Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them **before** publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
KHADIJAH MUHAMMAD, Employee	
v.	OEA Matter No.: 1601-0033-07AF11
DISTRICT OF COLUMBIA GOVERNMENT OPERATIONS DIVISION, Agency	Date of Issuance: March 4, 2014

OPINION AND ORDER
ON
ATTORNEY'S FEES

Khadijah Muhammad ("Employee") worked as an Office Automation Assistant with the District of Columbia Government Operations Division ("Agency"). On October 24, 2006, Employee received a final notice of removal from Agency. The notice provided that Employee was charged with Unauthorized Absence totaling 1,032 hours between March 20, 2006 and September 14, 2006.[1]

On December 1, 2006, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). She explained that she was ordered to bed rest by her doctor because of pregnancy complications. Employee contended that she provided Agency with the proper medical documentation regarding her leave of absence and immediately contacted her supervisor

[1] *Petition for Appeal,* Exhibit B (December 1, 2006).

to return to work after she received medical clearance.[2]

On May 19, 2008, the Administrative Judge ("AJ") issued her Initial Decision. She held that the testimonial and documentary evidence supported the conclusion that Employee submitted sufficient medical documents to give Agency notice of her illness. As a result, she ruled that Agency did not meet its burden of proof by a preponderance of the evidence and reversed its decision to remove Employee from her position.[3]

On June 23, 2008, Agency filed a Petition for Review with the OEA Board requesting that it reverse the Initial Decision because the AJ's finding that Employee was medically incapacitated from March 20, 2006 until June 30, 2006 was not supported by substantial evidence.[4] The Board ruled that OEA had consistently held that "when an employee offers a legitimate excuse, such as illness, for being absent without leave, the absence is justified and therefore excusable."[5] Moreover, the Board reasoned that if an employee's absence is excusable, the absences cannot "serve as a basis for an adverse action."[6] Accordingly, Agency's Petition for Review was denied.[7]

After Employee filed a Motion for Enforcement, a Status Conference on compliance was held on April 20, 2011, wherein Employee submitted that she had been reinstated to her position with Agency. However, the issues surrounding back-pay, benefits, and attorney's fees remained unresolved. The parties agreed to mediate the issue of attorney's fees, and the AJ ordered the parties to file status reports on the remaining issues.[8] This went on for a few months until November 15, 2011, when Employee conceded that she received her back-pay and benefits but

[2] *Petition for Appeal,* p. 2 (December 1, 2006).
[3] *Initial Decision* (May 19, 2008).
[4] *Petition for Review*, p. 5 (June 23, 2008).
[5] Citing *Employee v. Agency*, OEA Matter No. 1601-0137-82 (1985).
[6] Citing *Richardson v. Department of Corrections,* OEA Matter No. 1601-0196-97 (February 1, 2002).
[7] *Muhammad v. D.C. National Guard,* OEA Matter No. 1601-0033-07, *Opinion and Order on Petition for Review* (March 1, 2010).
[8] *Order Regarding Compliance* (August 22, 2011).

provided that her issues regarding attorney's fees and damages remained outstanding.[9] She subsequently submitted a revised final invoice for legal fees and expenses.[10] The fees were based on the *Laffey* Matrix for hours billed by her attorney, legal assistant, and administrative assistant.[11]

In response to Employee's request for attorney's fees, Agency contested the reasonableness of the hours claimed and the hourly rate sought by Employee's attorney. It reasoned that pursuant to *Surgent v. Department of Human Services*, OEA Matter No. 2405-0096-91A94 (September 8, 1999), OEA adopted the Lodestar method to determine attorney's fees.[12] Agency provided, *inter alia*, that Employee's counsel's billable hours were not sufficiently detailed; that duplicative hours should be subtracted from the total; that the number of hours should be reduced for excessive time expended; and that hours billed for purely clerical tasks should be subtracted or reduced. Moreover, it argued that the *Laffey* Matrix rates should not apply because Employee failed to establish that her counsel was entitled to such rates.[13]

