THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Bryan Edwards	)	OEA Matter No. 1601-0017-06-AF-10
Employee	)	
	)	Date of Issuance: December 17, 2012
v.	)	
	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge
Department of Youth Rehabilitation Services	)	
Agency	)	

Betty Grdina, Esq., and Robert H. Stropp, Jr., Esq., Employee Representatives
Andrea Comentale, Esq., Agency Representative

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL BACKGROUND

The pertinent facts are as follows: On December 15, 2005, Bryan Edwards (hereinafter "Employee"), filed a petition for appeal with the Office of Employee Appeals (hereinafter "OEA" or "the Office") contesting the District of Columbia Department of Youth Rehabilitation Services (hereinafter "DYRS" or "the Agency") adverse action of removing him from service. A Prehearing Conference and Evidentiary Hearing were held in this matter. Based on the documents of record as well as the evidence gleaned through the aforementioned Evidentiary Hearing, I issued an Initial Decision (hereinafter "ID") on May 14, 2007 wherein I ruled in Employee's favor. The ID Ordered in relevant part that:

> 1. Agency's action of removing the Employee from service is REVERSED; and
>
> 2. The Agency shall reinstate the Employee and reimburse him all back-pay and benefits lost as a result of his removal; and
>
> 3. The Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

ID at 15.

The Agency timely filed a petition for review of the ID to the Board of the OEA. On July 22, 2009, the Board of the OEA issued an Opinion and Order wherein it denied Agency's petition for review. Thereafter, the Agency did not seek to have this matter reviewed by the District of Columbia Superior Court. On March 30, 2010, approximately seven months after the Opinion and Order became the Final Decision (hereinafter "FD") in this matter; Employee was forced to file a Motion to Enforce Final Decision, alleging that the Agency has failed, thus far, to comply with any aspect of the ID or the FD. On May 6, 2012, the Undersigned issued a Addendum Decision on Compliance wherein this matter was referred to the Office of Employee Appeals General Counsel in order to enforce the ID.

While Employee's counsel was litigating compliance with the FD, he filed two interim fee petitions with the Undersigned. Then, the parties' entered into protracted settlement talks in order to resolve the issues surrounding the various fee petitions. Those settlement activities were ultimately unsuccessful. Taking into account the objections raised by DYRS in response to his prior fee petitions as well as the additional work expended in litigating ongoing compliance of the FD, on June 28, 2012, Employee, through counsel, asked that those two prior fee petitions be withdrawn and replaced with Employee's Motion for Award of Revised Interim Fees and to Withdraw Pending Interim Fee Petitions (hereinafter "fee petition"). DYRS, in its response to the fee petition dated November 26, 2012, consented to the withdrawal of the two prior fee petitions. In his Fee Petition, Employee fee request of $38, 914.00 was significantly reduced from his prior requests by approximately 17%. Agency, in its response, had issues with some of the hours expended in this matter. On December 13, 2102, Employee's counsel submitted a Notice of Clarification of Interim Fee Petition wherein she explained that Employee does not "intend to file an additional fee petition on the merits of the above-captioned matter."[1] Agency's contentions will be discussed in more detail below.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether the attorney fee requested is reasonable.

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 634 *et al*.

[1] Employee's Notice of Clarification of Interim Fee Petition at 1 (December 13, 2012).

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). It is without question that Employee was the prevailing party in this matter. Moreover, this point was conceded by DYRS in Agency's Opposition to Fees at 4.

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.

In this matter, the Agency improperly removed Employee from his position without proper cause, and in doing so I find that DYRS violated Allen Factors Nos. 1, 4 and 5.

REASONABLENESS OF ATTORNEY FEES

A. Hourly Rate

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. 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 Laffey Matrix calculates reasonable attorney fees based on the amount of work experience the attorney has and the year that the work was performed. Imputing the year allows for the rise in the costs of living to be factored into the equation.[2]

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.

The OEA has recognized that the *Laffey* rate is applicable in cases where the employee is a prevailing party and where counsel's skill and experience justify such a rate. *Fogle v. D.C. Public Schools*, OEA Matter No. 2401-0123-04-A-09 (March 21, 2011); *Tate v. D.C. Department of Parks & Recreation Agency*, OEA Matter No. 1601-0117-07-A-08 (March 18, 2009); *Gurley v. D.C. Public Schools*, OEA Matter No. 1601-008-05-A-08 (June 25, 2008); *Hoston v. D.C. Public Schools*, OEA Matter No. 1601-0022-04-AF-07 (December 14, 2007); *Witcher-Sessoms v. D.C. Public Schools*, OEA Matter No. 1601-0139-03-AF-04 (June 10, 2005).

The following discussion will focus on the reasonableness of the requested rates *vis a vis* the Laffey Matrix. In the course of litigating this matter, Employee utilized the services of Attorney Robert H. Stropp, Jr., who in his fee petition requested payment for the following:

[2] A copy of the Laffey Matrix is included as part of this Addendum Decision on Compliance.

- Robert H. Stropp, Jr.: 93.60 hours at a rate of $350/hour.[3]
- Then law clerk Diana Bardes: 19.70 hours at a rate of $140/hour.[4]
- Then law clerk Natalie Bedard : 20.40 hours at a rate of $135/hour.[5]
- Then law clerk Evan Hamme: 1.20 hours at a rate of $135/hour.
- Then first year associate Lauren Powell: 2.0 hours at a rate of $240/hour.[6]

B. Number of hours expended

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. *Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985).

Employee's counsel, Robert H. Stropp, Jr., (hereinafter "Stropp") is an experienced litigator in the field of labor and employment law with more than 35 years experience practicing law. *See* Employee's Motion for Award of Revised Interim Fees and to Withdraw Pending Interim Fee Petitions at Tab 2, Fourth Declaration of Robert Stropp Jr. (June 28, 2012). Of note, Stropp stated in his declaration:

> I have received attorney fees at the *Laffey* rate.
>
> However, I represent mostly labor unions and individual working men and women who often cannot afford fees at the prevailing market rate.
>
> On March 24, 2010, I entered into a fee agreement with Bryan Edwards. A copy of the agreement is attached hereto. [See Tab 5, Edwards Retainer Agreement].
>
> On occasion and to serve the public interest, I enter into fee agreements, such as the one I entered into with Bryan Edwards, which require my clients to initially pay a rate below the *Laffey* or market rate.
>
> My retainer agreement with Bryan Edwards reflects that I am charging him an

[3] In his Fee Petition, Robert H. Stropp, Jr., Esq., had deducted 58.54 hours from his two prior fee request in seeming compliance with some of the objections DYRS had raised in his prior fee request.

[4] In the Fee Petition, Diana Bardes , had deducted 6.3 hours from her two prior fee requests in seeming compliance with some of the objections DYRS had raised in the prior fee requests.

[5] In the Fee Petition, Natalie Bedard , had deducted 22.90 hours from her two prior fee requests in seeming compliance with some of the objections DYRS had raised in the prior fee requests.

[6] In the Fee Petition, Lauren Powell, had deducted 1.58 hours from her two prior fee requests in seeming compliance with some of the objections DYRS had raised in the prior fee requests.

> hourly rate of $350/hour. This was a special rate which reflected Mr. Edwards' unique circumstances as an employee who was unemployed and facing financial hardship.
>
> The hourly rate I am seeking in the Revised Fee Petition ($350/hour) is below the *Laffey* rate for an attorney with my years of experience ($495/hour).
>
> In this Revised Fee Petition, (and in the two earlier filed petitions), I elected to seek the lower hourly rate of $350/hour against the District of Columbia, rather than the *Laffey* rate, to minimize any potential objections the Agency would assert to my petition and expedite the resolution of this process. *Id.*

Stropp's professional skill and experience in this subject area alone would justify a fee award at the *Laffey* rate. Furthermore, as attested by the Declaration of Jonathan Gould *See Id*. at Tab 3, the recent past president of the Metropolitan Washington Employment Lawyers Association ("MWELA") from 2009 to 2011, Stropp's reputation in the Washington, D.C. legal community is outstanding, and the application of the *Laffey* rate would be commensurate with his professional experience and expertise. I agree with Stropp's statement and I find that in this matter, his sought after attorney fee rate of $350/hour is both reasonable and allowable pursuant to both *Laffey* and OEA precedent.

According to the fee petition, other persons worked on this matter under the supervision of Stropp. All of the law clerks who participated in this matter were either second year, third year or recent graduates of either the George Washington University School of Law or the Catholic University Columbus School of Law. At the time that she billed for this matter Lauren Powell was a first year associate. Since the FD was issued, most have gone on to be admitted as members of the Washington, DC Bar Association. As noted above, I find that the rate sought for Diana Bardes, Natalie Bedard, Evan Hamme, and then first year associate Lauren Powell hour is both reasonable and allowable pursuant to both *Laffey* and OEA precedent.

Agency's Objections

The Agency took issue with .2 and .6 hour time entries where Employee's counsel consulted with a dental practitioner.[7] I note that one of the seminal portions of the record came from the dental surgeon who had performed oral surgery on Employee just prior to the final urine test that ultimately resulted in Employee's removal from service. I further note that the dental surgeon's testimony was crucial in my finding in favor of Employee. I disagree with the Agency's objection to Employee's counsel's consultation with the dental surgeon and hereby find that those time entries are valid.

The Agency objected to other research done by Employee's counsel. The following excerpt describes the Agency's contention in detail:

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[7] *See* Agency's Repsonse to Employee's Motion for Award of Revised Interim Fees and to Withdraw Pending Interim Fee Petition at 2 (November 26, 2012).

The Back Pay provisions do not expressly or impliedly provide for payment of interest on a back pay award. However, they do expressly provide that unemployment compensation benefits, i.e. erroneous payments from the District, shall be deducted from the back pay award. Therefore, the following 18.6 hours spent researching pre- and post-judgment interest and the deductibility of unemployment compensation benefits should be substantially reduced or subtracted from the total number of hours as they are excessive and unnecessary:

Diana Bardes – Law Clerk

1. 6/14/2010 – "Research pre- and post-judgment interest and steps to be taken after matter has been certified to DC General Counsel for compliance" – 2.20 hours;

2. 6/15/2012 – "Research pre- and post-judgment interest and steps to be taken after matter has been certified to DC General Counsel for compliance" – 2.40 hours;

3. 6/21/2010 – "Research prejudgment interest, draft memo for RHS, research wage penalties and remedies" – 2.4 hours;

4. 6/24/2010 – "Research procedural history of cases where prejudgment interest was awarded" – 2.3 hours;

5. 8/5/2012 – "Research deductibility of unemployment benefits from backpay awards" - .7 hour; and

6. 8/6/2012 – "Research deductibility of unemployment benefits from backpay awards, compile research, email RHS" – 3.8 hours.[8]

Robert H. Stropp, Jr. – Counsel

1. 6/14/2010 – "Conference law clerk re: prejudgment interest issues and status of compliance issues before GC" - .5 hour;

2. 6/21/2010 – "Conference law clerk; review prejudgment interest memo; research re: prejudgment intent (sic)" – 1.8 hours;

3. 8/5/2012 – "Research deductibility of UC benefits from backpay aware – DC law; email law clerk" - .8 hour; and

[8] *Id.* at 3 - 4.

4. 8/9/2010 – "Review DB memo and cases re: UC deductions; research" – 1.7 hours.

Again, I find that I disagree with Agency's contention in this regard. While, it may be true that Employee may or may not be able to recoup pre or post judgment interest it is certainly within his attorney's right and duty to fully explore what the state of the law is and whether there was a reasonable opportunity to recoup potentially legitimate losses on behalf of his client. It should also be noted that this disputed research was not personally conducted by Stropp whereupon he would command a higher hourly rate but rather was conducted by his then law clerk Diana Bardes. I find that these time entries were valid expenditures of time on behalf of Employee in making sure that all reasonable legal arguments before this body were fully vetted and zealously prosecuted by Employee's counsel. This finding is informed by the fact that Employee's counsel deducted a significant portion of his law firm's billable time in its final fee petition.

Agency contends that the following time entries on Employee's Revised Fee Petition are for hours handling litigation or in anticipation of litigation in D.C. Superior Court:

Diana Bardes – Law Clerk/First-Year Associate

1. 7/7/2010 – "Research potential causes of action to take against the District (writ of mandamus, failure to enforce, injunction, civil contempt)" – 2.6 hours

Natalie Bedard – Law Clerk

1. 8/26/2010 – "Begin research re: Superior Court jurisdiction over enforcement of OEA final decision" - .8 hour;

2. 9/2/2012 – "Confer with RHS re: Motion for Awarding Attorney's Fees and Complaint for Enforcement; edit Motion accordingly and forward to RHS for review; begin review of draft complaint by DB" – 1.6 hours;

3. 9/10/2010 – "Additional edits to complaint for Enforcement and Motion for Awarding Attorneys Fees; research re: proper service of District of Columbia and its agencies" – 1.5 hours.

Lauren Powell – First-Year Associate

1. 12/21/2011 – "Call to S. Knapp office, check, release" – 1.0 hour;

2. 12/21/2011 – "Call to S. Knapp office; check, release" – 1.0 hour.

Robert H. Stropp, Jr., - Counsel

1. 7/6/2010 – "Conference w/law clerk re: research into remedies against district" - .5 hour;

2. 2/25/2011 – "C.fr. B. Edwards re: termination meeting" - .2 hour;

3. 5/12/2011 – "Conference Atty. Knapp, c.t. B. E." - .4 hour;

4. 6/8/2011 – "Email Atty. Knapp; c.t. B.E. c.t. Knapp re: IRS form return" - .5 hour;

5. 7/15/2011 – "Preparation re: cases in support of Reply to Agency Response to OEA order; conf. Atty. Knapp; to judge Rankin court; calls B. Edwards." – 3.0 hours;

6. 7/22/2011 – "Review back pay reconciliation from Atty. Knapp; email review calculations and file docs." – 1.5 hours;

7. 7/22/2011 – "Conference J. Truitt re: Tax consequences" - .5 hour;

8. 7/22/2011 – "Review back pay reconciliation from Atty. Knapp; email; c.t. BE" - .8 hour;

9. 7/25/2011 – "Review Settlement Agreement and post correspondence; draft reply to issues in addition to DYRS tender" – 2.5 hours;

10. 7/26/2011 – "Conference Atty. Knapp; c.t. BE re: calculation explanation" - .7 hour;

11. 8/15/2011 – "C. fr. BE; c.t. Atty Knapp re: immediate issuance of back pay check" - .3 hour;

12. 10/31/2011 – "Email S.Knapp; reply, retrieve back pay info to S. Knapp" - .7 hour;

13. 11/2/2011 – "C.fr. BE re: status, Robert Owens hire" - .3 hour;

14. 11/3/2011 – "Email S, Knapp and reply; emails re: health insurance, sick leave, etc.; calls S. Knapp. - .7 hour;

15. 11/24/2011 – "C.t. Atty. Knapp; email; conf. BE re: back pay check" - .5 hour;

16. 12/2/2011 – "Conference S. Knapp; c.t. BE re: back pay check" - .3 hour;

17. 12/12/2011 – "Call to S. Knapp re: back pay check" - .2 hour;

18. 12/20/011 – "C.t. S. Knapp; conf. B. Edwards re: back pay progress on settlement" - .5 hour;

19. 12/21/2011 – "Calls S. Knapp; drafting reconciliation, check" - .8 hour;

20. 12/21/2011 – "Calls S. Knapp, conf B. Edwards re: check delivery and logistics" - .5 hour;

21. 12/21/2011 – "C.t. S. Knapp; draftinhg reconciliation, check" - .8 hour;

22. 12/23/2011 – "Drafting reconciliation statement; conf. MM, RW, DG re: distribution method" – 1.5 hours;

23. 12/27/2011 – "Review BE tax papers 2010; email Truitt; calls BE conf. MG; email" - .7 hour;

24. 12/29/2011 – "Meeting B. Edwards; review outstanding issues; email S. Knapp" - .5 hour;

25. 12/30/2011 – "Research Dupree v OEA, D.C. Ct. Appls." - .7 hour;

26. 1/4/2012 – "Email S. Knapp and review back pay chart" - .4 hour;

27. 2/20/2012 – "Email S. Knapp re: step/grade increases" - .2 hour;

28. 2/27/2012 – "Email S. Knapp re: recovery of step/grade increases and loss of sick days" - .2 hour'

29. 4/4/2012 – "c.t. K. Knapp re: upgrade/step increases" - .2 hour.[9]

Again, I find that I disagree with Agency's contention in this regard. DYRS has made the bare assertion that the disputed time entries noted above "are for hours handling litigation or in anticipation of litigation in D.C. Superior Court."[10] This is the sum total of the Agency's argument. Moreover, DYRS did not provide any persuasive details or arguments that would lead the undersigned to believe that these entries were for work that was done in furtherance of Employee's appeal before some other judicial or quasi-judicial body. There is nothing inherently dubious about the aforementioned billable time that would lead the Undersigned to believe that

[9] *Id*. at Attachment 1.
[10] *Id.*

the billed work listed above was done in furtherance of any other litigation. The only notations that could ostensibly be regarded as such would be research conducted by Diana Bardes and Natalie Bedard in items no. 1 for each above. Again, I note that it is certainly within Employee's counsel law firm attorney's right and duty to fully explore what the state of the law is and whether there was a reasonable opportunity to recoup potentially legitimate losses on behalf of Employee. I find that these time entries were valid expenditures of time on behalf of Employee in making sure that all reasonable legal arguments before the OEA were fully vetted and zealously prosecuted by Employee's counsel. This finding is informed by the fact that Employee's counsel deducted a significant portion of his law firm's billable time in its final fee petition.

Conclusion

The Agency did not note any other substantive objections to the fee petition. Employee's counsel has requested compensation for fees and costs totaling $38, 914.00. I have reviewed the pertinent documents of record and conclude this sum is both reasonable and recoverable.

ORDER

Based on the foregoing, it is hereby ORDERED that Agency pay Employee, within thirty (30) days from the date on which this addendum decision becomes final, $38, 914.00 in attorney fees and costs.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Senior Administrative Judge