THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Alice Lee,	)	OEA Matter No. 1601-0087-15A18
Employee	)	
	)	Date of Issuance: July 27, 2018
v.	)	
	)	Joseph E. Lim, Esq.
Metropolitan Police Department,	)	Senior Administrative Judge
Agency	)	

Ted Williams, Esq., Employee Representative
Onyebuchim Chinwah, Esq., Agency Representative

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 11, 2015, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting Agency's action of terminating her from her position as a Police Officer. Agency filed its response to Employee's Petition for Appeal on August 12, 2015.

This case was assigned to me on November 4, 2015. After both parties have complied with the briefing schedule, I issued an Initial Decision on March 15, 2017, overturning Agency's termination of Employee's employment for Agency's failure to comply with D.C. Code § 5–1031.

On May 19, 2017, Agency appealed the Initial Decision to the D.C. Superior Court, and on February 13, 2018, the Court affirmed the Initial Decision.[1] Agency did not appeal. Thus, the decision became final.

On April 13, 2018, Employee submitted a Motion for Attorney Fees and Costs in the amount of $58,873.00, pursuant to OEA Rule 634.1.[2] On May 7, 2018, Agency submitted its response to Employee's motion while Employee submitted his reply to Agency's response on May 21, 2018. The record is closed.

JURISDICTION

1 *Metropolitan Police Department v. D.C. Office of Employee Appeals*, Case No. 2017 CA 003525 (D.C. Super. Ct. Feb. 13, 2018).

[2] OEA Rule 634.1, 59 D.C. Reg. 2129 (2012) 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."

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.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

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 634.1, *supra* at n.3.

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). *See also Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371, 375 (1980). Employee filed an appeal seeking reinstatement to her position and recovery of all benefits lost due to Agency's termination of her employment. Agency has accepted the Initial Decision and has reinstated Employee to her prior position and restored any benefits she has lost as a result of its adverse action. 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 (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 when Agency terminated Employee for fraud, insubordination, and prejudicial conduct. After Employee filed her appeal with this Office, I found that Agency did not abide by the 90-day rule codified in D.C. Code § 5–1031 regarding its charge against Employee.

Therefore, Agency committed a "gross procedural error" which "severely prejudiced the employee." The prejudice suffered by Employee was the loss of her job. Another ground that applies here is that the agency "knew or should have known that it would not prevail on the merits", when it brought the proceeding. In this matter, Agency not only brought the proceeding against Employee, it went on to appeal the ID with the Superior Court even though it was settled law that compliance with the 90-day rule codified in D.C. Code § 5–1031 is mandatory. This further unnecessarily prolonged and increased the costs of litigation for Employee. Therefore, I further conclude that an award of reasonable attorney fees is warranted in the interest of justice.

REASONABLENESS OF ATTORNEY FEES

Employee's attorney fee request

The party seeking an award of attorney fees bears the burden of proving that the requested fees are reasonable. *Joyce v. Department of the Air Force*, 74 M.S.P.R. 112 (1997). Employee's submission was detailed and included the specifics of the services provided on Employee's behalf. Employee requested an award of $58,873.00 in attorney fees and costs for services performed from January 12, 2016, through February 13, 2018. This covered legal services provided before this Office and before the D.C. Superior Court. Employee claims that her counsel expended approximately 110 hours at the hourly rate ranging from $530.00 to $563.00.

Although Agency did not dispute that Employee was the prevailing party, and that an award of a reasonable attorney's fee and costs was warranted, Agency argued that this fee request amount is excessive and unreasonable and should be dramatically reduced. Agency asserts that the hours claimed for a case that was not complex should be reduced as the hours are

excessive. Agency also asserts that the claimed hourly rate using the *Laffey* Matrix[3] is unreasonable and unwarranted. Agency asserts that the *Laffey* Matrix was developed for complex federal litigation, not for a administrative appeal of Agency's decision that did not require discovery, depositions, and a long trial.

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 reasonableness of a fee request may be assessed by considering two objective variables, those being the customary billing rate of the attorney and the number of hours reasonably devoted to the case. *Casali v. Department of Treasury*, 81 M.S.P.R. 347 (1999). An attorney's customary billing rate may be established by showing the hourly rate at which the attorney actually billed other clients for similar work during the period for which the attorney fees are requested, or, if the attorney has insufficient billings to establish a customary billing rate, then by affidavits from other attorneys in the community with similar experience stating their rate for similar clients. *Id.* at 352.

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 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.

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3 *Laffey* was developed by the U.S. Attorney's Office for the District of Columbia to track prevailing attorneys' hourly rates for complex federal litigation. As such, it "creates an axis for a lawyer's years of experience in complicated federal litigation and a second [axis] for rates of compensation." See *Griffin v. Washington Convention Center*, 172 F. Supp 2d 193, 197 (D.C.C. 2001)

The following discussion will focus on the reasonableness of the requested rates *vis a vis* the *Laffey* Matrix. Employee used the services of the law firm of Ted Williams. Employee backs up her hourly rate request with an affidavit from Attorney Williams, enumerating his legal education and experience. The affidavit shows that Williams has more than 20 years of legal experience in the field of employment law.

Employee is asking that Attorney Williams be compensated at hourly rate of $530.00 for services rendered from January 12, 2016, through March 28, 2016; $543/hour for services rendered from March 20, 2017, through November 7, 2017; and $563/hour for services rendered from January 12, 2018, through February 13, 2018.

Agency does not dispute Attorney Williams's claimed years of experience in employment law. Agency disputes the use of *Laffey* Matrix hourly rates solely on the ground that this matter was a simple straight-forward administrative case that did not involve any complex issues.

On the other hand, Employee does not support her hourly rate request with any affidavits from other employment law practitioners regarding her attorney's skill and reputation. Nor does she submit any signed fee agreement that she had with her counsel, nor does she present any evidence of the customary hourly rate charged by employment lawyers in the Washington, D.C. area. Instead, Employee simply asserts that her attorney is entitled to *Laffey* hourly rates because of his years of experience. Nonetheless, this Office has used the *Laffey* Matrix as a reasonable rate for matters before it, and thus Employee's claimed hourly rate will be accepted. The U.S. District Court in the District of Columbia has held that the court has the discretion to determine whether or not *Laffey* rates are warranted, and whether or not the hours claimed are reasonable. See *Harvey v. Mohammed*, 951 F.Supp.2d 47 (2013).

According to the *Laffey* Matrix, a reasonable hourly rate for an attorney with more than 20 years experience is $530.00 for services rendered from January 12, 2016, through March 28, 2016; $543/hour for services rendered from March 20, 2017, through November 7, 2017; and $563/hour for services rendered from January 12, 2018, through February 13, 2018. Since Employee's attorney's requested hourly rates are in line with those figures, I conclude that it is reasonable.

B. Number of hours expended

Employee's counsel lists the hours and the type of work performed by month and year. Agency registers its opposition to the amounts claimed by listing each specific date and its basis for its objection. While the Agency did not deny that Employee was entitled to some attorney's fees for time expended incidental to this matter, Agency challenged the number of claimed hours of legal service time as excessive.

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).

Agency asserts that the following hours claimed by Attorney Williams are excessive: 34.5 to prepare and file Employee's petition for review; 17.5 hours to draft a Reply Brief before OEA; and 28.5 hours to draft a brief before the D.C. Superior Court.

Specifically, Agency states that the attorney's entries for filing Employee's petition for review included other tasks such as "research", "review file," "consult with other attorney," and "file brief," lump together multiple tasks, i.e. "block billing", thus making it impossible to evaluate their reasonableness. *See Role Models, Inc. v. Brownlee*, 353 F.3d 962, 971 (D.C. Cir. 2004) (citing *In re Olson*, 884 F.2d 1415, 1428, 1428-29 (D.C. Cir. 1989) ("[W]hen an attorney bill[s] for more than one task in a day, the court is left to approximate the amount of time which should be allocated to each task. With such inadequate descriptions the court cannot 'determine with a high degree of certainty,' as it must, that the billings are reasonable.")).

As for the 17.5 hours to draft a Reply Brief before OEA, Agency argues that the hours claimed should be reduced as much of the reply brief was simply a restatement of the initial brief before OEA. Agency also decried the 28.5 hours claimed for drafting a brief before the D.C. Superior Court as much of it was solely a legal argument that was a cut and paste from an earlier work. Agency noted that the first 4.5 pages were cut from Employee's Petition for Review before OEA, the Standard of Review section was borrowed from prior briefs, and 1.5 pages lifted almost entirely from a brief filed by attorneys from another firm in a similar matter.

