THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
YORDANOS SIUM, Employee	OEA Matter No. 1601-0135-13R20AF21
v.	Date of Issuance: March 11, 2020
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION, Agency	MONICA DOHNJI, Esq. Senior Administrative Judge

David A. Branch, Esq., Employee Representative
Louise Ryde, Esq., Employee Representative
Hillary Hoffman-Peak, Esq., Agency Representative

ADDENDUM DECISION ON ATTORNEY FEES[1]

INTRODUCTION AND PROCEDURAL HISTORY

On August 15, 2013, Yordanos Sium ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the Office of the State Superintendent of Education's ("OSSE" or "Agency") decision to terminate her from her position as a Bus Driver effective April 12, 2011. Following an Agency investigation, Employee was charged with [a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: Neglect of Duty. On October 10, 2014, I issued an Initial Decision ("ID") in this matter upholding Agency's decision to terminate Employee.[2]

Employee appealed the ID to the OEA Board, which upheld the ID in an Opinion and Order ("O&O") dated May 10, 2016.[3] Thereafter, Employee retained the Law Office of David A. Branch and Associates, PLLC to appeal the OEA Board's O&O to the District of Columbia Superior Court. The District of Columbia Superior Court upheld the O&O. Subsequently, Employee, through her representative, appealed the ID to the District of Columbia Court of Appeals, which vacated the OEA Board's O&O and remanded the matter to OEA for further

[1] This decision was issued during the District of Columbia's COVID-19 State of Emergency.
[2] *Yordanos Sium v. Office of the State Superintendent of Education*, OEA Matter No: 1601-0135-13, Initial Decision (October 10, 2014).
[3] *Yordanos Sium v. Office of the State Superintendent of Education*, OEA Matter No: 1601-0135-13, Opinion and Order on Petition for Review (May 10, 2016)

proceedings to address the material facts in dispute.[4] A Prehearing Conference was held on January 29, 2020. Prior to the scheduled Prehearing Conference, the Law Office of David A. Branch withdrew its appearance and the Federal Practice Group entered its appearance in this matter. Subsequently, a video (WebEx) Evidentiary Hearing was held on September 9 & 10, 2020. Both parties were present for the Evidentiary Hearing. On December 3, 2020, I issued an Initial Decision on Remand ("IDR") reversing Agency's decision to remove Employee.[5] Agency did not file an appeal.

On February 8, 2021, Employee's current and previous attorneys filed separate Petition for Attorney Fees and Costs.[6] Both attorneys noted that Employee was the prevailing party and attorneys' fees were warranted in the interest of justice. Pursuant to OEA Rule 634.4, Agency had fifteen (15) business days from the date of the service of the motion for attorney fees to file a written opposition to Employee's Fee Petitions. On March 3, 2021, the undersigned emailed the parties inquiring if Agency would submit an opposition to the Fee Petition. Agency responded that it would not file a response to the Fee Petitions. The record is now closed.

JURISDICTION

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

ISSUES

1) Whether Employee is a prevailing party for the purpose of determining whether the award of attorney fees is warranted; and

2) If so, whether the payment of attorney fees is warranted in the interest of justice.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

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 634.1, 59 DCR 2129 (March 16, 2012). This award is an exception from the "American Rule" which requires each party to pay its own legal fees.[7] 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.[8]

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[4] *Sium v. Office of the State Superintendent of Educ.*, 218 A.3d 228, 231 (D.C. 2019).
[5] *Yordanos Sium v. Office of the State Superintendent of Education*, OEA Matter No. 1601-0135-13R20 (December 3, 2020).
[6] *See* Employee's Petition for Attorney Fees and Costs (February 8, 2021) and Employee's Verified Statement of Attorney Fees (February 8, 2021).
[7] *See, e.g., Huecker v. Milburn*, 538 F.2d, 1241, 1245.
[8] *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968).

Prevailing Party

As noted above, 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. OEA has previously relied on its ruling in *Zervas v. D.C. Office of Personnel,* OEA Matter No. 1602-0138-88AF92 (May 13, 1993) and the Merit Systems Protection Board's ("MSPB")[9] holding in *Hodnick v. Federal Mediation and Conciliation Service,* 4 M.S.P.R. 371, 375 (1980) which held that, "for an employee to be a prevailing party, he must obtain all or a significant part of the relief sought…" However, the decision in *Hodnick* was overruled by the MSPB in *Ray v. Department of Human and Health Services*, 64 M.S.P.R. 100 (1994). In *Ray*, the MSPB adopted the U.S. Supreme Court's holding in *Farrar v. Hobby*, 506 U.S. 103 (1992) in determining the prevailing party in the context of the Civil Service Reform Act of 1978. Pursuant to *Ray*, "… to qualify as a prevailing party, a … plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgement against the defendant from whom fees are sought … or comparable relief through a consent decree or settlement." In addition, the District of Columbia Court of Appeals in *Settlemire v. D.C. Office of Employee Appeals*, 898 A.2d 902 (D.C. 2006), noted that, "[g]enerally speaking the term 'prevailing party' is understood to mean a party 'who had been awarded some relief by the court' (or other tribunal)…"[10]

In the instant matter, Agency did not appeal the December 3, 2020, IDR, which became final in January of 2021. As such, the undersigned's IDR reversing Agency's decision to remove Employee became the binding decision of this Office and Employee was entitled to all of the relief sought in her Petition for Appeal. Also, Agency did not oppose any of Employee's Petition for Attorney Fees and Cost. Therefore, it is undisputed that Employee is the "prevailing party" in this matter.

Interest of Justice

Pursuant to D.C. Official Code 1-606.08 and OEA Rule 634, the award of attorney fees is discretionary and not mandatory in a successful OEA appeal. In order to be awarded attorney fees, the party must be the prevailing party, and the degree of her success must also be sizeable enough to render the payment of attorney fees reasonable in the 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. Whether the agency engaged in a "prohibited personnel practice",

2. Whether 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;

[9] MSPB is this Office's federal counterpart.
[10] *See also Texas State Teachers Association v. Garland Independent School District,* 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) (holding that the prevailing party need only "succeed on any issue in the litigation which achieves some of the benefit he sought in bringing the action."

3. Whether the agency initiated the action against 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. Whether the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced the employee",

5. Whether the agency "knew or should have known that it would not prevail on the merits", when it brought the proceeding, *Id*. at 434- 35.

In the current matter, the basis of the IDR reversing Agency's removal of Employee was due to Agency's violation of *Allen* Factor 4. Agency violated Employee's due process right. Agency's "gross procedural error" of not providing Employee with proper notice of the reasons for her proposed termination unnecessarily "prolonged the proceeding" and "severely prejudiced the employee." Thus, I find an award of attorney fees to be in the interest of justice. Accordingly, I further find that the requirements of both D.C. Official Code § 1-606.08 and OEA Rule 634.1 have been satisfied. The issue now hinges on the reasonable amount of attorney fees to be awarded. The D.C. Court of Appeals, in *Frazier v. Franklin Investment Company, Inc*., 468 A.2d 1338 (1983), held that the determination of the reasonableness of an award is within the sound discretion of the trial court. It reasoned that the trial court has a superior understanding of the litigation.[11] Here, the undersigned is the equivalent of the trial court.[12]

Reasonableness of Attorney Fee

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the U.S. Supreme Court held that, the most critical factor in determining the reasonableness of an attorney's fee award is the degree of success obtained, since a requested fee based on the hours expended on the litigation as a whole may be deemed excessive if a plaintiff achieves only partial or limited success. In cases where a party is only partially successful, the trial court must exercise its discretion to determine what amount of fees, if any, should be awarded.[13] In the instant matter, Employee was fully successful in her appeal against Agency and she is entitled to attorney fees. Once the conclusion is reached that attorney fees should be awarded, the determination must be made on the amount of the award. 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.[14] 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.[15] OEA Rule 634.3 establishes that "an employee

[11] Citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1993, 1941 (1983).
[12] *Estate of Bryan Edwards v. District of Columbia Department of Youth and Rehabilitation Services*, Opinion and Order on Attorney's Fees, OEA Matter No. 1601-0017-06AF10 (June 10, 2014).
[13] *Fleming v. Carroll Publ'g Co*., 581 A.2d 1219 (D.C. 1990).
[14] *Blum v. Stenson*, 465 U.S. 886 (1984).
[15] *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988).

shall submit reasonable evidence or documentation to support the number of hours expended by the attorney on the appeal."

Here, in Employee's Petition for Attorney Fees and Costs, filed February 8, 2021, Mr. Branch requested attorney fees in the amount of $38,050, which represent a total of about 104 hours of service at a rate of $300 and $500 per hour during the 2016-2019 timeframe. These hours reflect work completed by Mr. Branch in the D.C. Superior Court to the D.C. Court of Appeals.[16] These hours include his submission of Employee's Prehearing Statement at OEA after the matter was remanded, as well as his current Fees Petition.

Additionally, Employee's current attorney, Ms. Ryder from the Federal Practice Group also filed a Verified Statement of Attorney's Fees on February 8, 2021. In this fee petition, Ms. Ryder requested attorney fees and costs in the amount of $20,490, which represents approximately 62 hours of service at a rate of $300 for Ms. Ryder and $450 for the supervising Partner, Debra A. D'Agostino's. These hours reflect work completed at OEA from January 2020, through February 8, 2021. It also included $100 for costs.

OEA's Board has determined that the Administrative Judges of this Office may consider the "*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.*[17] 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, 2015-16, 2016-17) 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 *Laffey* Matrix calculates reasonable attorney fees based on the amount of work experience the attorney has and the year that the work was performed. Imputing the applicable year allows for the rise in the costs of living to be factored into the equation. The matrix, which includes rates for paralegals and law clerks, is updated annually by the Civil

[16]The D.C. Court of Appeals in *Metropolitan Police Department v. Stanley*, 951 A. 2d 65 (D.C. 2008) stated that, in a case that originated in OEA, the responsibility to award fees should be placed on the trial court where the case arose, so the value of the service could be estimated in its entirety. Moreover, D.C. Official Code § 1-606.08 states that "the Hearing Examiner or the Arbitrator 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." Additionally, the Court of Appeals in *Bryant v. Office of Employee Appeals,* Case No. 2009 CA 6181 P (D.C. Super. Ct. June 16, 2015), stated that "petitioners who prevail in the Office of Employee Appeals . . . are entitled to attorney's fees for work done on appeal to the Superior Court and the Court of Appeals; and the amount of these fees is a factual matter for the OEA to decide." Furthermore, the OEA Board in *Webster Rogers v. District Public Schools*, OEA Matter No. 2401-0255-10AF16, Opinion and Order on Remand, (November 7, 2017) held that, in *Department of Mental Health v. District of Columbia Office of Employee Appeals, et al.*, Case No. 2015 CA 007829 P(MPA)(D.C. Super. Ct. July 13, 2017), the Superior Court for the District of Columbia ruled that it has no statutory authority to award attorney's fees because the D.C. Official Code authorizes a Hearing Examiner to award attorney's fees. However, no authority was conferred upon the Superior Court to award fees related to the review of decisions made by OEA. This Board found this reasoning to be consistent with the ruling in *Stanley*, which requires that requests for attorney's fee originate at OEA. Thus, the Board ruled that the AJ's decision to award fees for work performed before OEA and Superior Court was proper. Consistent with the OEA Board's reasoning in *Rogers*, I find that because the current matter originated at OEA, the undersigned can award attorney fees for work performed before OEA, Superior Court and the Court of Appeals.

[17] 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).

Division of the United States Attorney's Office for the District of Columbia.[18] Courts have "treated…the *Laffey* Matrix as a reference rather than a controlling standard."[19] "There is no concrete, uniform formula for fixing the hourly rates that are awarded in employment disputes (federal or local)."[20] The purpose of the *Laffey* Matrix is to provide a "short-cut compilation of market rates for a certain type of litigation."[21] Determining a reasonable hourly rate requires a showing of at least three elements: 1) the attorneys' billing practices; 2) the attorneys' experience, skill, and reputation; and 3) the prevailing rates in the relevant community.[22] When utilizing the *Laffey* Matrix as a guide, courts will "first determin[e] the so-called loadstar—the number of hours reasonably expended by counsel multiplied by a reasonable hourly rate."[23] Courts have increased or decreased the hourly rates depending on the characteristics of the case and the qualification of counsel.[24] In addition, "[t]he novelty [and] complexity of the issues" should be "fully reflected" in the determination of the fee award.[25]

Attorney fees for 2020-2021

Louise Ryder, Esq.

According to the *Laffey* Matrix, a reasonable hourly rate for an attorney with eight (8) to ten (10) years of experience in the year 2020-2021 is $452. Ms. Ryder is an Associate Attorney at the Federal Practice Group. She graduated from law school in May of 2012. She was admitted into the California Bar in January of 2013, and the District of Columbia Bar in 2014. She worked as an Associate Attorney at the Law Office of David A. Branch & Associates, P.L.L.C. from 2013 to 2019. She has experience in federal, state government and private sector employment law, including representation of complainants before the EEOC. She attached an unnotarized Affidavit in support of her experience. However, Ms. Ryder does not seek the rates as enumerated under *Laffey* in this case. Instead, counsel only requests a reduced hourly rate of $300.00 per hour. The undersigned therefore finds that attorney Ryder has provided sufficient evidence to support the hourly rate requested based on her years of experience in the legal field.

Debra A. D'Agostino, Esq.

According to the *Laffey* Matrix, a reasonable hourly rate for an attorney with sixteen (16) to twenty (20) years of experience in the year 2020-2021 is $591. Ms. D'Agostino is a founding Partner of The Federal Practice Group. She graduated from law school in May of 2001. She was admitted into the New York Bar in February of 2002, and the District of Columbia Bar in May

[18] The updates are 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.
[19] *Elec. Transaction Sys. Corp. v. Prodigy Partners Ltd*., Inc., CIV. A 08-1610 (RWR, 2009 WL 3273920 (D.D.C. Oct. 9, 2009).
[20] *Ross v. Ofc. of Employee Appeals*, 2010 CA 3142 (MPA) (December 31, 2014)
[21] *Id*.
[22] *Id*. at 4 (quoting *Covington v. District of Columbia*, 313 U.S. App. D.C. 16, 18, 57 F.3d 1101, 1103 (D.C. Cir. 1995); *See also Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 988 (D.C. 2007).
[23] *Federal Marketing Co. v. Virginia Impression Products Co., Inc*., 823 A.2d 513, 530 (D.C. 2003) (quoting *Hampton Courts Tenants Ass'n v. District of Columbia Rental Hous. Comm'n*, 599 A.2d 1113, 1115 (D.C. 1991).
[24] *See Elec. Transaction Sys. Corp*., supra.
[25] *Ross v. Ofc. of Employee Appeals*, 2010 CA 3142 (MPA) (December 31, 2014) (quoting *Pennsylvania v. Del Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986).

2016. In support of Employee's Fee Petition, Ms. D'Agostino submitted an unnotarized Affidavit, which details her lengthy and extensive professional experience and accomplishments throughout the course of her legal career. However, Ms. D'Agostino does not seek the rates as enumerated under *Laffey* in this case. Instead, counsel only requests a reduced hourly rate of $450.00 per hour. The Undersigned therefore finds that attorney D'Agostino has provided sufficient evidence to support the hourly rate requested based on her years of experience in the legal field.

Attorney fees for 2016-2019

David A. Branch, Esq.

Mr. Branch is the founder of the Law Office of David A. Branch and Associates, PLLC, located in Washington, D.C. Branch graduated from Law school in 1990, and is admitted to practice in the District of Columbia. According to his submission in support of his Fee Petition, Mr. Branch has approximately thirty (30) years of legal experience and a significant amount of his practice involves representing employees in disciplinary actions. He has also represented several employees in appeals before this Office. Under the *Laffey* Matrix, an attorney with 21-30 years of experience is entitled to the following:

1. $543/hour in 2016-2017
2. $563/hour in 2017-2018
3. $572/hour in 2018-2019
4. $595/hour in 2019-2020.

Mr. Branch was retained as counsel in this matter in 2016 and he represented Employee until 2019, when he withdrew his appearance. Mr. Branch represented Employee in the D.C. Superior Court and the D.C. Court of Appeals. However, Mr. Branch does not seek the rates as enumerated under *Laffey* in this case. Instead, counsel only requests a reduced hourly rate of $500.00 per hour. The Undersigned therefore finds that attorney Branch has provided sufficient evidence to support the hourly rate requested based on his years of experience in the legal field.

Louise Ryder, Esq.

As previously noted, Ms. Ryder also worked as an Associate Attorney at the Law Office of David A. Branch & Associates, PLLC from 2013 to 2019. She was also part of Employee's legal team at the Law Office of David A. Branch & Associates, PLLC from 2016 to 2019. In 2016, Ms. Ryder had approximately four (4) years of legal experience; in 2017, Ms. Ryder had approximately five (5) years of experience; in 2018, she had six (6) years of experience; and in 2019, she had seven (7) years of experience. According to the *Laffey* Matrix, a reasonable hourly rate for an attorney with four (4) to five (5) years of experience from 2016-2019, ranged from $332/hour to $365/hour. A reasonable hourly rate for an attorney with six (6) to seven (7) years of experience in 2016-2019 ranged from $339/hour to $375/hour. However, Mr. Branch does not

seek the rates as enumerated under *Laffey* in this case. Instead, counsel only requests a reduced hourly rate of $300.00 per hour. The Undersigned therefore finds that attorney Branch has provided sufficient evidence to support the hourly rate requested based on Ms. Ryder's years of experience in the legal field

Hui Min Cao, Esq.

Branch stated in his fee petition that Ms. Cao also worked on the case. According to the fee petition submitted by Branch, Ms. Cao graduated from law school in 2016. While Mr. Branch does not indicate the year that Cao was barred or when she worked on the case, I find that she had less than 2 years of experience. According to the *Laffey* Matrix, a reasonable hourly rate for an attorney with less than two (2) years of experience from 2017-2019 ranged from $302/hour to $319/hour. However, Mr. Branch does not seek the rates as enumerated under *Laffey* in this case. Instead, counsel only requests a reduced hourly rate of $300.00 per hour. The undersigned therefore finds that attorney Brach has provided sufficient evidence to support the hourly rate requested based on Ms. Cao's years of experience in the legal field.

In conclusion, I find that Employee is the prevailing party in this matter and in the interest of justice, she is entitled to the award of reasonable attorney fees. Agency did not oppose either of the Fee Petitions submitted by Employee's attorneys. Consequently, the Law Office of David A. Branch & Associates, P.L.L.C. is entitled to attorney fees and costs in the amount of $38,050, and The Federal Practice Group is entitled to attorney fees and costs in the amount of $20,490.

ORDER

It is hereby ORDERED that Agency pay, within thirty (30) days from the date on which this addendum decision becomes final, **$38,050 to the Law Office of David A. Branch & Associates, P.L.L.C.** and **$20,490 to The Federal Practice Group** in attorney fees and costs.

FOR THE OFFICE:

/s/ *Monica N. Dohnji*
MONICA DOHNJI, Esq.
Senior Administrative Judge