second Report at 20-22.

5. Whether the Agency knew or should have known that it would not prevail on the merits when it brought the proceeding.[59]

The Hearing Examiner found that, under this test, if any of the five criteria are met, an award of attorney fees is in the interest of justice.[60]

The Hearing Examiner conducted an *Allen* factors analysis and concluded that three of the criteria were met. First, the Hearing Examiner found that DGS unilaterally changed an established past practice "'which resulted in the withdrawal or reduction of all or part of the pay, allowances or differentials' of FOP bargaining unit employees," thereby constituting an "unwarranted and unjustified prohibited personnel action."[61] Second, the Hearing Examiner determined DGS's unilateral change to this "long standing, binding past practice" and its "ensuing refusal to bargain was unsupported by record evidence and clearly without merit."[62] Third, the Hearing Examiner found that DGS negotiated regarding free parking at the new headquarters based on the free parking at the old headquarters, establishing that DGS and OLRCB "knew or should have known that they would not prevail on the merits when they unilaterally rescinded the free parking benefit."[63] Thus, the Hearing Examiner concluded that, pursuant to *Allen*, an award of attorney fees and costs was in the interest of justice.[64]

C. The appropriateness of the sum of attorney fees FOP requests

The Hearing Examiner determined that because "FOP entirely prevailed in its ULP," there was no reason for reducing or apportioning FOP's attorney fees.[65] Additionally, the Hearing Examiner concluded that the uncontested number of hours FOP's attorneys expended was reasonable and supported by documentation.[66] The Hearing Examiner also found that the uncontested hourly rate FOP's attorneys sought was "reasonable and consistent with the U.S. Attorney's Office for the District of Columbia *Laffey*[67] Matrix, which is the accepted measure of reasonable hourly rates for attorney fees in back pay cases."[68] Therefore, the Hearing Examiner recommended that, in the interest of justice, the Board award FOP $42,076.40 in attorney fees and $919.60 in costs.[69]

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[59] 2 MSPR 420, 434-35 (1985). Second Report at 20, fn. 18.
[60] Second Report at 20. "The parties d[id] not dispute that the appropriateness of an award of attorney fees should be evaluated under the *Allen v. U.S. Postal Service* standards." Second Report at 26, fn, 23 (quoting *FOP/PSD Labor Comm.*, Slip Op. No. 1739 at 14).
[61] Second Report at 28 (quoting 5 USC § 5596(b)(1)).
[62] Second Report at 28.
[63] Second Report at 28-29.
[64] Second Report at 28-29.
[65] Second Report at 31 (citing *FOP/PSD Labor Comm.*, Slip Op. No. 1739).
[66] Second Report at 31.
[67] *Laffey v. Northwest Airlines*, 572 F. Supp. 354 (D.D.C. 1983).
[68] Second Report at 31.
[69] Second Report at 31.

III. Discussion

The Board will adopt a hearing examiner's recommendations where those recommendations are reasonable, supported by the record, and consistent with Board precedent.[70] The Hearing Examiner's original Report and Recommendations in this case conflicted with the Board's precedent by concluding that the Board has authority to award attorney fees to a complainant in an unfair labor practice case. However, the Hearing Examiner's second Report and Recommendations are consistent with the precedent set in Slip Opinion No. 1739, which directed the Hearing Examiner to determine whether an award of attorney fees was in the interest of justice and whether the requested amount was appropriate.[71] Regardless, inconsistency with Board precedent does not preclude the Board from adopting the a hearing examiner's recommendations, provided they are reasonable and supported by the record. The D.C. Court of Appeals has held that *stare decisis* is "a principle of palpably less rigorous applicability in the field of administrative law than elsewhere ...."[72] The Court of Appeals has determined that "[a]n agency has the 'right to modify or even overrule an established precedent or approach, [because] an administrative agency concerned with the furtherance of the public interest is not bound to rigid adherence to its prior rulings.'"[73] The Court of Appeals has observed that "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."[74] Here, the Superior Court's Order established that the Board "is free to determine whether or not it has this authority, so long as its analysis is reasoned and consistent with the principles in th[e] Order."[75]

To meet the Court of Appeals' "reasoned analysis" requirement, the record must indicate that the agency gave consideration to all the statutory language and to the structure and purpose of the provisions it construes.[76] A "reasoned analysis" must be "faithful and not indifferent to the rule of law,"[77] and is required to "follow the plain and ordinary meaning of the statute because that is the meaning intended by the legislature."[78] The Court of Appeals has held that it will "give great weight to any reasonable construction of a regulatory statute that has been adopted by the

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[70] *FOP/MPD Labor Comm. v. MPD*, 59 D.C. Reg. 7285, Slip Op. No. 1250 at 2, PERB Case No. 05-U-01(2012).
[71] *FOP/PSD Labor Comm. v. DGS*, 67 D.C. Reg. 7031, Slip Op. No. 1739 at 16, PERB Case No. 18-U-01 (2020).
[72] *See Springer v. DOES*, 743 A.2d 1213, 1221 (D.C. 1999) (quoting *FTC v. Crowther*, 139 U.S.App.D.C. 137, 140, 430 F.2d 510, 513 (1970)).
[73] *Id*. (quoting *Columbia Broadcasting System*, Inc. v. FCC, 147 U.S.App.D.C. 175, 183, 454 F.2d 1018, 1026 (1971)).
[74] *Greater Bos. Television Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970).
[75] *DGS v. PERB*, Case No. 2020 CA 003165 P(MPA) at 3.
[76] *See Springer*, 743 A.2d at 1221 (citing *Coumaris v. D.C. Alcoholic Beverage Control Bd.*, 660 A.2d 896, 900 (D.C. 1995)). In *Springer*, the court upheld DOES' decision to overrule its prior interpretation of a workers' compensation statute because "[t]he [DOES] Director specifically cited and discussed [contrary DOES caselaw] in her opinion, thus showing that she was aware of its existence and its value as precedent." *Id*. at 1222. The court observed that the DOES Director "explicitly held that [DOES precedent] had been overruled by the enactment of D.C.[Official] Code § 36-303(a–1), which amended the prior statute…." *Id*. The court held that DOES' "decision demonstrate[d] that the Director did not ignore past decisions, but chose to change the DOES interpretation of the statute in a manner entirely consistent with controlling case law." *Id*.
[77] *Id*. at 1221 (quoting *Columbia Broadcasting System, Inc. v. FCC*, 147 U.S.App.D.C. 175, 183, 454 F.2d 1018, 1026 (1971)).
[78] *Id*. (quoting *Guerra v. D.C. Rental Housing Comm'n*, 501 A.2d 786, 789 (D.C.1985)).

agency charged with its enforcement."[79] The Court of Appeals has established that "[t]he interpretation of the agency is binding unless it is plainly erroneous or inconsistent with the enabling statute," regardless of whether "other, contrary, constructions [are] equally as reasonable as the one adopted by the agency."[80]

The Superior Court established in its Order that "the key issue facing PERB [i]s whether the DPM qualifies as a 'new compensation system.'"[81] The court found that the Board's previous decision diverged from the Board's precedent without "provid[ing] a reasoned analysis for a conclusion that the [DPM] is not a new compensation system that superseded the [Federal Back Pay Act]…."[82] The court established that the Board "must explain and justify its change of mind or its use of a different standard from one situation to the next."[83]

In *White v. WASA*,[84] the Court of Appeals held that a D.C. Water and Sewer Authority (WASA) employee who prevailed in a breach of contract dispute against his employer was not entitled to attorney fees.[85] DGS argues that the Court of Appeals' ruling in *White* demonstrates that the 2005 DPM revisions superseded the Federal Back Pay Act as a new compensation system "without attorney fee authorization equivalent to that in the [Federal Back Pay Act]."[86] In *White*, the court found that WASA, an independent District agency "adopted a new personnel and compensation system that supplant[ed] application of the [Federal Back Pay Act] to employees of WASA."[87] The Court of Appeals' decision was not based on the 2005 DPM revisions.[88] In *White*, the aggrieved employee cited *Zenian* to support his argument that he was entitled to attorney fees.[89] However, the court rejected this argument and distinguished *Zenian* as a matter involving an agency subordinate to the Mayor, as opposed to an independent agency.[90] The present matter involves an employee of DGS, a subordinate agency without a replacement compensation system. Thus, this case is analogous to *Zenian* – not to *White*.

The Hearing Examiner's recommendations on remand, combined with the Board's discussion herein, provide the reasoned analysis required by the court. Thus, the Board adopts the Hearing Examiner's findings of fact and conclusions and holds that the DPM is not a new compensation system and, therefore, does not supersede the Federal Back Pay Act.[91]

The Board's holding is supported by D.C. Court of Appeals precedent concerning the award of attorney fees to District employees who are awarded back pay due to unjustified

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[79] *Reichley v. DOES*, 531 A.2d 244, 247 (D.C. 1987) (quoting *Lee v. DOES*, 509 A.2d 100, 102 (D.C. 1986)).
[80] *Id*. (quoting *Lee v. DOES*, 509 A.2d at 102).
[81] *DGS v. PERB*, Case No. 2020 CA 003165 P(MPA) at 5.
[82] *See id*. at 3.
[83] *Id*. at 2 (quoting *Brentwood Liquors*, 661 A.2d at 656).
[84] 962 A.2d 258 (D.C. 2008).
[85] *Id*.
[86] *See* DGS Remand Brief at 8 (citing *White*, 962 A.2d at 259).
[87] *White*, 962 A.2d at 259.
[88] *See Id*.
[89] *Id*. (citing *Zenian*, 598 A.2d at 1161).
[90] *Id*.
[91] *See* Second Report at 11.

