THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ARMETA ROSS,	)	
Employee	)	
	)	OEA Matter No.: 2401-0133-09R11AF14
v.	)	
	)	Date of Issuance: September 30, 2014
OFFICE OF CONTRACTING	)	
AND PROCUREMENT,	)	
Agency	)	SOMMER J. MURPHY, Esq.
	)	Administrative Judge

Wendy Kahn, Esq., Employee Representative
Lindsay Neinast, Esq., Agency Representative

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 18, 2009, Armeta Ross ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the Office of Contracting and Procurement's ("Agency" or "OCP") action of abolishing her position through a Reduction-in-Force ("RIF"). Employee worked as a Program Analyst for Agency until 2009, when she was terminated. The effective date of the RIF was May 22, 2009.

In response to Employee's appeal, Agency challenged OEA's jurisdiction over this matter. On February 12, 2010, Administrative Judge ("AJ") Sheryl Sears (retired) issued an Order requiring Employee to submit a brief on the issue of jurisdiction. Employee's request for an extension of time in which to file her brief was denied by the AJ. On March 30, 2010, the AJ issued an Initial Decision, dismissing Employee's appeal for lack of jurisdiction.

Employee subsequently filed an appeal with the District of Columbia Superior Court on May 6, 2010 contesting OEA's dismissal of her appeal on jurisdictional grounds. The Honorable Judge Cheryl M. Long reversed the ID and held that the AJ abused her discretion in denying a request for a one (1) day continuance for Employee's counsel to file a brief on jurisdiction, as

was originally ordered by the AJ.[1] Judge Long remanded this matter back to OEA for further proceedings on the merits of both the jurisdictional issue and the Reduction-in-Force.

On February 23, 2012, I issued an Order, finding that this Office had jurisdiction over Employee's appeal. The Order further required the parties to submit additional briefs addressing whether Agency, in conducting the instant RIF, adequately followed proper District of Columbia statutes, regulations and laws. On April 8, 2013, the Undersigned Administrative Judge issued an Initial Decision ("ID"), reversing Agency's action of terminating Employee under the RIF. The ID held that Agency failed to include Employee's correct position of record in the proper lesser competitive area based on a review of her official personnel record. As such, the Undersigned held that Agency had not meet its burden of proof under D.C. Code § 1-624.08, which required Employee to be provided with one round of lateral competition. Agency did not file an appeal with OEA's Board or D.C. Superior Court, thus, the Initial Decision became final thirty-five (35) days later, on May 13, 2013. Employee, through counsel, subsequently filed a request for the award of attorney fees and costs. Agency filed a response to Employee's motion on July 3, 2013.

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?

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."[2]

1. **Prevailing Party**

"[F]or an employee to be a prevailing party, he must obtain all or a significant part of the relief sought…."[3] In this case, Employee appealed her termination from her position as a Program Analyst with Agency and asked to be reinstated with all back pay and benefits due to her. Agency has not appealed this Office's final decision and has restored Employee to her position in accordance with the Undersigned's April 8, 2013 Initial Decision. Based on the record, I conclude that Employee is the prevailing party.

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[1] *Ross v. DC Office of Employee Appeals*, 2010 CA 3142 P (MPA).
[2] *See also* OEA Rule 634.1.
[3] *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).

2. Interest of Justice

In *Allen v. United States Postal Service*[4], 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."[5] 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. Whether the agency "knew or should have known that it would not prevail on the merits", when it brought the proceeding.[6]

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 that Employee is entitled to an award of attorney fees for the services provided to Armeta Ross. While not all five *Allen* factors were met, the record supports a finding that Agency engaged in a prohibited personnel practice and that Agency's action of terminating Employee under the RIF was clearly without merit. Additionally, Agency has not argued that attorney fees are not warranted in the interest of justice. However, Agency contends that Employee has requested an hourly rate that is unreasonable and unjustified. I conclude that Agency's actions are manifestations of *Allen* Factors #1 and #2, above. Therefore, I conclude that an award of reasonable attorney fees is warranted in the interest of justice.

[4] 2 M.S.P.R. 420 (1980).
[5] *Id*. at 435.
[6] *Id*. at 434-35.

REASONABLENESS OF ATTORNEY FEES

The law firm representing Employee is Zwerdling, Paul, Kahn & Wolly, P.C. The lawyers who represented Employee before this Office were: Wendy L. Kahn, Esq. and Jordan Kaplan. Kahn served as the lead counsel for Employee and Kaplan, a junior attorney, assisted Kahn as her associate. Both lawyers have provided a summary of their respective experience in sworn declarations as discussed below. Kahn's submission includes the specifics of the services provided on Employee's behalf. Kahn requests an award of $40,056.75 in attorney fees and $ 238.07 in costs for services performed from March 4, 2010, through April 30, 2013. In addition, Kahn requests to be compensated for the work performed from May 1, 2013 through June 30, 2013, totaling $22,119.00.

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.[7] 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.[8]

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*.[9] 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.[10]

Courts have "treated…the *Laffey* Matrix as a reference rather than a controlling standard."[11] "There is no concrete, uniform formula for fixing the hourly rates that are awarded in employment disputes (federal or local)."[12] The purpose of the *Laffey* Matrix is to provide a

[7] *Blum v. Stenson*, 465U.S. 886 (1984).
[8] *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988).
[9] 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).
[10] 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.
[11] *Elec. Transaction Sys. Corp. v. Prodigy Partners Ltd., Inc.*, CIV. A 08-1610 (RWR, 2009 WL 3273920 (D.D.C. Oct. 9, 2009).
[12] *Ross v. Ofc. of Employee Appeals*, 2010 CA 3142 (MPA) (December 31, 2014).

"short-cut compilation of market rates for a certain type of litigation."[13] 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.[14] 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."[15] Courts have increased or decreased the hourly rates depending on the characteristics of the case and the qualification of counsel.[16] In addition, "[t]he novelty [and] complexity of the issues" should be "fully reflected" in the determination of the fee award.[17]

In its Response to Employee's Motion for Award of Attorney's Fees and Costs, Agency argues that the *Laffey* Matrix is not applicable in this matter because the proceedings before this Office were not complex litigation matters. Agency notes that there were no oral arguments, evidentiary hearings or complex discovery matters involved in the OEA proceedings.[18] In addition, Agency believes that the *Laffey* Matrix is not warranted based on the type of work that Employee's attorney performed in this case. In the alternative, Agency contends that even if the *Laffey* Matrix were applicable in this matter, Employee has failed to provide sufficient evidence to meet her burden in establishing that her hourly rates were reasonable.[19]

After carefully reviewing the submissions of the parties, the undersigned Administrative Judge concludes that the *Laffey* Matrix is applicable in this instance, and that the hourly rate requested is reasonable.

Wendy Kahn, Esq.

Attorney Kahn is a partner at Zwerdling, Paul, Kahn & Wholly, P.C. in Washington, DC. Kahn graduated from the New York University School of Law in 1973, and is admitted to practice in several jurisdictions, including the District of Columbia. According to her declaration, Kahn has over thirty (30) years of legal experience and has served as lead counsel in the representation of District of Columbia public employees, unions, and other administrative bodies including the Office of Employee Appeals and the D.C. Public Employee Relations Board.[20] Kahn has also provided a lengthy and detailed list of her professional accomplishments, as incorporated by reference in an Updated and Supplemental Motion for Attorney Fees and Costs.[21] Undoubtedly, attorney Kahn has extensive experience in employment-related matters and has devoted numerous years to the practice of law.

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[13] *Id*.
[14] *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).
[15] *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).
[16] *See Elec. Transaction Sys. Corp*., supra.
[17] *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).
[18] Agency's Response to Motion for Award of Attorney's Fees and Costs (July 3, 2013).
[19] *Id*.
[20] Motion for Attorney Fees, Tab 2 (June 14, 2013).
[21] *See* Attachment C (July 3, 2013).

Jordan Kaplan, Esq.

Attorney Kaplan is a junior attorney at Zwerdling, Paul, Kahn & Wholly, P.C. Kaplan graduated from Rutgers University School of Law in 2007. Kaplan was barred in 2007, and is licensed to practice law in several jurisdictions, including New Jersey, the District of Columbia, and the Fourth Circuit Court of Appeals. He has over six years of experience in practicing labor and employment law. Kahn's practice also includes litigation before federal and local agencies, in addition to representing employees in negotiations, arbitration and mediation.[22]

In support of her request to utilize the *Laffey* Matrix, Kahn offers the affidavit of Steven C. Leckar, Esq. Leckar, a 1973 graduate of Duke University School of law, is admitted to practice law in Washington, D.C. and Georgia. He has over thirty-three (33) years of experience representing employees in state and federal courts. Leckar has also represented employees before this Office. In his declaration, Leckar states the following:

> "I have represented employees in at least eight litigated cases at the D.C. Office of Employee Appeals…In conjunction with those matters, I have filed petitions for attorney fees and costs. In all of the cases in which fees were awarded or agreed upon in settlement, they were awarded to me at the *Laffey* rates or…at the even higher "Legal Services" *Laffey* matrix. In these cases, which involved public servants of modest means whom I believed to have been victimized by abusive practices, I followed a policy of charging my time at a substantial reduction from my then-normal hourly rate, with the understanding that I would seek an award of fees at market rates if the case proved successful."[23]

Moreover, Lecklar believes that Kahn's reputation in the legal community is highly favorable, and agrees that the Laffey Matrix rates "would be reasonable and consistent with the prevailing market rate for an employment litigator of [Kahn's] experience and stature in the community."[24] Kahn also notes that Employee had previously reviewed the *Laffey* rates, and understood that the hourly rates provided therein were agreeable as a reference point for the D.C. area.[25]

Billing Practices

Kahn notes that some, but not all of her time, was spent preparing a motion for fees and costs associated with filing a May 6, 2010 appeal to D.C. Superior Court after the denial of Employee's request for a one-day continuance. According to Kahn, the costs have been allocated between the total amount of attorney fees for D.C. Superior Court and OEA. The total allocated

[22] Motion for Attorney Fees at 9 (June 14, 2013).
[23] Declaration of Steve Lekar at 3.
[24] *Id*.
[25] Declaration of Armeta Ross, Attachment B.

amount; however, does not exceed 100%. In describing her billing practices, Kahn states the following:

> "My method of preparing the line item invoice was to review the contemporaneous time records for the case—involving time by me, by our associate Jordan Kaplan…and by a summer law clerk. I reviewed the records to eliminate matter[s] arguably subject to attorney client privilege, but most importantly, reviewed them to eliminate arguably duplicative or unnecessary time. The resulting line item invoice reflects specifically (by use of "NC"—for "No Charge") that we did not charge Ms. Ross and are not seeking reimbursement for a substantial amount of time. In addition, as a matter of billing judgment, I simply did not even show on the invoice some of the attorney time actually spent on the case."[26]

Novelty and difficulty of questions presented

As previously stated, Kahn has previously represented clients before the Office of Employee Appeals in several matters. The issue presented in this case was whether the RIF, which resulted in Employee's separation from service, was done so in accordance with all applicable District laws, rules and regulations. In the Undersigned's April 8, 2013 Initial Decision, I held that the instant RIF was primarily guided by D.C. Official Code § 1-624.08, which limited OEA's review to the following:

1. Whether the employee received thirty (30) days written notice prior to the effective date of his or her separation from service; and/or

2. Whether the employee was afforded one round of lateral competition within their competitive level.

Appeals resulting from Reductions-in-Force are frequently reviewed by this Office. In this case, I find that specialized expertise in employment law was essential to the successful prosecution of this appeal. Both Kahn and Kaplan were required to perform legal research pertinent to jurisdictional and RIF-related issues, and to interpret relevant statutes and case law. Both parties have also filed numerous legal briefs and motions over approximately a four year period.

Based on the foregoing, I find that Kahn has provided substantial evidence to support the award of attorney fees at the *Laffey* Matrix rates.[27] According to the *Laffey* Matrix, a reasonable hourly rate for an attorney with more than 20 years of experience is as follows:

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[26] Motion for Attorney Fees at 5.

[27] "Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *WMATA v. D.C. Dept. of Empl. Servs*., 926 A.2d 140, 147 (D.C. 2007) (quoting *Ferreira v. D.C. Dept. of Empl. Servs.*, 667 A.2d 310, 312 (D.C. 1995)). Evidence is substantial if it is "more than a mere

1. $465/hour in 2009-2010
2. $475/hour in 2010-2011
3. $495/hour in 2011-2012
4. $505/hour in 2012-2013

Likewise, the *Laffey* Matrix reflects an hourly rate for an attorney with 1-3 years of experience as follows:

1. $225/hour in 2009-2010
2. $230/hour in 2010-2011

Under the *Laffey* Matrix, an attorney with 4-7 years of experience is entitled to the following:

1. $285/hour in 2011-2012
2. $290/hour in 2012-2013[28]

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.[29] 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.[30] The number of hours reasonably expended is calculated by determining the total number of hours and subtracting nonproductive, duplicative, and excessive hours.[31]

Kahn submits that the total amount of hours expended for which reimbursement is sought for OEA work through April 30, 2013 are as follows: 1) 75.95 hours for attorney Kahn; and 2) 11.3 hours for attorney Kaplan. Kahn has also filed a supplemental invoice for attorney time from May 1, 2013 through May 31, 2014 as follows: 1) 25.8 hours for attorney Kahn; and 2) 10.6 hours for attorney Kaplan. For the period of June 1, 2013 through June 30, 2013, Kahn submits a total of 18 hours for her work only. A summation of the hours requested is as follows:

Date	Kahn	Kaplan
3/4/2010-5/31/2010	23.05 hrs.	1.3 hrs.

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scintilla." *Polcover v. Secretary of Treasury*, 155 U.S.App.D.C. 338, 477 F.2d 1223, 1231-1232 (1973); *Finfer v. Caplin*, 344 F.2d 38, 41 (2d Cir.), cert. denied, 382 U.S. 883, 86 S.Ct. 177, 15 L.Ed.2d 124 (1965).

[28] At the time Employee's Petition for Appeal was filed, attorney Kaplan had three years of experience. In 2011, Kaplan was entitled to higher rate (in the 4-7 years of experience range).

[29] *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).

[30] *Copeland*, supra.

[31] *Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985).

6/1/2010-5/31/2011	.4 hr.	1.4 hrs.
6/1/2011-5/31/2012	42.95 hrs.	8.6 hrs.
6/1/2012-4/30/2013	9.55 hrs.	NA
5/1/2013-6/30/2014	43.8 hrs.	10.6 hrs.
Hours Subtotal:	119.75 hrs.	21.9 hrs.
Costs:	283.07	

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

1. .9 hours on 5/24/13. "Re: Research for attorney fees for Superior Court portion of case…."
2. 12.0 hours on 5/28/13. "Re: Communications with client and draft Ross Declaration…in support of Motion for Attorney Fees and Costs for Superior Court…"
3. 8.2 hours on 5/29/13. "Re: At 12:23 a.m., e-File and e-Serve Motion for Attorney Fees and Cost for Superior Court portion of case and related pleadings…."
4. 4.1 hours on 5/29/13 (Kaplan). "Re: Complete e-Filing of Motion for Attorney Fees.…"[32]

Based on the foregoing, the total amount of hours disallowed is: 1) 21.1 for attorney Kahn; and 2) 4.1 hours for attorney Kaplan. I find that the remainder of the hours submitted were not excessive based on the degree of difficulty and the amount of time required to prosecute the instant case. Accordingly, Kahn is entitled to be compensated for a total of 98.65 hours. Kaplan is entitled to be compensated for a total of 17.8 hours. It should further be noted that Agency has not objected to the number of hours expended prosecuting Employee's Petition for Appeal.

Summary of Total Amount of Attorney Fees Due

Time Period:	3/4/2010-5/31/2010
Attorney Wendy Kahn:	23.05 hours x. $465 = $ 10,718.25
Attorney Kaplan:	1.3 hours x. $225 = $ 292.50
	Subtotal: $ 11, 010.75
Time Period:	6/1/2010-5/31-2011
Attorney Wendy Kahn:	.4 hours x. $475 = $ 190.00

[32] *See* Ross Invoice (May 2013).

Attorney Kaplan:	1.4 hours x. $230 = $ 322.00
	Subtotal: $ 512.00
Time Period:	6/1/2011-5/31-2012
Attorney Wendy Kahn:	42.95 hours x. $495 = $ 21,260.25
Attorney Kaplan:	8.6 hours x. $285 = $ 2451.00
	Subtotal: $ 23,711.25
Time Period:	6/1/2012-4/30/2013
Attorney Wendy Kahn:	9.55 hours x. $505 = $ 4,822.75
Attorney Kaplan:	NA
	Subtotal: $ 4,822.75
Time Period:	5/1/2013-5/31/2013 *(Supplemental Filing)*
Attorney Wendy Kahn:	4.7 hours x. $505 = $ 2,373.50
Attorney Kaplan:	6.5 hours x. 290.00 = $ 1,885.00
	Subtotal: $ 4,258.50
Time Period:	6/1/2013-6/30/2013 *(Supplemental Filing)*[33]
Attorney Wendy Kahn:	18 hours x. $510 = $ 11,463.5
Attorney Kaplan:	NA
	Subtotal: $ 9,180.00

Total: $ 53,495.25
Costs/Fees: $ 283.07[34]

In conclusion, I find that Employee is entitled to a reduced grand total of allowable attorney fees of $ 53,495.25 and legal costs of $ 283.07 for a total attorney fee award of $ 53,688.32.

ORDER

It is hereby **ORDERED** that Agency pay Employee, within thirty (30) days from the date on which this addendum decision becomes final, $ 53,405.25 in attorney fees and $ 238.07 in court costs.

FOR THE OFFICE:

_____
Sommer J. Murphy, Esq.
Administrative Judge

[33] Work performed from during this period will be calculated at the 2013/2014 *Laffey* rates.
[34] I find these expenses to be reasonable, and not duplicative. Therefore, the total amount of all expensive/fees will be rewarded.