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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
JOHN BARBUSIN JR.,	)	
Employee	)	OEA Matter No. 1601-0090-18AF20
	)	
v.	)	Date of Issuance: September 3, 2020
	)	
D.C. DEPARTMENT OF GENERAL	)	
SERVICES,	)	
Agency	)	MICHELLE R. HARRIS, ESQ.
	)	Administrative Judge
	)	
_____	)	
Talon R. Hurst, Esq., Employee Representative <sup>1</sup>	)	
C. Vaughn Adams, Esq., Agency Representative	)	

**ADDENDUM DECISION ON ATTORNEY FEES<sup>2</sup>**  
**INTRODUCTION AND PROCEDURAL HISTORY**

On September 14, 2018, John Barbusin, Jr. (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of General Services’ (“Agency” or “DGS”) decision to terminate him from service, effective September 7, 2018. Employee was a Supervisory Special Police Officer at the time of his termination. Agency’s filed its Answer on October 17, 2018. This matter was assigned to the undersigned Administrative Judge (“AJ”) on December 5, 2018. Following an Evidentiary Hearing and the submission of written closing arguments, on January 15, 2020, I issued an Initial Decision reversing Agency’s removal action. Agency did not file an appeal; thus the Initial Decision became final. On March 20, 2020, Employee, by and through his counsel, filed a Motion for Attorney Fees and Expenses. Accordingly, on March 25, 2020, I issued an Order requiring Agency to submit a response to Employee’s Motion on or before April 13, 2020. Following a request for an extension of time, Agency submitted its response on April 14, 2020. On April 21, 2020, Employee filed a Motion for Leave to File a Response (response was attached to motion) to Agency’s Brief. Agency did not file a response or opposition to this Motion. As a result, on May 21, 2020, I issued on Order granting Employee’s motion. The record is now closed.

<sup>1</sup> On May 28, 2020, Talon R. Hurst, Esq., filed a Notice of Substitution of Counsel in this matter. The new attorney is Ann Kathryn-So, Esq. and a copy of the decision will sent to her attention.

<sup>2</sup> This decision was issued during the District of Columbia’s Covid-19 State of Emergency.

## JURISDICTION

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

## ISSUE

Whether the attorney fees requested are reasonable.

## FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

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 party 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. 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.

### **Prevailing Party**

The Initial Decision issued on January 15, 2020 in this matter, reversed Agency’s action of removing Employee from service. Agency did not file an appeal of this decision, and as a result, the Initial decision became binding and Employee was entitled to all relief as prescribed therein. Further, this Office has consistently held that “[f]or an employee to be a prevailing party, he must obtain all or a significant part of the relief sought.”<sup>3</sup> Further, Agency does not dispute that Employee is the prevailing party in this matter.<sup>4</sup> Accordingly, based on the record in this matter, I conclude that Employee is the prevailing party.

### **Interest of Justice**

In *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980), the Merit Systems 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. 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 employee in “bad faith”, including:
  - a. Whether the agency’s action was brought to “harass” the employee;

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<sup>3</sup> *Alice Lee v. Metropolitan Police Department*, OEA Matter No 1601-0087-15AF18 (July 27, 2018) citing to *Zervas v D.C. Office of Personnel*, OEA Matter No 1601-0138-88AF92 (May 16, 1993). *See also. Hodnick v Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371, 375 (1980).

<sup>4</sup> Agency’s Opposition to Employee’s Motion (April 14, 2020).

b. Whether 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, *Id.* at 434-35.

In the instant matter, I find that the basis of the Initial Decision reversing Agency's removal of Employee was due to Agency's violation of Allen Factors 2 and 5. Agency pursued a removal action of Employee, despite an independent hearing officer's recommendation that there was not sufficient evidence to sustain the charges. Further, witness testimony during the Evidentiary Hearing held before the undersigned, revealed Agency's knowledge regarding the charges and that Employee had not committed the actions for which he was charged.<sup>5</sup> 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. Here, the undersigned administrative judge is the equivalent of the trial court.<sup>6</sup>