personnel actions. In *D.C. v. Hunt*,[92] the Court of Appeals held that, pursuant to the Home Rule Act, the attorney fees provision of the Federal Back Pay Act remains applicable to District employees who were hired before the enactment of the CMPA.[93] The court held that "the District must retain personnel benefits and entitlements at least equal to those previously available under the federal system, even after the CMPA went into effect."[94] The court established that the Home Rule Act "provides a floor for benefits under the…CMPA, equal to those applicable to federal employees immediately prior to enactment of District personnel legislation."[95] The court found that the CMPA did not contain an equivalent alternative.[96] Thus, the court awarded attorney fees to the prevailing party pursuant to the Federal Back Pay Act.[97]

In *Zenian*, the Court of Appeals relied on the "jump back" provision of the CMPA to expand the scope of its holding in *Hunt*, awarding attorney fees to a District employee who prevailed in a dispute concerning an unjustified personnel action, despite the fact he was hired after the enactment of the CMPA.[98] The court determined that attorney fees "constitute a 'concrete personnel entitlement or benefit that the District must retain, or replace with an equivalent alternative pursuant to [the Home Rule Act].'"[99] The court grounded its decision in the policy rationale that attorney fees act as "a restitutionary form of compensation for employees who are forced to litigate District personnel actions later determined to be improper."[100]

The legal and policy rationale supporting the court's decision in *Zenian* has catalyzed the Board's reevaluation of the attorney fees issue. Prior to the case at hand, the Board's discussion of its authority to award attorney fees in unfair labor practice cases has been limited. The Board has addressed this issue in fewer than fifty cases since its inception and has consistently held that it does not have authority to grant attorney fees under the CMPA, even where back pay is awarded.[101] Beginning with the Board's first pre-*Zenian* discussion of this issue in *UDC Faculty Association v. UDC*, [102] the Board has exclusively relied on the fact that D.C. Official Code § 1-617.13 does not list attorney fees as an available remedy. None of the Board's subsequent decisions have discussed the *Zenian* holding, the Home Rule Act, or the "jump back" provision of the CMPA in the context of the Board's authority to award attorney fees in unfair labor practice cases. The present matter has brought to light the disparity between the Board's precedent and the Court of Appeals' holdings on this issue and has prompted the Board to diverge from its prior decisions.

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[92] 520 A.2d 300 (D.C. 1987).
[93] *Id*. at 301.
[94] *Id*. at 303.
[95] *Id*. at 303 (quoting *AFGE v. Barry*, 459 A.2d 1045, 1049 (D.C.1983)) (internal quotations omitted).
[96] *Id*. at 304.
[97] *Id*. at 306.
[98] *Zenian*, 598 A.2d at 1162-63.
[99] *Id*. at 1165 (quoting *Hunt*, 520 A.2d at 304).
[100] *Id*. (quoting *Hunt*, 520 A.2d at 304).
[101] *E.g., AFGE, Local 2725 v. DOH*, 59 D.C. Reg. 6003, Slip Op. No. 1003, PERB Case No. 09-U-65 (2009); *WTU, Local 6 v. DCPS*, 59 D.C. Reg. 3463, Slip Op. No. 848, PERB Case No. 05-U-18 (2006); *AFSCME, Local 2921 v. DCPS*, 50 D.C. Reg. 5077, Slip Op. No. 712, PERB Case No. 03-U-17 (2003); *Comm. of Interns v. DHS*, 46 D.C. Reg. 6868, Slip Op. No. 480, PERB Case No. 95-U-22; PERB Case No. 91-U-14 (1992); *UDC Faculty Ass'n v. UDC*, 38 D.C. Reg. 3463, Slip Op. No. 272, PERB Case No. 90-U-10 (1991).
[102] Slip Op. No. 272 at 5.

The Board finds that the Court of Appeals' holding in *Zenian* still applies because the District continues to utilize the OPM classification and compensation system, and the 2005 DPM amendment[103] does not constitute a new compensation system[104] within the meaning of the Home Rule Act. Pursuant to 6-B DCMR § 1149.1(f), the Board is authorized "to correct or direct the correction of an unjustified or unwarranted personnel action." However, 6-B DCMR § 1149 is silent regarding the Board's authority to award attorney fees. The "floor of benefits" available to District employees under the OPM classification and compensation system includes attorney fees as an available remedy.[105] The 2005 DPM Amendment does not provide a replacement for the remedy of attorney fees, which is part of the "floor of benefits" the OPM affords.. Therefore, pursuant to the "jump back" provision of the CMPA, the 2005 DPM amendment did not supplant the Federal Back Pay Act provision, which gives the Board discretionary authority[106] to award attorney fees.

