

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
WINFRED L. STANLEY)	OEA Matter No. J-0075-98A08R10
REGINALD L. SMITH, SR.)	OEA Matter No. J-0074-98A08R10
JOHN C. DANIELS)	OEA Matter No. J-0081-98A08R10
Employees)	
)	Date of Issuance: June 1, 2011
v.)	
)	Joseph E. Lim, Esq.
METROPOLITAN POLICE DEPARTMENT)	Senior Administrative Judge
Agency)	
_____)	

Kevin Turner, Esq., Agency Representative
Steven C. Leckar, Esq., Employee Representative
Robert Boraks, Esq., Employee Representative

CORRECTED ATTORNEY FEES DECISION ON REMAND

INTRODUCTION

On March 2, 1998, Employees Smith and Stanley appealed from Agency's actions which they claimed caused them to involuntarily retire. Employee Daniel filed his appeal on March 9, 1998 for the same reasons as Employees Smith and Stanley.

I held a pre-hearing conference on November 29, 2000 and consolidated all three matters before holding a status conference on October 16, 2002. Employees requested a stay of the matters pending a decision of the United States District Court for the District of Columbia on the case they filed on essentially the same issues before this Office. See *Stanley, et al v. District of Columbia, et al.*, Case No. 1:98-CV-02780. On September 25, 2002, the U.S. District Court disposed of the case in its entirety, essentially remanding the matter to this Office for Employees to exhaust their administrative remedies. I held a hearing on July 21 and 23, 2003. On January 14, 2004, I issued a decision declaring that this Office lacked jurisdiction over the appeals in light of my finding that Employees voluntarily retired.

Employees appealed the decision and on November 1, 2004, Superior Court Associate Judge Michael L. Rankin issued an Order reversing the January 14, 2004 decision, holding that this Office does have jurisdiction, and ordering this Office to enter an Order in accordance with his Order. On January 10, 2005, I issued an Initial Decision on Remand in accordance with the Superior Court Order. Agency appealed the Superior Court Order. On November 24, 2004, Employees filed a

Motion for Attorneys' Fees and Expenses. On January 12, 2005, I dismissed Employees' fee motion for being premature.

On February 28, 2008, the District of Columbia Court of Appeals affirmed the Superior Court decision. On April 24, 2008, and on June 25, 2008, Employees filed their Amended Fee Petition. On December 4, 2008, I awarded \$143,971.94 in attorney fees and costs to Employees. Because Employees had asked for \$226,760.63, they appealed the decision. Agency then appealed the Superior Court's attorney fee award which granted Employees' entire fee request. The D.C. Court of Appeals reversed the Superior Court order and ordered the Superior Court to follow the normal remedy of remanding to the agency to deal with the concerns it had found. Thus, on September 17, 2010, the Superior Court of the District of Columbia remanded the issue of attorneys' fees with a directive to explain with more specificity the reductions and denials of some attorney fee items.

I held several status conferences, the first on October 20, 2010, and ordered the parties to engage in settlement discussions. In the meantime, the parties submitted their respective arguments after Employees submitted their final fee petition.¹ On May 16, 2011, the parties informed me that they could not settle.

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). In their appeals, Employees had sought reinstatement to their prior positions on the ground that their retirements were coerced and thus involuntary. Employees were

¹ Employees submitted additional attorney fee claims for the work relating to the remand.

successful in their quest and had been reinstated. Agency never asserted that Employees were not in fact the prevailing parties. Based on the record of this case, I conclude that Employees are prevailing parties.

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 on February 13, 1998, when Employees were coerced into retiring by then Interim Chief Sonya Proctor. In this matter, I conclude that Agency's actions fall under numbers one through three of the above Allen factors. Agency engaged in a prohibited personnel practice, agency's action was clearly without merit, and Agency initiated the action against the employees in bad faith to exert pressure on the employees to act in certain ways. Additionally, Agency has not argued that attorney fees are not warranted in the interest of justice. Therefore, I further conclude that an award of reasonable attorney fees is warranted in the interest of justice.

