

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Robert Johnson)	OEA Matter No. 1601-0051-06A09
Employee)	
)	Date of Issuance: February 16, 2010
v.)	
)	Senior Administrative Judge
D.C. Fire & Emergency Medical Services Dept.)	Joseph E. Lim, Esq.
Agency)	
_____)	

Thelma Chichester, Esq., Agency Representative
Clarissa Edwards, Esq., Employee Representative
Frederick Schwartz, Esq., Employee Representative

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL BACKGROUND

On November 28, 2005, Employee, a Paramedic, DS-0699, Grade 9, filed a Petition for Appeal with the D.C. Office of Employee Appeals (the “Office”), challenging his 20-day suspension for “failure to follow orders.”

Judge Lois Hochhauser held a prehearing conference on March 16, 2006, and a hearing on June 2 and July 5, 2006. After the submission of written closing arguments, the record was closed on February 9, 2007. On February 12, 2007, Judge Hochhauser issued an Initial Decision (ID) in which she found that Agency did not meet its burden of proof in proving cause to discipline Employee on a charge of insubordination, and therefore ordered Agency to reinstate Employee to his position of record with all back pay and benefits due him. Agency appealed, but on May 6, 2009, the Office Board upheld the Initial Decision in an Opinion and Order on Petition for Review. Agency did not appeal. Thus, the decision became final.

On June 1, 2009, Employee, through his second attorney¹, Frederic Schwartz, Jr., submitted a Motion for Attorney Fees and Costs in the amount of \$16,065.00, pursuant to OEA Rule 635.1.²

¹ Employee’s first attorney, Ms. Edwards, initially represented him in the initial phases of his appeal. Mr. Schwartz replaced Ms. Edwards in the latter stages of this appeal.

² OEA Rule 635.1, 46 D.C. Reg. 9320 (1999). 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.”

On August 13, 2009, Employee's first attorney, Clarissa Edwards, submitted a Motion for Attorney Fees in the amount of \$5,532.14. This Matter was reassigned to me on October 16, 2009. After several postponements by the parties, I held a status conference on January 20, 2010. On January 21, 2010, Agency submitted its response to Employee's motion while Employee submitted his reply to Agency's response on January 26, 2010. The record is closed.

JURISDICTION

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.

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 an appeal seeking reinstatement to his position and recovery of all benefits lost due to Agency's termination of his employment. Agency has accepted the Initial Decision and has reinstated Employee to his prior position and restored any benefits he 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 suspended Employee for alleged insubordination regarding the submission of a report. After Employee filed his appeal with this Office, the judge found that Agency did not meet its burden of proof regarding its charge against Employee.

Therefore, Agency’s action was “clearly without merit”. Additionally, Agency has not argued that attorney fees are not warranted in the interest of justice. I therefore conclude that Agency’s action against Employee is a manifestation of Allen Factor #2 above. Therefore, I further conclude that an award of reasonable attorney fees is warranted in the interest of justice.

REASONABLENESS OF ATTORNEY FEES

First Counsel, Ms. Clarissa Edward’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 first counsel, Ms. Clarissa Edward’s submission was detailed and included the specifics of the services provided on Employee’s behalf. Employee requested an award of \$5,532.14 in attorney fees and costs for services performed from October 21, 2005, through September 5, 2006. This covered legal services provided from the inception of this appeal to the conclusion of the hearing. Counsel expended approximately 28 hours at the hourly rate of \$195.00.

In its response, Agency indicated that it had no problem with Ms. Edward’s fee petition. I have examined the supporting documents for the fee request, and have found it to be prudent and reasonable. Thus, Attorney Edward’s \$5,532.14 fee request is approved.

Second Counsel, Mr. Frederic Schwartz, Jr.’s attorney fee request

Employee's second counsel, Mr. Frederic Schwartz, Jr.'s submission was detailed and included the specifics of the services provided on Employee's behalf. Employee requested an award of \$16,065.00 in attorney fees and costs for services performed from November 17, 2006, through May 8, 2009. This covered legal services provided from preparing the closing argument to the conclusion of the appeal. Counsel expended 37.8 hours at the hourly rate of \$425.00.

Agency argued that this fee request is unjustified; that the amount is excessive, redundant, and unnecessary and should be disallowed. Agency asserts that the hours claimed for a case that was neither complex nor complex should be reduced since an attorney of Mr. Schwartz's vast experience should not need so many hours to prepare a closing argument and a response to Agency's petition for review. Agency asserts that the bulk of the legal work done in this Matter was performed by Attorney Edward, who filed the appeal and represented Employee during the hearing.

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.³ 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).

³ A copy of the Laffey Matrix for the District of Columbia for the years 2003 - 2009, is attached to this addendum decision.

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.

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 Frederic Schwartz. Employee backs up his hourly rate request with an affidavit from Attorney Schwartz enumerating his legal education and experience. The affidavits show that Schwartz has more than 20 years of legal experience in the field of employment and labor litigation.

Employee is asking that Attorney Frederic Schwartz be compensated at hourly rate of \$425.00 for services rendered from November 17, 2006, through May 8, 2009.

According to the Laffey Matrix, a reasonable hourly rate for an attorney with more than 20 years experience is \$425.00 for services rendered from June 1, 2006, through May 31, 2007; and \$440.00 for services rendered from June 1, 2007, through May 31, 2008; and \$465.00 for services rendered from June 1, 2008, through May 31, 2009. Since Attorney Banov’s requested hourly rates are either in line with or below 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 4.1 hours claimed by Attorney Schwartz to meet with his client and review materials, 7.8 hours of legal research, 11.9 hours to prepare closing argument, and 8.9 hours to review response to petition for review are excessive. I have reviewed the total 37.8 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, the degree of legal complexity involved in the issues presented, as well as on my own years of experience as a plaintiff's attorney. 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 Schwartz has handled numerous appeals before this Office.

Thus, I reduced these time claimed as follows: Meet with client and review materials - 2 hour; Legal research – 2 hours; Prepare closing argument – 2 hours; Review response to petition for review – 1 hour.

SUMMATION OF FEES

To summarize, I find that the following hours and rates for attorney fees are substantiated.

Attorney Edward: 28 hours x \$195.00 = \$5,532.14
Attorney Schwartz: 12 hours x \$425 = <u>\$5,100.00</u>
Total attorney fees = \$10,632.14

In conclusion, I therefore find that Employee is entitled to the reduced grand total of allowable attorney fees of \$10,632.14.

ORDER

It is hereby ORDERED that Agency pay Employee, within thirty (30) days from the date on which this addendum decision becomes final, \$10,632.14 in attorney fees and costs.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge