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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

<b>In the Matter of:</b>	)	
	)	
<b>CAROLYN WITCHER-SESSOMS</b>	)	<b>OEA Matter No.: 1601-0139-03 AF-04</b>
<b>Employee</b>	)	
	)	<b>Date of Issuance: June 10, 2005</b>
<b>v.</b>	)	
	)	
<b>DISTRICT OF COLUMBIA</b>	)	<b>Rohulamin Quander, Esq.</b>
<b>PUBLIC SCHOOLS,</b>	)	<b>Senior Administrative Judge</b>
<b>Agency</b>	)	

Omar V. Melehy, Esq., and Angelo G. Spenillo, Esq., Employee's Representatives  
Harriet Segar, Esq., Agency Representative

**ADDENDUM DECISION ON ATTORNEY FEES**

INTRODUCTION AND PROCEDURAL HISTORY

On December 13, 2004, I issued an *Initial Decision* (the "ID") granting Employee's *Motion for Summary Judgment*, thus rendering Employee as the prevailing party. The ID provided that: 1) The District of Columbia Public Schools (the "Agency") place Employee in a position of ET-15 Teacher, retroactive to August 15, 2003, the expiration date of her third and last one year contract as an assistant principal with the Agency; 2) Agency restore all of Employee's ET-15 Teacher benefits without a break in service, including, but not limited to, retirement and time served retroactive to August 15, 2003; and 3) Agency file with this Office, within thirty days from the date on which this decision becomes final, documents showing compliance with the terms of this Order. Agency did not appeal the ID, nor challenge this AJ's ruling that Employee was the prevailing party.

On February 22, 2003, and pursuant to OEA Rule 635.1.<sup>1</sup> Employee, through counsel,

<sup>1</sup> OEA Rule 635.1, 46 D.C. Reg. 9320 (1999). Reads as follows: "An employee shall be entitled to an award of reasonable attorney fees, if: (a) He or she is a prevailing party; and (b) The award is warranted in the interest of justice."

filed a motion requesting an award of attorney's fees and costs, which motion also requested that the record remain open for requesting additional attorney's fees and costs that might be incurred incidental to having to pursue a Motion for Enforcement, which was also filed on the same date. Although served a copy of all documents on February 18, 2005, according to Employee's counsels' Certificate of Service, Agency filed no responsive pleadings, and did not oppose the attorney fee request. The record is now 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, *supra* at n.2.

#### **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). Employee filed a motion for an award of attorney's fees and a separate compliance motion pertaining to this Administrative Judge's (the “AJ”) determination that Employee was entitled to be placed into an ET-15 Teacher position pursuant to the provisions of Title 5, § 520 of DCMR. When challenged, Agency conceded that Employee was so entitled, and did not pursue or defend any legal position contrary to Employee's claim. Nor did Agency indicate that Employee was not in fact the prevailing party. Based on the record of this case, including my granting of Employee's *Motion For Summary Judgment*, 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 several circumstances to serve as “directional markers toward the ‘interest of justice’ (the “Allen Factors”) - 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.

This matter began on August 15, 2003, the effective date of Employee’s separation as a result of the expiration of her Assistant Principal contract. Agency was always aware that Employee was entitled to revert to an ET-15 Teacher position, but did nothing to effect this entitlement, which necessitated Employee filing her Petition for Appeal. Additionally, Agency has not argued that attorney fees are not warranted in the interest of justice. I conclude that Agency’s delay in effecting the relief to which Employee was entitled is a manifestation of Allen Factor #4, above. Therefore, I further conclude that an award of reasonable attorney fees is warranted in the interest of justice.

#### REASONABLENESS OF ATTORNEY FEES

Counsels’ submission was detailed and included the specifics of the services provided on Employee’s behalf. Employee requested an award of \$7,074.00 in attorney fees and \$45.15, in costs, for a total amount of \$7,119.15, and claimed that the request covered services performed solely before this Office during the adjudication of this matter. As the deciding AJ, I take note that the sequence and fact pattern of this matter is very similar to other cases filed by counsel before the Office, and essentially raised and addressed the same legal arguments, thus significantly reducing the amount of unique legal work required on behalf of this Employee.