### REASONABLENESS OF ATTORNEY FEES

#### Hourly Rate

"Once the conclusion is reached that attorney fees should be awarded, the determination must be made on the amount of the award."<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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 Fees, Hannon Law Group, LLP, request attorney fees in the amount of \$93, 343.01, which represents 234.3 hours of service based on the hourly rates of all attorneys and paralegals that worked on this matter.<sup>10</sup>

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<sup>5</sup> See. Agency's Opposition to Employee's Motion at Pages 2-3 (April 14, 2020). Agency cited that it objected to Employee's notion that its adverse action was arbitrary and not supported. Further, Agency indicated that Captain Preston's testimony during the evidentiary hearing was not consistent with what she indicated in her written proposed removal of Employee. Additionally, Agency notes that Captain Preston was terminated from Agency and suggests that could have impacted her testimony.

<sup>6</sup> *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).

<sup>7</sup> *Thomas Pierre v. District of Columbia Public Schools*, OEA Matter No. 1601-0186-12AF17, *Addendum Decision on Attorney Fees* (September 18, 2017).

<sup>8</sup> *Blum v. Stenson*, 465 U.S. 886 (1984).

<sup>9</sup> *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988).

<sup>10</sup> Employee's Motion for Attorney Fees (March 20, 2020).

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.*<sup>11</sup> 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.<sup>12</sup>

Courts have "treated...the *Laffey Matrix* as a reference rather than a controlling standard."<sup>13</sup> "There is no concrete, uniform formula for fixing the hourly rates that are awarded in employment disputes (federal or local)."<sup>14</sup> The purpose of the Laffey Matrix is to provide a "short-cut compilation of market rates for a certain type of litigation."<sup>15</sup> 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.<sup>16</sup> 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."<sup>17</sup> Courts have increased or decreased the hourly rates depending on the characteristics of the case and the qualification of counsel.<sup>18</sup> In addition, "[t]he novelty [and] complexity of the issues" should be "fully reflected" in the determination of the fee award.<sup>19</sup>

The primary attorneys in the instant matter were Talon Hurst and J. Scott Hagood. The other attorneys in this matter, J. Michael Hannon, Daniel S. Crowley and Karey Hart expended less than three (3) hours as related to this matter.<sup>20</sup> Employee is requesting that Attorney Talon Hurst ("Hurst") be compensated at an hourly rate of \$351.00 for services rendered from June 1, 2018 through May 31, 2019, and \$365.00 for services rendered from June 1, 2019 to May 31, 2020. Employee asserts that Hurst was an associate at Hannon Law Group since 2016. Further, Hurst earned his Juris Doctor in 2014 and is licensed in Maryland, New Jersey and the District of Columbia. Employee avers that Hurst appeared during the Evidentiary Hearing in this matter, attended prehearing conferences, and was responsible for extensive legal research, filing briefs, and conducted depositions. Employee asserts that J. Scott Hagood ("Hagood") was also a primary attorney on this matter and is requested he be compensated at a rate of \$491.00 for services rendered June 1, 2018 through May 31, 2019 and \$510.00 for services rendered from June 1, 2019 through May 31, 2020. Employee proffers that Hagood is an

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<sup>11</sup> 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).

<sup>12</sup> 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.

<sup>13</sup> *Elec. Transaction Sys. Corp. v. Prodigy Partners Ltd., Inc.*, CIV. A 08-1610 (RWR, 2009 WL 3273920 (D.D.C. Oct. 9, 2009).

<sup>14</sup> *Ross v. Ofc. of Employee Appeals*, 2010 CA 3142 (MPA) (December 31, 2014).

<sup>15</sup> *Id.*

<sup>16</sup> *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).

<sup>17</sup> *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 Housings. Comm'n*, 599 A.2d 1113, 1115 (D.C. 1991).

<sup>18</sup> See *Elec. Transaction Sys. Corp.*, *supra*.

<sup>19</sup> *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)).

<sup>20</sup> *Id.*

attorney with over twelve (12) years' experience and received his Juris Doctor in 2007. Employee asserts that Hagood was an associate at Hannon Law Group from 2008-2010 and then again from 2012 to 2020. Hagood is licensed in the District of Columbia and Maryland.

In the instant matter, Agency does not contest that Employee was the prevailing party. Further, Agency does not oppose the *Laffey* matrix or USAO rates in the assessment of fees in this matter. Rather, Agency makes other assertions regarding billing practices (including duplicative or non-legal work etc.) and the hours documented claimed in this matter. Accordingly, I find that the rates submitted by Employee in this matter are consistent with the *Laffey* matrix/USAO<sup>21</sup> and are appropriate in the assessment of fees in this matter.

### **Number of Hours Expended**

OEA's determination of whether an Employee's attorney fee request is reasonable is also based upon consideration of the number of hours reasonably expended on the litigation as multiplied by the reasonable hourly rate.<sup>22</sup> While it is not necessary to know the "exact number of minutes spent or 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."<sup>23</sup> The number of hours reasonably expended is calculated by determining the total number of hours and subtracting nonproductive, duplicative and excessive hours.

Agency avers that the award of fees should be denied because Employee was not personally responsible for legal fees in this matter, because of an agreement between Hannon Law Group and FOP<sup>24</sup> insurance. Further, Agency asserts that if fees are awarded that the amount should be reduced to **\$76,780.53**. Agency argues that counsel in this matter applied "block-billing", filed claims for unsuccessful motions and failed to use "reasonable business judgement", in that it listed "excessive time for redundant supervisory review of Talon Hurst's work by J. Scott Hagood and Michael Hannon." Further, Agency asserts that fees include claims for non-legal travel activity and bills for

<sup>21</sup> USAO Attorney Fee's Matrix 2015-2020 (<https://www.justice.gov/usao-dc/page/file/1189846/download>) applicable rates/years: **Years (Hourly Rate for June 1 – May 31, based on change in PPL-OL since January 2011)**

<b>Experience</b>	<b>2018-19</b>	<b>2019-20</b>
31+years	613	637
21-30 years	572	595
16-20 years	544	566
11-15 years	491	510
8-10 years	417	433
6-7 years	358	372
4-5 years	351	365
2-3 years	340	353
Less than 2 years	307	391
Paralegals & Law Clerks	166	173

<sup>22</sup> *Lee v. Metropolitan Police Department*, OEA Matter No 1601-0087-15AF18 (July 27, 2018) citing to *Copeland v Marshall*, 641 F.2d 880 (D.C. Cir. 1980). See also *Hensley v Eckerhart*, 461 U.S. 424 (1983) and *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir 1982).

<sup>23</sup> *Id. Copeland supra*.

<sup>24</sup> FOP is Employee's union.

routine expenses such as mail, messenger fees and binders. Agency also argues that Employee filed for “fees on fees” in their assessment of what is owed.<sup>25</sup>

### *Billing Entries*

Agency asserts that counsel for Employee engaged in blocked billing. Specifically, Agency asserts that lawyers should not “lump together multiple tasks when billing because such practices make it impossible to review their reasonableness.”<sup>26</sup> Agency argues that the fee requests included several block billings with travel requests. Specifically, Agency asserts that Employee’s counsel block billed for the following:

- 1.1 hours billed on 2/4/ 2019 for “Travel to/from prehearing conference, attended prehearing conference.” [Ex 4.p 5]
- 1.2 hours billed on 3/15/ 2019 for “travel to/from status conference at OEA, attended status conference.” [Ex. 4 p.7]
- 7.5 hours billed on 6/4/2019 for “travel to/from evidentiary hearing; attended evidentiary hearing; meeting with Sgt. Barbusin evidentiary hearing.” (Ex. 4 pg. 10)
- 4.6 hours billed on 3/7/2019 for “Travel to/from deposition; attended deposition.” [Ex. 4 p20]
- 1.1 hours billed on 2/4/2019 for “traveled to/from prehearing conference; attended prehearing conference.” [Ex. 4 p 24]
- 1.2 hours billed on 3/15/ 2019 for “traveled to/from prehearing conference; attended prehearing conference. [Exhibit 4 p.24]
- 7.5 hours billed on 6/4/2019 for Travel to/from evidentiary hearing; attended evidentiary hearing; meeting with Sgt Barbusin evidentiary hearing “ Talon Hurst [Ex. 4 p27] (DUPLICATIVE ENTRY?)
- 7.5 hours billed on 6/4/2019 for “prepared for and attended hearing.” S.Hagood [Ex. 4 p 28]<sup>27</sup>

Agency argues that these time entries are defective in that they are vague and make it impossible to decipher what activities were appropriately devoted to compensable time. Agency cites that the entries seem to reflect J.Scott Hagood’s “micromanagement of lead counsel Talon Hurst’s work, up to and including review of his email responses.”<sup>28</sup> Further, Agency avers that it appears that there are duplicative time entries from June 4, 2019, documenting Talon Hurst’s attendance at the Evidentiary Hearing. As a result, Agency avers that the fees should be reduced by the amount of **\$2,737.50 (7.5 hours x \$365.00) and a ten percent (10%) reduction in the overall fee** to address the “persistent impropriety of the records and for the failure to exercise appropriate and reasonable billing judgment.”<sup>29</sup>

Counsel for Employee asserts that it did not engage in improper billing. Employee argues that OEA has previously held that legal services include travel times.<sup>30</sup> Further, Employee asserts that counsel’s “billing entries describe the legal services provided on Sgt. Barbusin’s behalf with enough

<sup>25</sup> *Alice Lee v Metropolitan Police Department supra.* citing to *Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985)

<sup>26</sup> Agency’s Opposition to Employee’s Motion at Page 6 (April 14, 2020).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at Page 7.

<sup>29</sup> *Id.*

<sup>30</sup> Employee’s Reply to Agency’s Opposition at Page 2 (April 21, 2020).

detail for this Office to make a determination on reasonableness.”<sup>31</sup> Counsel also argues that it was required to travel from their law office to attend hearings and depositions and this travel was “attendant to the services provided” on behalf of Employee. Additionally, Employee argues that the fee motion included documentation further showing counsels’ travel to and from the hearings and depositions. Regarding Agency’s assertion of duplicative time entries for Hurst and Hagood, Employee proffers that Mr. Hagood served as lead counsel for Employee since the onset of Agency’s proposed removal action, alongside Talon R. Hurst. Employee avers that Hagood also represented Employee throughout his appeal before OEA and appeared at the evidentiary hearing. As a result, Employee asserts that the time Mr. Hagood “spent drafting and reviewing legal work product and correspondences and developing case strategy in this case were necessary representational functions.”<sup>32</sup> Additionally, Employee argues that Agency’s assertion about duplication of the June 4, 2019 time entries are incorrect. Specifically, Employee asserts that:

“[t]he agency wrongly claims that there are duplicative entries of time for June 4, 2019 by Mr. Hurst for his attendance at the evidentiary hearing, and asks this Office to reduce the requested fees by \$2,737.50 representing 7.5 hours of work at his hourly rate. These entries are not duplicative. Pages 1-13 of Exhibit 4 to Sgt. Barbusin’s fee motion shows all the attorney’s fees incurred at the time of filing, totaling 234.3 hours. Pages 14-38 of Exhibit 4 then breaks down the same 234.3 hours into separate categories consistent with those described in section III.B of the fee motion. For example, page 27 of Exhibit 4 merely reflects the hours spent in connection with the evidentiary hearing. However, if you add the hours on pages 14-38 together, they total 234.3 as well. Sgt. Barbusin only claimed the 7.5 hours spent by Mr. Hurst on June 4, 2019 once towards the 234.3-hour total.”

Upon review of the billing entries included with Employee’s Motion, the undersigned finds that the entries are detailed and listed in a manner consistent with the measures of reasonableness upon which this Office has relied. As previously outlined, OEA has held that “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.”<sup>33</sup> Accordingly, I find that Employee’s motion includes detailed time entries that are consistent with the services provided.

Further, this Office has held that compensable legal services can include related travel expenses incurred during the course of a matter.<sup>34</sup> In *Robert Fogle v. District of Columbia Public Schools*,<sup>35</sup> OEA held that consistent with the Office’s ruling in *Spriggs v. District of Columbia School*<sup>36</sup>, that an attorney can be compensated for travel expenses incurred while “officially operating in the service on behalf of [e]mployee.” In the instant matter, the travel costs enumerated by Employee’s counsel clearly exhibit that travel was made while operating on behalf of Employee, to include attending prehearing

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Alice Lee v. Metropolitan Police Department* *Supra* citing to *citing to Copeland v Marshall*, 641 F.2d 880 (D.C. Cir. 1980). *See also Hensley v Eckerhart*, 461 U.S. 424 (1983) and *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir 1982).

<sup>34</sup> In *Brenda Fogle v District of Columbia Public Schools*, OEA Matter No 2401-0123-04-A09 Initial Decision-Awarding of Attorney Fees and Costs ( March 22, 2011) , OEA held that consistent with the Office’s ruling in *Spriggs v DCPS*, OEA Matter No. 2401-0124-03, that fees reimbursed can include travel expenses counsel incurred while

<sup>35</sup> OEA Matter No. 2401-0123-04 (March 22, 2011)

<sup>36</sup> OEA Matter No. 2401-0124-03 (December 6, 2004).

conferences and the evidentiary hearing as required. Additionally, upon examination of the alleged June 4, 2019 duplicative entry, the undersigned finds that Employee's exhibits provide the different breakdown and associated enumerations, but do not result in a different calculation of hours outside of the 234.3 total claimed by Employee. For these reasons, I find that the fees presented are reasonable, and not duplicative. Further, I find that the associated travel costs are a compensable expense in this matter. Accordingly, I find that Employee's request should be compensated as indicated in the Motion for fees and should not be reduced.

#### *"Fees on Fees"*

Agency asserts that Employee's request to be compensated for fees associated with the preparation of the instant Motion for Attorney Fees and Costs should be at a reduced rate. Agency does not dispute the *Laffey* matrix rates but asserts that the rate should be reduced. Agency avers that courts in this jurisdiction have held that "fee petitions are inherently less complicated than the underlying litigation and so courts have awarded those "fees on fees" at fifty percent (50%) of the normal rate."<sup>37</sup> As a result, Agency asserts that the \$7,350.80 (19.9 hours -17 hours for Hurst and 1.5. for J. Scott Hagood) be reduced by 50% to \$3,675.40. Employee asserts that the "fees on fees" issue that Agency argues is different than those that are before this Office. Employee argues that fees at OEA are awarded "pursuant to the D.C. Comprehensive Merit Personnel Act and the Federal Back Pay Act (FBPA)."<sup>38</sup> Employee argues that "[u]nder these procedures, the prevailing party on an appeal before OEA must present his fee motion for all work performed on his appeal before this Office, including work performed on review before the Superior Court." As a result, Employee avers that OEA has awarded fee motions which include fees associated with the preparation of the motion for fees. The undersigned concurs. This Office has consistently awarded fees at a full rate to prevailing parties, including fees associated with the preparation of the fee motion.<sup>39</sup> Accordingly, I find that the fee for the preparation of the motion for attorney fees should not be reduced.

#### *Unsuccessful Motion for Sanctions*

Agency asserts that Employee should not be compensated for a failed motion. Specifically, Agency argues that Employee's counsel's preparation of the January 31, 2019 Motion for Sanctions should not be compensated because Employee's motion was not a prevailing party on this motion.<sup>40</sup> As a result, Agency avers that the \$828.20 that counsel seeks should be denied. Employee argues that the rate should not be reduced. Employee concedes that the motion was not granted but avers that it was still necessary to the litigation. Employee asserts that the "Supreme Court has held that if a prevailing party's unsuccessful claims originate from the same common core of facts as the party's successful claims, thereby making it difficult to separate the hours which the prevailing party's counsel expended on a claim-by-claim basis, the court should "focus on the significance of the overall relief obtained . . . in relation to the hours reasonably expended in the litigation."<sup>41</sup> The undersigned agrees

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<sup>37</sup> Agency's Opposition Motion at Page 8 (April 14, 2020). citing to *Garvin v. District of Columbia*, 910 F.Supp.2d 135 (D.D.C. 2012); *Wright v. District of Columbia*, 883 F.Supp.2d 132, 133-134 (D.D. C. 2012); *Means v. District of Columbia*, 999 F.Supp.2d 128, 130-31 (D.D.C. 2013); *F.S. v. District of Columbia*, 307 F.R.D. 28, 29 (D.D.C. 2014).

<sup>38</sup> Employee's Reply to Agency's Opposition at Page 6 (April 21, 2020). Citing *Surgent v. District of Columbia*, 683 A.2d 493, 495 (D.C. 1996), citing *Zenian v. Office of Employee Appeals*, 598 A.2d 1161, 1163 (D.C.1991)

<sup>39</sup> See. *Fogle v. District of Columbia Public Schools*, OEA Matter No. 2401-0123-04-A-09, Initial Decision-Awarding of Attorneys Fees and Costs (Mar. 21, 2011). Here, OEA awarded fees at the applicable *Laffey* rates, including the work performed preparing the motion for attorney fees and costs (see page 14-15).

<sup>40</sup> Agency's Opposition Motion at Page 8 (April 14, 2020).

<sup>41</sup> Employee's Reply to Agency's Opposition at Page 7 (April 21, 2020) citing to *Hensley*, 461 U.S. 424, 435 (1983).



with Employee's assertion. While the motion for sanctions was unsuccessful, Employee was the prevailing party overall and reasonable legal expenses incurred in the course of that service can be compensated. The motion was not arbitrary and was filed in response to Agency's failure to submit discovery as previously ordered. Accordingly, I find that the \$828.20 for the motion for sanctions should not be reduced or denied.

### *Routine Business Expenses*

Agency asserts that Employee's requests for \$1,476.41 for routine business costs such as \$265.70 for printing exhibit binders, \$270.45 for messenger services, \$89 dollars for travel expenses and \$162.06 for legal research is inappropriate. Agency does not contest the \$686.20 for deposition transcripts but asserts the other costs are "routine costs of any business and should not be borne by a non-prevailing party."<sup>42</sup> Employee argues that Agency's argument should be rejected. Employee asserts that "Agency does not dispute that these expenses were reasonable and necessarily incurred in this case. Nor does the agency offer any case law to support its position that they should not be reimbursed."<sup>43</sup> Further, Employee asserts that OEA has held that these expenses have been reimbursed in similar personnel actions.<sup>44</sup> The undersigned concurs with Employee's assertions. As was previously stated, OEA has held that reasonable expense incurred in the service of Employee can be reimbursed. In the *Fogle* decision, costs were reimbursed for matters such as case management and legal research. Accordingly, I find that Employee's requests are reasonable and should not be denied.

### *Employee Not Liable for Legal Fees*

Agency argues that fees should not be compensated because Employee was not personally liable for legal expenses in this matter. Agency asserts that Employee's legal fees were covered through FOP Insurance and as a result, he is not a true party of interest because he did not suffer any personal costs for litigation expenses.<sup>45</sup> Further, Agency avers that counsel for Employee has likely already been compensated for legal fees and should have no basis to claim any further reimbursement from Agency. Employee asserts that he was responsible for legal fees incurred over the course of this litigation. Further, Employee proffers that Agency provides no legal basis for this claim. Employee avers that the Merit Systems Protection Board has held that fees can be reimbursed in a similar action. Specifically, Employee asserts that the MSPB has held that a third-party payment of some fees does not preclude an award of attorney fees.<sup>46</sup> Further, Employee provides that the "Federal Labor Relations

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<sup>42</sup> Agency's Opposition at Page 9 (April 14, 2020).

<sup>43</sup> Employee's Reply to Agency's Opposition at Page 8 (April 21, 2020).

<sup>44</sup> *Id.* citing to *Alfred Gurley v. D.C. Public Schools*, OEA Matter No. 1601-0008-05A08, Addendum Decision on Attorney Fees, at p. 6 (June 25, 2008) (holding that "costs, if reasonable, are recoverable.").

<sup>45</sup> Agency's Opposition at Page 9 (April 14, 2020) previously citing to Employee's Motion at Exhibit 4.

<sup>46</sup> Employee's Reply to Agency's Opposition at Page 9-10 quoting in pertinent part:

"The Merit Systems Protection Board, this Office's federal counterpart, has examined similar scenarios presented in this case. In *Brennan v. Dep't of Justice*, an administrative judge overturned an employee's removal and the employee later filed his motion for attorney's fees and expenses. *Brennan v. Dep't of Justice*, 2011 WL 3897363 (M.S.P.B. Jan. 19, 2011). In its opposition, the DOJ argued that the employee was not entitled to part of his requested fees for work performed by one of his attorneys because the work performed was pursuant to a professional liability insurance policy. *Id.* In rejecting the DOJ's argument, the administrative judge explained, contrary to the agency's argument, however, I find that Ms. Roth and SB&R rendered legal services on behalf of the appellant starting in 2005. The fees incurred are well-documented in the billing statements. AFF, Tab 3, Attachment 2. Although it appears that SB&R represented the appellant pursuant to a professional liability insurance policy, Ms. Roth averred that she had an attorney-client relationship with the appellant; not with the insurance company. AFF, Tab 3, Declaration of Debra Roth at 1. Therefore, I find that an attorney-client relationship existed between the appellant and SB&R and fees were incurred."

Authority also recognizes that fee awards are permitted under the FBPA when the fees were paid by third parties on behalf of the employees.”<sup>47</sup> As a result, Employee avers that while the MSPB and Federal Labor Relations Authority cases are not precedential, “that it does lend credence to the position that fees are awarded in these circumstances as long as the employee incurred the fees.”<sup>48</sup> Employee asserts that he “incurred such fees in defense of his unwarranted removal action. As the record shows, Sgt. Barbusin and HANNON LAW GROUP entered into an attorney-client relationship as expressed in the retainer agreement.” Employee does not deny that he had an insurance policy that he purchased that covered part of the legal fees incurred on his behalf, but asserts, “the fact that his insurer or any other third party paid towards some of those fees does not make him less liable to pay the full value of the work performed pursuant to the retainer agreement.” Employee avers that he entered into the fee agreement with Hannon Law Group which agreed to accept payment at a reduced rate with the expectation that they would recoup the fees incurred on Employee’s behalf at the full value.<sup>49</sup> Further, Employee cites that he is required to “reimburse the portion of incurred fees his insurer paid out following any award of attorney’s fees pursuant to a subrogation clause in his insurance policy.”<sup>50</sup>

The undersigned finds that Employee as the prevailing party is entitled to the reimbursement of reasonable attorney fees and costs. The fact that Employee had to employ a method for payment of fees when ascertaining counsel for this matter should not preclude him from reimbursement. Further, because Employee paid for the policy and is also subject to the reimbursement of fees to that policy pursuant to the subrogation clause, I find that there is no unjust enrichment for the award of fees. Accordingly, for the aforementioned reasons, I find that the request for attorney fees in this matter are reasonable. I further find that Employee’s counsel documented with clarity and enumerated all costs and fees appropriately. As a result, I find it appropriate to award attorney fees for 234.3 hours of legal services provided in this matter (per applicable *Laffey* rates and documented expenses) in the amount of **\$93,343.01**.

#### ORDER

Based on the foregoing it is hereby **ORDERED** that Agency pay, within thirty (30) days from the date on which this addendum decision becomes final, **\$93,343.01 (Ninety-three-thousand-three-hundred-forty-three dollars and one cents)** in attorney fees.

FOR THE OFFICE:

/s/ Michelle R. Harris  
Michelle R. Harris, Esq.  
Administrative Judge

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<sup>47</sup> *Id.* citing to *American Federation of Government Employees, AFL—CIO, Local 3882 v. FLRA*, 944 F.2d 922 (D.C. Cir. 1991) (holding that attorney fees are available under the FPBA to union attorneys who rendered services on behalf of an employee). Attorney’s fees are incurred by an employee within the meaning of the FBPA as long as an attorney-client relationship exists, and the attorney has rendered legal services on behalf of the employee. See *Naval Air Development Center, Department of the Navy and American Federation of Government Employees, Local 1928, AFL—CIO*, 21 FLRA 131 (1986).

<sup>48</sup> Employee’s Reply to Agency’s Opposition (April 21, 2020).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*