

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
MORRIS BEY)	Matter No. 1601-0118-02AF08
Employee)	
)	
v.)	Date of Issuance: September 14, 2009
)	
DEPARTMENT OF PARKS AND)	Muriel Aikens-Arnold
RECREATION)	Administrative Judge
_____)	

Craig Ellis, Esq., Employee Representative
Kevin J. Turner, Esq., Agency Representative

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL HISTORY

On September 19, 2002, Employee, a Carpenter, filed a Petition for Appeal (“PFA”) from Agency’s action to remove him effective September 18, 2002 based on an employment-related act that interferes with the efficiency or integrity of government operations.¹ On October 22, 2002, Employee (through Counsel) requested mediation in this matter. This matter was assigned to Administrative Judge Susan Hoppe King, who issued a Notice of Mediation Conference on November 19, 2002 scheduling said conference on December 11, 2002.

This matter was assigned to this Administrative Judge (“AJ”) on November 4, 2003 after the parties failed to reach a resolution through mediation. On December 2, 2003, an Order to Convene a Prehearing Conference was issued scheduling said meeting on January 6, 2004. Thereafter, an evidentiary hearing was scheduled on February 25, 2004 and subsequently postponed indefinitely, at the parties’ joint request, in attempts to resolve this matter.² On July 15, 2004, an Order to Continue Hearing was issued scheduling said hearing on August 31, 2004. The hearing was held and concluded. The record was closed effective January 28, 2005.³ On March 14, 2005, an Initial Decision (ID) was issued reversing Agency’s action and ordering Employee’s reinstatement with all appropriate back pay and restoration of benefits.

¹ Employee was charged with solicitation and threatening the job of a co-worker.

² On 04/15/04, and several times thereafter, this Judge contacted the parties to discuss further proceedings.

³ The hearing transcript was received on 12/07/04 at which time the parties obtained copies and Briefs were filed.

On April 18, 2005, Agency filed a Petition For Review (PFR), which Employee opposed.⁴ On July 31, 2007, the Board issued an *Opinion and Order On Petition For Review* affirming the ID in which the AJ concluded that Agency failed to prove its case. Agency sought review of the Board decision in the Superior Court of the District of Columbia. On March 31, 2008, the Court denied Agency's Petition for Review and affirmed the final decision of this Office.

On June 18, 2008, Employee filed a Motion for Attorney Fees in the amount of \$33,328.77 (includes \$298.77 in expenses), pursuant to OEA Rule 635.1.⁵ On June 30, 2008, an Order was issued for Agency to respond to said Motion no later than July 22, 2008. On August 26, 2008, Agency filed a Consent Motion to Hold Motion for Attorney Fees in Abeyance Pending Resolution of All Reinstatement Issues. On August 27, 2008, an Order to Stay Proceedings was issued, at which time, the parties were advised to file status reports by September 26, 2008. Further, Employee was directed to file any supplemental Motion for Attorney Fees no later than October 10, 2008. Agency was given until October 24, 2008 to respond.

On August 28, 2008, Employee advised this Office that, despite best efforts of the parties, Agency had not complied with the ID; and that Employee's negotiation with Agency's General Counsel (who disputed Employee's entitlement to certain benefits lost), as well as Agency's representative, has slowed the process. On September 26, 2008, the parties filed a Joint Status Report which reflected the parties' pending agreement to the structure for an overall settlement which was expected within seven to ten days. On October 2, 2008, an Order to Stay Proceedings revised the previous dates: status reports due on October 17, 2008; supplemental motion for Attorney Fees due no later than October 24, 2008; and Agency response due by October 31, 2008. On October 17, 2008, the parties filed a Joint Status Report, which also requested six to eight weeks to complete the processing of necessary paperwork to ultimately resolve all compliance issues. Pursuant to that request, further proceedings were stayed and the parties were directed to file status reports by December 5, 2008.⁶

On December 29, 2008, an Order Convening a Status Conference was issued scheduling said meeting on February 19, 2009, based on failure of the parties to file scheduled status reports

⁴ On 04/14/05, Employee filed a Motion for Attorney Fees which was denied on 06/14/05 as premature due to Agency's pending PFR.

⁵ OEA Rule 635.1, 46 D.C. Reg. 9320 (1999) reads: "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." On 07/17/08, Employee filed a Motion for Leave to Accept Motion for Attorney Fees Out-of-Time due to the parties' continued efforts to resolve compliance issues as there was no available position to which Employee could return.

⁶ Agency required drug tests and a criminal background check, to which Employee complied. Following receipt of the results, Employee would be placed in a carpenter's position and immediately retired per agreement of the parties. The parties expected that the compliance matter would be resolved in six to eight weeks, leaving only the attorney fees to be resolved.

resulting in the delay in disposition of these proceedings.⁷ On February 12, 2009, Employee filed an Interim Motion for Attorney Fees in the amount of \$51,383.16 (including \$385.66 for expenses). Therein, Employee contended that Agency, despite the efforts of its representative, had not negotiated in good faith to resolve the outstanding back pay issues which caused Employee's Counsel to spend an inordinate amount of time on those issues.

On February 12, 2009, upon Agency's request, the Status Conference was continued to March 4, 2009. At that time, Agency was ordered to file its response to the initial Motion for Attorney Fees and the Interim Motion for Attorney Fees no later than March 4, 2009. As a result of the Status Conference, Agency filed a status report outlining the general procedural steps for implementation of provisions in the ID. However, except for the indication that Agency's paperwork was returned from the Office of Human Resources for additional information, no specific time sequences for processing the back pay and Employee's retirement application were provided, as previously agreed upon, during the Status Conference.⁸

On March 30, 2009, an Order for Agency to Provide Documents was *again* issued directing Agency to comply with the AJ's previous order to do so. On April 7, 2009, this Office received correspondence from Agency's representative regarding Employee's unexpected demise on March 17, 2009. In addition, the representative advised that, on April 6, 2009, he communicated with staff of Human Resources, who advised that Employee's Counsel must forward specific documents, regarding Employee's death, prior to disbursement of monies due to the estate.

On April 29, 2009, a teleconference was held with the parties. As a result, each party was instructed to submit the following to this Office: Employee's representative will provide information regarding Employee's death, determine an "end date" for representation, and shall file a final Motion for Attorney Fees no later than May 6, 2009. Agency was required to file documentation relative to Agency's back pay calculations and restoration of lost benefits; and to file a response to Employee's Motion for Attorney Fees no later than May 13, 2009. Both parties were directed to discuss any opposition to fees requested and attempt to resolve said claims; to make earnest efforts to resolve all outstanding issues in this matter; and file a joint status report within two (2) weeks.

On May 4, 2009, the parties filed a Joint Status Report reflecting their agreement that Employee's demand for attorney fees will be submitted to Agency officials for approval. If Agency did not accept the demand within two (2) weeks, then the parties would "submit this matter to this tribunal for resolution."

On June 8, 2009, a Memorandum to the Record was issued reflecting that neither party has further communicated with this Judge. Nor did either party respond to prior instructions

⁷ Employee was instructed to file a final invoice itemizing attorney fees by 02/13/09.

⁸ Agency did not file any response to the Motions for Attorney Fees and requested more time, which was granted.

regarding the resolution of outstanding issues. Further attempts by this Judge to contact the individual parties, via telephone, were ignored. The parties were admonished regarding their lack of cooperation which unduly delayed disposition of this matter. Last, the parties were advised that this matter would be adjudicated based on the existing record, unless persuaded otherwise.

On June 18, 2009, this Office received a letter from Agency's representative with attached documents that Agency had sent to the District of Columbia Department of Human Resources (DCHR) regarding Mr. Bey's back pay check.⁹ He further advised that, on June 10, 2009, he was informed by DCHR officials, that despite several requests, Mr. Bey's Official Personnel Folder had not been received from the Office of Personnel Management (OPM). However, he was assured that the subject back pay and retirement would be processed as soon as the personnel folder is received.

As no further pleadings, in this matter, have been received from either party, this Judge concludes that this matter is ready for adjudication of the attorney fee issue based on the existing record. The record in this matter is closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §-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 by the agency is warranted in the interest of justice." *See also* OEA Rule 635.1, 46 D.C. Reg. at 9320.

OEA Rule 635.2 reads: "[U]nless the Administrative Judge directs otherwise, a request for attorney fees shall be made by written motion within thirty (30) calendar days of the date that the initial decision becomes final."

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. 1601-0138-88A92 (May 14, 1993), __ D.C. Reg. __ (.). *See also Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371, 375 (1980).

Here, the relief sought was the reversal of Employee's removal, restoration to duty, and

⁹ The documents included, *inter alia*, salary calculations from 09/19/02 through 10/10/08 for a total of \$238,700.52 in lost wages and Mr. Bey's income tax forms from 2002 through 2007.

reimbursement for loss of wages and benefits. As a result of this Judge's ID, that is the result Employee obtained. Even though Agency appealed the ID to the Board and then to the Court, each decision affirmed the ID. Therefore, this Judge concludes that Employee is a prevailing party.

2. Interest of Justice

In *Allen v. United States Postal Service*, 2 M.S.PR. 420 (1980), the Merit Systems Protection Board (MSPB), this Office's Federal counterpart, set forth circumstances to serve as "directional markers toward the 'interest of justice'-- 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 434-35.¹⁰

First, this Judge found that Agency's action was wholly unfounded and the ID, which reversed Agency's action, was affirmed in two further appeals. Second, approximately six (6) months after the Court's decision, Agency had not complied with the ID which became a final]

¹⁰ "[T]here is no requirement that an applicant for attorney fees meet all of the above criteria in order to show 'interest of justice.'" *Thomas v. Metropolitan Police Department*, OEA Matter No. 1601-0002-86AF89, 42 D.C. Reg. 5642, 5645 (1995).

decision when the Court affirmed it.¹¹ In fact, over one (1) year later, and several months beyond Mr. Bey's untimely death, the compliance issue, which was interrelated with the attorney fee issue, was not resolved. The interest of justice is served by the award of attorney fees when the agency delays its compliance beyond the date set by the ID. *Harris v. Department of Agriculture*, 40 MSPR 604, 610 (1989). Based on the totality of the circumstances and under *Allen* factor 2, Employee is entitled to attorney fees in the interest of justice.

REASONABLENESS OF ATTORNEY FEES

This Office's determination of whether Employee's attorney fees request is reasonable is based on 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). 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. *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). Further, the 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.¹²

Counsel's latest submission was detailed and included enumeration of the services provided on Employee's behalf, totaling \$51,383.16 for 213.2 hours, including expenses in the amount of \$385.66.¹³ Counsel's usual and customary hourly fees during his representation of

¹¹ OEA Rule 633.3, 46 D.C. Reg. 9319 (1999) reads, "If the Board denies all petitions for review, the initial decision shall become final five (5) business days after issuance of the last denial."

¹² The Laffey Matrix, used to compute reasonable attorney fees in the Washington, DC-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). The fees are calculated by cross-referencing an "x-y" matrix reflecting the years in which the services were performed and the attorney's years of experience, yielding a figure that is a reasonable hourly rate (from June 1-May 31). It is updated yearly by the Civil Division of the U.S. Attorneys 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, then adjusted to the applicable *Laffey* rate for the prior year to ensure that the relationship between the highest rate and the lower rates remains reasonably constant. The current Laffey Matrix is attached to this decision.

¹³ Counsel's initial Motion for Attorney Fees filed 06/18/08 in the amount of 33,328.77 (including \$298.77 for expenses) at his usual and customary hourly rate of \$225.00, covered the period from

Employee were: \$225.00 prior to March 1, 2006; \$250.00 for the period from March 1, 2006 through July 1, 2007; and \$275.00 for the period July 1, 2007 through January 14, 2009.

Counsel also attached a list of hours with the type of work performed by date, month, and year reflecting a summary of his credentials, which included his educational background, employment history, and professional experience in the practice of law for twenty-three (23) years at the time this matter began. Counsel was a government trial attorney, including a Special Assistant United States Attorney, for seven (7) years before opening his private practice. Counsel further represents that, in his private practice, he has handled employment-related cases before this Office, the Office of Human Rights and in both federal and local courts.

1. Number of hours expended.

According to the billing documents submitted with the attorney fees motion, Counsel's billable hours total 213.2 for services performed between February 25, 2002 and January 14, 2009.¹⁴

2. Reasonable hourly rate.

After consideration of Counsel's credentials and the fact that he charged a reasonable hourly rate (considerably lower than the *Laffey matrix* rates), this Judge concludes that the appropriate hourly rates for legal services performed between February 25, 2002 through January 14, 2009 are \$225.00, \$250.00 and \$275.00, respectively. Those fees, which are far below the rates normally paid in the District of Columbia under similar circumstances, are, in this Judge's view, more than reasonable.¹⁵ Based on Counsel's billing statements and the following calculations, the allowable fees are as follows:

<u>Date/Period</u>	<u>Hours</u>	<u>Fee Amount</u>	<u>Total Costs</u>
2/25/02 - 2/03/06	149.5	\$225.00	\$33,637.50

02/25/02 through 03/06/08, 146.8 hours, including representation at the agency level prior to the appeal to this Office. This Office has awarded attorney fees for representation of an employee in proceedings before the agency. *See McCall v. Department of Human Services*, OEA Matter No. 1601-0134-91AF92 (January 28, 1993), __ D.C. Reg. __ (). In the latest Motion, Counsel also requested an increase in fees, utilizing the prevailing rate of attorneys of similar skill and reputation in the community, based upon his belief that Agency did not negotiate the settlement of outstanding issues in good faith.

¹⁴ The period from 02/25/02 through 09/03/02 (22.3 hours) constituted Counsel's representation at the agency level, prior to the filing of the PFA to this Office, which reasonably began on 09/18/02 when Counsel received and reviewed the decision to terminate Employee.

¹⁵ See footnote 12. The *Laffrey matrix*, updated through 5/31/09 reflects allowable hourly rates ranging from \$522.00 (year 02-03) to \$671 (year 08-09) based on 20+ years' legal experience to which Counsel would be entitled.

3/01/06 - 5/02/07	6.3	\$250.00	\$1,575.00
7/28/07 - 1/14/09	57.4	\$275.00	\$15,785.00

Therefore, the total allowable fees for the legal work involved in the representation of Employee from February 25, 2002 through January 14, 2009 is \$50,997.50.

3. Costs

In addition to the above legal fees, Employee's Counsel requested compensation for costs totaling \$385.66 to cover such expenses as postage, photocopying, and filing fees. In the absence of any dispute by Agency and the reasonableness of said costs, this Judge concludes that said costs claimed are recoverable.¹⁶

OEA Rule 635.5, 46 D.C. Reg. 9321 (1999) reads, "An agency may file a written opposition to the employee's motion for attorney fees within fifteen (15) business days of service of the motion or within such time as the Administrative Judge may direct. In its written opposition the agency must state its objection to the employee's request for attorney fees with particularity and clarity." Here, Agency was given at least three (3) clear opportunities to respond to Employee's Motion, and did not do so. In particular, this Judge notes that the parties most recently agreed that the demand for attorney fees would be submitted to Agency officials for approval. If Agency did not accept the demand within two (2) weeks, then the parties would submit this matter to this Office for resolution. As of this date, there is no evidence in the record regarding resolution of this claim or Agency's opposition to said Motion. In fact, neither party has put forth any further submission.

When an Employee prevails, he or she has the right to the *status quo*. Here, the *status quo* had not been restored and Agency continued the injustice of the adverse action initiated upon Employee for at least an additional year beyond the final appellate decision. The passing of the deadline for compliance had already established noncompliance by Agency. Based on a review of the legal services listed, consideration of the totality of circumstances, and to prevent further undue delay in disposition, this Judge concludes that Employee's Counsel is entitled to said attorney fees in the amount of \$51,383.16 for hours and expenses expended therein.

¹⁶ 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 (October 17, 2000), __ D.C. Reg. __ ().

ORDER

It is hereby ORDERED that Agency pay Employee's Counsel, within 30 days from the date on which this addendum decision becomes final, \$51,383.16 in attorney fees and costs.

FOR THE OFFICE:

MURIEL AIKENS-ARNOLD, ESQ.
Administrative Judge