REASONABLENESS OF ATTORNEY FEES

Counsels' submission was detailed and included the specifics of the services provided on Employees' behalf. Employees requested an award of \$266,085.85 in attorney fees² and \$5,270.88 in costs for services performed from February 23, 1998, through March 1, 2011. Thus, the total amount sought was \$271,356.73 to be divided among three law firms. The three law firms which represented the employees in this matter and requested fees were Butera & Andrews, Garvey Schubert Barer, and Shainis & Peltzman, Chartered. Five attorneys (Stephen Leckar of Butera & Andrews law firm and later, Shainis & Peltzman law firm; Stanislava Kimball of Butera & Andrews law firm; John Jamnback of Boraks & Jamnback law firm and later, Garvey Schubert Barer law firm; Robert Boraks of Boraks & Jamnback law firm and later, Garvey Schubert Barer law firm; and Amy Levenson-Jones of Garvey Schubert Barer law firm) represented the Employees in various stages of this matter.

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.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). 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 was 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.

² Employees had asked for \$221,489.75 in attorney fees back in 2008. However, they have since requested additional fees of \$44,596.10 for 2010-2011 after the matter was remanded by the D.C. Superior Court on the issue of attorney fees.

³ A copy of the Laffey Matrix, complete through June 1, 1994 - May 31, 2008, is attached to this addendum decision.

In their attorney fees petition, Employees' attorneys briefly state their legal work experiences practicing law before different state and federal tribunals. The hours claimed in this matter were expended between February 23, 1998, and April, 2008. Employees back up their hourly rate request with a copy of the Laffey Matrix table for 2008.

Agency objects to the use of the Laffey Matrix in setting the attorneys' hourly rates; arguing that a more appropriate rate would be one based on current Equal Access to Justice Act rates. However, the D.C. Superior Court's remand order clearly specifies that the Laffey Matrix be used, so the Matrix is employed here.

The following discussion will focus on the reasonableness of the requested rates *vis a vis* the Laffey Matrix. Employees are asking that Attorney Robert Boraks with his 39 years of experience be compensated at hourly rate of \$440.00 for his services. However, the Laffey Matrix does not allow a single flat rate, regardless of the attorney's experience, for all the years of service. Rather, the matrix takes into account the change in the Consumer Price Index for urban consumers for the Washington-Baltimore area, and thus calculates a different hourly rate depending on the year. The matrix divides the year from June 1 of the previous year to May 31 of the current year.

Thus, according to the Laffey Matrix, the proper hourly rates for an attorney with 39 years of experience are as follows: March 2 to April 20, 1998: \$406; November 14, 2000, to January 19, 2001: \$468; October 14, 2002, to May 5, 2003: \$522; July 11 to July 23, 2003: \$549; October 11, 2010, to February 26, 2011: \$709.

Where an attorney's requested rate exceeds the Laffey rate, which in this instance by about 10% (\$440 versus \$406), the Laffey rate will apply. Where the attorney's requested rate is less than the Laffey rate, then the requested rate is presumed reasonable. Thus, the approved hourly rates for Attorney Robert Boraks are as follows: March 2 to April 20, 1998: \$406; November 14, 2000, to July 23, 2003: \$440; April 2008: \$645; October 11, 2010, to February 26, 2011: \$709.

Employees are asking that Attorney Stephen Leckar with his 29 years of experience be compensated at hourly rate of \$440.00. According to the Laffey Matrix, the proper hourly rates for an attorney with 29 years of experience are as follows: January 7, 1999: \$424; November 14, 2000 to May 23, 2001: \$468; July 16, 2002 to May 2, 2003: \$522; June 9 to September 3, 2003: \$549; June 1, 2004 to May 31, 2005: \$574; June 1, 2007 to May 31, 2008: \$645; and October 18, 2010, to March 1, 2011: \$709. Thus, following the attorney hourly rate discussion above, the approved hourly rates for Attorney Stephen Leckar are as follows: January 7, 1999: \$424; November 14, 2000 to September 3, 2003: \$440; November 2004: \$574; April 2008: \$645; and October 18, 2010, to March 1, 2011: \$709.

Employees are asking that Attorney John Jamnback who graduated from law school in 1987

be compensated at hourly rates of \$315.00 for his services rendered in 1998; \$390.00 for services rendered from 1999 through 2004.

According to the Laffey Matrix, the proper hourly rates for Attorney Jamnback are as follows: February 23 to May 20, 1998 (11-19 years experience): \$337; August 25, 1999: \$369; November 10, 2000, to May 18, 2001: \$388; November 2004: \$476.

Thus, these are the approved rates for Attorney Jamnback: February 23 to May 20, 1998 (11-19 years experience): \$315; August 25, 1999: \$369; November 10, 2000, to May 18, 2001: \$388; November 2004: \$390.

Employees are asking that Attorney Amy Jones be compensated at hourly rate of \$215.00 (1999-2000) and \$255 (2001-2004). According to the Laffey Matrix, the proper hourly rates for attorneys with her years of work experience are as follows:

November 9, 2000 to April 20, 2001:	\$195
October 14, 2001, to May 31, 2002:	\$249 ⁴
June 1, 2002, to December 28, 2002:	\$267
January 29 to May 5, 2003:	\$267
June 6 to September 4, 2003:	\$280
June 1, 2004 to May 31, 2005:	\$293

Thus, the approved rates for Attorney Jones are as follows:

November 9, 2000 to April 20, 2001:	\$195
October 14, 2001, to May 31, 2002:	\$249
June 1, 2002, to November 2004:	\$255

Employees are asking that Attorney Stanislava Kimball be compensated at hourly rate of \$215.00. According to the Laffey Matrix, a reasonable hourly rate for legal services performed in 2003 for an attorney with one to three years experience is \$217.00. Thus, the requested hourly rates of \$215.00 for the period of July 1 to August 27, 2003, for Attorney Kimball, is reasonable.

According to the Laffey Matrix, a reasonable hourly rate for paralegal services performed in July 2003 by Erin Shiffer is \$124.

B. Number of hours expended⁵

⁴ Based on her resume, Attorney Jones jumps to the 4 to 7 years experience category by 2001.

⁵ To avoid confusion and duplication, the hours were identified by the date or dates that legal services were rendered, not the date of the invoice itself.

Employee lists the hours and the type of work his attorneys performed by month and year. Because the Employees have the burden of proving that their requested attorney fees are reasonable, I considered only those hours where the services performed are listed. Hours for which no details are provided are disregarded. Likewise, hours in which the work performed is listed but which fails to identify the performer is disregarded as I have no way of ascertaining who the attorney is.

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).

Attorney Robert Boraks

March 2 to April 20, 1998: The requested 4 hours is approved

November 14 to November 20, 2000: The requested 1.7 hours is approved.

December 18 to 29, 2000: No detail was provided for Boraks' 0.20 hour. Thus, it is denied.

January 19, 2001: The requested 0.2 hour is approved.

October 14, 2002: The requested 0.1 hour is approved.

December 12, 2002: The requested 1 hour is approved.

January 29 to May 5, 2003: The requested 6.1 hours is approved.

July 11 to July 23, 2003: The requested 2.6 hours is approved.

April 2008: The requested 8.8 hours updating the fee petition is approved.

October 11, 2010, to February 26, 2011: Of the requested 34.3 hours requested, 19.3 hours were expended in conferences with Steve Leckar regarding the submission of additional attorney fee hours and 12.3 hours in drafting and revising the attorney fee brief on remand for a total of 31.6 hours. In its March 31, 2011, response, Agency argues that Employees' fee request for the period covering 2010 to 2011 should be reduced by 59% for Attorney Boraks because it is excessive and duplicative. Agency states that the resultant pleadings are merely a restatement of procedural history and arguments they have already presented in multiple pleadings before the Superior Court and the D.C. Court of Appeals.

I also note that attorneys with more experience command a higher hourly rate on the reasonable assumption that they expend less time on their tasks as they gain experience and knowledge. Thus where the hours asked for seem excessive in light of the higher hourly rates allowed, I reduce those hours accordingly.

I have reviewed these additional hours and I note that two attorneys seeking to be paid \$709 per hour each expended an inordinate amount of time, 31.6 hours for Boraks and 24.3 hours for Leckar, in conferencing, drafting and revising in what is essentially a supplement to their 2008 fee petition. In other words, they are demanding that Agency pay them an additional \$44,606.91 (\$24318.70 + \$20288.21) simply for asking Agency for more attorney fees! I thus concur with Agency's concerns and reduce the 31.6 hours by the requested 60%. Thus, the approved hours for this period is 18.96 hours (2.7 + 12.64) out of the 34.3 hours requested.

Attorney Stephen Leckar

January 7, 1999: The requested 0.2 hours is approved.

November 14, 2000 to May 23, 2001: The requested 4.3 hours is approved.

July 16 to October 15, 2002: The requested 2 hours is approved.

December 12, 2002, to September 3, 2003: The requested 147.30 hours is approved.

June 9 to September 3, 2003: As Agency has not objected to these hours, the requested 110.2 hours is approved.

November 2004: The requested 30 hours preparing the fee petition is approved.

April 2008: The requested 2.8 hours updating the fee petition is approved.

October 18, 2010, to March 1, 2011: Of the 28.6 hours requested, 1.8 hours were expended in conferences with Attorney Boraks regarding the submission of additional attorney fee hours and 22.5 hours in drafting and revising the attorney fee brief on remand for a total of 24.3 hours.

In its March 31, 2011, response, Agency argues that Employees' fee request for the period covering 2010 to 2011 should be reduced by 50% for Attorney Leckar because it is excessive and duplicative. Agency states that the resultant pleadings are merely a restatement of procedural history and arguments they have already presented in multiple pleadings before the Superior Court and the D.C. Court of Appeals.

I have reviewed these additional hours and following the same rationale I noted in Boraks' case, I concur with Agency's concerns and thus reduce the 24.3 hours by the requested 50%. Thus, the approved hours for this period is 16.45 hours (4.3 + 12.15) out of the 28.6 hours requested.

Attorney John Jamnback

The February 23 to May 20, 1998, services lists 27.1 hours. I double-checked the math, and came up with 20.9 hours. Because Agency raised no objections to the services provided, the entire amount is approved.

The August 10, 1999, services listed 0.20 hours for Jamnback which is approved.

Although the August 25, 1999, services listed 11.10 hours for Jamnback and 0.75 hours for Associate Amy Jones, it provided work detail for only 0.25 hour. Thus, only 0.25 hours is approved.

November 10 to November 20, 2000: The requested 2.4 hours is approved.

December 18 to 29, 2000: The requested 0.9 hours is approved.

January 16 to January 19, 2001: The requested 1.9 hours is approved.

February 28, 2001: The requested 0.40 hour is approved.
April 20, 2001: The requested 1.75 hours is approved.
April 24 to May 18, 2001: The requested 1.1 hours is approved.
November 2004: The requested 0.75 hours preparing the fee petition is approved.

Attorney Amy Levenson-Jones

November 9 to November 21, 2000: The requested 2.4 hours is approved.
December 18 to 29, 2000: The requested 3.55 hours is approved.
January 2 to January 19, 2001, services lists 4.1 hours. I double-checked the math, and came up with 3.85 hours. Thus, only 3.85 hours is approved
February 28, 2001: The requested 0.75 hours is approved.
April 16 to 20, 2001: Of the requested 2.5 hours, only 1.25 hours was accounted for. Thus, 1.25 hours is approved.
October 14 to 15, 2001: The requested 1.25 hours is approved.
December 9 to 28, 2002: The requested 9 hours is approved.
January 29 to May 5, 2003: Agency had not voiced any objection to the requested 86.15 hours, thus, they are approved.
June 6 to July 31, 2003: Agency had not voiced any specific objection to the requested 116.8 hours. Thus, they are approved.
September 3 to 4, 2003: The requested 4.5 hours is approved.
November 2004: The requested 2 hours preparing the fee petition is approved.

Attorney Stanislava Kimball

December 12, 2002, to September 3, 2003: The requested 15.2 hours for research is approved.

Paralegal Erin Shiffer

July 17 to July 17, 2003: The requested 5.1 hours is approved.

Miscellaneous hours

Employee attached two pages of handwritten time records that were incomplete and did not identify the year the services were performed. Thus, I cannot decipher which attorney performed these services or when. In submitting his fee petition, Employee(s) has the duty to provide sufficiently detailed information about hours logged and work done. "Casual after-the-fact estimates of time expended on a case are insufficient to support an award of attorneys' fees. Attorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney."⁶ Due to this failure, I therefore deny these 7.8 hours requested.

In summary, the approved reasonable attorney fees for Employees are as follows:

⁶ *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 at 1327 (1982).

Attorney Robert Boraks

March 2 to April 20, 1998: \$406 x 4 hours	= \$1624.00
November 14, 2000, to July 23, 2003: \$440 x 11.7 hours	= \$5148.00
April 2008: \$645 x 8.8 hours	= \$5676.00
October 11, 2010, to February 26, 2011: \$709 x 18.96 hours	= <u>\$13442.64</u>
Total	\$25890.64

Attorney Stephen Leckar

January 7, 1999: \$424 x 0.2 hour	= \$ 84.80
November 14, 2000 to September 3, 2003: \$440 x 263.8 hours	= \$116072.00
November 2004: \$574 x 30 hours	= \$ 17220.00
April 2008: \$645 x 2.8 hours	= \$ 1806.00
October 18, 2010, to March 1, 2011: \$709 x 16.45 hours	= <u>\$ 11663.05</u>
Total	\$146845.85

Attorney John Jamnback

February 23 to May 20, 1998: \$319 x 20.9 hours	= \$6667.10
August 25, 1999: \$369 x 0.45 hour	= \$ 116.05
November 10, 2000, to April 20, 2001: \$388 x 8.45 hours	= \$3278.60
November 2004: \$390 x 0.75 hours	= <u>\$ 292.50</u>
Total	\$10354.25

Attorney Amy Levenson-Jones

November 9, 2000 to April 20, 2001: \$195 x 11.80 hours	= \$ 2301.00
October 14, 2001, to October 15, 2001: \$249 x 1.25 hours	= \$ 311.25
December 9, 2002 to November 2004: \$255 x 209.45 hours	= <u>\$53409.75</u>
Total	\$56022.00

Attorney Stanislava Kimball

July 1 to August 27, 2003: \$215 x 15.2 hours.	= <u>\$3268.00</u>
Total	\$3268.00

Paralegal Erin Shiffer

July 17 to July 17, 2003: \$124 x 5.1 hours	= <u>\$632.00</u>
Total	\$632.00

Grand Total for Attorney fees and paralegal fees	\$243,012.74
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Attorney Costs⁷

Employees also requested that the following expenses be reimbursed: messengers \$26.10, postage \$15.98, photocopying \$669.00, long distance telephone \$21.00, computerized legal research \$883.10, taxi \$135.00, transcripts of depositions \$3,484.61. I find these to be reasonable and since there are no objections from the Agency, I award the entire \$5,234.79 in expenses.

To summarize, I find that \$23,073.11 sought in attorney fees is not substantiated. In conclusion, I therefore find that Employee is entitled to the reduced grand total of allowable attorney fees of \$243,012.74 and the attorney expenses of \$5,234.79 for a grand total of \$248,247.53.

ORDER

It is hereby ORDERED that Agency pay Employee, within thirty (30) days from the date on which this addendum decision becomes final, \$248,247.53 in attorney fees and costs.⁸

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

⁷ Employees' Memorandum Supporting Amended Petition for Attorney's Fees and Expenses, page 12.

⁸ Given that Agency has already paid part of the attorney fees and costs requested, Agency may deduct the amounts it has already paid.