THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Robert Tate	)	OEA Matter No. 1601-0117-07A08
Employee	)	
	)	Date of Issuance: March 18, 2009
v.	)	
	)	Joseph E. Lim, Esq.
D.C. Department of Parks and Recreation	)	Senior Administrative Judge
Agency	)	
	)	

Andrea Comentale, Esq., Agency representative
Frederick Schwartz, Jr., Esq., Employee representative

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 10, 2007, Employee, an Information Technology Specialist in the Career Service, filed a petition for appeal from Agency's final decision summarily removing him from his position for "on-duty act and conduct which constitutes an immediate hazard to the Department of Parks and Recreation (DPR) and other District Government employees," and "on-duty act and conduct that interferes with the efficiency or integrity of government operations."

This matter was assigned to me on November 19, 2007. After a hearing held on February 11, 2008, I found that Agency had terminated Employee without cause.[1] Thus, on March 12, 2008, I issued an Initial Decision (ID) in Matter No. 1601-0117-07, in which I found that the Agency had not met its burden of establishing cause for taking adverse action. I ordered Agency to reinstate Employee to his position, and to restore to Employee all pay and benefits of which he was deprived because of the termination. Agency did not appeal, and the Decision become final on April 16, 2008.

Shortly thereafter, Employee filed a motion for award of attorney fees pursuant to OEA Rule 635.1.[2] Despite being given a chance, Agency failed to respond. On November 6, 2008, Employee filed an amended motion for attorney fees. Because Employee's counsel failed to provide any information to back up the requested hourly rate, I issued another order on January 28, 2009, to give

[1] The Agency representative during the hearing was Gail Elkins, Esq.
[2] 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."

Employee another chance to do so. In fairness, I also gave Agency another chance to submit its response to the fee petition. Agency filed its response and Employee filed its counter-response. 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 filed a motion for an award of attorney's fees and a separate compliance motion pertaining to this AJ's determination that Employee was entitled to be reinstated into either his prior position or another equivalent position. Agency conceded that Employee was so entitled, and never asserted that Employee was not in fact the prevailing party. 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 "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 July 11, 2007, when Employee got involved in an altercation with a fellow worker. Employee asserts that his actions were entirely in self-defense and that he was merely trying to protect government property. Agency failed to consider the circumstances and the prior disciplinary records of the employees involved, and immediately concluded that Employee should be terminated. Additionally, Agency has not argued that attorney fees are not warranted in the interest of justice. I conclude that Agency's unwarranted adverse action and its delay in effecting the relief to which Employee was entitled is a manifestation of Allen Factors #2 and #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 $31,832.50 in attorney fees for services performed from July 16, 2007, through January 31, 2009.[3] Employee subsequently submitted a supplementary motion for additional $7,876.00 in attorney fees for services performed from February 13, 2009, through February 21, 2009. Thus, the total amount of requested attorney fees is $39,708.50.

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

3 Employee's initial fee petition indicated that the legal services for $26,690.00 were performed from July 16, 2007 through February 15, 2007. This is obviously a typographical error; so based on the chronology of events in this appeal, I determined the correct date was February 15, 2008. Later Employee also submitted a confusing three sets of fee calculation which had to be analyzed and reconciled to avoid duplication.

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.[4] 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 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 Schwartz be compensated at a flat hourly rate of $425.00 for his services rendered from July 16, 2007, through January 31, 2009, and a flat hourly rate of $440.00 for his services rendered from February 13, 2009, through February 21, 2009.

Employee backs up his hourly rate request with a copy of the Laffey Matrix table for 2003-2007. Based on the Laffey Matrix, Attorney Schwartz's requested hourly rate indicates that he has had at least twenty years of legal experience. Employee backs up his request with a minimal account of the attorney's experience.[5]

The hours claimed in this matter were expended between July 16, 2007 and February 21, 2009. According to the Laffey Matrix, a reasonable hourly rate for legal services performed from July 16, 2007, through February 15, 2008, for an attorney with 20 years or more of experience is $440.00; while a reasonable hourly rate for legal services performed from February 13, 2009, through February 21, 2009, for such an attorney is $465.00. Since Employee's requested hourly rates of $425.00 and $440.00 are less than these amounts, they will be deemed reasonable.

B. Number of hours expended

[4] A copy of the Laffey Matrix from the U.S. Attorney's Office for the District of Columbia, for the period June 1, 2003 - May 31, 2009, is attached to this addendum decision.

[5] Including a resume or affidavit of one's education and experience would better support the requested hourly rate. Employee's counsel's submission fits the bare minimum.

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).

Employee lists the hours and the type of work he performed by month and year. For the period of July 16, 2007, through January 31, 2009, he claims a total of 79.9 hours. For the period of February 13, 2009 through February 21, 2009, he claims a total of 17.9 hours. The total number of hours claimed is 97.8 hours. In his response to Agency's objections, Employee rebutted Agency's allegations that his hours were excessive.

I have reviewed the hours claimed, as well as Agency's objections to some of them, and have determined that some of the hours expended were excessive for the degree of difficulty and the amount of legal service time required in the instant matter. I base this determination in significant part upon my comparison of the professional services provided to other clients that counsel of similar experience has represented in this Office against the same Agency, frequently using very similar pleadings, making the same or nearly identical legal arguments which, although ultimately successful for each of their clients, were not unique. I also base my findings on the degree of legal complexity involved in the issues presented, as well as on my own years of experience as a plaintiff's attorney.

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.

Based on the reasonable assumption that Agency has no objection to the parts of the fee petition it does not specifically mention, I will therefore deal only with the items highlighted by Agency.

Agency asserts that Employee is not entitled to Attorney Fees for any work performed before August 17, 2007, the effective date of his removal, on the grounds that doing so would establish the precedent that an attorney is entitled to attorney fees whenever he or she performs tasks related to a contemplated or proposed disciplinary action by an agency, and that entitlement would not depend upon whether a disciplinary action was actually taken.

Agency's argument is misplaced here. D.C. Official Code § 1-606.08, the statutory authority which authorizes the payment of attorney fees, authorizes the award of attorney fees **only** if

Employee is the prevailing party. (Emphasis added.) Thus, a contemplated disciplinary action will not result in the award of attorney fees unless said disciplinary action was actually carried out.

Agency complains that the 4.6 hours claimed on September 7, to 10, 2007, for reviewing the final termination letter, the hearing officer's report, and preparing and filing an appeal, is excessive and merits 2 hours at the most. Based on the billing statements, Employee counsel has already expended a total of 9.3 hours interviewing his client, reviewing the materials and researching the issues before Employee received his final termination letter. Thus, I deemed the 4.6 hours as excessive and reduce it accordingly to 2 hours.

Next, Agency states that 3.9 hours on October 29, 2007, for preparing discovery requests is excessive and should be reduced to 0.5 hours for the five document requests. I find that 1.5 hours is warranted.

Agency states that 6.9 hours on November 13, 2007, for reviewing Agency's response to Employee's appeal should be reduced to 3 hours. Based on the record, I find that 4.5 hours is reasonable.

Agency asserts that 5.2 hours billed on December 10, to 12, 2007, is duplicative of the 5.2 hours of work done on July 23, to 25, 2007. I have reviewed the hours claimed, and have determined that 3 hours is proper and reasonable.

Agency's complaint about the 1.2 hours reviewing its prehearing statement on December 13, 2007, is unwarranted, and therefore, the entire time is approved. Likewise, Agency's complaint about Employee's 3.7 hours preparing for and attending the prehearing conference is also unwarranted.

Agency then claims that Employee should have only charged 3 hours on February 11, 2008, for the 3 hour hearing. Employee justified his 5 hours by including the travel time and time with the witnesses. Thus, the 5 hours claimed is approved.

Agency also objects to the 18.8 hours claimed for trial preparation for a half day hearing. I have reviewed Employee's explanations and the trial record. I determined that 12 hours is reasonable.

Then Agency objects to 3.9 hours expended on August 11, 2008. I have reviewed Employee's explanations and the file record. I determined that 3 hours is reasonable. Lastly, Agency objects to 4 hours billed for December 18, 2008, and January 31, 2009, and states that only 2 hours is justified. Again, based on my review, I agree and reduce it to 2 hours.

Agency did not register any objection to the hours claimed from February 13, 2009, through February 21, 2009, so that entire portion is approved.

Therefore, the reasonable attorney fees for the period of July 16, 2007, through January 31, 2009, is 55.6 hours times an hourly rate of $425.00 for a total of $23,630. The reasonable attorney fees for the period of February 13, 2009, through February 21, 2009, is 17.9 hours times an hourly rate of $440.00 is $7,876.00. To summarize, I therefore find that Employee is entitled to the reduced grand total of allowable attorney fees of $31,506.00.

ORDER

It is hereby ORDERED that Agency pay Employee, within thirty (30) days from the date on which this addendum decision becomes final, $31,506.00 in attorney fees.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge