

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
DELORES JUNIOUS	)	OEA Matter No. 1601-0057-01AF07
Employee	)	
	)	
v.	)	Date of Issuance: May 7, 2007
	)	
DISTRICT OF COLUMBIA	)	Muriel Aikens-Arnold
CHILD AND FAMILY SERVICES	)	Administrative Judge
_____	)	

Robert E.Deso, Esq., Employee Representative  
Andrea Comentale, Esq., Assistant Attorney General for the District of Columbia

**ADDENDUM DECISION ON ATTORNEY FEES**

**INTRODUCTION AND PROCEDURAL HISTORY**

On June 22, 2001, Employee, a Social Worker, filed a Petition for Appeal from Agency's action to remove her effective April 20, 2001 based on employment-related conduct.<sup>1</sup> On October 25, 2004, an Order convening a Prehearing Conference was issued scheduling said conference on November 16, 2004. After two (2) postponements, based on requests by the parties, said meeting was held on February 1, 2005. On March 8, 2005, an evidentiary hearing was conducted, the parties submitted closing arguments, and the record was closed effective June 10, 2005.

<sup>1</sup> This Judge initially dismissed this matter on 10/07/03 based on Employee's failure to prosecute. However, upon further appeal to this Office, the Board issued an *Opinion and Order on Petition for Review* on 9/27/04, finding that, based on the evidence presented, remand for further proceedings was warranted. The specific charges are not repeated as the specifics are not pertinent to the outcome in this matter.

On November 10, 2005, this Judge issued an Initial Decision (ID) in which it was concluded that Agency had failed to prove its charges against Employee. The removal action was reversed and Agency was ordered to reinstate Employee to her position of record with all appropriate back pay and benefits. Agency was further directed to file written verification with this Office regarding its compliance with said decision. Agency did not file said notification. Nor did Agency appeal the ID or otherwise challenge this Judge's ruling.

On August 3, 2006, Employee, through her attorney, filed a Petition for Enforcement of the ID asserting that she had not been reinstated nor reimbursed back pay and benefits.<sup>2</sup> On August 25, 2006, this Judge issued an Addendum Decision on Compliance dismissing the initial Petition for Enforcement based on Agency's assurance that Employee had been reinstated and that Agency was then processing her back pay and retroactive benefits.<sup>3</sup>

On November 13, 2006, Employee's Counsel filed a second Petition for Enforcement and a Motion for Award of Interim Attorney Fees and Costs (hereinafter referred to as "MAIAF") with this Office in the amount of. \$19,948.12. Said request for fees covered the representation of Employee from November 8, 2004 through August 30, 2006.<sup>4</sup> On December 14, 2006, Agency filed its response to said Motion.<sup>5</sup> The record is closed.

### JURISDICTION

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

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<sup>2</sup> See OEA Rule 636.2, 46 DCR at 9321 which reads, "If any District agency fails to comply with a final decision of this Office . . . the employee may file a motion to enforce the final decision." Employee represents that Agency did not appeal the ID and, therefore, the ID became a final decision.

<sup>3</sup> At that time, this Judge relied on Agency's representation (made telephonically on 8/15/06) that Employee's back pay and benefits were "currently" being processed. Further, on 8/17/06, Agency's representative faxed an undated letter (to this Judge) addressed to Employee's Counsel regarding said issues.

<sup>4</sup> The record reflects that Employee's Counsel filed two (2) Petitions for Enforcement (on 8/3/06 and 11/13/06); and he represents that a draft Consent Motion for attorney fees was sent to Agency's representative on 9/05/06, and there was no response. Counsel requests attorney fees in the amount of \$19,437.00 and costs associated with the representation of Employee in the amount of \$511.12, totaling \$19,948.12.

<sup>5</sup> On or about 11/17/06, this Judge contacted Agency's Counsel, who subsequently provided documents reflecting Employee's back pay worksheet and a copy of the agency paycheck issued to Employee on 11/24/06. On December 7, 2006, an Order to Respond to Petition for Enforcement was issued in accordance with OEA Rule 635.5 which provides a time limit for such response. Agency's representative (with consent of Employee's Counsel) requested additional time which was granted until 12/14/06.

## FINDINGS OF FACT

### Employee's Position

Employee's Counsel contends that Agency did not reinstate Employee until July 24, 2006; as of this filing, Agency had not issued her back pay and benefits; that she is the prevailing party; and that the payment of reasonable attorney fees is in the interest of justice. Counsel represents that the \$300.00 hourly rate charged and the work performed are reasonable.<sup>6</sup> This motion is filed pending compliance by Agency and final disposition of the case.

### Agency's Position

Agency initially contends that the Motion for Interim Attorney Fees was untimely filed as its filing exceeded the required thirty (30) day period within which the initial decision becomes final; that "the motion was required to be filed no later than January 17, 2007 (sic) unless Employee's counsel sought and was granted an extension."<sup>7</sup> In addition, "some of the services performed were not necessary" and should be denied. First, Counsel's charge of \$171.00 for services on February 28, 2005 for the preparation, review and revision of a proposed Settlement Agreement was premature, as such preparation took place immediately following preliminary discussions between the parties, and was ultimately not necessary, as the parties failed to agree on settlement terms.<sup>8</sup>

Second, Counsel's charge of \$770.00 between July 5, 2006 and July 14, 2006 for preparation of a detailed letter to Agency's Counsel, which was completed and mailed after Agency's July 14, 2006 letter informing Employee of her reinstatement effective July 24, 2006, was unnecessary.<sup>9</sup> Third, Counsel's charge of \$684 between July 21, 2006 and August 15, 2006 regarding the preparation and resolution of a Petition for Enforcement was premature and

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<sup>6</sup> See MAIAF at p. 1 where Counsel states, in part, "... Agency still has not provided Employee with any back pay or retroactive benefits as . . . ordered to do more than a year ago . . ." It is noted, however, that Counsel's "current" hourly rate of \$300.00 conflicts with the \$285.00 amount reflected on his attached billing statements in Exhibit 1. Since the \$285.00 directly correlates with the listed hours expended on Counsel's billing statement, and in the absence of any amendment therefore, said rate will be utilized for purposes of this review.

<sup>7</sup> See Agency's Response (hereinafter referred to as "AR") at p. 2; and footnote 2 where Agency states, "Thirty days after the decision became final was Saturday, January 14, 2006. Therefore, the motion was due on the next business day, Tuesday, January 17, 2006."

<sup>8</sup> See AR at p. 2.

<sup>9</sup> See AR at p. 2 where Agency argues that said letter contained procedural history of the case as well as Employee's estimate of the salary and lost benefits due; neither of which was necessary or helpful to Agency as said calculation is governed by applicable law and municipal regulations.

unnecessary; therefore, unreasonable and should be denied.<sup>10</sup>

### 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.

OEA Rule 635.2 reads: “[U]nless the Administrative Judge directs otherwise, a request for attorney fees shall be made by written motion within thirty (30) calendar days of the date that the initial decision becomes final.”

#### 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, and reimbursement for loss of wages and benefits. As a result of this Judge’s ID, that is the result Employee obtained. Moreover, Agency did not appeal the ID 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”;

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<sup>10</sup> See AR at pp. 2-3 where Agency argues that: the petition incorrectly asserted that Employee had *not* been reinstated nor reimbursed back pay and benefits despite the attached two letters dated 7/14/06 and 7/21/06 outlining the provisions of Employee’s reinstatement and advising “[A]ny and all other compliance matters will be addressed appropriately . . . [T]he petition was filed a mere eight business days after Employee’s reinstatement. It was not possible for Agency to have completed the calculation and processing . . . at the time the petition for enforcement was filed.”

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.<sup>11</sup>

First, as indicated above, this Judge found that Employee is the prevailing party based on reversal of Agency's action without any subsequent challenge thereof. Accordingly, the ID became a final decision on December 15, 2005, when the thirty-five (35) calendar days within which to file a petition for review were exhausted.<sup>12</sup> Second, Agency's failure to file written verification, with this Office, within 30 days of the issuance of the ID *or thereafter*, to reflect its compliance with the Order to do so, diminishes its own argument that Employee failed to meet the required time limit within which to file for attorney fees. In fact, Agency officials, not only failed to report their compliance; but, blatantly, failed to reinstate Employee and begin processing

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<sup>11</sup> "[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).

<sup>12</sup> See OEA Rule 633.1 and footnote 7. Agency's argument that the compliance period extended another 30 days [presumably under OEA Rule 636.1] lacks credulity due to its apparent inaction therefore. It is noted that Employee's Counsel submitted a reply (on 12/29/06) to the timeliness issue wherein he asserts, *inter alia*, that his request for attorney fees was not earlier filed pending Agency's compliance with the ID and the necessity of continuing representation. Said rationale is reasonable, under the circumstances, as a second Petition for Enforcement was filed in a continuing effort to gain that which the improper removal had taken away.

her back pay and benefits until approximately eight (8) months after the ID became final.<sup>13</sup> 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) (“If the agency had met the Board’s deadline, the appellant would not have had to seek enforcement,” thereby incurring additional expenses). Based on the totality of the circumstances and under *Allen* factor 2, 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 “Laffrey Matrix” in determining the reasonableness of a claimed hourly rate.<sup>14</sup>

Counsel’s submission was detailed and included enumeration of the services provided on Employee’s behalf, totaling \$19,437.00 for 68.20 hours, at a reasonable hourly rate of \$285.00. Further, costs associated with the representation of Employee in this matter total \$511.12. He

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<sup>13</sup> A Second Petition for Enforcement is currently pending adjudication.

<sup>14</sup> The Laffrey Matrix, used to compute reasonable attorney fees in the Washington, DC-Baltimore Metropolitan Area, was initially proposed in *Laffrey 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 *Laffrey* rate for the prior year to ensure that the relationship between the highest rate and the lower rates remains reasonably constant. The current Laffrey Matrix is attached to this decision.

also attached an affidavit reflecting a summary of his credentials, which included his educational background, employment history, and professional experience of practicing law for thirty-seven (37) years, most of which involved employment-related administrative appeals.

1. Number of hours expended.

According to the billing documents submitted with the attorney fees motion, Counsel's billable hours total 68.20 for various services performed. Relative to Agency's opposition to the fees charged, only monetary totals and time periods were provided for disputed fees. This Judge individually identified the amounts presumed to be in dispute as follows:

	<u>Date</u>	<u>Hours</u>	<u>Amount</u>	<u>Service Performed</u>
a)	2/28/2005	.40	\$114.00	Prepare Proposed Settlement Agreement
	2/28/2005	.20	\$ 57.00	Review and revise Proposed Settlement Agreement
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	Total		\$171.00	
b)	7/5/2005	1.00	\$285.00	Prepare letter to Comentale re back pay
	7/6/2005	.50	\$142.50	Work on letter to Comentale
	7/10/2005	.30	\$ 85.50	Review and revise letter to AAG Comentale
	7/12/2005	.30	\$ 85.50	"
	7/13/2005	.30	\$ 85.50	"
	7/14/2005	.30	\$114.00	Review fax from client; speak w/client; revise letter
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	Total		\$798.00*	
c)	7/21/2006	.70	\$199.50	Telephone conference w/client re: Agency noncompliance; start Petition for Compliance
	7/24/2006	.20	\$ 57.00	Receive and review fax from client
	7/25/2006	.80	\$228.00	Review and revise Petition for Enforcement
	7/27/2006	.30	\$ 85.50	Work on Petition
	8/02/2006	.10	\$ 28.50	Review Petition for Enforcement; leave message for Comentale
	8/02/2006	.20	\$ 57.00	Telephone conference w/AAG Comentale
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	Total		\$655.50**	

\*\$28.00 difference between the \$770.00 amount disputed by Agency for this particular time period and the actual amount reflected on Counsel's invoice for the same period.

\*\*\$28.50 difference between \$684.00 amount disputed by Agency for the time period

between 7/21/06 and 8/15/06 and the actual amount reflected on Counsel's invoice (assuming that Agency did not include the 8/15/2006 line item reflecting \$57.00 for a telephone conference with the Judge which would have exceeded the amount in dispute).

First, Agency opposes the \$171.00 billed "on February 28, 2005 for the preparation, review and revision of a proposed Settlement Agreement . . . [which] took place immediately following preliminary telephone conversations between counsel . . . and before the terms of settlement had been reached." Agency contends those services "were premature and ultimately not necessary as the parties failed to agree on settlement terms." Nevertheless, there is no dispute that settlement discussions were conducted between the parties and, in this Judge's view, the result of those negotiations is immaterial to the fact that the services were performed. Therefore, this Judge concludes that Agency's rationale, in the first instance, has no merit as such discussions are encouraged as a reasonable means to alternatively resolve disputes, and Employee's Counsel should be awarded \$171.00.

Relative to Agency's second issue regarding Employee's "unnecessarily detailed letter" regarding back pay and lost benefits due, Agency's rationale for disputing the \$770.00 (actually \$798.00) billed between July 5, 2006 and July 14, 2006 is partially unfounded.<sup>15</sup> Even though back pay is governed by applicable law and municipal regulations, as indicated by Agency, said letter appears to be an earnest effort, by Counsel, to restore the *status quo ante*, and to stop Agency delay in compliance. Nevertheless, the .30 hour billings for "review and revise letter to Comentale" on July 10, July 12 and July 13, 2006 are less beneficial billings, particularly in view of the more productive revision done on July 14, 2006 *after* speaking with the client. This Judge, therefore, finds that said charges in the amount of \$256.50 are *not* warranted. Only fees for services performed on July 5, July 6, and July 14, 2006 in the amount of \$541.50 should be awarded.<sup>16</sup>

Last, Agency disputes the \$684.00 (actual amount is \$655.50) for services performed "between July 21, 2006 and August 15, 2006 for the preparation and resolution of a Petition for Enforcement that was filed on August 3, 2006." Agency contends that said petition was premature and unnecessary. Even though Employee had been advised to return to work prior to the Petition's filing, there is no dispute that other compliance issues, ie., back pay and benefits, were pending.

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<sup>15</sup> See AR at pp.2-3. Agency did not identify the letter in dispute by date. Rather, Agency indicated that "the letter was completed and mailed after Agency informed Employee, by letter dated July 14, 2006 [presumably Exhibit 3 attached to Employee's Second Petition for Enforcement (SPFE) referenced by Agency] of her reinstatement effective July 24, 2006." Based on that assertion and a review of the record, this Judge presumes that Employee's letter dated 7/18/06 matches the one in dispute in the AR.

<sup>16</sup> See chart on p.7 which reflects a corrected total amount of \$798.00 requested.



When an Employee prevails, he or she has the right to the *status quo*. Here, the *status quo* had not been restored and Agency continued the injustice of the adverse action initiated upon Employee for an additional year. Further, Agency's advisement that "Any and all other compliance matters will be addressed appropriately" was *not* sufficient assurance to Employee that retroactive pay and benefits were forthcoming. In fact, it is undisputed that Agency did *not* reinstate Employee until approximately eight (8) months after issuance of the ID, nor reimburse back pay and benefits until approximately one (1) year subsequent to issuance of the ID. The passing of the deadline for compliance had already established noncompliance by Agency. Based on a review of the legal services listed in item "c" and consideration of the totality of circumstances, this Judge concludes that Employee's Counsel is entitled to said attorney fees in the amount of \$655.50 for hours expended therein.

## 2. Reasonable hourly rate.

After consideration of Counsel's credentials and the fact that he charged a reasonable hourly rate (considerably lower than the *Laffrey matrix* rates), this Judge concludes that the appropriate hourly rate for legal services performed between November 8, 2004 and August 30, 2006 is \$285.00.<sup>17</sup> Based on Counsel's billing statements and the preceding calculations, the allowable fees are as follows:

11/8/04 through 8/30/06    68.20 hours    \$19,437.00-\$256.50=\$19,180.50

Therefore, the total allowable fees for the legal work involved in the representation of Employee from November 8, 2004 through August 30, 2005 is \$19,180.50.

## 3. Costs

In addition to the above legal fees, Employee's Counsel requested compensation for costs totaling \$511.12 to cover such expenses as postage, photocopying, telecopy and on-line legal research. In the absence of any dispute by Agency and based on a review of the billing statement, this Judge concludes that said costs claimed are reasonable and recoverable.<sup>18</sup>

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<sup>17</sup> See footnote 14. The *Laffrey matrix*, updated through 5/31/07 reflects allowable hourly rates of \$390.00 (year 04-05) and \$405 (year 05-06) based on 20+ years' legal experience to which Counsel would be entitled..

<sup>18</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. \_\_\_ ().

ORDER

It is hereby ORDERED that Agency pay Employee, within 30 days from the date on which this addendum decision becomes final, \$19, 691.62 in attorney fees and costs.

FOR THE OFFICE:

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MURIEL AIKENS-ARNOLD, ESQ.  
Administrative Judge