Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0109-13AF15
SCOTT A. SEFTON,	)	
Employee	)	
	)	Date of Issuance: November 19, 2015
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
FIRE & EMERGENCY MEDICAL	)	
SERVICES,	)	
Agency	)	Sommer J. Murphy, Esq.
	)	Administrative Judge

James Pressler, Jr., Esq., Employee Representative
Andrea Comentale, Esq., Agency Representative

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 28, 2013, Scott Sefton ("Employee"), filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the D.C. Fire & Emergency Medical Services' ("Agency") action of suspending him, and demoting him from the rank of Captain to Lieutenant. Employee's position of record at the time Agency took adverse action was a Firefighter with Engine 27. Employee was charged with: 1) "Any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations" to wit: (Neglect of Duty); 2) "Any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations" to wit: (Misfeasance); and 3) Making false statements during an accountability call. The events which formed the basis of Employee's appeal occurred on August 24, 2012, when Engine 27 responded to a fire at 4418 Edson Place in Northeast, D.C. On February 27, 2013, the Fire Trial Board ("Board") held a disciplinary hearing. The Board issued a Letter of Decision on June 14, 2013.

Employee's pleas and the Trial Board's findings/penalties were as follows:

Charge/Specification	**Plea**	**Trial Board Finding**	**Penalty**
Charge 1, Specification 1	Not Guilty	Guilty	72 hour suspension
Charge 1, Specification 1	Not Guilty	Guilty	72 hour suspension
Charge 2, Specification 1	Not Guilty	Guilty	96 hour suspension and demotion to rank of Lieutenant
Charge 3, Specification 1	Not Guilty	Not Guilty	None

Employee subsequently appealed Agency's decision to this Office. On August 18, 2014, the Undersigned issued an Initial Decision, sustaining Charge No. 1, Specification No. 1. However, Charge No. 1, Specification No. 2; and Charge No. 2, Specification No. 1 were reversed. Agency was ordered to reimburse Employee for all back pay and benefits incurred from the effective date of his suspension through the expiration date of his suspension (totaling 168 hours).[1] The Initial Decision also reversed Employee's demotion, and Agency was ordered to promote him back to the rank of Captain.[2] Agency subsequently filed a Petition for Review of the Undersigned's Initial Decision with D.C. Superior Court on September 22, 2014.[3] On July 28, 2015, the Honorable Judge Brian Holeman upheld OEA's decision and denied Agency's Petition for Review.[4] Agency did not elect to appeal the Superior Court's decision with the D.C. Court of Appeals; therefore, the Superior Court's decision became final on August 28, 2015. Counsel for Employee then filed a Motion for Award of Attorney Fees and Costs on September 25, 2015. On October 19, 2015, Agency filed an Opposition to Employee's Motion for Award of Attorney Fees and Costs.

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?

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[1] *Sefton v. D.C. FEMS*, OEA Matter No. 1601-0109-13 (August 18, 2014).
[2] *Id*.
[3] Employee filed a Motion to Intervene in D.C. Superior Court. Employee also filed a Consent Motion to Stay the Time to File Attorney Fees on October 22, 2014. The motion was granted.
[4] 2014 CA 005987 P(MPA).

ENTITLEMENT OF EMPLOYEE TO ATTORNEY FEES

D.C. Official Code § 1-606.08 (2001) 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."[5]

1. **Prevailing Party**

"[F]or an employee to be a prevailing party, he must obtain all or a significant part of the relief sought…."[6] In this case, Employee appealed Agency's action of suspending him for 240 hours and demoting from the rank of Captain to Lieutenant. Agency did not appeal Judge Holeman's July 28, 2015 decision, sustaining the Undersigned's Initial Decision. Accordingly, I conclude that Employee is the prevailing party in this matter.

2. Interest of Justice

In *Allen v. United States Postal Service*[7], 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."[8] 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;

3. Whether 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. Whether the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced the employee";

[5] *See* OEA Rule 634.1.
[6] *Zervas v. D.C. Office of Personnel*, OEA Matter No. 1602-0138-88AF92 (May14, 1993), __ D.C. Reg. ( ). *See also Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371, 375 (1980).
[7] 2 M.S.P.R. 420 (1980).
[8] *Id*. at 435.

5. Whether the agency "knew or should have known that it would not prevail on the merits", when it brought the proceeding.[9]

However, an applicant for attorney fees is not required to meet all of these criteria. Based on an analysis of the facts, the Undersigned concludes Employee is entitled to an award of attorney fees for the services provided to Scott Sefton during the course of proceedings before this Office. While not all five *Allen* factors are met, the record supports a finding that Agency's engaged in a prohibited personnel action when it determined that Employee was guilty of Charge No. 1, Specification No. 2; and Charge No. 2, Specification No. 1. These charges were not supported by substantial evidence in the record, and were therefore overturned. The Undersigned further determines that Employee was substantially innocent of the charges brought by Agency.[10] Employee's attorneys were successful in prosecuting his appeal before OEA, which resulted in the reversal of the majority of charges levied by Agency. As such, I find that the award of reasonable attorneys is warranted in the interest of justice.

REASONABLENESS OF ATTORNEY FEES

The law firm representing Employee is Pressler & Senftle, P.C. James Pressler served as lead counsel for Employee in this matter. Associate attorneys Marc Wilhite, Esq., and John Schroth, Esq. assisted Pressler in performing legal work. Each attorney has submitted a summary of their respective legal experience in sworn declarations, as discussed below. In total, Employee has moved for the award of attorney fees in the amount of $21,119.18.[11]

In its Response to Employee's Motion for Award of Attorney's Fees and Costs, Agency argues that $21,119.18 that has been requested by Employee is unreasonable because it includes $4,700.00 for legal work that was performed before the D.C. Superior Court. Agency asks that the award be reduced to $16,419.18, to account for 18.8 hours of work that was not expended before OEA.[12]

A. Hourly Rate

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.[13] 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.[14]

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[9] *Id*. at 434-35.
[10] As previously noted, the Trial Board held that Employee was not guilty of Charge No. 3, Specification No. 1.
[11] Employee's Motion for Award of Attorney's Fees and Costs at 12.
[12] Agency's Opposition to Employee's Motion for Award of Attorney's Fees and Costs (October 19, 2015).
[13] *Blum v. Stenson*, 465 U.S. 886 (1984).
[14] *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988).

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*.[15] 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 *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 Division of the United States Attorney's Office for the District of Columbia.[16]

Courts have "treated…the *Laffey* Matrix as a reference rather than a controlling standard."[17] "There is no concrete, uniform formula for fixing the hourly rates that are awarded in employment disputes (federal or local)."[18] The purpose of the *Laffey* Matrix is to provide a "short-cut compilation of market rates for a certain type of litigation."[19] 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.[20] 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."[21] Courts have increased or decreased the hourly rates depending on the characteristics of the case and the qualification of counsel.[22] In addition, "[t]he novelty [and] complexity of the issues" should be "fully reflected" in the determination of the fee award.[23]

According to the *Laffey* Matrix, a reasonable hourly rate for an attorney with more than 20 years of experience is as follows:

1. $505/hour in 2012-2013
2. $510/hour in 2013-2014
3. $520/hour in 2014-2015

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[15] 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).
[16] 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.
[17] *Elec. Transaction Sys. Corp. v. Prodigy Partners Ltd., Inc.*, CIV. A 08-1610 (RWR, 2009 WL 3273920 (D.D.C. Oct. 9, 2009).
[18] *Ross v. Ofc. of Employee Appeals*, 2010 CA 3142 (MPA) (December 31, 2014).
[19] *Id*.
[20] *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).
[21] *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).
[22] *See Elec. Transaction Sys. Corp*., supra.
[23] *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).

Under the *Laffey* Matrix, an attorney with 11-19 years of experience is entitled to the following:

1. $445/hour in 2012-2013
2. $450/hour in 2013-2014
3. $460/hour in 2014-2015

However, counsel for Employee does not seek the rates as enumerated under *Laffey* in this case. Instead, counsel only requests the reduced hourly rate as agreed upon in the retainer agreement with Employee; $375.00 per hour for lead attorney Pressler, and $250.00 per hour for any associate attorney time.[24]

James W. Pressler, Jr., Esq.

Attorney Pressler is the Managing Partner at Pressler & Sentfle, P.C., located in Washington, D.C. Pressler graduated from Suffolk University Law school in 1977, and is admitted to practice in several jurisdictions, including the District of Columbia. According to his affidavit, Pressler has over forty (40) years of legal experience and a significant amount of his practice involves representing employee in disciplinary actions.[25] He has also represented several employees in appeals before this Office. In support of Employee's Motion, Pressler has provided a copy of his Curriculum Vitae ("CV"), which details his lengthy and extensive professional experience and accomplishments throughout the course of his legal career. The Undersigned therefore finds that attorney Pressler has provided sufficient evidence to support the hourly rate requested based on his years of experience in the legal field.

Marc L. Wilhite, Esq.

Attorney Wilhite is an associate attorney with Pressler & Sentfle. Wilhite graduated from George Washington University School of Law in 1999, and is a member of the District of Columbia, Illinois, and Maryland Bars. He has over fifteen (15) years of legal experience, and states the following regarding his expertise:

> "I have specialized in the area of labor and employment law since 2000. During that time, I have represented both private sector and public employees in disciplinary actions and other contested cases. I have successfully represented private sector union employees affiliated with Teamsters' locals in dozens of disciplinary arbitrations where the employee was terminated. I have also represented scores of public employees, many of which worked for the DC Metropolitan Police Department and the DC Fire Department…."[26]

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[24] Employee's Motion for Award of Attorney's Fees and Costs, Exhibit 8.
[25] *Id*. at Exhibit 2.
[26] Affidavit of Marc L. Wilhite, Esq.

John H. Schroth, Esq.,

Attorney Schroth is also an associate with Pressler & Sentfle. In 1994, Schroth received a Juris Doctorate from the University of Minnesota Law School. He has over twenty (20) years of litigation experience, including trials, arbitrations, mediations, and administrative hearings.[27] Schroth has represented public employees in administrative disciplinary hearings, including appearances before OEA and Public Employee Relations Board ("PERB"). According to his resume, Schroth is admitted to practice law in the jurisdictions of D.C., Maryland, Minnesota, Virginia, and Wisconsin. He has worked as a litigation attorney for several law firms since graduating from the University of Minnesota Law School.

Billing Practices

Pressler states that his law firm utilizes itemized time slip spreadsheets, which are arranged chronologically by date. The slips provide details regarding the legal services performed on each date, and the amount of time expended, as reflected in one tenth hour increments, for each service provided. The spreadsheets further reflect the "contemporaneous time records made personally by counsel and his associate attorneys on a daily basis, entered into a computerized billing system on a daily basis, and used in the preparation of our regular billing statements to the client."[28] Counsel for Employee has submitted a copy of the retainer agreement between Employee and his firm to the Motion for Attorney's Fees. In addition, counsel submitted the declaration of District of Columbia attorney Ted J. Williams, Esq., which attests to his experience in comparable cases and the reasonableness of Pressler's regular hourly billing rates.[29]

Novelty and difficulty of questions presented

In *Elton Pinkard v. D.C. Metropolitan Police Department* the D.C. Court of Appeals limited the scope of OEA's review in appeals where certain criteria were met. [30] Under the holding in *Pinkard*, an Administrative Judge of this Office may not conduct a *de novo* hearing in an appeal before him or her, but must rather base their decision solely on the record below, when all of the following conditions are met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
>
> 2. The employee has been subjected to an adverse action;
>
> 3. The employee is a member of a bargaining unit covered by a collective bargaining agreement;

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[27] Affidavit of John H. Schroth, Esq.
[28] Affidavit of James W. Pressler, Esq.
[29] Employee's Motion for Award of Attorney's Fees and Costs, Exhibit 13.
[30] 801 A.2d 86 (D.C. 2002).

> 4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard*, *i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, Trial Board] has been held, any further appeal shall be based solely on the record established in the Departmental hearing"; and
>
> 5. At the agency level, Employee appeared before a Trial Board that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.

Having determined that Employee satisfied each condition set forth in *Pinkard*, the Undersigned determined that the issues to be decided before OEA were:

1. Whether the Trial Board's decision was supported by substantial evidence.
2. Whether there was harmful procedural error, or whether Agency's action was done in accordance with applicable laws or regulations.[31]

Appeals analyzed under *Pinkard* are frequently reviewed by this Office. In this case, I find that specialized experience in employment and administrative law was essential to the successful prosecution of Employee's appeal before OEA. Pressler, Whilite, and Schroth were required to become familiar with all pertinent rules, regulations, and case law pertinent to the issues presented in Employee's appeal. The preparation of Prehearing Conference statements, and detailed written legal briefs were also required throughout the course of the instant appeal, over approximately a two (2) year period.

A. Number of Hours Expended

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.[32] 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.[33] The number of hours reasonably expended is calculated by determining the total number of hours and subtracting nonproductive, duplicative, and excessive hours.[34]

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[31] *Sefton v. D.C. FEMS* at 2. OEA.
[32] *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).
[33] *Copeland*, supra.
[34] *Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985).

After reviewing the Motion for Attorney's Fees, I have determined that some of the hours expended were in fact attributable to Employee's case before D.C. Superior Court.[35] In order to eliminate duplicate billing, the hours that will be deducted from the total hours submitted are:

Date	**Description**	**Attorney**	**Time**	**Total**
4.15.15	Review of working /litigation file to Prepare Brief in opposition to Petitioner's Brief in Superior Court.	Schroth	.8 hrs	$ 200.00
4.22.15	Review of OEA Record to Prepare Brief in Superior Court	Schroth	2.0 hrs	$ 500.00
4.27.15	Research of DC Case Law and Statuses re: Malfeasance due process and Vagueness Doctrine for Brief in Opposition to Petitioner's Brief in Superior Court	Schroth	3.5 hrs	$ 875.00
4.30.15	Begin Preparation of Brief in Opposition to Petitioner's Brief in Superior Court	Schroth	3.0 hrs	$ 750.00
5.2.15	Draft Intervener's Brief in Response to Petitioner's Brief in Superior Court – Statement of the case	Schroth	2.0 hrs	$ 500.00
5.4.15	Draft Intervener's Brief in Response to Petitioner's Brief in Superior Court – Statement of the facts	Schroth	2.0 hrs	$ 500.00
5.7.15	Draft Intervener's Brief in Response to Petitioner's Brief in Superior Court – Legal Argument	Schroth	5.5 hrs	$1,375.00
Total deduction:			**18.8 hrs**	**$4,700.00**

[35] Employee's Motion for Award of Attorney's Fees and Costs, Exhibit 13.

Summary of Total Amount of Attorney Fees Due[36]

Time Period: 6/7/13 – 9/21/15
Attorney: James Pressler 8.6 hours x $375.00/hr = $ 3,225.00
Attorney: Marc Wilhite 41 hours x. $250.00/hr = $10,250.00

Time Period: 9/22/15 – 9/25/15
Attorney: James Pressler 7.1 hours x $375.00/hr = $ 2,662.50

Subtotal: $16,137.50

Fees and Costs: $232.68 + 49.00 = $281.68

Total: $16,419.18

In conclusion, I find that Employee is the prevailing party in this matter and is therefore entitled to the award of reasonable attorney fees. The reduced grand total for allowable attorney fees of $16,137.50 and legal costs of $281.68, for a total attorney fee award of $16,419.18.[37]

ORDER

It is hereby **ORDERED** that Agency pay, within thirty (30) days from the date on which this addendum decision becomes final, **$16,137.50** in attorney fees and **$281.68** in court costs and fees.

FOR THE OFFICE:

Sommer J. Murphy, Esq.
Administrative Judge

[36] *Id*. at Exhibit 1.
[37] The award is reduced by $4,700, which includes all duplicative attorney fees incurred in D.C. Superior Court.