THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
WANDA HOSTON	)	OEA Matter No. 1601-0022-04AF07
Employee	)	
	)	
v.	)	Date of Issuance: December 14, 2007
	)	
D.C. PUBLIC SCHOOLS	)	Muriel Aikens-Arnold
	)	Administrative Judge
	)	

Debra D'Agostino, Esq., Employee Representative
Harriet Segar, Esq., Office of the General Counsel

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL HISTORY

On December 29, 2003, Employee, a Social Worker, filed a Petition for Appeal (PFA) from Agency's action to remove her effective January 30, 2004 based on her failure to possess a valid District of Columbia license to perform the duties of her position. Agency was notified to respond to said PFA, and in doing so, moved for dismissal based on the fact that Employee had filed a union grievance pursuant to the terms of the collective bargaining agreement..

On September 24, 2004, this matter was assigned to the undersigned Judge, who scheduled and held a Prehearing Conference on February 1, 2005. On February 23, 2005, Employee's Counsel filed a Motion for Summary Judgment based on the following: 1) that there were no genuine facts in dispute; and 2) that Agency was unable to show by a preponderance of evidence that Employee failed to possess the required District of Columbia Social Worker license to work for the D.C. Public Schools. Agency was given an opportunity to respond and did so. On April 7, 2005, this Judge issued an Initial Decision (ID) granting Employee's Motion for Summary Judgment and reversing Agency's removal action.

On May 13, 2005, Agency filed a Petition For Review (PFR) which was denied on January 26, 2007 and became a final decision.[1] On March 13, 2007, Employee (through her

[1]Agency's PFR raised the possibility that an additional examination was required for proper certification. The Board upheld the ID, however, finding that Agency failed to clearly show that Employee lacked the requirements to continue employment and, therefore, improperly removed her. Agency did not file any further appeal.

attorney) filed a Motion for Attorney Fees and Expenses in the amount of $15,788.84 from October 5, 2004 to March 2, 2007. Agency was, thereafter, given an opportunity to respond and did so on April 13, 2007[2]. The record is closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §-606.08 (2001).

POSITIONS OF THE PARTIES

Employee's Position

Employee's Attorney (hereafter referred to as "Counsel") contends that Employee is the prevailing party and that the payment of reasonable attorney fees is in the interest of justice. Counsel represents that, as the lead attorney, the $225.00 hourly rate charged and the work performed are reasonable. Counsel further represents that she was supervised by James M. Eisenmann (JME), a former Principal of the firm ($445 per hour); and then by Joseph V. Kaplan, Principal of the firm ($375 per hour, after JME left the firm); that paralegals Steven M. Schultz (SMS) and Nicole D. Calliste (NDC) also assisted in representation and in preparation of fee reports; and that said fees are also reasonable. Total attorney fees requested are: Ms. D'Agostino, $13,375.00; Mr. Kaplan, $133.50; Mr. Eisemann, $1,800.00; Mr. Schultz, $11.50; and Ms. Calliste, $92.00. Further, Employee requests additional costs ($476.84) for such expenses as copying, faxing, and postage.[3]

Agency's Position

Agency contests five (5) individual legal fees requested by Employee's Counsel as

[2] On 4/13/07, Employee returned to work in her former position, but was not paid at the appropriate rate. Nor did Agency issue back pay or restore her leave benefits. On 5/18/07, Employee filed a Motion for Enforcement of Final Decision. In response, Agency advised that the review process was not complete and requested additional time until 7/9/07 to credit sick leave and generate a back pay check. On 10/9/07, a Order to Submit Documents Verifying Compliance was issued with a one week deadline for Agency to do so. On 11/1/07, Agency submitted documents reflecting pertinent personnel actions that were processed the same day, with an indication that the back pay check will be processed within 30 days.

[3] See Appellant's Motion for Attorney Fees and Expenses (hereafter referred to as "AMAF") at pp. 2-4. Counsel included reports summarizing time spent by each firm attorney and paralegal who participated in Employee's representation, and additional costs incurred.

unrelated to the matter before this Office and, therefore, should not be paid. The following details were cited:

Date	Service Performed	Time Spent	Amount
10/25/04.	Review fax from client re EEO complaint/request for financial assistance.	0:12:00	$27.00
12/13/04	Discussion w/JME re mediation order	0:06:00	$13.50
2/22/05	Discussion w/JME re order/status of OHR complaint	0:06:00	$13.50
6/3/05	Research pay rate change	0:36:00	$81.00
1/29/07	Draft case summary for publication	0:24:00	$54.00
Total		0:84:00	$189.00

ENTITLEMENT OF EMPLOYEE TO ATTORNEY FEES

D.C. Official Code § 1-606.08 provides that: "[An Administrative Judge of this Office] may require payment by the agency of reasonable attorney fees if the appellant is the prevailing party and payment by the agency is warranted in the interest of justice." *See also* OEA Rule 635.1, 46 D.C. Reg. at 9320.

1. Prevailing Party

"[F]or an employee to be a prevailing party, he must obtain all or a significant part of the relief sought . . ." *Zervas v. D.C. Office of Personnel*, OEA Matter No. 1601-0138-88A92 (May 14, 1993), __ D.C. Reg. __ ( ). *See also Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371, 375 (1980).

Here, the relief sought was the reversal of Employee's removal, restoration to duty in her former position, and reimbursement for loss of wages and benefits. That is the result Employee obtained. Moreover, Agency did not further appeal the Board decision, or otherwise imply the Employee was not in fact the prevailing party. Therefore, this Judge concludes that Employee is a prevailing party.

2. Interest of Justice

In *Allen v. United States Postal Service,* 2 M.S.P.R. 420 (1980), the Merit Systems Protection Board (MSPB), this Office's Federal counterpart, set forth circumstances to serve as "directional markers toward the 'interest of justice'-- a destination which, at best, can only be approximate." *Id.* at 435. The circumstances to be considered are:

> 1. Where the agency engaged in a "prohibited personnel practice";
>
> 2. Where the agency's action was "clearly without merit" or was
>
> "wholly unfounded", or the employee is "substantially innocent" of the charges brought by the agency;
>
> 3. Where the agency initiated the action against the employee in "bad faith", including:
>
> > a. Where the agency's action was brought to "harass" the employee;
> >
> > b. Where the agency's action was brought to "exert pressure on the employee to act in certain ways";
>
> 4. Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced the employee";
>
> 5. Where the agency "knew or should have known that it would not prevail on the merits" when it brought the proceeding.

id. at 434-35.[4]

As indicated above, this Judge found that Employee is the prevailing party. The ID became a final decision on January 31, 2007, five (5) days after the issuance date of the Board Order. Moreover, Agency's action was "clearly without merit" and Agency "knew or should have known" that it would not prevail when it initiated the action. In fact, the Board stated, in part: " . . .[T]his Board will not allow any agency to terminate an employee while using the

[4] "[T]here is no requirement that an applicant for attorney fees meet all of the above criteria in order to show 'interest of justice'." *Thomas v. Metropolitan Police Department,* OEA Matter No. 1601-0002-86AF89, 42 D.C. Reg. 5642, 5645 (1995).

appeals process to determine if they had reasonable grounds to do so."

Further, approximately seven (7) months after the issuance of the ID, Agency has *not* yet issued the back pay check for wages lost due to the unwarranted removal, and unduly delayed restoring Employee's leave benefits. The interest of justice is served by the award of attorney fees when the agency delays its compliance beyond the date set by the ID. *Harris v. Department of Agriculture, 40* MSPR 604, 610 (1989). Based on the circumstances, and under *Allen* factors 2 and 5, Employee is entitled to attorney fees in the interest of justice.

REASONABLENESS OF ATTORNEY FEES

This Office's determination of whether Employee's attorney fees request is reasonable is based on a consideration of the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980). Although it is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted, the fee application must contain sufficient detail to permit an informed appraisal of the merits of the application. *Copeland, supra.* The number of hours reasonably expended is calculated by determining the total number of hours and subtracting nonproductive duplicative, and excessive hours. *Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985).

The burden is on the fee applicant to produce satisfactory evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation. *Blum v. Stenson*, 465 U.S. 886 (1984). The best evidence of the prevailing hourly rate is ordinarily the hourly rate customarily charged in the community in which the attorney, whose rate is in question, practices. *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988). Further, the Board has determined that the Administrative Judges of this Office may consider the so-called "Laffey Matrix" in determining the reasonableness of a claimed hourly rate.[5]

Counsel's submission included enumeration of the services provided on Employee's behalf, totaling $15,788.84 for 65 hours (including $476.84 in additional expenses). Also

[5] The *Laffey* Matrix, used to compute reasonable attorney fees in the Washington, DC-Baltimore Metropolitan Area, was initially proposed in *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*,746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). The fees are calculated by cross-referencing an "x-y" matrix reflecting the years in which the services were performed and the attorney's years of experience, yielding a figure that is a reasonable hourly rate (from June 1-May 31). It is updated yearly by the Civil Division of the U.S. Attorneys Office for the District of Columbia based on the change in the Consumer Price Index for All Urban Consumers (CPI-U) for Washington-Baltimore, DC-MD-VA-WV, then adjusted to the applicable *Laffey* rate for the prior year to ensure that the relationship between the highest rate and the lower rates remains reasonably constant. The current Laffey Matrix (1980-2007) is attached to this decision.

attached were three (3) affidavits reflecting summaries of attorney credentials, which included educational background, employment history, and professional experience of practicing law, particularly employment law.

1. Number of hours expended.

According to the billing documents submitted with the attorney fees motion, Counsel's billable hours total 65 for various services performed by herself, two (2) other attorneys, and two (2) paralegals. Said attorney fees, for work performed, are summarized as follows:.

Attorney	Hours	Amount
JVK (Principal)	.30 @$445	$ 133.50
DDA (Counsel)	59.00 @$225	$13,275.00
JME (Principal)	4.80 @$375	$ 1,800.00
NDC (Paralegal)	.80 @$115	$ 92.00
SMS (Paralegal)	.10 @$115	$ 11.50
Total	65	$15,312.00

Relative to Agency's response, this Judge agrees that the legal services cited (.84 hours) were unrelated to this matter, and therefore, unwarranted.[6] Therefore, said costs, in the amount of $189.00, should be subtracted from Ms. D'Agostino's total billing. Second, this Judge's review of Counsel's billing reflects that the amount of time for the following legal services was excessive and/or the legal services performed appeared to be unrelated to this matter:

11/08/04	Telephone call w/client re mediation, fee agreement, AJ's ruling	0:18:00
2/22/05	Telephone call w/client re hearing/OHR complaint	0:30:00
6/7/05	Discussion w/JME re brief	0:06:00
6/15/05	Revise brief	0:24:00[7]

[6] See Agency Response (AR) at p. 1.

[7] Due to Counsel's redaction of items not relevant (ie., Office of Human Rights (OHR) complaint) to this matter, concerns arose regarding time spent relative to the "brief". Specifically, when Counsel cited time spent regarding Employee's response to Agency's "petition for review" (which was prepared around the same time period), said item was cited.

6/15/05	Telephone call w/client re bill	0:06:00
6/16/05	Telephone call w/client re bill payment	0:12:00
1/30/07	Discussion w/JME re relief, settlement	0:06:00
2/2/07	Review fax from client re requested relief	0:06:00
2/2/07	Telephone call w/client re relief requested	0:06:00
Total		1:14:00

While this Judge was lenient with some discussions between Counsel and her supervisor(s) when said discussions *included* the OHR matter, the above listed services were not reasonable and/or necessary. Accordingly, this Judge, concludes that the 1:14:00 hours ($256.50) should also be subtracted from the total amount.[8]

Relative to Employee's request for attorney fees for Mr. Kaplan and Mr. Eisenmann, whose affidavits reflect an abundance of employment law experience, this Judge believes that in-house consultation does not warrant the award of attorney fees in this instance. Further, the *Laffey* Matrix reflects reasonable fees based on years of experience of the attorney who, in this Judge's view, personally performed services; and not duplicative services.[9] Last, Employee requests an award of paralegal fees at the hourly rate of $115 for .90 hours. However, there was no indication of any paralegal academic or professional training, or other legal-related credentials for the persons identified as "paralegals." Moreover, the Motion reflects that the paralegals "also assisted in representation and in preparation of the fee reports." Yet, there is no clear indication regarding the type(s) of legal services performed; and only a broad reference to "fee summaries" which are generated through a computerized billing program.[10] This Judge concludes, therefore, that fees in the amount of $103.50 are not warranted.

[8] Counsel requests payment for 59 hours in the amount of $13,275.00. The disallowed costs equal $445.50.
[9] The "Experience" column refers to the years following the attorney's graduation from law school.
[10] See Appellant's Motion For Attorney Fees at p. 4.

2. Reasonable hourly rate.

In this instance, Counsel represented that she received her law degree in 2001, was admitted to the New York Bar in February 2002, and then began employment with Klimaski & Associates, P.C. performing litigation in various administrative forums. In May 2003, she began her current employment with Passman & Kaplan where she is "regularly [engaged] in all facets of litigation practice . . ." In October 2004, Counsel began her representation of Employee and, at that time had approximately two (2) years' experience which increased each subsequent year. Counsel provided the following customary hourly rates for the years in question:

2004	$175
2005	$190
2006	$205
2007	$215

Under the *Laffey* Matrix, Counsel asserts that the prevailing market rate for legal services, based on Counsel's experience, is as follows:

6/1/04-5/31/05	$190
6/1/05-5/31/06	$220
6/1/06-5/31/07	$225

A review of Counsel's credentials reflects that Counsel's legal experience began in 2002 with the aforementioned law firm. In 2004, she accumulated two (2) years' experience which amounts to an hourly rate of $185 in the *Laffey* Matrix. In 2005, she accrued three (3) years' legal experience which is reflected as $195 in the *Laffey* Matrix. In 2006, with four (4) years' legal experience, Counsel's reasonable fee, according to the *Laffey* Matrix, is $235; and in 2007, the fee increased to $245 for five (5) years' experience. An average of those fees equals $225 which Counsel, otherwise, contends is a reasonable rate.[11] Therefore, the total allowable fees for the legal services performed in the representation of Employee from October 5, 2004 through March 2, 2007 (minus disallowed costs) is $ 12,829.50.

3. Costs

In addition to the above legal fees, Employee requested compensation for costs totaling $476.84 to cover such expenses as postage and copying costs. In the absence of any dispute by Agency and based on a review of the billing statement, this Judge concludes that said costs

[11] The Judge's view of Counsel's legal experience apparently differs with Counsel's as the fees cited by both differ. Nonetheless, considering the totality of circumstances, the $225 amount is a reasonable hourly rate for the legal services performed in this matter.

claimed are reasonable and recoverable.[12]

The grand total, therefore, of allowable attorney fees plus costs is $ 13,306.34.

ORDER

1) It is hereby ORDERED that Agency pay Employee, within 30 days from the date on which this addendum decision becomes final, $13,306.34 in attorney fees and costs.

2) It is FURTHER ORDERED that Agency file with this Office, within 30 DAYS from the date on which this *Addendum Decision on Attorney Fees* becomes final, documents showing compliance with the terms of this addendum decision.

FOR THE OFFICE:

_____
MURIEL AIKENS-ARNOLD, ESQ.
Administrative Judge

[12] It is well-settled in this Office that costs, if reasonable, are recoverable. *See e.g., Glee v. Department of Public & Assisted Housing*, OEA Matter No. 2405-0113-92A98 (April 28, 1998), __ D.C. Reg. __ ( ); *Brunatti v. D.C. Public Schools*, OEA Matter No. 2401-0165-93A00 (October 17, 2000), __ D.C. Reg. __ ( ).