THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ALFRED GURLEY	)	OEA Matter No. 1601-0008-05A08
Employee	)	
	)	Date of Issuance: June 25, 2008
v.	)	
	)	Joseph E. Lim, Esq.
	)	Senior Administrative Judge
D.C. PUBLIC SCHOOLS	)	
Agency	)	

Barbara B. Hutchinson, Employee Representative
Harriet Segar, Esq., Agency Representative

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL BACKGROUND

On November 24, 2004, Employee, an Investigator with the District of Columbia Public Schools, filed a petition for appeal from Agency's final decision separating him from Government service due to inexcusable neglect of duty, insubordination, and absence without leave.

Agency did not submit its Answer to Employee's petition for appeal by February 15, 2005, despite being cautioned that a failure to do so could result in a decision in Employee's favor, and despite being given an extension of time in which to submit its Answer. Pursuant to Rule 622.3(b), Agency's failure to submit its Answer constituted a failure to defend its action separating Employee, and thus, on March 21, 2005, I issued an Initial Decision (ID) in Matter No. 1601-0008-05, reversing Agency's action; and ordered Agency to reinstate Employee to his position of record or a comparable position with all back pay and benefits due him.

Agency appealed the decision, and on April 14, 2008, the Office of Employee Appeals (OEA) board issued an Opinion and Order on Petition for Review (O&O) affirming that Agency's answer must be mailed or personally delivered within 30 days of the service of the petition for appeal as per OEA Rule 608.2. OEA Rule 608.3-6 states that Agency's answer must be mailed, not faxed. The DC Court of Appeals has held that this is a mandatory deadline. *District of Columbia Public Employee Relations Board v. DC Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991). This decision became final on April 21, 2008.

On May 12, 2008, Employee filed a motion for award of attorney fees. Agency filed its opposition to the motion on May 30, 2008, pursuant to OEA Rule 635.1.[1] In its response, Agency did not question the legality of Employee's fee petition, only its specifics. Employee filed her reply to Agency's opposition on June 12, 2008. 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 appealed his separation from his position as an investigator with Agency and asked to be restored to his job with all back pay and benefits due him. Agency has not appealed this Office's final decision restoring Employee to his position by the April 21, 2008 deadline. 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

[1] 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."

"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.

Despite ample warnings and additional time granted, Agency did not properly submit its Answer to Employee's petition for appeal by February 15, 2005. Additionally, Agency has not argued that attorney fees are not warranted in the interest of justice. I conclude that Agency's delay in responding to Employee's appeal is a manifestation of Allen Factor #4, above. Therefore, I further conclude that an award of reasonable attorney fees is warranted in the interest of justice.

REASONABLENESS OF ATTORNEY FEES

Counsel's submission was detailed and included the specifics of the services provided on Employee's behalf. Employee requested an award of $8,957.85 in attorney fees and costs for services performed from October 12, 2004 through May 9, 2008. Agency argued that the fee request is unjustified; that the fee petition includes work done before other tribunals and that Employee has not met his burden of proving that he is entitled to his fee request.

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 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.[2] 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). 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 year allows for the rise in the costs of living to be factored into the equation.

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 is asking that Attorney Hutchinson be compensated at hourly rate of $225.00 for services rendered from October 12, 2004, through May 9, 2008. Employee does not back up his hourly rate request other than with a bare assertion that this is the agreed upon hourly rate he has with his attorney. Employee fails to present an affidavit of the attorney's education and experience.

The OEA Board has held that the failure to provide adequate factual support for attorney's hourly rate does not warrant a denial of fees. "The total denial of fees is a stringent sanction which is only justified in extraordinary circumstances." OEA Matter No. 1601-0018-86AF87, p. 4 (June 15, 1988), _D.C. Reg._( ). The presiding official is required to make a reasoned determination of a reasonable hourly rate.

The hours claimed in this matter were expended between October 12, 2004, and May 9, 2008. According to the latest Laffey Matrix for the Washington, D.C. area, the reasonable hourly rate for attorneys for work performed in June 1, 2004, through May 31, 2005, is $239; for work performed in June 1, 2005, through May 31, 2006, is $249; for work performed in June 1, 2006, through May 31, 2007, is $255; for work performed in June 1, 2007, through May 31, 2008, is $268. Since the hourly rate that Employee is asking for is less than the minimum hourly rate that his attorney is entitled, I conclude that the hourly rate of $225.00 is reasonable.

B. Number of hours expended

[2] A copy of the Laffey Matrix, complete through June 1, 2005 - May 31, 2008, is attached to this addendum decision.

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

Employee lists the hours and the type of work he performed by date, month and year. Agency registers its opposition to the amounts claimed by stating that all legal work done at the Agency level and not before this Office should not be awarded. Agency asserts that the award of attorney fees must directly involve proceedings before the Office of Employee Appeals and points out that no hearing was conducted in this matter. Agency states that Employee has submitted numerous invoices for legal services not performed before this Office.

Specifically, Agency objects to the following: 1) 12/8/2004 prepare letter rescheduling DCPS hearing – 10 minutes or 0.17 hour; 2) 12/30/2004 Preparation for DCPS hearing – 2 hours 30 minutes or 2.5 hours; 3) 1/4/2005 Prepare for DCPS hearing – 6 hours 15 minutes or 6.25 hours; 4) 1/5/2005 Hearing DCPS - 6 hours 30 minutes or 6.50 hours. The total disputed hours is 15 hours 25 minutes or 15.42 hours. Thus, out of the 39 hours 20 minutes that Employee is claiming, Agency objects to 15 hours 25 minutes of it. Agency's objection rests on the premise that legal services performed at the Agency level should not be awarded by this Office.

Contrary to Agency's assertion, this Office has awarded attorney's fees for representation of an employee in proceedings before the agency. See *McCall v. Department of Human Services*, OEA Matter No. 1601-0134-91AF92 (January 28, 1993), ___D.C. Reg. _( ).[3]

I have reviewed the hours claimed, as well as Agency's objections to some of them, and have determined that the employee's claim for 39 hours and 20 minutes or 39.33 hours for the work done in this matter is reasonable. I therefore find that Mr. Gurley has justified 39.33 hours of work expended in this Matter.

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[3] However, apart from proceedings before this Office and the Agency, this Office may not award attorney fees for work done elsewhere. In *Jenkins v. D.C. Public Schools*, OEA Matter No. J-0050-91AF92, *Opinion and Order* issued March 18, 1994, _D.C. Reg.__ ( ), this Office ruled that absent any statutory provision expressly granting such authority, this Office has no jurisdiction over the granting of attorney fees for work done before any court or tribunal other this Office.

Employee also claims $107.85 in costs such as postage, copying, parking, and photo processing, that were incurred in litigating this matter. In *Employee v. Agency*, OEA Matter No. 1601-0174-81AF85, *Order on Attorney Fees* (June 18, 1987), __ D.C. Reg. __ ( ), the OEA Board held that costs, if reasonable, are recoverable. *See also Laffey v. Northwest Airlines, Inc*., 746 F.2d 4, 30 (D.C. Cir. 1984). I have reviewed the billing statements, and I conclude that the costs claimed are reasonable.

To summarize, I find that counsel has met his burden of proving that the amount of attorney fee requested is proper and reasonable.

ORDER

It is hereby ORDERED that Agency pay Employee, within thirty (30) days from the date on which this addendum decision becomes final, $8,957.85 in attorney fees and costs.

FOR THE OFFICE:

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JOSEPH E. LIM, Esq.
Senior Administrative Judge