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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
JOHN F. TATUM, JR.)	OEA Matter No. 2401-0013-03A03
Employee)	
)	Date of Issuance: June 2, 2005
v.)	
)	Daryl J. Hollis, Esq.
)	Senior Administrative Judge
D.C. PUBLIC SCHOOLS)	
Agency)	
_____)	

Omar Vincent Melehy, Esq. and Angelo Spenillo, Esq., Employee Representatives
Harriet Segar, Esq., Agency Representative

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL HISTORY

On November 19, 2002, Employee, an Assistant Principal, ET-08, filed a petition for appeal in which he claimed that his employment ended without any notice on September 30, 2002. This appeal was docketed as *John F. Tatum, Jr. v. D.C. Public Schools*, OEA Matter No. 2401-0013-03 and was assigned to Administrative Judge Susan Hoppe King on December 19, 2002.

By Judge King's Order issued December 23, 2002, Agency was given a deadline of January 21, 2003 to respond to Employee's appeal. However, Agency did not comply with that deadline. On January 28, 2003, Judge King held a Prehearing Conference. At that proceeding, the exact nature of Agency's action and what rights, if any, Employee had to

challenge the action were not clear from the parties' discussions. Therefore, Agency, which had not yet responded to Employee's appeal, was again ordered by Judge King to do so.

Agency filed its response on March 20, 2003. Agency stated that Employee was appointed to the position of Assistant Principal, ET-08, under a three-year grant program known as the Twenty-first Century Community Learning Centers Grant. It was clearly understood from the terms of the grant that the program had a duration of only three years. Prior to his appointment as an Assistant Principal, Employee held permanent status as an ET-15 Teacher.

On April 14, 2003, Employee, through counsel, filed a Motion and Memorandum Supporting Summary Judgment in which he claimed that Agency violated its own regulation by failing to place him in an ET-15 teaching position when his temporary appointment to Assistant Principal expired on September 30, 2002. On May 16, 2003, Agency filed a response to Employee's motion in which it admitted that he should have been offered an ET-15 teaching position when his temporary appointment to the position of Assistant Principal ended.

Judge King held a Status Conference on June 2, 2003, at which time she advised the parties that Employee's motion for summary judgment was granted. On June 6, 2003, Judge King issued an Initial Decision (ID) in which she ordered that:

1. Agency's action terminating Employee effective September 30, 2002 is REVERSED; and
2. Agency place Employee in a position of ET-15 Teacher, made retroactive to September 30, 2002; and
3. Agency file with this Office, within thirty (30) days from the date on which this decision becomes final, documents showing compliance with the terms of this Order.

ID at 4-5. (emphasis in original). No appeal of the ID was taken, and thus it became a Final Decision (FD) of the Office on July 11, 2003. See OEA Rule 633.1, 46 D.C. Reg. 9319 (1999).

On July 28, 2003, Employee, through his attorney, submitted a Motion for an Award of Attorney Fees and Costs in the amount \$15,015.00 (attorney fees) and \$83.84 (costs). Since Judge King had left the bench to become this Office's Deputy General

Counsel, the attorney fees matter was reassigned to me. On September 10, 2003, Employee submitted a Supplemental Memorandum in Support of Motion for an Award of Attorney Fees and Costs. In pertinent part, the supplemental motion reads as follows: “[T]he [July 28, 2003] Motion for Attorney Fees included the Laffey Matrix¹ rates for the previous year because the new Laffey Matrix was not available to counsel . . . at that time. Therefore, the attorney fees sought for time expended through July 27, 2003 must be recalculated based on the new Laffey Matrix rates.” Thus, Employee was now requesting \$15,473.50 in attorney fees through July 27, 2003. The costs requested remained the same. Employee was further requesting additional attorney fees through September 10, 2003 in the amount of \$2,030.00.² On September 29, 2003, Employee filed a second supplemental motion in which he requested additional attorney fees in the amount of \$402.00. On November 8, 2004, Employee submitted a third supplemental motion in which he requested additional attorney fees in the amount of \$4,339.00 and additional costs of \$23.23. By Order dated April 27, 2005, I ordered Employee to submit any additional attorney fees’ requests (attendant to the compliance phase of this case)³ by the close of business on May 17, 2005. Agency was ordered to submit its opposition to any or all of Employee’s requests, if it so chose, by the close of business on May 31, 2005. On May 3, 2005, Employee filed a fourth supplemental motion in which he requested additional attorney fees of \$922.50 and additional costs of \$10.16. Thus, the grand total of all requests for attorney fees and costs is \$23,284.23. Agency did not submit an opposition. The record is closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.08 (2001).

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 is warranted in the interest of justice.” *See also* OEA Rule 635.1, 46 D.C. Reg. at 9320.

¹ The “Laffey Matrix” will be addressed below.

² This supplemental motion and the ones that followed were the result of Employee’s attempts to have Agency comply with the FD. *See* OEA Rule 636, 46 D.C. Reg. at 9321. The compliance matter was also reassigned to me, and on April 27, 2005 I issued an Addendum Decision on Compliance, in which I found that Agency had complied with the FD.

³ *See* n.2, *supra*.

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. 1602-0138-88AF92 (May 14, 1993), ___ D.C. Reg. ___ (). See also *Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371, 375 (1980).

Here, Employee sought to be reinstated to an ET-15 teaching position. As set forth in Judge King's decision, that is the result Employee obtained. Therefore, I conclude 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 System Protection Board (MSPB), this Office's federal counterpart, set out 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

Here, Agency admitted that Employee should have been offered an ET-15 teaching position when his temporary appointment to the position of Assistant Principal ended. This admission was the basis for Judge King’s granting of Employee’s motion for summary judgment. I conclude that under *Allen* factor 4, 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). *See also Hensley v. Eckerhart*, 461 U.S. 424 (1983); *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982). 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 OEA 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

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).

⁵ The Laffey Matrix, used to compute reasonable attorney fees in the Washington, D.C.-Baltimore Metropolitan Area, was initially proposed in *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C.

According to the billing documents submitted with Employee's various attorney fees motions:

Attorney Omar Vincent Melehy expended:

- a) April 9, 2003 - July 27, 2003: 41.3 hours @ \$335.00/hr. = \$13,835.50.
- b) July 28, 2003 - September 10, 2003: 5.4 hours @ \$335.00/hr. = \$1,809.00.⁶
- c) September 11, 2003 - September 29, 2003: 1.2 hours @ \$335.00/hr. = \$402.00.
- d) September 30, 2003 - April 21, 2004: 12.2 hours @ \$335.00/hr. = \$4,087.00.

Attorney Angelo Spenillo⁷ expended:

- a) April 9, 2003 - July 27, 2003: 9.1 hours @ \$180.00/hr. = \$1,638.00.
- b) July 28, 2003 - September 10, 2003: 0.3 hours @ \$180.00/hr. = \$54.00.
- c) September 29, 2003 - November 8, 2004: 1.4 hours @ \$180.00/hr. = \$252.00.

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). It is an "x-y" matrix, with the x-axis being the years (from June 1 of year one to May 31 of year two, e.g. 92-93, 93-94, etc.) during which the legal services were performed; and the y-axis being the attorney's years of experience (defined as the years following the attorney's graduation from law school). The axes are cross-referenced, yielding a figure that is a reasonable hourly rate. The matrix also contains rates for paralegals and law clerks. The first time period found on the matrix is 1980-81. It is updated yearly by the Civil Division of the United States Attorney's 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, as announced by the Bureau of Labor Statistics for May of each year. A copy of the Laffey Matrix, complete through June 1, 2004 - May 31, 2005, is attached to this addendum decision.

⁶ Employee's September 10, 2003 motion incorrectly lists this amount as \$1,976.00.

⁷ Mr. Spenillo is an associate in Mr. Melehy's firm, Zipin, Melehy & Driscoll L.L.C.

d) November 9, 2004 – April 26, 2005: 4.1 hours @
\$225.00/hr. = \$922.50.

Thus, the total fees requested for Attorney Melehy is \$20,133.50 and for Attorney Spenillo, \$2,866.50. Further, costs associated with the representation of Employee in this matter total \$117.23.⁸

1. Number of hours expended.

According to the billing documents submitted with the attorney fees motions, Attorney Melehy expended 60.1 hours in this matter, and Attorney Spenillo expended 14.9 hours. I have reviewed the billing documents and have determined that the hours expended were reasonable and were clearly related to the instant matter. Therefore, I conclude that Employee is entitled to payment for these hours expended by the attorneys on his behalf.

2. Reasonable hourly rate.

As noted above, the OEA Board has determined that the Administrative Judges of this Office may consider the Laffey Matrix in determining the reasonableness of a claimed hourly rate. Therefore, the following discussion will focus on the reasonableness of the requested rates *vis à vis* the Laffey Matrix.

Submitted with the initial attorney fees motion was Mr. Melehy's affidavit. That document shows that he graduated from law school in May 1986, and that Mr. Spenillo graduated in May 2000. Thus, at the time the firm's representation of Employee began in April 2003, Mr. Melehy had almost 17 years of experience, whereas Mr. Spenillo had almost three years of experience. Employee asks that Mr. Melehy be compensated at an hourly rate of \$335.00, and that Mr. Spenillo be compensated at hourly rates of \$180.00 (10.8 hours) and \$225.00 (4.1 hours). As set forth above at n.5, the Laffey Matrix provides rates from June 1 of one year through May 31 of the next year.

a) Attorney Omar Vincent Melehy.

Employee requests that Mr. Melehy be compensated at an hourly rate of \$335.00 for all of the work performed between April 9, 2003 and November 8, 2004. However, according to the Matrix, a reasonable hourly rate for work performed between June 1, 2002

⁸ 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. ___ ().

and May 31, 2003 by an attorney with 11-19 years experience is \$325.00. According to the billing statements, during this time period Mr. Melehy expended 12.5 hours in this matter. Pursuant to the Matrix, I conclude that the appropriate hourly rate for this expenditure of time is \$325.00. For the 47.6 hours expended from June 1, 2003 through April 21, 2004, the appropriate rate is \$335.00.

b) Attorney Angelo Spenillo.

Employee requests that Mr. Spenillo be compensated at hourly rates of \$180.00 for work performed between April 9, 2003 and November 8, 2004; and \$225.00 for work performed between November 9, 2004 and April 26, 2005. However, according to the Matrix, a reasonable hourly rate for work performed between June 1, 2002 and May 31, 2003 by an attorney with 1-3 years experience is \$175.00. According to the billing statements, during this time period Mr. Spenillo expended 9.1 hours in this matter. Pursuant to the Matrix, I conclude that the appropriate hourly rate for this expenditure of time is \$175.00. For Mr. Spenillo's work performed from June 1, 2003 through May 31, 2004, *i.e.*, 0.7 hours, the appropriate rate is \$180.00.

According to the Matrix, beginning on June 1, 2004, Mr. Spenillo's experience would entitle him to an hourly rate of \$225.00 (4-7 years experience). Nevertheless, according to the billing statements, he continued to charge \$180.00/hr. for work performed from June 1 through November 8, 2004 (one hour). I interpret this as an exercise of billing judgment on the attorney's part, and therefore find it to be reasonable. For the work performed from November 9, 2004 through April 26, 2005, he charged the allowable rate of \$225.00.

Based on the preceding calculations, the summary of allowable fees is as follows:

Attorney Melehy: a) April 9, 2003 – May 31, 2003: \$4,062.50; b) June 1, 2003 – April 21, 2004: \$15,946.00. The total allowable fees for the work performed by Mr. Melehy is \$20,008.50.

Attorney Spenillo: a) April 9, 2003 – May 31, 2003: \$1,592.50; b) June 1, 2003 – November 8, 2004: \$306.00; c) November 9, 2004 – April 26, 2005: \$922.50. The total allowable fees for the work performed by Mr. Spenillo is \$2,821.00.

Therefore, the total allowable fees for the legal work involved in the representation of Employee is \$22,829.50.

3. Costs.

Employee has requested compensation for costs totaling \$117.23. I have reviewed the billing statements, and I conclude that the costs claimed are reasonable. Thus, pursuant to the cases cited in n.8, *supra*, I conclude that these costs are recoverable.

ORDER

It is hereby ORDERED that Agency pay Employee, within 30 days from the date on which this addendum decision becomes final, \$22,946.73 in attorney fees and costs.

FOR THE OFFICE:


DARYL J. HOLLIS, Esq.
Senior Administrative Judge

LAFFEY MATRIX 1980-2005

Years in which legal services were rendered (Rate for June 1-May 31, based on prior year's CPI-U)

Experience	80-81	81-82	82-83	83-84	84-85	85-86	86-87	87-88	88-89	89-90	90-91	91-92	92-93	93-94	94-95	95-96
20+ years	165	175	185	195	205	210	220	230	245	260	275	285	300	305	310	315
11-19 years	140	150	160	170	180	185	190	200	210	225	240	250	265	265	270	275
8-10 years	120	125	130	135	140	145	150	155	165	175	185	195	210	215	220	225
4-7 years	95	100	105	110	115	120	125	130	140	150	160	165	170	175	180	185
1-3 years	70	75	80	85	90	95	100	105	110	115	120	125	130	135	140	145
Paralegals/ law clerks	30	35	35	40	40	45	50	55	60	65	70	75	75	75	80	80

Note: *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 (1984), set fees for work done principally in 1981-82. The fees in this matrix are calculated by adding the increase in the Consumer Price Index for All Urban Consumers (CPI-U) for Washington-Baltimore, DC-MD-VA-WV, to the applicable *Laffey* rate for the prior year, then rounding (up, if within \$3.00 of the next multiple of \$5.00). The result is then adjusted to ensure that the relationship between the highest rate and the lower rates remains reasonably constant. The Matrix is updated yearly by the Civil Division of the United States Attorney's Office for the District of Columbia.

The "Experience" column refers to the years following the attorney's graduation from law school.

Years in which legal services were rendered (Rate for June 1-May 31, based on prior year's CPI-U)

<u>Experience</u>	<u>96-97</u>	<u>97-98</u>	<u>98-99</u>	<u>99-00</u>	<u>00-01</u>	<u>01-02</u>	<u>02-03</u>	<u>03-04</u>	<u>04-05</u>
20+ years	325	330	335	340	350	360	370	380	390
11-19 years	280	285	290	295	305	315	325	335	345
8-10 years	230	235	240	245	250	260	265	270	280
4-7 years	190	195	195	200	205	210	215	220	225
1-3 years	150	155	155	160	165	170	175	180	185
Paralegals/ law clerks	80	85	85	90	90	95	100	105	110