In this matter, the Superior Court found that the Board "decided only whether it has authority to award attorney fees to FOP, and it did not decide whether to exercise that authority and award attorney fees to FOP." The court ordered the Board to "decide this issue in the first instance." In the absence of Board precedent regarding a question of law, the Board may consider relevant persuasive precedent from federal labor boards.[107] The Hearing Examiner utilized the test MSPB established in *Allen* to assess whether an award of attorney fees would be in the interest of justice. The Board finds that the Hearing Examiner's *Allen* analysis was reasonable and supported by the record. Thus, the Board adopts the Hearing Examiner's conclusion that an award of attorney fees would be in the interest of justice.

The court did not explicitly direct the Board to determine whether the attorney fees FOP seeks are appropriate. Nevertheless, the Hearing Examiner addressed this issue and found that, pursuant to the *Laffey* Matrix, the attorney fees sought were reasonable and should be awarded.[108] In a prior case, the Board declined to overturn an arbitration award which used the *Laffey* Matrix,

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[103] 6-B DCMR § 1149.

[104] In *AFSCME, Local 2087 v. UDC*, the Court of Appeals found that although "[t]he Council of the District of Columbia itself has never promulgated regulations to implement the Back Pay Act, which is a vestige of the patchwork system in effect prior to the passage of Home Rule in 1973…the Back Pay Act continues to apply to District employees under the broader [CMPA] policies of maintaining all concrete personnel entitlements or benefits or their equivalents for employees hired before the CMPA ... and maintaining the pre-CMPA compensation system for all employees whenever hired until a new one is enacted to replace it." The court explained, however, that independent government entities may be statutorily eligible for CMPA exemption. 166 A.3d 967, 970 (D.C. 2017) (internal citations omitted).

[105] *See* 5 U.S.C.A. § 5596(b)(1)(A)(ii).

[106] 5 U.S.C.A. § 5596(b)(1)(A)(ii) provides that "reasonable attorney fees…shall be awarded in accordance with standards established under section 7701(g) of this title…." 5 U.S.C.A. § 7701(g)(1) establishes that "the Board…may require payment by the agency involved of reasonable attorney fees," where "payment by the agency is warranted in the interest of justice." *See Surgent v. D.C.*, 683 A.2d 493, 495 (D.C. 1996) (finding that "[i]t was within the Superior Court's discretion to determine whether attorney's fees should be awarded in 'the interest of justice.'").

[107] *See e.g., AFGE, Local 1403 v. D.C. and DBH*, 65 D.C. Reg. 12891, Slip Op. No. 1685, PERB Case No. 17-U-22 (2018); *Antoine, et al. v. Int'l Brotherhood of Teamsters, Local 730*, 61 D.C. Reg. 12845, Slip Op. No. 1496, PERB Case No. 14-U-17 (2014) (citing *Production and Maintenance Union, Local 101, Chicago Truck Drivers Union (Bake-Line Products) and Efrain Jimenez, Bake Line Products, Inc.*, 329 NLRB 247, 248 (1999)).

[108] Second Report at 31.

despite objection from the petitioner in that matter.[109] The Board acknowledges that the standard of review for arbitration awards is different than the standard for review for hearing examiner recommendations. Nonetheless, this precedent is relevant because it demonstrates the Board's past acceptance of the *Laffey* Matrix as a valid tool for calculating appropriate attorney fees. The Board finds that the Hearing Examiner's conclusion regarding the appropriate amount of attorney fees is reasonable, supported by the record, and consistent with Board precedent.

IV. Conclusion

For the reasons stated, the Board adopts the Hearing Examiner's recommendation and finds that the Federal Back Pay Act grants the Board discretionary authority to award attorney fees in unfair labor practice cases where back pay is awarded; that an award of attorney fees is appropriate in this matter; and that the sum of attorney fees sought is appropriate. Therefore, the Board adopts the Hearing Examiner's recommendation and orders DGS to pay FOP the requested attorney fees and costs.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of General Services must pay the Fraternal Order of Police/Protective Services Division Labor Committee $42,076.40 in attorney fees and $919.60 in costs;

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons, and Peter Winkler.

May 18, 2023

Washington, D.C.

[109] *DCRA v. AFGE, Local 2725*, 59 D.C. Reg. 5502, Slip Op. No. 992, PERB Case No. 09-A-03 (2012).