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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
EMPLOYEE <sup>1</sup> ,	)	
Employee	)	OEA Matter No. 1601-0053-22AF23
	)	
v.	)	Date of Issuance: October 31, 2024
	)	
D.C. DEPARTMENT EMPLOYMENT	)	
SERVICES,	)	
Agency	)	MICHELLE R. HARRIS, ESQ.
	)	Senior Administrative Judge
_____	)	
Morris E. Fischer, Esq., Employee Representative	)	
Tonya A. Robinson, Agency Representative	)	

**ADDENDUM DECISION ON ATTORNEY FEES**

**INTRODUCTION AND PROCEDURAL HISTORY**

On May 13, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Department of Employment Services’ (“DOES” or “Agency”) decision to terminate him from service effective April 14, 2022. This matter was assigned to the undersigned Senior Administrative Judge (“AJ”) on August 2, 2022. On May 2, 2023, I issued an Initial Decision reversing Agency’s adverse action. Agency did not file an appeal; thus, that decision became final thirty-five (35) calendar days after its issuance.<sup>2</sup> On June 15, 2023, Employee, by and through his counsel, filed a Motion for Attorney Fees and costs in the amount of \$21,627, and \$50, respectively. On June 28, 2023, I issued an Order requiring Agency submit a response to Employee’s Motion for Attorney Fees on or before July 14, 2023. Agency filed its response on July 20, 2023, and cited therein that Employee and his counsel had engaged in a retainer agreement, and that Employee’s counsel had notified Agency that he was entitled to 30% of the backpay award pursuant to this agreement. Upon review of the parties’ submissions, I issued an Order on August 1, 2023, scheduling a Status Conference for August 17, 2023. On August 8, 2023, Employee filed a Motion to reschedule the Status Conference to an afternoon time on August 17, 2023, citing to a schedule conflict for the

<sup>1</sup> Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

<sup>2</sup> OEA Rule 635.2 (December 27, 2021).

previous time schedule. I issued an Order on August 10, 2023, granting this Motion and rescheduled the Status Conference for August 17, 2023. Both parties appeared for the conference as required.

During the August 17, 2023, Status Conference, the undersigned noted that Employee's counsel would be required to file a supplemental brief addressing the issue regarding the retainer agreement. Employee filed this supplemental brief on September 5, 2023.<sup>3</sup> On September 7, 2023, I issued an Order requiring Agency to file a response to Employee's supplemental brief by or before September 20, 2023. Agency also filed its Response as prescribed.<sup>4</sup> As a result of what was conveyed in both parties' supplemental submissions, on September 21, 2023, I issued an Order scheduling a Status Conference for October 3, 2023.<sup>5</sup> Both parties appeared for the Status Conference as required. That same day, I issued an Order requiring Agency to file a substantive response on or before October 17, 2023.<sup>6</sup> Agency filed its response as required. On October 25, 2023, Employee's counsel filed a reply to Agency's response. On February 20, 2024, Employee's counsel filed a Supplemental Attorney Affidavit. Following the filing of the Supplemental Attorney Affidavit, the parties agreed to and engaged in mediation regarding both the compliance (1601-0053-22C23) and instant attorney fee matter. On March 7, 2024, Employee emailed a courtesy copy of a Motion Regarding Reinstatement, which was later filed at this Office March 8, 2024. On March 7, 2024, Employee's counsel notified the undersigned through email correspondence that his representation of Employee in this matter was *"making sure he gets his back pay and attorney fees are paid....[Employee] may have additional issues about himself about reinstatement and even after this issue, there may be others. My view on his motion is this [sic] almost like a separate action, but this issue that he has is not within the scope my representation."*

On April 10, 2024, the undersigned was notified that attempts to mediate this matter were unsuccessful. Accordingly, on April 10, 2024, the undersigned issued an Order requiring Agency to file a response to Employee's Supplemental Motion for Attorney Fees. Agency's response was due by or before May 15, 2024, which Agency complied with. The undersigned has determined that an Evidentiary Hearing is not warranted. The record is now closed.

### 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.

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<sup>3</sup> Specifically, the undersigned noted during the Status Conference that the Retainer reflect an agreement between counsel and Employee for which this tribunal has no jurisdiction. Further, the undersigned noted that Employee's counsel would have to assert whether he was going to rely upon this tribunal's determination regarding attorney fees or rely upon the retainer agreement with his client.

<sup>4</sup> Agency filed its response as required, however Agency only reiterated its position regarding the retainer agreement and did not substantively address Employee's supplemental motion.

<sup>5</sup> This Order included a related compliance matter (1601-0053-22C23), as Employee raised a compliance matter regarding backpay.

<sup>6</sup> In the September 5, 2023, Supplemental Motion, Employee's counsel asserted that *"the attorney fee motion seeks the Court awarded attorney fees that DOES must pay per the regulations, the billing, etc. (all of the documents in the Attorney Fee motion). The Attorney confirmed that he does not seek both the fees per the retainer agreement and the Court awarded attorney fees. Rather the Court awarded Attorney fees are an offset to the fees agreed upon in the retainer agreement."* The undersigned will address this assertion in the analysis portion of this decision.

## 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 § 639.1, 6-B District of Columbia Municipal Regulations (“DCMR”) Ch. 600, et seq (December 27, 2021), 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 May 2, 2023, in this matter, reversed Agency’s action of terminating Employee from service. Agency did not file an appeal of this decision, as a result, the Initial Decision became binding thirty-five (35) calendar days following issuance, and Employee is 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>7</sup> I do find that since the Initial Decision reversed Agency’s action, Employee prevailed in his Petition for Appeal before this Office, and as such can be deemed the prevailing party. 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. 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 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.

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<sup>7</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).

Employee asserts that based upon the Initial Decision in this matter, that “Employee was unquestionably the prevailing party in this matter.”<sup>8</sup> Employee asserts that the Initial Decision found that Agency failed to follow District regulations and guidelines and that there were administrative errors in the matter regarding Employee’s reasonable accommodation request.<sup>9</sup> Agency makes no assertions regarding whether Employee was the prevailing party in this matter, and notes issues regarding Employee’s retainer agreement with his counsel<sup>10</sup> and that the request for attorney fees should be reduced.<sup>11</sup>

In the instant matter, I find that the basis of the Initial Decision reversing Employee’s termination was due to Agency’s violation of *Allen Factor 4 – gross procedural error*. The Initial Decision determined that Agency failed to follow applicable District laws, rules and regulations in the administration of the adverse action against Employee. Accordingly, I find that the award of attorney fees is warranted in the interest of justice. This notwithstanding, the undersigned finds that in the interest of justice, Agency has no obligation to meet any request regarding the existing retainer agreement between Employee and his counsel. Employee’s counsel noted in the Status Conferences in this matter that he would adhere to this tribunal’s ruling regarding the award of the requested fees. Employee engaged in a retainer agreement with his counsel and as an attachment to the June 15, 2023, Motion for Fees, counsel included a copy of that agreement. Agency’s initial response regarding that matter was that Employee’s counsel had contacted them and noted that he was owed 30% of Employee’s backpay award to satisfy this agreement. Wherefore, Agency cited that it believed that attorney fees would be paid by Employee. Agency further cites that Employee’s counsel “change in position regarding the relevance of the retainer agreement to the fee award” to be confusing.

The undersigned advised the parties in a Status Conference held on August 17, 2023, that this Office has no jurisdiction over a retainer agreement, and that if Employee’s counsel sought to rely on that, then the Motion for Attorney Fees would be dismissed. Further, the undersigned also advised that Employee’s counsel would need to choose if he wanted to rely upon this tribunal’s ruling regarding fees or rely upon his retainer. The undersigned reiterated that OEA has no jurisdiction over retainer agreements as those are private contracts between an employee and their representative. The undersigned further explained that the only action this Office would have would be to not hold Agency responsible for any payments associated with the retainer agreement if Employee’s counsel agreed to a receipt of fees provided through issuance of an addendum decision that awarded fees in this matter. This all noted, the undersigned advised Employee’s counsel during this same Status Conference, that he would need to file a formal written statement for the record regarding his position about the retainer agreement and the award of attorney fees. On September 5, 2023, counsel for Employee filed a Supplement to the Motion for Attorney Fees. Counsel noted the following therein:

“Per the conference, the Undersigned explained to the Court and to DOES that with respect to the Attorney Fee Motion, the retainer agreement is not relevant for the Court, as that is a private contract between the Attorney and [Employee], which covers the amount of attorney fees that [Employee] is obligated to pay, regardless of the Court award. The Attorney fee motion seeks the Court awarded attorney fees that DOES must pay per the regulations, the billing, etc. (all of the documents in the Attorney Fee motion). The Attorney confirmed that he does not seek both the fees per the retainer

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<sup>8</sup> Employee’s Motion for Attorney Fees (June 15, 2023).

<sup>9</sup> *Id.*

<sup>10</sup> DOES’ Response to Employee’s Motion for Attorney Fees (September 20, 2023).

<sup>11</sup> DOES’ Response to Employee’s Motion for Attorney Fees (October 17, 2023).

agreement and the Court awarded Attorney fees. Rather the Court awarded Attorney fees are an offset to the fees agreed upon in the retainer agreement.”

In light of the attestations made by Employee’s counsel regarding the retainer and the fees sought before this tribunal, the undersigned iterates, by and through this instant addendum decision, that Agency is under no obligation beyond the order and ruling in this instant decision to pay any fees associated with the retainer agreement. Wherefore, in the interest of justice, the undersigned finds that any consideration of the retainer agreement entered by Employee and his representative are outside the scope of this instant decision and this Office’s jurisdiction. Accordingly, this decision will only address the request for fees as presented in the initial June 15, 2023, Motion for Attorney Fees and subsequent supplemental filings received on September 5, 2023, October 25, 2023, and February 20, 2024.

Accordingly, I find that the requirements of both D.C. Official Code § 1-606.08 and OEA Rule 639.1<sup>12</sup> 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. In the instant mater, this Office is the equivalent of the trial court and has the discretion to make determinations regarding the reasonableness of an award of attorney fees.<sup>13</sup>

#### REASONABLENESS OF ATTORNEY FEES

Here, Employee was the prevailing party in his appeal against Agency, and as such, entitled to attorney fees. “Once the conclusion is reached that attorney fees should be awarded, the determination must be made on the amount of the award.”<sup>14</sup> This Office has consistently held in accordance with the U.S. Supreme Court that “the most critical factor in determining the reasonableness of an attorney’s fee award is the degree of success obtained, since a requested fee based on the hours expended on the litigation as a whole may be deemed excessive if a plaintiff achieves only partial or limited success.” “In cases where a party is only partially successful, the trial court must exercise its discretion to determine what amount of fees, if any, should be awarded.” Additionally, OEA has held that “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>15</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>16</sup> In the instant matter, Employee received a backpay award of \$59,879.92 (\$58,115.56 and FY22 bonus \$1,765.36).

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<sup>12</sup> 6-B District of Columbia Municipal Regulations (“DCMR”) Ch. 600, et seq (December 27, 2021)

<sup>13</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>14</sup> *Employee v. DCRA*, OEA Matter No. 1601-0017-21AF24 (February 28, 2024).