Following a Status Conference where oral arguments were provided, the AJ issued an Addendum Decision on Attorney's Fees.[14] She held that under D.C. Official Code §1-606.08, "an agency may be directed to pay reasonable attorney fees if the employee is the prevailing party . . ." To determine whether attorney's fees were merited, the AJ considered the Merit

[9] *Status Report from Employee* (November 15, 2011).
[10] At this time, Employee requested $38,653. *Employee's Submission of Attorney's Fees and Expenses* (March 20, 2012).
[11] The Matrix is derived from the case, *Laffey v. Northwest Airlines, Inc*., 572 F. Supp. 354 (D.D.C. 1983).
[12] Under the Lodestar method, attorney's fees are calculated by multiplying the number of hours reasonably expended on the matter by a reasonable hourly rate.
[13] Agency explained that Employee's case was not complex; she failed to show why her counsel was entitled to the *Laffey* rates; and Employee's counsel could not bill the government for more than he would have received had Employee paid the bill. *Agency's Response to Employee's Submission of Attorney's Fees and Expenses,* p. 4-16 (April 5, 2012).
[14] Prior to the Status Conference, Employee submitted a revised final invoice for legal fees and expenses which requested that she be awarded $42.905.60. She reiterated that the *Laffey* Matrix method should be used because it is the standard used by OEA. *Employee's Resubmission of Attorney's Fees and Expenses and Reply to Division's Opposition* (July 24, 2012).

Systems Protection Board's rationale in *Allen v. U.S. Postal Services., 2 M.S.P.R. 420* (M.S.P.B. July 22, 1980) and the five factors it listed for making this determination.[15] Ultimately, the AJ ruled that Employee was entitled to an award of attorney's fees.[16]

With regard to the reasonableness of the hourly rate, the AJ concluded that utilizing the *Laffey* Matrix method would not be appropriate in this matter. She cited *Blum v. Stenson,* 465 U.S. 886 (1984) and reasoned that "[t]he 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, expertise, or reputation."[17] She held that Employee's counsel did not meet this burden and awarding the *Laffey* Matrix fees ". . . would result in a windfall to which he is not entitled."[18] The AJ reviewed the fee agreement that Employee's counsel submitted and concluded that the hourly rates in the agreement, including the time expended by each individual performing the work and the costs, were reasonable.[19] Consequently, she awarded $21,454.90 for fees and costs.[20]

Agency disagreed with the decision and filed a Petition for Review on October 11, 2012. It argues that the decision was not based on substantial evidence, and it failed to address all

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[15] The factors in *Allen* were:

1. Did agency engage in a prohibited personnel practice;
2. Was agency's action clearly without merit or wholly unfounded, or was the employee substantially innocent of the charges brought by the agency;
3. Did agency initiate the action against the employee in bad faith, including:
    a. Was agency's action brought to harass the employee;
    b. Was agency's action brought to exert improper pressure on the employee to act in certain ways;
4. Did agency commit a gross procedural error which prolonged the proceeding or severely prejudiced the employee; and
5. Did agency know or should have known that it would not prevail on the merits when it brought the proceeding.

[16] *Addendum Decision on Attorney's Fees,* p. 2-3 (September 6, 2012).
[17] *Id.,* 3-4.
[18] *Id.*
[19] The AJ awarded $150.00 per hour for services provided by Employee's counsel; $85.00 per hour for paralegal services; and $50.00 per hour for administrative assistant services.
[20] *Id.* at 5.

material issues of fact properly raised in its oppositions to Employee's fee requests. Agency maintains its position that the hours claimed by Employee are not reasonable. It presents the same arguments provided in its April 5, 2012 submission and asserts that the number of hours should be either subtracted or reduced for excessive time expended; hours billed for unnecessary or unwarranted tasks; hours billed for purely clerical tasks; hours billed for tasks before other tribunals; and hours not sufficiently detailed. Thus, it requests that the Addendum Decision on Attorney's Fees be reversed and remanded for further consideration of the number of hours awarded.[21]