Finally, Agency argues that Employee's counsel unreasonably billed excessive hours for reviewing the Initial Decision (3.5 hours on March 20, 2017), reviewing a form Petition for Review (1 hour on May 22, 2017), and reviewing the Superior Court's ruling in Employee's favor (1 hour), given that Employee was not attempting to appeal any of these decisions nor did they require extensive analysis by counsel.

I find that Agency's arguments are well-founded. My review of the file in this matter reveals that this was not a complex administrative law appeal. It was a typical *Elton Pinkard v. D.C. Metropolitan Police Department*[4] type of appeal where the D.C. Court of Appeals has held that OEA has a limited role where a departmental hearing has been conducted as was the case in this matter. The Court of Appeals has held that this Office is proscribed from conducting a new

4 801 A.2d 86 (D.C. 2002).

hearing, and that the only issues that this Office can decide on are whether the agency decision was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations.

The *Pinkard* holding has been around for 16 years and is one that Employee's counsel, with his 20 plus years of experience, has routinely tackled before the OEA. This matter involved only the submission of briefs on the routine *Pinkard* issues and involved no discovery, did not require any evidentiary hearing, did not require interview of witnesses, or involve multiple pleadings.

As the U.S. District Court in the District of Columbia noted, "When claims for attorney's fees are brought against the government, courts should exercise special caution in scrutinizing the fee petition. This is because of the incentive which the [agency's] deep pocket offers to attorneys to inflate their billing charges and to claim far more as reimbursement [than] would be sought or could reasonably be recovered from most private parties."[5]

Employee's attorney's billing entries raises a lot of troubling unanswered questions. Employee does not explain why her seasoned attorney, skilled and experienced in trying OEA appeals, would need to "consult with other attorney" on this relatively simple matter. Who is this other counsel? What is his or her connection to this case? Employee's counsel has billed for time spent consulting with an unnamed attorney whose role in the case was never explained. The Court in *Harvey* held that "For purposes of fee award…, it is inadequate to merely state in billing documentation that a meeting occurred without specifying the subject-matter or purpose."[6]

And how does Employee's attorney justify billing a total of $19,080 ($18,285 + $795) in one day (February 29, 2016) and how is it possible to bill a total of 36 hours (34.5 + 1.5 hours) for that one day? Without answers to these questions, such time entries—of which there are many examples throughout the time records—are manifestly inadequate. *See In re Donovan,* 877 F.2d 982, 995 (D.C.Cir.1989) (per curiam) ("[W]e are also compelled to deduct ... charges incurred when attorneys held conferences and teleconferences with persons referenced as 'Geiser' and 'Wells.' The application fails to document who these individuals are or the nature of their relationship to the investigation; consequently, we cannot evaluate whether such fees were reasonably incurred.").

In addition, many time records also lack adequate detail, particularly in the entry for 34.5 hours drafting Employee's Petition for Review with this Office. Neither does Employee explain why she needed 28.5 hours drafting what is essentially the same brief before the D.C. Superior Court. *See In re Sealed Case,* 890 F.2d 451, 455 (D.C.Cir.1989) (per curiam) ("[W]e note numerous instances of documentation and specification that do not adequately describe the legal work for which the client is being billed. This makes it impossible for the court to verify the reasonableness of the billings, either as to the necessity of the particular service or the amount of

5 *Eureka Inv. Corp., N.V. v. Chicago Title Ins. Co.,* 743 F.2d 932, 941 (D.C.Cir.1984) (internal citation omitted).
6 *Supra*, Harvey at headnote 32.

time expended on a given legal task.").

The generic entries for "research," "reviewing," and "drafting," are inadequate to meet a fee applicant's "heavy obligation to present well-documented claims." *Kennecott Corp. v. EPA*, 804 F.2d 763, 767 (D.C.Cir.1986) (per curiam). *See Olson*, 884 F.2d at 1428 ("[T]here are multitudinous billing entries, included among other entries for a particular day, that wholly fail to state, or to make any reference to the subject discussed at a conference, meeting or telephone conference.").

In view of all this—inadequate documentation, failure to justify the number of hours sought, and the lack of detail in the billing entries—I will reduce those hours where the hours asked for seem excessive in light of the higher hourly rates allowed. I also note that attorneys with more experience command a higher hourly rate on the reasonable assumption that they expend less time on their tasks as they gain experience and knowledge.

The number of hours claimed by a prevailing party must also be reasonable. A court may exercise discretion to reduce a fee award by particular amounts "in response to specific objections," *DL v. Dist. of Columbia*, 256 F.R.D. 239, 243 (D.D.C.2009) (citing *Donnell v. United States*, 682 F.2d 240, 250 (D.C.Cir.1982)), or " 'by a reasonable amount without providing an item-by-item accounting.' " *Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 973 (D.C.Cir.2004).

Employee's attorney defends his block-billing by citing *Cook v. Block*, 609 F.Supp. 1036 (D.D.C. 1985) and *Smith v. District of Columbia*, 466 F.Supp.2d 151 (2006). However, *Cook* holds that "The application need not present "the exact number of minutes spent,"[13] but should enable the court to make "an independent determination whether or not the hours claimed are justified." The problem with Employee's fee application is not that it fails to present the exact number of minutes spent, but that it lacks sufficient information and detail to enable this Office to make an independent determination to ascertain whether the hours claimed are justified. In addition, while *Smith* held that the mere use of block billing did not warrant a reduction in an attorney fee award, it held that sufficient detail must be provided to enable the court to "evaluate what the lawyers were doing and the reasonableness of the number of hours spent on those tasks…" *Id.*

This is not to cast any aspersion on the attorney's billing practice. I simply conclude that Employee has not sufficiently met her burden of proving that all her claimed hours is reasonable as required under D.C. Official Code § 1-606.08. *See Hensley*, 461 U.S. at 433, 103 S.Ct. at 1933 ("Where the documentation of hours is inadequate, the district court may reduce the award accordingly."). A fixed reduction is appropriate given the large number of entries that suffer from one or more of the deficiencies we have described. *See, e.g., Copeland v. Marshall*, 641 F.2d 880, 903 (D.C.Cir.1980) (en banc) ("[T]he District Court Judge in this case—recognizing, as he did, that some duplication or waste of effort had occurred—did not err in simply reducing the proposed ... fee by a reasonable amount without performing an item-by-item accounting."); *see also Okla. Aerotronics*, 943 F.2d at 1347 (affirming the district court's flat

forty percent reduction in allowable hours).

I have reviewed the total 110 hours claimed, as well as Agency's objections to some of them, and have determined that some of the hours expended were indeed 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 by other similarly experienced counsel who have appeared before the Office, and the degree of legal complexity involved in the issues presented. I note that an attorney charging a high hourly rate should have expended less time on a legal task due to his prior experience and expertise on a matter. I also note that Attorney Williams has handled numerous appeals before this Office.

Therefore, I reduced these time claimed as follows: 2/29/2016 Drafting Employee's Petition for Review before OEA, research, review file, consult with other attorney, file final Petition, review Consent Motion to Extend Time – 18 hours; 3/28/2016 Draft Employee's Reply Brief, research, review file – 10 hours; 3/20/2017 Review Initial Decision, research case law and statutes – 1.5 hours; 11/7/2017 Drafting, researching, reviewing file, exhibits, filing Intervenor Employee's Opposition to Petitioner's Petition for Review – 14 hours. Apart from these, I find the rest of the hours claimed as reasonable and substantiated.

SUMMATION OF FEES

In conclusion, I find that the following hours and rates for attorney fees are substantiated.

January 12, 2016, through March 28, 2016:	$530/hour x 43.5 hours =	$23,055.00
March 20, 2017, through November 7, 2017:	$543/hour x 22.5 hours =	$12,217.50
January 12, 2018, through February 13, 2018:	$563/hour x 2 hours =	$ 1,126.00
	Total attorney fees =	$36,398.50

ORDER

It is hereby ORDERED that Agency pay Employee, within thirty (30) days from the date on which this addendum decision becomes final, $36,398.50 in attorney fees and costs.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge