THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
OTIS J. REYNOLDS	)	**OEA Matter No.: 2401-0192-04 AF-05**
Employee	)	
	)	**Date of Issuance: December 9, 2005**
v.	)	
	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	**Rohulamin Quander, Esq.** **Senior Administrative Judge**
Agency	)	
	)	

Mattie P. Johnson, Esq., Employee's Representatives
Sara Moskowitz, Esq., Agency Representative

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL HISTORY

On October 5, 2005, I issued an *Initial Decision* (the "ID") which found Employee to be the prevailing party. In the ID I also found that the District of Columbia Public Schools (the "Agency") had universally violated the reduction in force (the "RIF") regulations on May 27, 2004, effective June 30, 2004, when it failed, prior to the implementing of the RIF, to properly group Otis J. Reynolds (the "Employee") with his fellow English teachers, the effect of which denied him the guaranteed one round of lateral competition at his competitive level, as mandated by *D.C. Official Code* § 1-624.08(d). I vacated the RIF and ordered that Employee be restored to an ET-15 English Teacher position, with back pay, benefits, and without a break in service, retroactive to June 30, 2004.

Agency was directed to file written verification with the Office within 30 days of the issuance of the ID, to indicate compliance with my Order. Although Agency filed no notification of compliance with the Office, Agency neither appealed the ID nor otherwise challenged this AJ's ruling that Employee was the prevailing party.

On October 18, 2005, and pursuant to OEA Rule 635.1,[1] Employee, through counsel, filed a motion requesting an award of attorney's fees and costs. The basic attorney fee requested was $7,256.29, with costs of $44.80. Under the terms of the Retainer Agreement that Employee and counsel executed, it is provided that in consideration of counsel agreeing to undertake representation without receiving an initial retainer in the sum of $5,000.00, should she prevail on Employee's behalf, she is further entitled to a bonus equal to 100% of whatever attorney fee is awarded by this Office, i.e., $7,256.29 x 2 = $14,512.58. The total attorney fee and costs requested by Employee's counsel is $14,557.38 ($14,512.58 + $44.80). Agency submitted no response to Employee's attorney fees' motion. The record on the issue of attorney fees and costs 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.1.

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 pertaining to this AJ's determination that Employee was entitled to be placed into an ET-15 English Teacher position pursuant to the provisions of Title 5, § 520 of DCMR. Agency did not appeal the ID or otherwise indicate that Employee was not in fact the prevailing party. Based on the record of this case, 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, 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:

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[1] OEA Rule 635.1, 46 D.C. Reg. 9320 (1999), states, "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."

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 June 30, 2004, with Employee's separation as a result of a RIF, when Agency failed to properly provide Employee with one round of lateral competition within his competitive level, as mandated by *D.C. Official Code* § 1-624.08. Additionally, Agency has not argued that attorney fees are not warranted in the interest of justice. I conclude that Agency's failure 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

This Office's determination of whether Employee's attorney fee 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).

Counsel's submission was detailed and included an enumeration of the services provided on Employee's behalf at a reasonable hourly rate of $200.00. She also attached a summary of her credentials, which included her educational background, employment history, and professional experience. According to the statement of services, between February 1, 2005, and October 10, 2005, counsel expended 36.28 hours at her hourly rate of $200.00, for a total of $7,256.29. She also claimed costs totaling $44.80.[2]

In addition to the above-noted fee, she also requested a bonus of another $7,256.29, pursuant to her Retainer Agreement with Employee, which provided that in exchange for her agreeing to waive an initial retainer fee of $5,000.00, that the parties agreed between themselves that she would be entitled to said bonus if Employee became the prevailing party. All of the claimed requested covered services were performed solely before this Office incidental to the adjudication of this matter.

1. Number of hours expended

I have reviewed the time claimed of 36.28 hours, and determined that the hours expended were reasonable for the degree of difficulty and the amount of legal service time required in the instant matter. Therefore, I conclude that Employee is entitled to attorney fees for 36.28 hours expended on Employee's behalf.

2. Reasonable hourly rate

I conclude that counsel's hourly rate of $200.00 is reasonable, considering the summary of her professional credentials, that she graduated from law school in 1982, is a member of the District of Columbia Bar, including additional membership in the bar's Employment Law Section, and lists 15 years of employment-related litigation experience at the time the professional services were rendered.

3. The bonus

The Retainer Agreement between Employee and counsel provides that, in lieu of Employee paying counsel a $5,000.00 retainer at the outset of her representation of his claim, counsel would agree to waive the retainer, in exchange for a provision that he agree to pay her a bonus in attorney fees equivalent to 100% of the attorney fee award that he was entitled to receive under the attorney fee award provision of this Office's governing rules.

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[2] 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 (Oct. 17, 2000), _ D.C. Reg. ___ ( ). *See also Laffey, supra*, 746 F.2d at 30.

OEA Rule 635.1, 46 D.C. Reg. 9320 (1999), states that: "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." The rule is simple and clearly stated, and as the prevailing party, Employee is unquestionably entitled to an award of reasonable attorney fees. No where, however, is there any provision in this regulation for the payment of a bonus or other additional attorney fees, based upon an employee being the prevailing party. Nor does counsel for Employee herein cite legal or other governing authority for support of her request for a bonus. It is clear from the Retainer Agreement that counsel elected to undertake representation of Employee on a contingency, without any money being paid to her at the outset. She voluntarily assumed the risk that she might get paid nothing for her efforts. Had she not prevailed, she would have garnered no fee, unless Employee and she made a separate agreement for compensation for her professional services, despite his not winning his appeal.

Having prevailed, she is only entitled to what is provided for in the governing law and guiding regulations, and nothing further. To allow otherwise would set a bad precedent, encourage attorney fee requests that are wildly beyond a reasonable hourly rate, and would subject the government to paying potentially specious and excessive monetary claims. Having considered the request for awarding an amount equal to 100% of the reasonable attorney fee, as a bonus to Employee's counsel as the prevailing party, I conclude that there is no authority for granting such an award, and that the request is unreasonable and should be denied.

4. Costs

According to the information supplied by Employee, costs associated with her representation in this matter totaled $44.80, to cover the costs of travel, postage, photocopying, and faxing.

4. Summary of reduced allowable attorney fees and costs.

Attorney fees – 36.28 hours @ $200.00/hour = $7,256.29, plus costs of $44.80. The grand total of allowable attorney fees and costs is $7,301.09.

ORDER

The foregoing having been considered, it is hereby

ORDERED that counsel's request for a bonus in the amount of $7,256.29, which is equal to 100% of the initial reasonable attorney fee award, is DENIED; and it is

FURTHER ORDERED that Agency pay Employee, within thirty (30) days from the date on which this Addendum Decision becomes final, $7,301.09 in attorney fees and costs.

FOR THE OFFICE:

ROHULAMIN QUANDER
Senior Administrative Judge