

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Aprille Washington)	OEA Matter No. 1601-0021-08A10
Employee)	
)	
v.)	Date of Issuance: June 21, 2010
)	
D.C. Public Schools)	Joseph E. Lim, Esq.
Agency)	Senior Administrative Judge
_____)	

Harriet Segar, Esq., Agency Representative
Stewart Fried, Esq., Employee Representative

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL HISTORY

On December 5, 2007, Employee appealed Agency’s final decision to characterize her absence from work as a “voluntary resignation.” After a two-day hearing, Judge Lois Hochhauser issued an *Initial Decision* (the “ID”) on October 22, 2008, which held that Agency had engaged in a constructive discharge without cause. She ordered Agency to reinstate Employee with full pay and benefits, thus rendering Employee as the prevailing party.

Agency did not appeal the ID, and the ID became final 35 days later on November 26, 2008. On February 3, 2009, and again on June 5, 2009, Employee filed a Motion to Enforce Final Decision which stated, *inter alia*, that Employee had not received her back pay, pay step increase and benefits. This Matter was subsequently reassigned to the undersigned on October 16, 2009. I held a status conference on October 28, 2009. I ordered Agency to process Employee’s back pay and other benefits and to submit a status report. Subsequently, Agency submitted a document indicating that it had credited Employee with all her hours of annual leave and sick leave.

On March 12, 2010, I received Employee’s Motion for Attorney Fees in the above-captioned matter pursuant to OEA Rule 635.1. On April 19, 2010, Agency submitted its opposition to Employee’s attorney fees’ motion. The record is 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 and a separate compliance motion pertaining to the AJ’s determination that Employee was entitled to be reinstated with all benefits restored. When challenged, Agency conceded that Employee was so entitled, and did not pursue or defend any legal position contrary to Employee’s claim. Nor did Agency 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 (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 on November 5, 2007, with Employee’s separation as a result of Agency’s erroneous assumption that Employee had abandoned her position. Once the ID became final on November 26, 2008, Agency was aware that Employee was entitled to be back in her prior job position with all lost benefits restored, but did nothing to effect this entitlement, which necessitated Employee hiring a lawyer. Additionally, Agency has not argued that attorney fees are not warranted in the interest of justice. I conclude that Agency’s delay in effecting the relief to which Employee was entitled is a manifestation of Allen Factor #1, 2, and 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 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).

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 the specifics of the services provided on Employee’s behalf. Employee requested an award of \$42,537.50 in attorney fees and \$20.80 in costs, for a total amount of \$42,558.30, and claimed that the services performed were necessary due to Agency’s delay in complying with the ID. The bulk of the time spent was in written and oral correspondence.

Agency argued that the hourly rate as well as the hours requested are excessive and unreasonable, and that counsel’s time recording his hours and attempting to negotiate a settlement of fees should not be recoverable. Agency asserts that a reasonable figure for attorney fees in this matter is \$23,985.00.

1. Number of hours expended

Employee's March 12, 2010, attorney fees' request document contains a section entitled "Spreadsheet in Support of Motion for Award of Attorneys' Fees and Costs" and a sworn affidavit from Attorney Stewart Fried, briefly stating his work history in a general manner and asserting that he was the only attorney in his law firm who represented clients in front of this Office. Mr. Fried also claimed that he alone could do these legal services as the use of paralegals or litigation associates would not be as cost effective. There was no mention of his educational background, employment history, or the type of cases he has handled in his 14 year practice. According to these documents, between January 9, 2009, and February 26, 2010, Mr. Fried expended 103.75 hours at a claimed hourly rate of \$410.00, for a total of \$42,537.50.

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. Agency objected to the 24 hours Employee counsel used in reviewing and responding to correspondence with Agency counsel as excessive, especially since Employee is charging \$9,480.00 for it. Next, Agency objects to the six hours counsel spent preparing the spreadsheet at a total cost of \$2,460.00. Agency asserts that it is unreasonable for an attorney to charge a client for his own time in recording his hours and preparing a bill, and thus, it is improper for counsel to bill the Agency for that time. Lastly, Agency objects to Employee charging Agency 7.75 hours or \$3, 177.50 for their failed attempt to negotiate a fee settlement.

I have reviewed the hours claimed, as well as Agency's objections to some of them, and have determined that some of the attorney hours claimed was unreasonable in light of the degree of difficulty required in the instant matter. I base this determination in significant part upon my comparison of the professional services provided to other clients that this and other counsel has represented in this Office against the same Agency, as well as my own prior experience working as a trial lawyer in the Washington-Baltimore Metropolitan area.

Agency has suggested that the time spent in correspondence with Agency counsel is excessive and should be cut in half. However, I note that Agency is mainly at fault for these hours for the simple fact that it had delayed the implementation of the ID. Thus, I am find these hours to be reasonable on its face and will not cut them.

Agency has objected to Employee's counsel charging for recording his hours and preparing a bill. I note that Employee has not presented any authority for its assertion that these hours are compensable. Thus, I agree and omit these six hours entirely.

Lastly, as for Employee charging Agency 7.75 hours for attempting to negotiate a fee settlement, I find that as a public policy, settlement discussions between disputing parties are to be encouraged.¹ There is an inherent conflict against this public policy when one party can charge the other for the time spent in settlement discussions, as one party can string along the other side and prolong discussions to increase the billable time while the other party tries to negotiate a settlement in good faith. Thus, I omit these 7.75 hours as well.

Therefore, I have reduced the attorney fee award, as explained below, by 13.75 hours and

¹ 15A Am. Jur. 2d Compromise and Settlement § 5.

conclude that Employee is entitled to attorney fees for 90.0 hours expended by Mr. Fried.

2. Reasonable hourly rate

In his fee application, Employee requests the use of the *Laffey Matrix*² in determining his hourly rate, noting that the federal courts in the District of Columbia,³ and the D.C. Court of Appeals has approved the use of this matrix in calculating attorney fees.⁴ Hence, Employee requests an hourly rate of \$410.00, as befitting an attorney with 14 years of experience in the D.C. Metropolitan area.⁵

Agency objects to the use of the *Laffey Matrix*, contending the Courts have applied the Matrix only in complex and complicated litigation, not in routine administrative proceedings.⁶ The *Laffey Matrix* was developed by the United States Attorney's Office for the District of Columbia to track prevailing attorneys' hourly rates for complex federal litigation. It "creates one axis for a lawyer's years of experience in complicated federal litigation and a second [axis] for rates of compensation." *Griffin v. Wash. Convention Ctr.*, 172 F.Supp.2d 193, 197 (D.D.C.2001). Agency asserts that this was not a complex case, presented no novel legal issues or complicated facts. Because this was simply a compliance matter when Employee's counsel stepped in, Agency states that, "there were no written discovery, no briefing of intricate statutory or constitutional issues, no pre-trial briefs, no lengthy hearings, and no lengthy oral arguments."

Agency, citing *Save Our Cumberland Mountains v. Hodel, supra*, said that 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, something that Employee failed to present.

² 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. A copy of the *Laffey Matrix*, complete through June 1, 2003 - May 31, 2004, and June 1, 2004 - May 31, 2005, is attached to this addendum decision.

³ *Smith v. District of Columbia*, 466 F.Supp. 2d 151, 156 (D.D.C. 2006) ("In the District of Columbia, it has been traditional to apply the so-called *Laffey Matrix*..."); *Northwest Coalition for Alternatives to Pesticides v. Browner*, 965 F.Supp. 59, 65 (D.D.C. 2006).

⁴ *Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 988-989 (D.C. 2007).

⁵ See Employee's Exhibit C, "*Laffey Matrix 2003-2010*."

⁶ See *Covington v. District of Columbia*, 57 F.3d 1101 (C.A.D.C. 1995).

As for Employee counsel's work experience, Agency states that the opposing counsel's only description of his legal experience is, "I have [been] actively practicing law for over 14 years and am a member of the District of Columbia and Florida bars, the United States Supreme Court bar and the bars of several federal U.S. District Courts and Circuit Courts of Appeal."

Agency insists that "mere membership in the bar of a court is very different from being 'an experienced federal court litigator' and Petitioner's counsel says nothing about his actual experience in federal court litigation. As the court emphasized in *Covington v. District of Columbia, supra.*, attorneys "have to state their *federal court experience* in order to get *Laffey rates.*" 57 F.3d at 1108 n. 17 (emphasis added).

When an administrative proceeding is uncomplicated, as this one was; courts have held the *Laffey* matrix inapplicable. See *Agapito v. District of Columbia*, 525 F. Supp. 2d 150, 152 (D.D.C. 2007) (holding *Laffey Matrix* inapplicable when the case is not complex and contains "no pre-hearing interrogatories or discovery, no production of documents or depositions, no psychiatrists or psychologists testifying about learning disabilities, no briefings of intricate statutory or constitutional issues, no pre-trial briefings, no lengthy hearings, no protracted arguments, and few, if any, motions filed"); *A.C. ex rel, Clark v. District of Columbia*, 2009 WL 4840939 (D.D.C. Dec 15, 2009) See also *Muldrow v. Redirect, Inc.* 357 F. Supp. 2d 1 (D.D.C.2005) reducing *Laffey rates* in "a relatively straightforward negligence." case, a "single plaintiff and a single defendant" with "few pretrial motions."

Petitioner seeks reimbursement at the rate of \$410.00 per hour for every minute of this case, without regard to the nature of the tasks performed and whether the work could have been done more cost effectively by lower-priced associates, paralegals, and clerical staff. That is *per se* unreasonable. See *Loughner v. Univ. of Pittsburgh*, 260 F.3d 173, 180 (3d Cir.2001) (finding that it is not fair or reasonable for lawyers to claim the same high reimbursement rate for tasks varying from telephone calls with clients, legal research, letters concerning discovery requests, drafting of a brief, and trial time, when many of these tasks could be effectively performed by administrative assistants, paralegals, or secretaries); See also *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir.1974), abrogated on other grounds by *Blanchard v. Bergeron*, 489 U.S. 87 (1989)("To distinguish between legal work, in the strict sense, an investigation, clerical work, compilation of facts and statistics, and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it.")

Petitioner asserts that the lawyer who handled this case is the only attorney in his firm who practices before the Office of Employee Appeals (OEA). According to the firm's website, Kilpatrick Stockton LLP employs 61 lawyers in its Washington office. That is a substantial operation. If, for whatever reason, the firm chose not to assign junior associates or paralegals to work with Petitioner's counsel, the Agency should not be saddled with the cost of that inefficiency. An hourly rate of \$410.00 does not become reasonable for every task on a case, however small, because a law firm has not made lower-priced personnel available. See *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) ("Counsel for the prevailing party should have made a

good faith effort to exclude from a fee request hours which are excessive, redundant, or *otherwise unnecessary*, just as lawyer in private practice ethically is obligated to exclude such hours from his fee submission.”) (emphasis added). Agency suggests that a more appropriate hourly rate would be \$205.00.

I find that this case does not warrant *Laffey* rates. Considering that Employee has failed to adequately meet his burden of proof that his requested hourly rate is reasonable, I therefore adopt Agency’s suggested hourly rate of \$205.00 as more in line with the prevailing hourly rate customarily charged for this type of legal services in the community.

3. Costs

Employee requests \$20.80 for photocopying 208 pages of documents related to this case. As Agency has no objections, the whole amount is granted.

4. Summary of allowable attorney fees and costs.

- a. Attorney fees – 90.0 hours @ \$205.00/hour = \$18,450.00
- b. Costs - \$20.80

Thus, the grand total of allowable attorney fees and costs is \$18,470.80

ORDER

It is hereby ORDERED that Agency pay Employee, within thirty (30) days from the date on which this addendum decision becomes final, \$18,470.80 in attorney fees and costs.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge