

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2009 MSPB 135**

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Docket No. CH-0752-08-0376-A-1

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**Ricky L. Hilliard,  
Appellant,  
v.  
United States Postal Service,  
Agency.**

July 17, 2009

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Nathaniel M. Jones, Esquire, Oak Park, Illinois, for the appellant.

Heather L. McDermott, Esquire, Chicago, Illinois, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

Chairman McPhie and Vice Chairman Rose both issue separate opinions.

**ORDER**

This case is before the Board by petition for review of the initial decision which denied the appellant's motion for attorney fees. The two Board members cannot agree on the disposition of the petition for review. Therefore, the initial decision now becomes the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1200.3(b) ([5 C.F.R. § 1200.3\(b\)](#)). This decision shall not be considered as precedent by the Board in any other case. [5 C.F.R. § 1200.3\(d\)](#).

NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and Forms [5](#), [6](#), and [11](#).

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.

SEPARATE OPINION OF NEIL A. G. MCPHIE

in

*Ricky L. Hilliard v. United States Postal Service*

MSPB Docket No. CH-0752-08-0376-A-1

¶1 I would issue a Final Order because there is no new, previously unavailable, evidence and the administrative judge made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115\(d\)](#).

**BACKGROUND**

¶2 The appellant appealed from an action demoting him based on the charges of insubordination and failure to perform the duties of his position. In his Initial Decision on the merits, the AJ found that the appellant’s actions underlying the first charge did not rise to the level of a “willful and intentional refusal” to obey his superior’s directive. MSPB Docket No. CH-0752-08-0376-I-3 Initial Appeal File (“IAF-3”), Tab 15 at 3. The AJ therefore did not sustain the charge. The AJ sustained the second charge that the appellant failed to perform the duties of his position. The AJ also reduced the penalty to a letter of warning in lieu of a 14-day suspension. The appellant then filed the motion for attorney fees that is the subject of the instant matter.

¶3 The AJ denied the motion for attorney fees. After finding that the appellant prevailed on the merits and was represented by a licensed attorney, the AJ considered all five of the bases for meeting the interest of justice standard set forth in *Allen v. U.S. Postal Service*, [2 M.S.P.R. 420](#), 434-35 (1980). Of the five, only the fifth standard – “the agency knew or should have known it would not prevail on the merits” – remains at issue on petition for review. *See Kruger v. Department of Veterans Affairs*, [95 M.S.P.R. 471](#), ¶ 8 (2004). The AJ reasoned that the “knew or should have known” standard requires a finding that the agency “never possessed any credible, probative evidence to support its action.” MSPB Docket No. CH-0752-08-0376-A-1 (“A File”), Tab 4 at 4. He concluded that the

standard was not met because “there was credible, probative evidence supporting both charges. The fact that the agency was not able at the hearing to establish its burden of proof with respect to the charge of insubordination does not establish it knew or should have known it would not prevail on the merits.” *Id.*

### ANALYSIS

¶4 I believe that the AJ correctly applied the standards governing whether an award of attorney fees is in the interest of justice under the “knew or should have known” test. The test is applicable both to the agency’s evaluation of the charged conduct and to its penalty determination. With regard to the charged conduct, the AJ correctly cited the rule that an agency is deemed to have actual or constructive knowledge that a charge would not be sustained where “the agency never possessed any credible, probative evidence to support the action taken.” *Griffin v. Department of Agriculture*, [96 M.S.P.R. 251](#), ¶ 8 (2004). An award of attorney fees is also warranted where the agency knew or should have known “that its choice of penalty would not be sustained.” *Gensburg v. Department of Veterans Affairs*, [80 M.S.P.R. 187](#), ¶ 7 (1998).

¶5 The evidence shows that the agency did possess “credible, probative evidence” to support its judgment that the appellant’s conduct underlying the unsustained charge was willful. Such evidence included: (1) the proposing manager’s unequivocal statements that he directed the appellant to take a particular action three times and that the appellant thrice refused to do so;<sup>1</sup> (2) a corroborating witness’ statement that the proposing manager accurately described the allegedly insubordinate conduct;<sup>2</sup> and, (3) the appellant’s admission during an

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<sup>1</sup> IAF-3, Tab 4e at 1 (Proposal notice recounting insubordination); Transcript at 40, 125 (proposing manager’s testimony regarding insubordination).

<sup>2</sup> Transcript at 138 (deciding official’s testimony that in the course of his independent investigation of the alleged insubordination prior to issuing his decision letter he identified and spoke to an individual who was present during the alleged conduct and corroborated the proposing manager’s account).

investigation preceding issuance of the proposal notice that he refused to carry out the manager's directive and, in fact, never took the directed action.<sup>3</sup> Consequently, although the AJ reached the contrary conclusion in the merits ID, based upon other conflicting evidence, that the appellant's conduct was not willful, the deciding manager possessed credible, probative evidence to support the action taken. Moreover, the AJ so found in his decision denying the appellant's motion for attorney fees.

¶6 The Vice Chairman would find that "the agency knew or should have known that it would not prevail on the insubordination charge, because it could not establish the willfulness of the appellant's conduct." Separate Opinion of Mary M. Rose at 5. In so finding, she focuses exclusively on the agency's knowledge of the evidence presented by the appellant and relied upon by the AJ in his findings of fact. She does not consider other "credible, probative evidence" that supported the agency's judgment, but was either not considered or not credited by the AJ. Specifically, the question of whether the appellant's conduct was willful turned in large measure on whether the appellant's or the proposing manager's differing recollections of the allegedly insubordinate conduct was more credible. The merits ID and the Vice Chairman both accurately cite to record evidence presented by the appellant supporting his position. However, both fail to address the additional evidence discussed above that was known to the deciding manager. Where, as here, that evidence is credible and probative – even if ultimately determined by the AJ to be of lesser weight than other contrary evidence – the agency cannot be found to have actually or constructively known that it would not prevail on the charge.

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<sup>3</sup> IAF-3, Tab 4b at 1 (decision letter citing fact that appellant did not deny that he repeatedly refused to follow the proposing manager's instructions); IAF-3, Tab 4f (notes of an investigative interview of the appellant taken by the proposing manager reporting the appellant's admission that he refused to carry out the proposing manager's instructions and that he in fact did not carry out the proposing manager's instructions).

¶7 Given the agency’s reasonable basis for the charged conduct, attorney fees are warranted only if there is an independent basis for concluding that it knew or should have known that the penalty would not be sustained. Prior to *Miller v. Department of the Army*, [106 M.S.P.R. 547](#) (2007), the Board had found such circumstances to exist only where the agency erred in connection with its penalty determination. For instance, the Board has found that an agency knew or should have known that its penalty would not be sustained because it relied upon impermissible factors in reaching its penalty determination. *Brunning v. General Services Administration*, [63 M.S.P.R. 490](#), 494 (1994).<sup>4</sup> The Board has also held that an agency’s failure to consider relevant Douglas factors of which it was aware warrants an award of attorney fees. *Del Prete v. United States Postal Service*, [104 M.S.P.R. 429](#), ¶ 11 (2007).

¶8 *Miller* is an outlying case that reached a new rule not consistent with then existing precedent or common sense. In *Miller*, the AJ sustained only one of two charges, and then mitigated the penalty based on the same factors considered by the agency, but without considering the unsustained charge. Importantly, the *Miller* Board did not find that the agency lacked credible, probative evidence to support the unsustained charge. Its holding that attorney fees were warranted was based upon the facts that (1) all of the evidence relied upon by the AJ in

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<sup>4</sup> The Vice Chairman cites *Brunning* for the proposition that where only some of an agency’s charges are sustained and the penalty is mitigated, attorney fees are warranted because “to conclude otherwise ‘would produce the anomalous result in which many appellants would be better off if all, rather than some, of the charges against them were sustained.’” Vice Chairman’s Separate Opinion at 3-4 (*quoting Brunning*, 63 M.S.P.R. at 494. But as noted, in *Brunning*, the Board held that attorney fees were appropriate because the Board relied upon impermissible factors in reaching its penalty determination. The Board’s point in the passage quoted by the Vice Chairman was that attorney fees should not be denied where impermissible penalty factors were considered, simply because the penalty was also mitigated because less than all of the charges were sustained. The case does not stand for the proposition that attorney fees are appropriate whenever some of an agency’s charges are sustained and the penalty is mitigated.

mitigating the penalty was before the agency when it imposed the penalty; (2) a serious charge against the appellant was not sustained;<sup>5</sup> and (3) no new significant information was introduced at the hearing that was unavailable to the agency before it took the disciplinary action. [106 M.S.P.R. 547](#), ¶ 11.

¶9 *Miller* improperly conflates the two separate bases for awarding attorneys fees under the fifth *Allen* category, creating a rule under which attorney fees are warranted whenever a “serious” charge is not sustained and the penalty is mitigated as a result. Obviously, when a significant charge upon which the agency based its penalty determination is not sustained, the appropriate penalty for the remaining sustained charge or charges is likely to be something less than that originally imposed. If the agency knew or should have known that the more serious charge would not have been sustained, then attorney fees are appropriate under longstanding Board precedent. But if the agency charged the appellant with serious misconduct based on its reasonable consideration of the available evidence, attorney fees are only warranted if there is an independent basis for concluding that the agency should have known that the penalty would not have been sustained. This is consistent with the general rule that penalty mitigation alone does not create a presumption that attorney fees should be awarded. *See Miller*, [106 M.S.P.R. 547](#), ¶ 9; *Del Prete*, [104 M.S.P.R. 429](#), ¶ 7. In other words, a penalty can be mitigated for myriad reasons that do not imply any bad faith, negligence or overreaching by the agency that would warrant an award of attorney fees. Something more is required. As noted, the circumstances warranting an award of attorney fees when a penalty is mitigated include that the agency relied upon impermissible factors (such as aggravating factors not referenced in the proposal notice), or failed to consider relevant Douglas factors.

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<sup>5</sup> Note the absence of a finding that the agency knew or should have known that the charge would not have been sustained.

¶10 In the instant case, the AJ did not find that the agency knew or should have known that the charge of insubordination would not have been sustained. Rather, he correctly found that there was “credible, probative evidence supporting” the charge. The agency did not specify that any lesser penalty was appropriate if the Board did not sustain both charges. The AJ therefore exercised the Board’s authority to mitigate the agency’s chosen penalty to the maximum reasonable penalty that could have been imposed based on the sustained charge. *See Neuman v. United States Postal Service*, [108 M.S.P.R. 200](#), ¶ 21 (2008). In doing so, he considered the same Douglas factors and relevant evidence that the agency had considered. He did not find that the agency had relied upon impermissible factors, failed to consider any factors, or otherwise erred in setting the penalty. The only reason the AJ deemed a lesser penalty to be the maximum reasonable one is that it was to be imposed for only one of the two charges. These circumstances do not warrant the award of attorney fees under *Allen*.

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Neil A. G. McPhie  
Chairman

SEPARATE OPINION OF MARY M. ROSE

in

*Ricky L. Hilliard v. United States Postal Service*

MSPB Docket No. CH-0752-08-0376-A-1

¶1 For the reasons set forth below, I would grant the appellant's petition for review (PFR), find that he established entitlement to attorney fees under *Allen v. U.S. Postal Service*, [2 M.S.P.R. 420](#), 435 (1980), and remand the matter for adjudication of the reasonableness of the fee request.

BACKGROUND

¶2 The appellant filed an appeal from the agency's action demoting him on March 15, 2008, from the position of Manager, Maintenance, EAS-24, Palatine, Illinois, to the position of Supervisor of Maintenance Operations, EAS-17, South Suburban, Illinois. MSPB Docket No. CH-0752-08-0376-I-1 Initial Appeal File (IAF-1), Tab 1. The agency's action was based on two charges: insubordination and failure to properly perform the duties of the appellant's position. MSPB Docket No. CH-0752-08-0376-I-3, Initial Appeal File (IAF-3), Tab 5, Subtab 4B. The administrative judge (AJ) found that the agency failed to prove the insubordination charge because it did not show by preponderant evidence that the appellant's conduct was willful, an element of the charge. IAF-3, Tab 15 at 3. The AJ also sustained the charge of failure to properly perform the duties of the appellant's position, holding that both specifications were proven. *Id.* at 3-5. The AJ mitigated the appellant's demotion to a letter of warning in lieu of a 14-day suspension, finding that to be the maximum reasonable penalty for the charge sustained. *Id.* at 8-9. Neither party filed a PFR, and the AJ's initial decision therefore became the Board's final decision.

¶3 After the appellant filed a motion for attorney fees, the AJ issued an addendum initial decision (AID) denying the motion. MSPB Docket No. CH-0752-08-0376-A-1 Attorney Fees File (AFF), Tabs 1, 4. The appellant has filed a PFR of that decision. Petition for Review File (RF), Tab 1. He asserts that he is entitled to a fee award under *Allen* because the agency's insubordination charge was clearly without merit and because the agency knew or should have known that it would not prevail on the merits of that charge. *Id.* The agency has responded in opposition to the PFR. *Id.*, Tab 3.

#### ANALYSIS

¶4 Under [5 U.S.C. § 7701\(g\)\(1\)](#), the Board may require an agency to pay reasonable attorney fees incurred by an appellant if the appellant is the prevailing party and the Board determines that payment is warranted in the interest of justice. *Allen*, 2 M.S.P.R. at 426. An individual is a prevailing party if he has obtained an enforceable final decision that changed the legal relationship between the parties. *Miller v. Department of the Army*, [106 M.S.P.R. 547](#), ¶ 7 (2007); *Del Prete v. U.S. Postal Service*, [104 M.S.P.R. 429](#), ¶¶ 3, 6 (2007). The AJ in this appeal found, and the agency does not dispute, that the appellant is a prevailing party.

¶5 An award of attorney fees may be warranted in the interest of justice under [5 U.S.C. § 7701\(g\)](#) when: (1) the agency engaged in a prohibited personnel practice; (2) the agency's action was clearly without merit or wholly unfounded, or the employee was substantially innocent of the charges; (3) the agency initiated the action against the employee in bad faith; (4) the agency committed a gross procedural error that prolonged the proceeding or severely prejudiced the employee; or (5) the agency knew or should have known that it would not prevail on the merits when it brought the action. *Allen*, 2 M.S.P.R. at 434-35. In the decision denying attorney fees, the AJ found that the appellant did not satisfy any of the *Allen* criteria. AFF, Tab 4 (AID). The appellant asserts on PFR that a fee

award is warranted in the interests of justice under *Allen* categories (2) and (5). RF, Tab 1. Because I would find that fees are warranted under category (5), i.e., that the agency knew or should have known that it would not prevail on the merits when it brought the demotion action, it is unnecessary to discuss the appellant's assertion under category (2), that the insubordination charge was clearly without merit. *Del Prete*, [104 M.S.P.R. 429](#), n.3 (citing *Payne v. U.S. Postal Service*, [79 M.S.P.R. 71](#), 72 n.\* (1998)).

¶6 It is well settled that the agency's penalty selection is part of the merits of its case; thus, an award of attorney fees is warranted where the agency knew or should have known that its choice of penalty would not be sustained. *See Matthews v. U.S. Postal Service*, [78 M.S.P.R. 523](#), 525 (1998); *Brunning v. General Services Administration*, [63 M.S.P.R. 490](#), 493 (1994); *Lambert v. Department of the Air Force*, [34 M.S.P.R. 501](#), 506 (1987) (citing *Yorkshire v. Merit Systems Protection Board*, [746 F.2d 1454](#) (Fed. Cir. 1984)). The Board therefore has held, where it sustains all charged misconduct but mitigates the penalty based on evidence known or readily available to the agency when it took the action, that an award of fees is warranted under *Allen* category (5), because the agency knew or should have known that its choice of penalty would not be upheld. *Del Prete*, [104 M.S.P.R. 429](#), ¶ 7; *Matthews*, 78 M.S.P.R. at 525; *Brunning*, 63 M.S.P.R. at 493.<sup>1</sup>

¶7 The Board also has held that fees were warranted in the interest of justice where only some of an agency's charges are sustained and the penalty is mitigated. *See Brunning*, 63 M.S.P.R. at 494. To conclude otherwise "would produce an anomalous result in which many appellants would be better off if all,

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<sup>1</sup> This does not create a presumption or *per se* rule in favor of fees whenever a penalty is mitigated; rather it indicates that an agency knew or should have known its penalty would not be upheld where the Board determines that it was unreasonable without considering new evidence not before the agency. *See Matthews*, 78 M.S.P.R. at 526; *see also Dunn v. Department of Veterans Affairs*, [98 F.3d 1308](#), 1313 (Fed. Cir. 1996).

rather than some, of the charges against them were sustained.” *Id.* Thus, the Board has held an award of fees warranted under *Allen* category (5) where one of two charges was sustained and the penalty was mitigated based on the remaining charge and evidence of mitigating factors available to the agency. *Miller*, [106 M.S.P.R. 547](#), ¶¶ 9-11. In *Miller*, where a serious charge against the appellant was not sustained and no new significant mitigating information was introduced at the hearing, the Board found that the agency knew or should have known that it would not prevail in its selection of the penalty. *Id.*, ¶ 11. This appeal follows closely the facts in *Miller*, and the same result is appropriate.

¶8 The agency’s insubordination charge alleged that the appellant failed to obey the instruction of his supervisor, Danny Brackett, Senior Manager of Distribution Operations, to schedule one of the appellant’s subordinates, Dwayne Perry, Supervisor of Maintenance Operations, for an investigative interview with the Office of Inspector General (OIG) on October 11, 2007. IAF-3, Tab 5, Subtab 4E. Because insubordination is defined as willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed, the agency must prove intent to support such a charge. *Phillips v. General Services Administration*, [878 F.2d 370](#), 373 (Fed. Cir. 1989). The AJ did not sustain the insubordination charge in this appeal because he found that the appellant did not act in a willful manner. IAF-3, Tab 15 at 3. The AJ reached this conclusion based on evidence showing the following: that the appellant had originally scheduled Perry for an interview on October 10 as instructed by Brackett; that Brackett had made an error as to the date; and that when Brackett told the appellant, by telephone, to have Perry return the next day and the appellant tried to explain that Perry was unavailable, Brackett hung up the phone. *Id.* at 2-3.<sup>2</sup>

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<sup>2</sup> On PFR, the appellant cites his own hearing testimony and that of Perry to show that the appellant conveyed Brackett’s direction to Perry to appear on October 11; i.e., he argues that he in fact carried out the instruction at issue. RF, Tab 1; *see* Hearing

¶9 In denying the appellant's motion for attorney fees, the AJ found that much of the evidence of these circumstances came out in testimony at the hearing, i.e., that it was not available to the agency when it took the demotion action. AID at 4. This finding is inaccurate. Brackett was the official who proposed the appellant's demotion, and, as a party to the October 10 telephone conversation, was aware of what transpired during the call. In addition, the appellant submitted a written response to the demotion proposal, in which he recounted his instructions to Perry to appear on October 10, the discovery of Brackett's mistake, his attempt to explain why Perry was unavailable again the following day, and Brackett's interruption of the call so he could not continue. IAF-3, Tab 5, Subtab 4C. Therefore, the substance of the hearing testimony was available to the deciding official at the time he made his decision. Accordingly, I would find that the agency knew or should have known that it would not prevail on the insubordination charge because it could not establish the willfulness of the appellant's conduct.

¶10 Having sustained only one of the two charges brought by the agency, the AJ proceeded to a determination of the maximum reasonable penalty for the charge sustained. See *Lachance v. Devall*, [178 F.3d 1246](#), 1260 (Fed. Cir. 1999). The remaining charge, failure to properly perform duties of the appellant's position, was based on two specifications of timekeeping irregularities. IAF-3, Tab 15 at 3-4; Tab 5 at 4E. The AJ held that this charge involved "negligent conduct rather than intentional conduct for personal gain." *Id.*, Tab 15 at 8-9.

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Transcript (HT) at 171, 207. The AJ did not make a finding on this point, focusing instead on the content of the conversation in which the instruction was given. Nevertheless, the AJ found the insubordination charge failed because the appellant's conduct was not willful, not because the appellant complied with the instruction. IAF-3, Tab 15 at 3. As discussed further herein, the AJ's decision on the merits is the Board's final decision and is not subject to reargument in the attorney fees proceedings. *Del Prete*, [104 M.S.P.R. 429](#), ¶ 9 (citing *Yorkshire*, 746 F.2d at 1458-59). Therefore, I do not consider the appellant's argument and evidence that he complied with Brackett's instruction in considering his motion for attorney fees.

Considering that, as well as the penalty factors cited by the deciding official (i.e., the prominence of the appellant's position and his lengthy record of service without prior discipline) but not the insubordination charge, which the deciding official stated he had particularly relied on, the AJ found that the penalty should be mitigated. *Id.* He held that the maximum reasonable penalty was a letter of warning in lieu of a 14-day suspension. IAF-3, Tab 15 at 9. In sum, a serious charge against the appellant (insubordination) was not sustained, and the AJ considered the same factors that the deciding official did to mitigate the maximum reasonable penalty for the single sustained charge. Therefore, I believe that the agency knew or should have known that a penalty of demotion would not be sustained merely on the second charge. *See Miller*, [106 M.S.P.R. 547](#), ¶ 11.

¶11 In his decision denying the appellant's motion for attorney fees, the AJ recharacterized his mitigation of the penalty to state for the first time that the charge of failure to properly perform the appellant's duties involved "a serious matter" and "should not be considered 'minor' in comparison to the charge of insubordination." AID at 3. This recharacterization was inappropriate and does not warrant denying the appellant's motion for fees. An "AJ's decision on the merits, including his findings with regard to the relevant mitigating circumstances, is the Board's final decision and is not subject to recharacterization in the attorney fees proceedings." *Miller*, [106 M.S.P.R. 547](#), ¶ 12 (citing *Del Prete*, [104 M.S.P.R. 429](#), ¶ 9); *see also Yorkshire*, 746 F.2d at 1458-59.

¶12 Because the AJ found that an award of fees was not warranted in the interest of justice, he did not address the reasonableness of the fee request. For the reasons explained above, I believe an award of fees is warranted and so would remand for further proceedings. When an award of attorney fees is warranted in the interest of justice but the appellant's success is only partial, the award of fees is limited by the degree of success. *Del Prete*, [104 M.S.P.R. 429](#), ¶¶ 13-15.

Therefore, I would remand this appeal for a determination of an award limited to the fees and expenses attributable to the merits of the insubordination charge and the mitigation of the penalty in this appeal. *Id.*; *see also Miller*, [106 M.S.P.R. 547](#), ¶ 13.

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Mary M. Rose  
Vice Chairman