Jurisdiction for OEA Board to Consider Petition on Attorney's Fees

The general rule regarding Petitions for Review is that the OEA Board has jurisdiction to consider a review of the Initial Decision. D.C. Official Code § 1-606.03(c) provides that "the initial decision of the Hearing Examiner shall become final 35 days after issuance, unless a party files a petition for review of the initial decision with the Office within the 35-day filing period." Moreover, OEA Rule 633.1 provides that "any party to the proceeding may serve and file a petition for review of an initial decision with the Board within thirty-five (35) calendar days of issuance of the initial decision." Although neither addresses the Board's ability to consider a Petition for Review of Attorney's Fees, we are given guidance in OEA Rule 634.5. This rule provides that "a decision by an Administrative Judge on a request for attorney fees shall be considered an addendum to the initial decision." Thus, because an attorney's fee decision is a direct extension of the Initial Decision, this Board does have authority to consider Agency's Petition for Review on Attorney's Fees.

Attorney's Fees

In accordance with D.C. Official Code §1-606.08, an Administrative Judge ". . . may

[21] *Agency's Petition for Review* (October 11, 2012).

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."[22] It is without question that Employee is the prevailing party in this matter. Agency concedes this point in its Response to Employee's Submission of Attorney's Fees and Expenses.[23] Moreover, Agency explained in its Petition for Review that it "does not contest that Employee is entitled to reasonable attorney's fees."[24] Therefore, both requirements of the D.C. Official Code §1-606.08 and OEA Rule 634.1 have been satisfied. However, Agency does not believe that the AJ's decision on attorney's fees was based on substantial evidence because she failed to address many of the issues of fact it raised regarding the reasonableness of the hours claimed and the hourly rate sought by Employee.

Substantial Evidence

OEA Rule 633.3(c) provides that a "petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a petition for review when the petition establishes that the findings of the Administrative Judge are not based on substantial evidence." Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[25] The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. After reviewing the record, this Board believes that the AJ's assessment of the hourly rate warranted by Employee's counsel was based on substantial evidence. However, the AJ's decision of the time expended by Employee was not

[22] Similarly, OEA Rule 634.1 provides that "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."
[23] Agency clearly provided that "it is uncontested that Employee is the prevailing party." *Agency's Response to Employee's Submission of Attorney's Fees and Expenses*, p. 4 (April 5, 2012).
[24] *Agency's Petition for Review,* p. 5 (October 11, 2012).
[25] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

based on substantial evidence. As a result, we must remand this matter to her for further consideration.

Hourly Rate

The AJ provided a thorough analysis of how she arrived at Employee's representative's true hourly rate. This Board believes that the AJ's decision not to use the *Laffey* Matrix was well-founded. She properly held that the *Laffey* Matrix is to be used as a guide and is not the mandatory measure to be used in all attorneys' fees cases. The AJ relied on *Blum v. Stenson,* 465 U.S. 886 (1984) and *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988) to establish that the burden of proof was on Employee's counsel to provide evidence that the rates he requested were in line with attorneys in the area for similar services and comparable skill, experience, and reputation. At the time of the Addendum Decision on Attorney's Fees, Employee's representative was requesting $305 per hour for the work he performed and $165 per hour for his paralegal.[26]

When discussing his paralegal and his own experience as an attorney, Employee's counsel offered no evidence to the AJ. Instead, he merely claimed he had been practicing law for more than six years and had participated in over fifty evidentiary hearings.[27] However, this Board must note that at the time that Employee filed her Petition for Appeal with OEA, her attorney had been barred only for one year. Thus, *assuming arguendo*, he would not have been entitled to $305 per hour even under *Laffey*. The AJ considered this in her analysis.

She asserted that Employee provided that he was barred in December of 2005 and that the current case was the first that he had handled since becoming an attorney. As a result, the AJ

[26] *Employee's Resubmission of Attorney's Fees and Expenses and Reply to Division's Opposition,* p. 6 (July 24, 2012).
[27] As for his paralegal, Employee's attorney claimed that she had more than fifteen years of experience as a paralegal with eight years specializing in employee and labor relations.

correctly held that Employee's counsel was not entitled to the fees outlined in *Laffey*. The AJ relied on the one document provided by Employee's counsel regarding fees – his retainer agreement – when deciding the ultimate hourly rate to be paid. In the retainer agreement, Employee's counsel clearly outlines that he was to be paid $150 per hour; his paralegal would be paid $65 per hour;[28] and his administrative assistant would be paid $50 per hour.[29] The Court in *Blum* held that "the fees charged often are based on the product of hours devoted to the representation multiplied by the lawyer's customary rate." Employee's counsel's customary rate is clearly outlined in the retainer at $150 per hour. Thus, this Board believes that given Employee's counsel's lack of experience at the time of the appeal and the plain language of his retainer agreement, $150 per hour was a reasonable rate. Accordingly, the AJ's decision to award $150 per hour to counsel was based on substantial evidence.

Number of Hours Expended/Material Issues of Fact

As for the time spent on the case, 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." 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.[30] As it relates to the reasonableness of the time expended on this case, the AJ simply provides in her Addendum Decision that "a review of the time expended by each individual does not appear unreasonable [ ] and will be awarded."[31] However, the *Frazier* Court also found that an award of attorney's fees should be modified upon

[28] It should be noted that the AJ incorrectly provided that the paralegal was to be paid $85 per hour in the Addendum Decision. The $85 per hour rate was reserved for law clerks under the retainer agreement. Therefore, the AJ should adjust the rate when re-calculating the final fees owed.
[29] *Employee's Submission of Attorney's Fees and Expenses,* Exhibit A (March 20, 2012).
[30] It reasoned that the trial court has a superior understanding of the litigation (citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 1941 (1983)).
[31] *Addendum Decision on Attorney's Fees,* p. 2-4 (September 6, 2012).

proof of an abuse of discretion. It concluded that "the failure to articulate the reasons for a particular fee award renders the trial court's determination effectively unreviewable and constitutes an abuse of discretion warranting reversal."[32] The Court further reasoned in *District of Columbia v. Jerry M.*, 580 A.2d 1270 (1990), that although deference is given to the judge's superior understanding of the matters for which fees are sought, the judge does not enjoy unqualified discretion in fixing the fee amount (citing *Hensley*, 461 U.S. at 437, 103 S.Ct. at 1941).[33]

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court of the United States provided that:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

In the current matter, Employee's counsel only submitted a chart of billable hours. However, Agency raised several discrepancies with the hours listed that were not addressed by the Administrative Judge.[34] Agency accurately argued that OEA has consistently held that the

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[32] *Frazier v. Franklin Investment Company, Inc*., 468 A.2d 1338, 1341 (1983).

[33] The court in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), reasoned that it is important for those making attorney fee awards to provide a concise but clear explanation of its reasons for the fee award.

[34] In accordance with OEA Rule 633.3(d) ". . . the Board may grant a petition for review when the petition establishes that the initial decision did not address all material issues of law and fact properly raised in the appeal." The D.C. Court of Appeals held in *Dupree v. D.C. Office of Employee Appeals*, 36 A.3d 826, 832 (D.C. 2011), that when the AJ is made aware of material issues in an employee's notice of appeal and there is the absence of any discussion of the arguments in OEA's decision, the determination cannot be made that all the issues were fully considered. Moreover, the court held in *District of Columbia Department of Mental Health v. District of Columbia Department of Employment Services*, 15 A.3d 692, 697 (D.C. 2011) (quoting *Branson v. District of Columbia Department of Employment Services*, 801 A.2d 975, 979 (D.C. 2002)) that it could not assume that "[an] issue has been considered sub silentio when there is no discernible evidence that it has." The *Dupree* court (quoting *Murchison v. District of Columbia Department of Public Works*, 813 A.2d 203, 205 (D.C. 2002)) further reasoned that "to pass muster, an administrative agency decision must state findings of fact on each material, contested factual issue; those findings must be supported by substantial evidence in the agency record; and the agency's conclusions of law must follow rationally from its findings."

number of hours reasonably expended is calculated by determining the total number of hours and subtracting all non-productive, duplicative, and excessive hours.[35] In its Petition for Review, Agency presented several arguments before the AJ which highlight excessive hours expended by counsel and his paralegal.[36] However, none of these arguments were addressed by the Administrative Judge in her Addendum Decision on Attorney's Fees.

The AJ offered no analysis on several very serious allegations raised by Agency regarding non-productive, duplicative, and excessive hours charged by Employee's counsel. This Board cannot blindly support the AJ's decision that such charges were reasonable without substantial evidence that she adequately considered the alleged time spent on this case. The Court in *District of Columbia v. Jerry M.* (citing *Copeland v. Marshall*, 205 U.S.App.D.C. 390, 401, 641 F.2d 880, 891-92 (1980)), clearly provided that "it does not follow that the amount of time *actually* expended is the amount of time *reasonably* expended." Moreover, the *Hensley* Court found that "the applicant should exercise 'billing judgment' with respect to hours worked and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims."[37] In this case, the AJ held that the time reported by Employee's counsel actually spent on this case was reasonable. Additionally, Employee submitted several versions of his billing records to the AJ. Although each new record contained more information than those previously provided, there is still a great deal of general descriptions of services of which

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[35] *Cocome v. D.C. Lottery and Charitable Games Control Board,* OEA Matter No. 1601-0014-84AF02 (June 5, 2003); *Hoston v. D.C. Public Schools,* OEA Matter No. 1601-0022-04AF01 (December 14, 2007); *Gurley v. D.C. Public Schools,* OEA Matter No. 1601-0008-05AF08 (June, 25, 2008); *McCray v. D.C. Public Schools,* OEA Matter No. 1601-0010-03AF07 (May 21, 2007); *Junious v. D.C. Child and Family Services,* OEA Matter No. 1601-0057-01AF07 (May 7, 2007); and *Richards and Ulis v. D.C. Public Schools, Department of Transportation*, OEA Matter Nos. 1601-0063-04AF06 and 1601-0092-04AF06 (December 22, 2006) (citing *Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985)).

[36] Additionally, it provided examples of time spent researching non-productive issues like punitive damages. Moreover, Agency argued that counsel charged for tasks performed before other tribunals other than OEA. Furthermore, Agency alleged that counsel did not adequately document the type of work performed to determine its extent of reasonableness, and he requested compensation for action on events that did not occur. *Agency's Petition for Review*, p. 6-10 (October 11, 2012).

[37] *Id.*

no one can discern is excessive or duplicative because it lacks distinct claims. In his *Memorandum and Points and Authorities in Support of Employee's Resubmission of Attorney's Fees and Expenses and Reply to Division's Opposition*, p. 7-8 (July 24, 2014), Employee's counsel admitted that while assessing Agency's claim of duplicate billing, he noted "that several items that may have been questionable with respect to the paralegal assigned to the case were removed." Based on the record, it is this Board's belief that not only did the AJ neglect to consider several issues of material fact, but she neglected to provide the requisite attention to the calculation of hours expended in this matter.

Because the Addendum Decision on Attorney's Fees is silent on several material issues of fact, this Board cannot hold that the decision is based on substantial evidence. As previously provided, counsel's hourly rate was based on substantial evidence and will stand. Thus, once a reasonable number of hours has been truly determined, under the Lodestar method, the AJ need only multiply the number of hours by the previously ordered hourly rate. Accordingly, we must REMAND this matter to the AJ for further consideration of the number of hours expended by Employee's attorney on the appeal.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review on Attorney's Fees is **GRANTED** and the matter is **REMANDED** to the Administrative Judge for further consideration of the number of hours expended by Employee's attorney on the appeal.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

_____
A. Gilbert Douglass

_____
Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.