The seven components of Employee’s attorney fee request are as follows:

- **Employee’s Counsel:** Initial factual and legal investigation, 9.7 hours; **Agency response:** None.
- **Employee’s Counsel:** Preparation of Motion for Summary Judgment, 9.3 hours; **Agency response:** None.
- **Employee’s counsel:** General procedural matters, 1.5 hours; **Agency response:** None.
- **Employee’s counsel:** Communications with client, 1.5 hours; **Agency response:**

- None.
- **Employee's counsel:** Preparation for attendance at hearing on *Motion for Summary Judgment*, 4.0 hours; **Agency response:** None.
  - **Employee's counsel:** Preparation of *Motion for Enforcement of Order to Reinstate*, 0.4 hours; **Agency response:** None.
  - **Employee's counsel:** Preparation of *Motion for Attorney's Fees and Costs*, 2.0 hours; **Agency Response:** None.

This Office's determination of whether Employee's attorney fees request is reasonable is based upon 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*. [emphasis added] *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). 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.<sup>2</sup>

Employee's February 22, 2005 attorney fees' request document contains a section entitled "Reasonableness Of Time Expended" and a sworn affidavit from Mr. Melchy, setting forth in detail the time expended by each counsel on this matter, their respective hourly rates, and their educational backgrounds, employment history, and professional experience. According to their documents, between July 29, 2003, and October 8, 2003, Mr. Melchy expended 5.7 hours at a claimed hourly rate of \$345.00, for a total of \$1,966.50. According to their documents and between August 18, 2003, and February 14, 2005, Mr. Spenillo expended 22.7 hours at a claimed

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<sup>2</sup> 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. 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. 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, 2003 - May 31, 2004, and June 1, 2004 - May 31, 2005, is attached to this addendum decision.

hourly rate of \$225.00, for a total of \$5,107.50. The total for legal services claimed is \$7,074.00. They also claim costs totaling \$45.15.<sup>3</sup>

### 1. Number of hours expended

Employee's counsels claims that they expended a combined total of 28.4 hours of legal service time on Employee's behalf between July 29, 2003, and February 14, 2005. All of this professional work was performed before this Office. While the AJ does not deny that Employee is entitled to reasonable attorney's fees for time expended incidental to this matter, the AJ questions whether the number of claimed hours of legal service time was excessive, in light of Employee's counsels' professional experience and the similarity to other pleadings that counsel has concurrently prepared and filed with the Office.

I have reviewed the hours claimed and have determined that the hours expended were excessive for the degree of difficulty and the amount of legal service time required in the instant matter. I base this determination in significant part upon my comparison of the professional services provided to other clients that counsel has represented in this Office against the same Agency, frequently using very similar pleadings, making the same or nearly identical legal arguments which, although ultimately successful for each of their clients, were not unique.

Therefore, I have reduced the attorney fee award, as explained below, and conclude that Employee is entitled to attorney fees for 17.0 hours expended by Mr. Melehy and Mr. Spenillo, and that although Employee was represented by two different counsels who are employed by the same law firm, there is no indication of any impermissible double billing by Employee's counsel.

### 2. Reasonable hourly rate

As noted above, the OEA Board has decided that the AJ's of this Office may consider the Laffey Matrix in determining reasonableness of a claimed hourly rate.<sup>4</sup> Therefore, the following

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<sup>3</sup> 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. \_\_ ( ). *See also Laffey, supra*, 746 F.2d at 30.

