THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0186-12AF17
THOMAS PIERRE, Employee	
	Date of Issuance: September 18, 2017
v.	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS, Agency	
	Arien P. Cannon, Esq. Administrative Judge

Raymond Jones, Esq., Employee Representative
Carl Turpin, Esq., Agency Representative

SECOND ADDENDUM DECISION ON ATTORNEY'S FEES

INTRODUCTION AND PROCEDURAL BACKGROUND

An Initial Decision was issued by the undersigned on September 30, 2014, which reversed Agency's decision and ordered that Employee be reinstated, and awarded back pay and benefits lost as a result of his termination. Pursuant to OEA rules 632 and 633, Agency had thirty-five (35) days to file a Petition for Review of the Initial Decision. Agency filed a Petition for Review on November 4, 2014. On November 27, 2014, Employee, by and through counsel, filed a Motion for Compliance and Award of Attorney Fees. Because a Petition for Review was filed and pending, the undersigned issued an Order on December 16, 2014, dismissing Employee's Motion for Attorney's fees as premature.

On May 10, 2016, the OEA Board issued an Opinion and Order on Petition for Review, upholding the undersigned's Initial Decision. Agency filed an appeal of the OEA Board's Opinion and Order with the Superior Court of the District of Columbia on June 9, 2016. This appeal was subsequently withdrawn by Agency, via praecipe, on November 4, 2016.

On May 26, 2017, Agency filed a Motion for Status Conference indicating that the parties had discussed back pay and attorney fees, but Employee failed to provide DCPS with the pertinent tax information to determine the appropriate back pay that must be paid. DCPS also

indicated that it agreed to pay Employee's attorney fees, but Employee had refused to sign the attorney fees agreement. Accordingly, a Status Conference was scheduled, and convened on June 27, 2017, to address the outstanding issues in this matter. Prior to convening the Status Conference, the undersigned was made aware that Employee had retained new counsel in this matter.

Subsequent to the June 27, 2017 Status Conference, Employee's first attorney, Mr. Raymond Jones, submitted a Consent Motion for Attorney Fees and Cost. Another Status Conference was convened, telephonically, on July 20, 2017, to address the Consent Motion for Attorney Fees. During this phone conference, the undersigned told the parties that it was unclear whether the Consent Motion was truly consented to by Agency. There was no signature of any representative from Agency on the Consent Motion. The undersigned further explained that based on the representations made at the June 27, 2017 Status Conference, it appeared Agency was agreeing to the requested attorney fees under the presumption that Employee would provide all of the necessary signatures and would absolve the need for further litigation regarding outstanding compliance issues. However, Employee's new counsel, Mr. H. David Kelly, Jr., made clear during the June 27, 2017, and July 20, 2017 status conferences that outstanding compliance issues were still being worked out between the parties.

Accordingly, the undersigned informed Employee's first counsel, Mr. Jones, to re-file his Motion for Attorney Fees since it was not clear that the first motion regarding attorney fees was truly a consent motion. During the July 20, 2017 telephonic conference, Agency's representative, Mr. Carl Turpin, confirmed that it had reached an agreement with Mr. Jones regarding attorney fees based on the understanding that the agreement would resolve all outstanding compliance issues. Agency's assertion made it apparent that Mr. Jones' July 5, 2017 Consent Motion was not truly a consent motion since there remained outstanding compliance issues that were being addressed by Employee's new counsel. Accordingly, the undersigned found it necessary for Mr. Jones to re-file his Motion for Attorney Fees, and provide Agency the opportunity to oppose Mr. Jones' Attorney Fees Motion, equipped with the understanding that additional work was being done by Employee's new attorney, Mr. H. David Kelly, Jr., regarding outstanding compliance issues. As such, Mr. Jones re-filed his Motion for Attorney Fees on August 17, 2017. The record is now closed.

JURISDICTION

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

ISSUE

Whether the attorney fees requested are reasonable.

DISCUSSION OF ATTORNEY'S FEES

D.C. Official Code D.C. Official Code § 1-606.08 provides that an Administrative Judge "…may require payment by the agency of reasonable attorney fees if the appellant is the

prevailing part and payment is warranted in the interest of justice." Similarly, OEA Rule 634, 59 DCR 2129 (March 16, 2012) provides that an employee shall be entitled to an award of reasonable attorney fees if: (1) he or she is a prevailing party; and (2) the award is warranted in the interest of justice.[1] An employee is considered the "prevailing party," if he or she received "all or significant part of the relief sought" as a result of the decision.[2] OEA Rule 634.4 further provides that an agency may file a written opposition to the employee's motion for attorney fees within fifteen (15) business days after being served the motion. Here, Employee's first attorney, Mr. Jones, filed the instant Motion for Attorney Fees on August 17, 2017. To date, more than fifteen business days after Employee's Motion for Attorney Fees was filed, Agency has not file an opposition.

Prevailing Party

The Initial Decision in this matter reversed Agency's action of removing Employee and awarding him all benefits lost as a result of his removal. The Initial Decision was upheld by the OEA Board in its May 10, 2016 Opinion and Order. Subsequently, Agency filed a Petition for Review with the District of Columbia Superior Court of the OEA Board's Order, and on its own volition ultimately withdrew the case in Superior Court. As such, the undersigned's Initial Decision became binding decision of this Office and Employee was entitled to all of the relief sought in his Petition for Appeal. Thus, it is undisputed that Employee is the "prevailing party" in this matter.

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 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",

[1] 59 DCR 2129 (March 16, 2012).
[2] *Zervas v. D.C. Office of Personnel*, OEA Matter No. 1601-0138-88AF92 (May 13, 1993).

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.

Here, the basis of the Initial Decision reversing Agency's removal of Employee was due to Agency's violation of *Allen* Factor 4. Agency's "gross procedural error" by failing to submit its brief even after it set its own self-imposed deadline 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 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.[3] Here, the undersigned is the equivalent of the trial court.[4]

Reasonableness of 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.[5] 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.[6] OEA Rule 634.3 establishes that "an employee shall submit reasonable evidence or documentation to support the number of hours expended by the attorney on the appeal."

In Employee's Motion for Attorney Fees, filed August 17, 2017, Mr. Jones request attorney fees in the amount of $19,792.50, which represent a total of 43.5 hours of service at a rate of $455 per hour. These hours reflect work completed by Mr. Jones through November 2016. Mr. Jones also request an additional $5,000.00, which he asserts Agency agreed upon for services rendered from December 2016, through June 2017.[7]

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*

[3] Citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1993, 1941 (1983).
[4] *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).
[5] *Blum v. Stenson*, 465 U.S. 886 (1984).
[6] *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988).
[7] Mr. Jones maintains that the additional $5,000.00 is a reduced amount based on 16.2 hours of work at an hourly rate of $465.00

Matrix, used to compute reasonable attorney fees in the Washington, D.C.-Baltimore Metropolitan Area, was initially proposed in *Laffey v. Northwest Airlines, Inc*.[8] 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 Division of the United States Attorney's Office for the District of Columbia.[9]

Courts have "treated…the *Laffey* Matrix as a reference rather than a controlling standard."[10] "There is no concrete, uniform formula for fixing the hourly rates that are awarded in employment disputes (federal or local)."[11] The purpose of the *Laffey* Matrix is to provide a "short-cut compilation of market rates for a certain type of litigation."[12] 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.[13] 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."[14] Courts have increased or decreased the hourly rates depending on the characteristics of the case and the qualification of counsel.[15] In addition, "[t]he novelty [and] complexity of the issues" should be "fully reflected" in the determination of the fee award.[16]

Mr. Jones has litigated cases for the last 14 years in both state and federal court.[17] His practice has focused on labor and employment and civil litigation matters.[18] According to the *Laffey* Matrix, a reasonable hourly rate for an attorney with 11-15 years of experience, such as Mr. Jones, is as follows:

1. $455/hour in 2015-2016
2. $465/hour in 2016-2017

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[8] 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).
[9] 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.
[10] *Elec. Transaction Sys. Corp. v. Prodigy Partners Ltd., Inc.*, CIV. A 08-1610 (RWR, 2009 WL 3273920 (D.D.C. Oct. 9, 2009).
[11] *Ross v. Ofc. of Employee Appeals*, 2010 CA 3142 (MPA) (December 31, 2014).
[12] *Id*.
[13] *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).
[14] *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).
[15] *See Elec. Transaction Sys. Corp*., supra.
[16] *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).
[17] Motion for Attorney's Fees, *See* Attachment Affidavit in Support of Attorney's Fees (August 17, 2017).
[18] *Id*.

The undersigned instructed Mr. Jones to re-file his Motion for Attorney's Fees as to not reflect it being a consent motion. The basis for this instruction was to allow Agency to file an opposition considering that it knew additional work was being done by Employee's new counsel in regards to outstanding compliance issues. Agency's counsel represented that an agreement regarding attorney fees had in fact been met, but that the agreement assumed that no further litigation was necessary. Because Employee's new counsel represented that additional work was necessary to get Agency to comply with the Initial Decision, the agreed upon attorney fees appeared uncertain given the prospect of Employee's new attorney also seeking attorney fees for work completed in the compliance matter. After Employee's first attorney, Mr. Jones, filed the instant motion, Agency elected not to file an opposition. Thus, I find that Mr. Jones' "Consent" Motion for Attorney's Fees filed on July 5, 2017, a little over a month prior to the instant motion, provided a reasonable amount of hours expended and a reasonable hourly rate of $455 per hour. Accordingly, I find it reasonable that Mr. Jones be awarded for 43.5 hours of legal services at a rate of $455 per hour.

The goal of having Mr. Jones re-file his Motion for Attorney Fee's was to allow Agency the opportunity to respond and state its' position regarding whether it truly consented to the Attorney Fees Motion filed by Mr. Jones on July 5, 2017. As stated above, because Employee's new counsel is providing services regarding the outstanding compliance issues, it was unclear as to whether Agency was consenting to the attorney fee request made by Employee's original counsel, Mr. Jones. The instructions for Mr. Jones to re-file his Motion for Attorney Fees were not meant to have additional fees added into his fee request. In Mr. Jones' re-filed Motion for Attorney's Fees, filed August 17, 2017, he seeks to recover an additional $5,000 for additional work completed that was not a part of his initial agreement with Agency regarding attorney fees. I do not find the additional fee request reasonable in light of the circumstances and characteristics of the case. Thus, I find it appropriate to award Mr. Jones with attorney fees for 43.5 hours work of legal services at a rate of $455 per hour, for total award of $19,792.50.

ORDER

It is hereby **ORDERED** that Agency pay, within thirty (30) days from the date on which this addendum decision becomes final, **$19,792.50 (Nineteen-thousand-seven-hundred-ninety-two and fifty cents)** in attorney fees.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge