THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
KHADIJAH MUHAMMAD	)	OEA Matter No. 1601-0033-07CA11
Employee	)	
	)	Date of Issuance: September 4, 2012
v.	)	
	)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA GOVERNMENT	)	Administrative Judge
OPERATIONS DIVISION	)	
Agency	)	

Andrea Comentale, Esq., Agency Representative
Ronald Colbert, Esq., Employee Representative

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION

On March 19, 2008, following an evidentiary hearing, I issued an Initial Decision in which I reversed the decision of the Agency[1] to terminate Khadijah Muhammad, Employee, from her position. based on a charge of absent without official leave (AWOL). As relief, I directed that Agency reinstate Employee, and I awarded her back pay and any benefits lost as a result of the removal. In reaching the decision, I determined that Agency had not met its burden of proof and further concluded that Employee had established that she had a legitimate medical basis for her absence. Agency filed a Petition for Review with the Board of the Office of Employee Appeals (OEA) seeking a reversal of the Initial Decision contending that the Initial Decision was not supported by substantial evidence. On March 1, 2010, the Board issued an Opinion and Order affirming the Initial Decision. Agency next petitioned the Superior Court of the District of Columbia on March 26, 2010, seeking a review of the Board's action. In September 2010, Agency withdrew its appeal.

[1] Until September 2010, Agency had been identified as the District of Columbia National Guard. However, in September 2010, the District of Columbia Department of Human Resources determined that the 2006 adverse action was void *ab initio* since the officials involved in the adverse action were employees of the federal government and therefore could not propose an adverse action against an employee of the District of Columbia Government. Agency, i.e., the agency that employed Ms. Muhammad, was then identified as the D.C. Government Operations Division.

Employee, through counsel, subsequently filed multiple requests for the award of attorney fees, for the award of damages[2] and for compliance. Agency responded to those requests. Following a status conference on April 20, 2011, the issue of attorney fees was referred for mediation while this Administrative Judge, at the request of the parties, retained the issue of compliance. Eventually, the compliance issues were resolved. However, the issue of attorney fees was not resolved at mediation, and the matter was referred back to me in May 2012. The parties were given an opportunity to file any final submissions regarding attorney fees. Oral argument was held on August 16, 2012. At the end of this proceeding, the record was closed.

JURISDICTION

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

ISSUES

Is Employee entitled to an award of attorney fees in this matter? If so, what amount should be awarded?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

D.C. Official Code ' 1-606.08 provides that an agency may be directed to pay reasonable attorney fees if the employee 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 (1999). This award is an exception from the "American Rule" which requires each party to pay its own legal fees. See, *e.g., Huecker v. Milburn*, 538 F.2d, 1241, 1245. ( ). The goal, in awarding attorney fees, is to attract competent counsel to represent individuals in civil rights and other public interest cases, where it might be otherwise difficult to retain counsel. *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968). An employee is considered the "prevailing" party, if he received "all or a significant part of the relief sought" as a result of the decision. *Zervas v. D.C. Office of Personnel,* OEA Matter No. 1602-0138-88AF92 (May 13, 1993). *See also, Hodnick v. Federal Mediation and Conciliation Service,* 4 M.S.P.R. 371, 375 (1980).

In this matter, Agency was ordered to reinstate Employee because it did not meet its burden of proving that she was AWOL from her position. Employee was the prevailing party and received the relief sought. However, there is no presumption that attorney fees will be awarded when an employee is determined to be the prevailing party. As the Federal Circuit stated in *Dunn v. Department of Veterans Affairs,* 98 F.3d 1308 (Fed.Cir. 1996), awarding attorney fees "should not become…the ordinary practice in cases which the employee wins". 98 F.3d at 1313.

This Office has often utilized the rationale enunciated by the Merit Systems Protection Board (MSPB) in *Allen v. United States Postal Service,* 2 M.S.P.R. 420, 428 (1980) in determining if an award of attorney fees is warranted. In order to merit the award of fees, Employee must establish more than the "mere fact" that she was the prevailing party. In *Allen,* MSPB identified five factors to be considered when determining if fees are merited:

1. Whether the agency engaged in a prohibited personnel practice.

[2] At the August 16, 2012 proceeding, Employee withdrew her request for the award of damages. The request was unopposed and was granted.

2. Whether the agency's action was "clearly without merit," "wholly unfounded" or the employee is "substantially innocent" of the charges brought by the agency.
3. Whether the agency initiated the action against the employee in "bad faith" (where the agency action was brought to "harass" the employee or brought to "exert improper pressure on the employee to act in certain ways").
4. Whether the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced the employee"; and
5. Whether the agency "knew or should have known that it would not prevail on the merits" at this proceeding. *Id* at 434-35.

An applicant for attorney fees is not required to meet all of these criteria. *Thomas v. Metropolitan Police Department*, OEA Matter No. 1601-0002-86AF89, 42 D.C. Reg. 5642, 5645 (1995). Based on an analysis of these criteria and the facts in this matter, the Administrative Judge concludes that Employee is entitled to an award of attorney fees for the services of Ronald Colbert, Esq. Although not all five factors were met, the record established that Employee was "substantially innocent" of the charges, and that Agency should have known it would not prevail on the merits. In addition, by allowing a non-D.C. Government entity to terminate Employee, a District of Columbia Government employee, Agency committed a "gross procedural error" which prolonged the proceedings.

Once the conclusion is reached that attorney fees should be awarded, the determination must be made on the amount of the award. The primary issue to be resolved then is the hourly rate to be awarded. Employee argues that the rate should be determined in accordance with the formula established 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. den.*, 472 U.S. 1021 (1985). The formula, often referred to as the "LaffeyMatrix" is used to compute reasonable attorney fees in the Washington, D.C.-Baltimore Metropolitan Area, based on the attorney's experience and the year in which the service was performed. This Board has, on occasion, allowed the use of the Matrix in determining the reasonableness of a claimed hourly rate. The Matrix also contains rates for paralegals and law clerks. The Matrix is updated annually by the Civil Division of the United States Attorney's Office for the District of Columbia. Agency asserts that the Matrix does not apply to this matter, based in large part on the attorney's lack of documented experience and expertise.

Courts have "treated the . . . Laffey Matrix as a reference rather than a controlling standard". *Elec. Transaction Sys. Corp. v. Prodigy Partners Ltd., Inc.*, CIV. A. 08-1610 (RWR, 2009 WL 3273920 (D.D.C. Oct. 9, 2009). The Laffey Matrix is considered a "starting point" that is not "appropriate in many cases." *Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 990 (D.C. 2007). The experience level of the attorney is an integral factor in determining the hourly rate. *Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 988 (D.C. 2007). Using the Laffey Matrix as a guide, courts have increased or decreased the hourly rates depending on the characteristics of the case and the qualifications of counsel. *See, Elec. Transaction Sys. Corp. v. Prodigy Partners Ltd., Inc.*, CIV. A. 08-1610 (RWR, 2009 WL 3273920 (D.D.C. Oct. 9, 2009). At times, courts have awarded Laffey Matrix rates because they are consistent with the attorney's hourly rate or the matter was unusually complex. *See, e.g.*, Does *I, II, III v. Dist. of Columbia*, 448 F. Supp. 2d 137, 140 (D.D.C. 2006) and *Adolph Coors Co. v. Truck Ins. Exch.*, 383 F. Supp. 2d 93, 98 (D.D.C. 2005).

After carefully reviewing the submissions, oral argument and precedent, the Administrative Judge concludes that it would not be appropriate to use the Laffey Matrix rates in this matter. 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 fee applicant did not meet this burden. No documentation was submitted regarding the prevailing hourly rate in the community. Of even more significance, no documentary evidence was submitted regarding the experience and expertise of any of the individuals who billed for services in this matter, although counsel was given numerous opportunities to do so. At the August 16, 2012 proceeding, the Administrative Judge gave Mr. Colbert another opportunity to present this information. He stated he graduated from law school in February 2001. He was uncertain when he was admitted to the Bar to practice law, but estimated that it was at the end of December 2005, when he started his private practice. Prior to that time, he said he was employed on a temporary or contractual basis with the National Association of Security Dealers for two years. Since entering practice, he has had a general practice, with a focus on family law. He stated that the matter currently at issue was his first case of its type. Thus, he lacked experience and expertise at the time he represented Employee. In addition, when he first began representing Employee, Mr. Colbert had been admitted to the Bar for less than a year, therefore, he would not even qualify for an award under the Laffey Matrix, which requires a minimum of one year of practice. Finally, counsel did not establish that the matter was sufficiently complex to merit an award. Although there was an evidentiary hearing at OEA, much of the time spent by counsel, by his own admission, was writing letters regarding compliance and submitting brief status reports. The appeal was eventually withdrawn by Agency because of its realization that the removal was void *ab initio*. Employee did not raise the identification or misidentification of Agency before OEA. As noted by the Supreme Court in *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400 , 402 (1968), the goal in awarding fees is to attract competent counsel for these cases, but not to award them "windfalls". The Administrative Judge finds that counsel is entitled to fees, but that the Matrix would result in a "windfall" to which he is not entitled.[3]

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). 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). Counsel submitted several fee requests, in which the hourly rates and work performed was revised. He stated at the proceeding that the July 18, 2012 submission reflected the correct itemization of work performed. The Administrative Judge will utilize that statement of service in calculating fees.

[3] Since fees are not be awarded according to the Laffey Matrix, the arguments regarding which Laffey Matrix to utilize and whether counsel can increase his hourly rate by refiling a fee request after several years when he would be entitled to a higher hourly rate, pursuant to the Matrix are moot and will not be addressed .

Counsel submitted a fee agreement signed by Employee on or about September 10, 2006, in which she agreed to pay the following hourly rates: $ 150.00 for Mr. Colbert, $85.00 for paralegals, and $50 for administrative work[4] The Administrative Judge assumes that when Mr. Colbert determined his hourly rate, he considered his experience and expertise as well as the rates charged by attorneys in this geographical area with similar qualifications. The Administrative Judge concludes that the hourly rates in the fee agreement are reasonable. A review of the time expended by each individual does not appear unreasonable, and will be awarded. Therefore, the amounts awarded are: 108.5 hours for Mr. Colbert at $150.00 per hour for a total of $16,275.00, 57.2 hours for Ms. Angela Harvell, paralegal, at an hourly rate of $85.00 for a total of $4,862.00 ; and 5.8 hours for Ms. Velarie Harvell, administrative assistant, at an hourly rate of $50.00 for a total of $290.00. It is well-settled that costs, if reasonable, are recoverable. *See, e.g., Glee v. Department of Public and Assisted Housing,* OEA Matter No. 2405-0113-92A98 (April 28, 1998) _____ D.C. Reg. _____. A total of $27.90 in fees is sought for postage, It will be awarded. The total awarded is $21,454.90.

ORDER

It is hereby:

ORDERED: Agency is directed to pay Employee the sum of $21,454.90 in fees and costs, within thirty days from the date on which this Addendum Decision.

FOR THE OFFICE: LOIS HOCHHAUSER, Esq.
Administrative Judge

[4] At oral argument, Mr. Colbert agreed that the hourly rate, and not the "flat rate" should be applied. He also stated that he had revised his fee agreement, and that the total awarded by the Administrative Judge would be the total paid to him by Employee.