<sup>4</sup> *See* n.6, *supra*. Prior to the Board's determination, the Administrative Judges used the following as a guide to analyzing the reasonableness of claimed hourly rates:

In *District of Columbia v. Hunt (Hunt II)*, 525 A.2d 1015 (D.C. App. 1987), the D.C. Court of Appeals adopted \$80.00 an hour as a reasonable rate. The Court noted that \$75.00 is the hourly rate mandated by the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(2)(A), for appellate services involving the MSPB, this Office's federal counterpart. Further, this Office has consistently held that a \$75.00 hourly rate is reasonable. *See, e.g., Employee v. Agency*, OEA Matter No. 1602-0054-83AF87 (February 22, 1990), \_ D.C. Reg. \_\_ ( ); *Employee v. Agency*, OEA Matter No. 1601-0202-86AF88, 39 D.C. Reg. 1086 (1992).

In *Hunt II, supra*, while holding that an \$80.00 hourly rate was reasonable, the Court also held that this rate need not always apply, "as all cases will vary in complexity and difficulty." *Id.* at 1017. Further, this Office has often found

discussion will focus upon the reasonableness of the requested rates *vis à vis* the Laffey Matrix.

For all of work performed, Employee requests that Mr. Melehy be compensated for 5.7 hours at an hourly rate of \$345.00. Attached to Employee's submission are Attorney Melehy's affidavit and his *Curriculum Vitae* (CV). In the affidavit, Mr. Melehy attests to his qualifications as counsel, and reflects his education and bar memberships, including reflecting that he was admitted to the D.C. Bar on December 7, 1988, 17 years before he filed this attorney fee request. His affidavit likewise reflects that he has approximately 18 years of professional experience, reflecting Maryland Bar admission on January 7, 1987, and that his professional concentration is in employment law and employment discrimination. Thus, I conclude that at the time the services in the instant matter were performed, he had been practicing law for 18 years.

The hours claimed in this matter were expended between July 29, 2003 and October 8, 2003. According to the Laffey Matrix, a reasonable hourly rate for services performed from June 1, 2003, through May 31, 2004, by an attorney with "17+ years" experience is \$335.00. I conclude that Melehy may be compensated for his professional services at the slightly increased rate of \$345.00 per hour.

Mr. Spenillo is requesting compensation for 22.7 hours at an hourly rate of \$225.00. The scope of Mr. Melehy's affidavit also attests to Mr. Spenillo educational experience, bar membership and other credentials, and qualifications as counsel. Spenillo was admitted to the Maryland bar in December 2000, and the D.C. Bar in February 2004. Initially employed for the U.S. Department of Justice, Tax Division, since March 2003, when he joined the law firm of Zipin and Melehy, LLC, as an association attorney, he had worked almost exclusively on employment matters. This I conclude that at the time the services in the instant matter were performed, he has approximately 3 + years of professional experience.

According to the Laffey Matrix, a reasonable hourly rate for services performed from August 18, 2003, through May 31, 2004 by an attorney with "3 + years" experience is \$180.00, and for services performed between June 1, 2004, and up to February 14, 2005, is \$185.00.00. Using the guidelines of the Laffey Matrix, I conclude that that portion of the attorney fee request for professional services rendered by Spenillo at the rate of \$225.00 per hour is excessive. Further, counsel's fee request does not indicate any extraordinary credential or experience that might justify an award higher than the fee schedule enumerated in the Laffey Matrix. A copy of the Laffey Matrix, covering the period of August 15, 2003, through November 9, 2004, is attached to this Addendum Decision. I conclude that Spenillo may be compensated for his professional services at the rate of \$185.00 per hour.

### 3. Costs

According to the information supplied by Employee, costs associated with her

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hourly rates in excess of \$80.00 to be reasonable, depending upon the complexity and difficulty of the case, and the attorney's level of experience. See, e.g., *Employee v. Agency*, OEA Matter No. 1601-0114-85AF88, 38 D.C. Reg. 3897 (1991); *Employee v. Agency*, OEA Matter No. 1601-0125-88AF89, 39 D.C. Reg. 6993 (1992).



# UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA

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## LAFFEY MATRIX 2003 - 2005

Years (Rate for June 1 - May 31, based on prior year's CPI-U)

Experience	03-04	04-05	05-06	06-07	07-08	08-09	09-10	10-11	11-12	12-13	13-14
20+ years	380	390									
11-19 years	335	345									
8-10 years	270	280									
4-7 years	220	225									
1-3 years	180	185									
Paralegals & Law Clerk	105	110									

### Explanatory Notes

1. This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared by the Civil Division of the United States Attorney's Office for the District of Columbia. The matrix is intended to be used in cases in which a "fee-shifting" statute permits the prevailing party to recover "reasonable" attorney's fees. See, e.g., 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412 (b) (Equal Access to Justice Act). The matrix does not apply in cases in which the hourly rate is limited by statute. See 28 U.S.C. § 2412(d).
2. This matrix is based on the hourly rates allowed by the District Court 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). It is commonly referred to by attorneys and federal judges in the District of Columbia as the "Laffey Matrix" or the "United States Attorney's Office Matrix." The column headed "Experience" refers to the years following the attorney's graduation from law school. The various "brackets" are intended to correspond to "junior associates" (1-3 years after law school graduation), "senior associates" (4-7 years), "experienced federal court litigators" (8-10 and 11-19 years), and "very experienced federal court litigators" (20 years or more). See *Laffey*, 572 F. Supp. at 371.
3. The hourly rates approved by the District Court in *Laffey* were for work done principally in 1981-82. The Matrix begins with those rates. See *Laffey*, 572 F. Supp. at 371 (attorney rates) & 386 n.74 (paralegal and law clerk rate). The rates for subsequent yearly periods were determined by adding the change in the cost of living for the Washington, D.C. area to the applicable rate for the prior year, and then rounding to the nearest multiple of \$5 (up if within \$5 of the next multiple of \$5). The result is subject to adjustment if appropriate to ensure that the relationship between the highest rate and the lower rates remains reasonably constant. Changes in the cost of living are measured by 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.
4. Use of an updated *Laffey* Matrix was implicitly endorsed by the Court of Appeals in *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc). The Court of Appeals subsequently stated that parties may rely on the updated *Laffey* Matrix prepared by the United States Attorney's Office as evidence of prevailing market rates for litigation counsel in the Washington, D.C. area. See *Covington v. District of Columbia*, 57 F.3d 1101, 1105 & n. 14, 1109 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996). Lower federal courts in the District of Columbia have used this updated *Laffey* Matrix when determining whether fee awards under fee-shifting statutes are reasonable. See, e.g., *Blackman v. District of Columbia*, 59 F. Supp. 2d 37, 43 (D.D.C. 1999); *Jefferson v. Milvets System Technology, Inc.*, 986 F. Supp. 6, 11 (D.D.C. 1997); *Ralph Hoar & Associates v. Nat'l Highway Transportation Safety Admin.*, 985 F. Supp. 1, 9-10 n.3 (D.D.C. 1997); *Martini v. Fed. Nat'l Mtg Ass'n*, 977 F. Supp. 482, 485 n.2 (D.D.C. 1997); *Park v. Howard University*, 881 F. Supp. 653, 654 (D.D.C. 1995).

representation in this matter totaled \$45.15, broken down as follows:

Courier/Delivery	\$	22.99	
Travel		3.70	
Photocopying		13.05	(87 pages @ \$ .15/page)
Postage		3.18	
Legal Research		<u>2.23</u>	
Total Costs	\$	45.15	

**4. Summary of reduced allowable attorney fees and costs.**

- a. Attorney fees for Melehy – 3.0 hours @ \$345.00/hour = \$1,035.00  
Attorney fees for Spenillo – 14.0 hours, reduced to \$185.00/hour = \$2,590.00
- b. Costs - \$45.15

Thus, the grand total of allowable attorney fees and costs is \$3,670.15

ORDER

It is hereby ORDERED that Agency pay Employee, within thirty (30) days from the date on which this addendum decision becomes final, \$3,670.15 in attorney fees and costs.

FOR THE OFFICE:

  
**ROHULAMIN QUANDER**  
Senior Administrative Judge