<sup>15</sup> *Id.* citing to *Blum v. Stenson*, 465 U.S. 886 (1984).

<sup>16</sup> *Id.* Citing to *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988).

## 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>17</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>18</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>19</sup> OEA Rule 639.3<sup>20</sup> establishes that “an employee shall submit reasonable evidence or documentation to support the number of hours expended by the attorney on the appeal.” OEA’s Board has previously held that the Administrative Judges of this Office may consider what was formerly known as the “Laffey Matrix” in determining the reasonableness of a claimed hourly rate.<sup>21</sup> That matrix, which included 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>22</sup> It should be noted that the United States Attorney’s Office for the District of Columbia now utilized an attorney fee matrix referred to as the USAO “Fitzpatrick Matrix<sup>23</sup>.” This is of note because what now exists as the “Laffey Matrix”, and the USAO/Fitzpatrick Matrix are representative of different hourly rates. This noted, this Office has consistently relied upon the USAO Matrix in consideration of the award for attorney fees. The “Fitzpatrick Matrix”<sup>24</sup> “has been prepared by the Civil Division of the United States Attorney’s Office for the District of Columbia (USAO) to evaluate request for attorney’s fees in civil cases in District of Columbia Courts.<sup>25</sup> The USAO matrix cites that the data for this matrix was based on a survey in the D.C. Metropolitan area.<sup>26</sup> Further, the USAO Fitzpatrick Matrix was

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<sup>17</sup> *Thomas Pierre v. District of Columbia Public Schools*, OEA Matter No. 1601-0186-12AF17, *Addendum Decision on Attorney Fees* (September 18, 2017).

<sup>18</sup> *Blum v. Stenson*, 465 U.S. 886 (1984).

<sup>19</sup> *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988).

<sup>20</sup> OEA Rule 639.3, 6-B DCMR Ch. 600 (December 27, 2021)

<sup>21</sup> That *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>21</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.

<sup>22</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>23</sup> In 2015, the USAO revised its method for determining rates and adopted those through 2021. It has since been adopted through subsequent years. See <https://www.justice.gov/usao-dc/page/file/1504361/download>

<sup>24</sup> See. <https://www.justice.gov/usao-dc/page/file/1504361/download>– Fitzpatrick Explanatory Note 1

This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared to assist with resolving requests for attorney’s fees in complex civil cases in District of Columbia federal courts handled by the Civil Division of the United States Attorney’s Office for the District of Columbia. It has been developed to provide “a reliable assessment of fees charged for complex federal litigation in the District [of Columbia],” as the United States Court of Appeals for the District of Columbia Circuit urged. *DL v. District of Columbia*, 924 F.3d 585, 595 (D.C. Cir. 2019). The matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, nor has it been adopted by other Department of Justice components.

<sup>25</sup> See. <https://www.justice.gov/file/1461316/download> – USAO Matrix Explanatory Note 1.

<sup>26</sup> *Id.* at Note 2.

“A reasonable fee” is a fee that is sufficient to attract an adequate supply of capable counsel for meritorious cases. See, e.g., *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). Consistent with that definition, the hourly rates in the above matrix were calculated from average hourly rates

utilized by the USAO in 2022, wherein fees for this matter were initially assessed. That stated, the undersigned would note that in consideration of the nature of this matter before this Office, the USAO Fitzpatrick Matrix aligns with OEA's previous attorney fee award determinations.

Courts have treated these matrices “as a reference rather than a controlling standard.”<sup>27</sup> (Emphasis added). “There is no concrete, uniform formula for fixing the hourly rates that are awarded in employment disputes (federal or local).”<sup>28</sup> The purpose of the matrix is to provide a “short-cut compilation of market rates for a certain type of litigation.”<sup>29</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>30</sup> When utilizing the 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>31</sup> Courts have increased or decreased the hourly rates depending on the characteristics of the case and the qualification of counsel.<sup>32</sup> In addition, “[t]he novelty [and] complexity of the issues” should be “fully reflected” in the determination of the fee award.<sup>33</sup> As previously note, the undersigned finds that the same considerations are applicable within the confines of the *USAO Fitzpatrick Matrix*. As a result, the undersigned will review this matter based upon the considerations of reasonableness as described.

In the initial Motion for Attorney Fees filed on June 15, 2023, Employee’s counsel requested attorney fees in the amount of \$21,627.00, representing 30.25 hours of service based on the work of Morris E. Fischer, Esq. (“MEF” or “Mr. Fischer”), and 4.5 hours for Joshua Lee, Esq. (“Mr. Lee”)<sup>34</sup> Further, the June 15, 2023, Motion for Attorney Fees asserted a request for \$50 in costs. In a subsequent submission filed on September 5, 2023, Employee asserted an additional request for fees in the amount of \$2,268 dollars for three (3) hours of work completed by Mr. Fischer, also billed at the rate of \$648/hr. That September 5, 2023, filing also included a receipt from Capitol Process Services, Inc. for \$150. Thus, Employee asserted that Employee’s counsel now sought reimbursement of costs in the amount of \$200. Additionally, in his Reply brief filed on October 25, 2023, Employee’s counsel asserted more

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reported in 2011 survey data for the D.C. metropolitan area, which rates were adjusted for inflation with the Producer Price Index-Office of Lawyers (PPI-OL) index. The survey data comes from ALM Legal Intelligence’s 2010 & 2011 Survey of Law Firm Economics. The PPI-OL index is available at <http://www.bls.gov/ppi>. On that page, under “PPI Databases,” and “Industry Data (Producer Price Index - PPI),” select either “one screen” or “multi-screen” and in the resulting window use “industry code” 541110 for “Offices of Lawyers” and “product code” 541110541110 for “Offices of Lawyers.” The average hourly rates from the 2011 survey data are multiplied by the PPI-OL index for May in the year of the update, divided by 176.6, which is the PPI-OL index for January 2011, the month of the survey data, and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).”

<sup>27</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>28</sup> *Ross v. Ofc. of Employee Appeals*, 2010 CA 3142 (MPA) (December 31, 2014).

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

<sup>30</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>31</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>32</sup> See *Elec. Transaction Sys. Corp.*, *supra*.

<sup>33</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>34</sup> Employee’s Motion for Attorney Fees (June 15, 2023). This Motion cited that the hourly rate for Mr. Fischer was determined to be \$648/hour and for Mr. Lee to be \$450/hour.

fees had accrued since September 1, 2023, in the amount of \$5,053.70 for seven (7) hours of work completed by Mr. Fischer; and an additional 2.5 hours incurred by a law clerk, Benjamin Alpert. The October 25, 2023, filing also cited therein that “the running total of attorney fees is now \$23,895 + \$5,053.50 = \$28,948.50.”<sup>35</sup> The October 25, 2023, filing also included a handwritten notation at the bottom citing to “\$32.21 costs-UPS See Receipt.” It should be noted that both the September 5, 2023, filing and the October 25, 2023, filings failed to include an attached “Time and Fee” journal like that provided with the June 15, 2023, Motion for Attorney Fees. Rather, each of these subsequent filings had narrative tables inserted into the body of the briefs and included attachments. In a Supplemental Motion for Attorney Fees filed on February 20, 2024, Employee’s counsel cited that there were “new developments” which informed the request for fees. Specifically, Employee’s counsel now asserted the following:

“Since the October 2023, reply to Agency’s Opposition to the Attorney Fee Petition, there have been two new developments. First, the [Employee’s Counsel] won another MSPB Wrongful Termination Appeal, Nicole Nualart v. Department of Homeland Security, Merit Systems Protection Board (“MSPB”) No. DC-0752-23-0084-I-2 (2024) in which the Court mitigated a termination to a twenty-one day suspension. Second the U.S. Department of Justice adjusted its rates on the Fitzpatrick.” Employee’s counsel further asserted that because of these two developments that the fees should be considered as follows: For 2022, it was asserted that Mr. Fischer has 26 years of experience and that the Fitzpatrick table shows a rate of “\$731 an hour.” As such, Employee’s counsel asserts that there were 17.05 hours of work done (referencing attached exhibits) which total \$12,792.50 in fees.<sup>36</sup> Employee’s counsel also asserts that in “Joshua Lee was admitted to practice for 10 years in 2022. The Fitzpatrick table shows an hourly rate of \$589 an hour. Total of 4.5 hours x \$589=\$2,650.”<sup>37</sup> Additionally, this Supplemental Attorney Affidavit cited that “Morris Fischer had 27 years of experience in 2023. The Fitzpatrick table shows an hourly rate of \$782 an hour...[t]he total number of hours for 2023 for Morris E. Fischer was 14.50 hours on the billing table (Exhibit 3) plus 7 hours on the Reply to Agency’s opposition to the Fee Petition. That’s a total of 21.50 x 782 = \$16,813. **Thus, Employee’s counsel asserted that the total amount sought for fees in this matter is \$32,256.00.**” (Emphasis added)

In the instant matter, Agency does not contest that Employee was the prevailing party nor the use of the Fitzpatrick Matrix in this matter nor does it contest the hourly rates asserted in the original June 15, 2023, Motion for Attorney Fees or subsequent filings. Rather, Agency asserts that the request for fees should be denied or reduced.<sup>38</sup> Specifically, Agency avers that the requested fees should be

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<sup>35</sup> *Id.* at Page 3.

<sup>36</sup> Counsel further asserted that Fitzpatrick rate for 2022 was \$731/hr., and that there were 17.05 hours expended which totaled \$12,792.50. However, the undersigned finds the total number to be an incorrect calculation. A calculation of  $17.05 \times \$731 = \$12,463.55$ .

<sup>37</sup> Employee’s Supplemental Attorney Affidavit at Page 1 (February 20, 2024).

<sup>38</sup> DOES’ Opposition to Supplemental Attorney Affidavit (May 15, 2024). Agency asserted therein that this filing “incorporates all prior responses and oppositions to attorney this Opposition by reference.” *See also*. DOES’ Response to Employee’s Motion for Attorney Fees at Pages 1-2. (October 17, 2023).

reduced for unrelated work, duplicated work and padding.”<sup>39</sup> Agency argues that “an attorney fee request is to be reduced as necessary to disallow hours for duplication or padding...[t]hus the amount of fees claimed is to be reduced where the record does not show that the expenditure of the claimed hours was necessary.”<sup>40</sup> Agency further avers that the Employee’s Supplemental Attorney Affidavit “and all prior requests for attorney’s fees in the case at bar, suffer from the same lack of evidence that (1) the matter addressed is relevant to the issues at bar, (2) the time spent on the matter is reasonable, and (3) the fee requested is reasonable based on the complexity of the issues at bar.”<sup>41</sup> Agency also argues that “[a] change to the Fitzpatrick matrix does not on its own establish that the requested fees in the case at bar are reasonable.” Agency also avers that “the application of the Fitzpatrick matrix is discretionary rather than required.” As a result, Agency maintains that this Office “should deny all requests for attorney’s fees submitted in the case at bar.”<sup>42</sup>

The primary attorney in the instant matter was Morris E. Fischer, Esq. Additionally, in the submissions to this Office, fees were also requested for an associate attorney, Joshua Lee, and law clerk, Benjamin Alpert. The hourly fees requested in the initial Motion for Attorney Fees filed on June 15, 2023, were based on Employee’s counsel self-determined rates of \$648/hour for Morris E. Fischer (MEF), and \$450/hour for Joshua Lee.<sup>43</sup> Employee’s counsel asserted in Tab 5 of the June 15, 2023, Motion for Attorney Fees that he determined the aforementioned hourly rates based on an average determined from a previous award of fees in an Equal Employment Opportunity Commission (EEOC) matter and Merit Systems Protection Board (MSPB) in 2023. Specifically, Employee’s counsel asserted that for the EEOC matter he was awarded fees at a rate of \$731/hour and in the MSPB matter, he was awarded fees at a rate of \$565/hour. Therefore, the average of those two rates was \$648. Employee’s counsel further asserted that he believed the \$648/hourly rate, “was more than fair.”<sup>44</sup> Here, Employee asserts that Mr. Fischer, was barred in the state of New York in 1995 and has practiced for over 20 years before the EEOC. Given the date of the receipt of licensure and the assertions made in the filings, the undersigned finds that, Mr. Fischer’s years of experience related to 2022 is 26 years, and in 2023, 27 years.<sup>45</sup> The Fitzpatrick Matrix fees related to experience cites that the rates for 2022 were \$731/hour and in 2023, \$736/hour. **For the reasons that will be explained below, the undersigned finds that Employee’s counsel self-determined rates of \$648/hr. (as submitted in the initial June 15, 2023, Motion) are sufficient and reasonable for the review of fees requested in this matter.**

As was previously cited, the Fitzpatrick Matrix is a reference, not a controlling standard in the consideration of an award of attorney fee. Further, this Office has consistently held that a determination of an award of fees also requires consideration of the degree of success of the prevailing party as well as a review of to ensure that the fees requested “are in line with those prevailing in the community for

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<sup>39</sup> *Id.* It should also be noted that Agency did not file a response to Employee’s October 25, 2023, submission, wherein an additional \$5,035.50 was requested (\$4,356.00 were requested for Mr. Fischer, and \$517.50 for law clerk Mr. Alpert).

<sup>40</sup> DOES’ Opposition to Supplemental Attorney Affidavit (May 15, 2024).

<sup>41</sup> *Id.* at Page 2 (May 15, 2024).

<sup>42</sup> *Id.*

<sup>43</sup> It should be noted that the billing time journal did not refer to Mr. Lee by initials, but by Associate Attorney (AA) for fees associated with 4.5 hours of work completed on September 15, 2022. The description of that work noted that this was billed as “Researched issue preclusion with respect to DC Superior Court and the Administrative Appeal.” See. Employee’s Motion for Attorney Fees at Tab 1, page 5 of 6 of the Time and Fee Journal. (June 15, 2023).

<sup>44</sup> Employee’s Motion for Attorney Fees Tab Five at Page 3.

<sup>45</sup> See. Employee’s Supplemental Attorney Affidavit (February 20, 2024).

similar services by lawyers of reasonably comparable skill, experience, or reputation.”<sup>46</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>47</sup> Additionally, the self-determined requested rate of \$648/hour does not exceed the Fitzpatrick Matrix, and as such I find that the rate submitted is *more than fair* in consideration of the nature of this appeal and the lack of complexity in the issues presented in the Petition for Appeal. Further, an Evidentiary Hearing was not held in this matter and the parties’ submitted only one round of substantive briefs regarding their positions in this matter. The subject matter of the appeal was not a complex legal matter that required extensive litigation, research or filings. Additionally, the primary responsive brief submitted by Employee in this matter on January 19, 2023, was comprised of a 14-page narrative brief with an additional 154 pages of attachments. Those attachments were largely comprised of the copies of the email communications between Employee and Agency prior to the issuance of the final agency notice. The substantive portion of the brief did not contain any complex legal arguments or analyses, and the majority of the 154 pages of attachments had already been submitted by the Employee himself in the Petition for Appeal. Accordingly, the undersigned finds the original self-determined \$648/hour rate presented in the initial Motion for Attorney Fees and billed by Employee’s counsel in the course of this matter to be fair and reasonable in accordance with the case.<sup>48</sup>

That stated, the undersigned would note that Employee’s initial Motion for Attorney Fees and the Time and Fee Billing Journal included therein did not reflect individual billing at \$648/hour rate, but instead reflected a rate of \$500/hour which was negotiated by and through the retainer agreement. That journal included a cover page that noted the total hours, and the billed rate requested for the Motion. In Employee’s Supplemental Attorney Affidavit submitted on February 20, 2024, the following was noted:

1. Year 2022: Morris E. Fischer, Esq - 26 years’ experience ; 17.05 hours expended.; Joshua Lee, Esq., - 10 years’ experience – 4.5 hours expended.<sup>49</sup>
2. Year 2023 – Morris E. Fischer, Esq. – 27 years’ experience; 14.50 hours on the billing table “plus 7 hours on the Reply to the Agency’s opposition to the Fee Petition” – Total of 21.50 hours.

This considered and for the reasons previously outlined, the undersigned still finds that the total hours requested for Morris E. Fischer, Esq., should be reviewed and considered at the rate of \$648/hour as presented in the June 15, 2023, Motion for Attorney Fees. This is also true of the four and a half (4.5) hours requested for work done by attorney Joshua Lee at a rate of \$450/hour. Regarding

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<sup>46</sup> *Id.* citing to *Blum v. Stenson*, 465 U.S. 886 (1984).

<sup>47</sup> *Id.* Citing to *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988).

<sup>48</sup> Additionally, in Exhibit 3 of the Supplemental Attorney Affidavit, the entry for May 17, 2023, description of the time billed includes a notation citing: “*Discussion with Client about next steps in case (a) attorney fee petition (about 30 hours x \$648 per hour). Also, will ask the Defense lawyer to allocate 30% of the back pay for attorney fees, per the contingency agreement. Explained MEF does not get the 30% and the Court awarded or settled amount of attorney fees. MEF gets the higher of the two...*”

<sup>49</sup> The undersigned has already determined that the hourly rate is based upon counsel’s initial self-determined rates (\$648/hr.). That stated, it should be noted that in the February 20, 2024, Supplemental Attorney Affidavit, Employee’s counsel asserted that the “U.S. Department of Justice adjusted its rates on the Fitzpatrick table.” Counsel further asserted that Fitzpatrick rate for 2022 was \$731/hr., and that there were 17.05 hours expended which totaled \$12,792,50. However, the undersigned finds the total number to be an incorrect calculation. A calculation of 17.05 x \$731 = \$12,463.55.

Mr. Lee's experience, it was noted that he has been licensed for 10 years (in the state of Tennessee).<sup>50</sup> The Fitzpatrick Matrix rate for an attorney with 10 years of experience in 2022 was \$589/hr. This considered, I also find that Employee's counsel self-determined rate of \$450/hour rate presented is more than fair for the work done, specifically given the limited work completed by Mr. Lee for this matter.

### **Number of Hours Expended**

OEA's determination of whether a request for attorney's fees is reasonable is also based upon a consideration of the number hours reasonably expended on the litigation as multiplied by the reasonable hourly rate.<sup>51</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>52</sup> The number of hours reasonably expended is calculated by determining the total number of hours and subtracting nonproductive, duplicative and excessive hours. In the instant matter, Employee initially requested attorney fees in the amount of \$21,627 for a total of 34.75 total hours expended in this matter - Morris E. Fischer, Esq. (30.25x \$648 = \$19,602), and Joshua Lee, Esq. (4.5 hrs. x\$450 =\$2025). In subsequent filings, Employee's counsel made other requests for additional hours expended. Agency averred in its October 17, 2023, Response to Employee's Motion for Attorney fees, that the request for fees should be denied and/or reduced because the fee requests were representative duplicative charges, "padding" and unreasonable. In Employee's Reply to Agency's Opposition filed on October 25, 2023, Employee's counsel asserted therein that additional fees had been incurred since September 1, 2023. Specifically, counsel cited that Morris Fischer, Esq., expended an additional seven hours (7.0 hours x 648 - \$4356.00); and Benjamin Alpert, a law clerk, had expended 2.50 hours at a rate of 207/hr. (2.5 x \$207- \$517.50).<sup>53</sup> It should be noted that Employee's counsel included those additional request (fees for September 1, 2023 and beyond) entries within the October 25, 2023, Reply to Agency's opposition. It was asserted that seven (7) hours were expended by Morris E. Fischer, Esq. for the preparation of the October 25, 2023, Reply, and two and a half (2.50) hours were expended by law clerk, Benjamin Alpert for work on the same.

In a Supplemental Attorney Affidavit submitted on February 20, 2024, Employee's counsel cited the following regarding the total hours expended: (1) For 2022- there were 17.05 hours expended by Morris Fischer, Esq., and four and a half (4.5 hours) expended by Joshua Lee, Esq.; (2) for 2023 there were 14.50 hours expended by Morris Fischer plus an additional seven (7) hours preparing the Reply to Agency's Opposition. Agency reiterated its position regarding the fee request in its Opposition filed on May 15, 2024, and again asserted that all fees requested should be denied. **Based on the aforementioned reasons, the undersigned finds that the total number of hours for consideration are: 38.55 hours for Morris E. Fischer, Esq., 4.5 hours for Joshua Lee, Esq., and 2.5 hours for Benjamin Alpert. As a result, the undersigned finds that the total amount of fees for consideration are:**

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

<sup>51</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>52</sup> *Id. Copeland supra.*

<sup>53</sup> Counsel asserted that the "running total for attorney fees is now \$23,895 + 5,053.50 =\$28,948.50).

Attorney or Law Clerk	Hours Expended	Rate	Total For Review
Morris E. Fischer, Esq.	38.55	\$648/hour	\$24,980.40
Joshua Lee, Esq.	4.5	\$450/hour	\$2,025
Benjamin Alpert (LC)	2.5	\$207/hour	\$517.50

**Accordingly, the total amount being considered for the award of fees for this instant decision is \$27,522.90.**

### *Billing Entries*

Agency avers that this tribunal should deny the Motion for Attorney fees in whole. Agency argues that :1) work performed on unrelated matters should be excluded from calculating reasonable attorney fees; 2) duplicative work should be excluded from calculating reasonable attorney fees; and 3) Employee’s Time and Fee Journal indicates fees for work that should have required less time.<sup>54</sup> Agency also asserted that the request for attorney fees should be denied for padding. This Office has consistently held that requests for attorney fees should be reasonable in nature and not excessive or duplicative. OEA has held that the award of attorney fees can be reduced if a determination has been made that the fees were excessive, duplicative or unreasonable.<sup>55</sup> In the initial Motion for Attorney Fees filed on June 15, 2023, Employee submitted a six (6) page “Time and Fee” journal of the billing entries in this matter. Agency argues Employee’s request for fees should be reduced because counsel is “seeking attorney fees for work performed on unrelated matters, and that Employee is seeking attorney fees for multiple hours of work that should take fewer hours, which indicates padding.”<sup>56</sup> To support these assertions, Agency proffers the following related to some of the fees that were billed<sup>57</sup>:

1. Employee is improperly seeking \$2,625.00 in attorney fees for work done on matters unrelated to the instant case: August 3, 2022, Employee is seeking \$100.00 for 0.20 hours spent on “*Review of email from Client, re: Congressman, fraudulent documentations*”; August 29, 2022, Employee is seeking \$100.00 for .20 hours spent on “*Review of UI determination in favor of Client*”; September 7, 2022, Employee is seeking \$100.00 for .20 hours spent on “*Responded to client email about forum selection*”; September 15, 2022, Employee is seeking \$1575.00 for 4.50 hours spent on “*Researched issue preclusion with respect to DC Superior Court and the Administrative Appeal*”; January 3, 2023, Employee is seeking \$150.00 for .30 hours spent on “*Receipt and review of Agency’s SJ motion*”; February 19, 2023, Employee is seeking \$100.0 for .20 hours spent on “*Responded to Client’s email about testifying at a public hearing. Advised against it.*”; May 17, 2023, Employee is seeking \$500.00 for 1.00 hours spent on “*Anticipated, negotiated, case resolution, wrapping up the case.*”<sup>58</sup>
2. Agency asserts that the work completed on August 3, 2022, August 29, 2022, September 7, 2022, September 15, 2022, January 3, 2023, and February 19, 2023, were unrelated. Further, Agency avers that “*reviewing and responding to emails about a “congressman”*”

<sup>54</sup> DOES’ Response to Employee’s Motion for Attorney Fees (October 17, 2023).

<sup>55</sup>See. *Winfred L Stanley, Reginald L. Smith Sr., & John C. Daniels v. Metropolitan Police Department*, OEA Matter Nos. J-0075-98A08R10, J-0074-98A08R10, J-0081-A08R10, Corrected Decision on Attorney Fees on Remand, (June 1, 2011). Here, the Administrative Judge reduced rates between 50% and up to 60% for excessive and duplicative hours (pages 7-10).

<sup>56</sup> *DOE*

<sup>57</sup> *Id.* The entirety of the issues raised are found on pages 3-8 of Agency’s submission.

<sup>58</sup> DOES’ Response at Page 3(October 17, 2023).

*“forum selection” and a “public hearing”* are unrelated to the Employee’s termination. As a result, Agency asserts that \$2,125.00 should be reduced an award.<sup>59</sup>

3. Agency also avers that there was duplicative work that should be reduced. Specifically, Agency asserts that an entry for November 7, 2022, Employee sought \$100 for 0.20 hours for *“receipt of discovery materials-paper.”* An entry for November 8, 2022, requests \$1,000 for 2.00 hours spent on *“review and case map of defendant’s discovery responses.”* Agency asserts this is duplicative *“since receipt and review are interdependent and cannot occur independently.”*<sup>60</sup>
4. Agency also avers that other entries should have taken less time. For July 21, 2022, Employee expended .30 hours for *“initial set up of file”* and for July 22, 2022, Employee is seeking \$1000 for 2 hours spent on *“reviewed all relevant documents.”* Agency also avers that other billing entries that the .70 hours requested for July 28, 2022, should be denied because *“Employee’s counsel spent most of the mediation insulting [Agency’s counsel].”*<sup>61</sup>
5. Agency asserts that for September 9, 2022, Employee is seeking \$250, for .50 hours spent on *“Attempted to file Pretrial Statement. Various phone calls and emails to confirm that AJ didn’t list the mailing address on her order. Receipt of emails requiring the client to complete the designation form. Asked client to send in.”* Agency avers that *“the expenditure of 0.50 hours to review an order to determine that the OEA address is not on it and then locate the address of OEA seem unreasonable.”* Further, Agency asserts that *“it is unclear who was being called and emailed to locate the OEA address that is easily located on the OEA website.”* Agency argues that this should be denied as unreasonable and padding.
6. For September 15, 2022, Agency asserts Employee is seeking 1.40 hours for *“appeared at prehearing and conference and call after with client.”* Agency asserts that the 1.40 hours spent at the Prehearing Conference should be *“disallowed since Employee’s counsel spent the majority of the prehearing conference asking questions about OEA processes, rules, remedies and the relationship of OEA processes, rules and remedies to those at other potential forums.”* Agency argues that *“the time required to conduct the prehearing conference was unreasonably extended by Employee’s actions, making these requests, duplicative, unreasonable and padding.”*<sup>62</sup>
7. For September 23, 2023, Agency asserts that it should not have taken .60 hours to draft and send out discovery demands. Agency asserts that the discovery request was a total of seven (7) pages, five (5) of which were instructions for completing discovery. Further, Agency notes that the actual requests consisted of five (5) interrogatories and nine (9) requests for production of documents that shouldn’t have taken .60 hours.
8. October 24, 2022 – Employee seeks .20 hours for *“Email to DL re: reminder, her dni responses are due today.”* Agency avers that this email contained a maximum of 15 typed

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<sup>59</sup> *Id.* at Page 3-4.

<sup>60</sup> *Id.* at Page 4.

<sup>61</sup> *Id.* at Page 5.

<sup>62</sup> *Id.* at Page 6.

- words and that OEA order noted that discovery was to be completed by October 28, 2022, not October 24, 2022.
9. October 27, 2022 – Employee seeks .20 for “*follow up email to DL re: still no responses. Must move to compel.*” Agency again asserts that discovery was due October 28, 2022, and that responses were made available to Employee via BOX on October 28, 2022.
  10. October 28, 2022 – Employee seeks .70 hours for “*prepared and mailed motion to compel.*” Agency asserts that this should be denied because discovery was sent on October 28, 2022, consistent with the directives in the September 16, 2022, OEA Order.
  11. November 2, 2022 – Employee seeks 0.20 hours for “*receipt of discovery responses*” Agency asserts that Employee was provided a shared link to discovery through BOX, a secure method for transmission of confidential documents. Agency also asserts that Employee’s counsel did not email Agency’s counsel regarding this discovery and that this should be denied as padding.
  12. Agency avers that for January 19, 2023, Employee seeks 4.0 hours spent on “*prepared opposition to SJ and cross motion. Began from framework and first draft of AA*” and seeks 1.5 hours for “*completed collating exhibits, arrange for flash delivery service. Sent copy to judge and DL.*” Agency argues that 5.5 hours spent on what the work described seems unreasonable. Further Agency asserts that “arranging for delivery service is not an allowable expense.”
  13. Agency asserts that for August 31, 2023, Employee is seeking \$1296 for hours spent on “*Prepared two motions (a) backpay issue and (b) the attorney fee issue.*” Agency avers that the request for fees for the backpay issue should be disallowed because “based on the statements and arguments made, it was clear that Employee did not understand the terminal pay out of annual or sick leave.” Agency argues that this information is publicly available on the DCHR website and that it was clear that Employee’s requests were “misplaced and in violation of District policy and law.”
  14. For September 1, 2023, Employee seeks \$324 for 0.50 hours for “*made sure the service of process was completed on back pay issue and made several changes to the attorney fee motion.*” Agency asserts that arranging for delivery service is not an allowable expense and that since there is no provision for the payment of costs in the OEA rules, time spent arranging for the same should be disallowed.”

Upon review of the billing entries included with Employee’s initial Motion for Attorney Fees and all the subsequent supplemental filings; as well as Agency’s aforementioned arguments regarding the requested fees, the undersigned finds that the entries provided by Employee’s counsel reflect work completed and included relatively sufficient detail as “to permit an informed appraisal of the merits” of the requested fees.<sup>63</sup> This noted, OEA has consistently held that fees may be reduced when a determination is made that the fees requested are unreasonable/unrelated, excessive or duplicative in

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<sup>63</sup> *Alice Lee v. Metropolitan Police Department Supra* 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).

nature.<sup>64</sup> The undersigned finds that given the 26+ years of experience of the primary attorney in this matter, Morris E. Fischer, Esq., that some of entries/times billed for should have taken less time and were duplicative in nature, and as a result, should be reduced or denied.<sup>65</sup> Again, the undersigned would note that Employee's Motion should have included Time and Fee Journals for all entries and reflected the actual hourly rate being sought. Specifically, the Motion and the journals should have reflected the \$648/hr. rate cited in the June 15, 2023, not the \$500/hr. rate noted in the retainer agreement.

Regarding the fees requested, the undersigned has determined the following should be reduced or denied from the request for attorney fees because they either are: 1) unrelated to the instant matter 2) lack sufficient detail; 3) are necessarily duplicative and/or otherwise excessive in nature given the simplicity of the issues of the case itself and years of experience of the primary attorney; and 4) are unreasonable based upon the typical practice and expenditure of hours for similar matters before this Office:

1. July 22, 2022 – 0.20 hours- “Email from mediator to set up mediation...” **DENIED (\$129.60 denied)** - Counsel expended 2.00 hours on the same day citing to work regarding mediation. Accordingly, these are denied for their duplicative nature.
2. July 22, 2022 – 0.20 hours - “Email with client for approval”... - **DENIED (\$129.60 denied)** – Counsel expended 2.00 hours on the same day citing to work regarding mediation. Accordingly, these are denied for their duplicative nature.
3. August 3, 2022 - 0.20 hours “Review of email from Client re: Congressman...” – **DENIED (\$129.60 Denied)**
4. August 29, 2022 - 0.20 hours “Review of UI determination in favor of client” – **DENIED (\$129.60 Denied)**
5. September 7, 2022 - 0.20 hours – “Responded to client email about forum selection” – **DENIED (\$129.60 denied)**
6. September 9, 2022 - 0.50 hours “Attempted to file Pretrial Statement” – **DENIED (\$324 denied)** - Denied as unnecessary. A brief call to OEA would've resolved issues cited and reduced time expended.
7. September 15, 2022 - 4.50 hours – “Researched issue preclusion with respect to DC Superior Court and the Administrative Appeal - **DENIED (\$450/hr. as indicated for Lee - \$2025 Denied)**<sup>66</sup> – Denied as unrelated to instant matter and lacking detail. Employee never filed or otherwise presented any argument regarding an “issue preclusion.”

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<sup>64</sup> See. *Winfred L Stanley, Reginald L. Smith Sr., & John C. Daniels v. Metropolitan Police Department*, OEA Matter Nos. J-0075-98A08R10, J-0074-98A08R10, J-0081-A08R10, Corrected Decision on Attorney Fees on Remand, (June 1, 2011). Here, the Administrative Judge reduced rates between 50% and up to 60% for excessive and duplicative hours (pages 7-10)

<sup>65</sup> *Id.*

<sup>66</sup> The entry noted was noted as “Researched issue preclusion with respect to DC Superior Court and the Administrative Appeal” \* It should be noted that the time entry journal for this matter reflects the notation of “MEF/AA.” The notation did not reflect attorney Joshua Lee, Esq., but instead reflected “AA”, which was meant for Associate Attorney. This is being denied as the work as presented in this journal appears to be unrelated to the matter, as there were no issues presented regarding “issue preclusion” presented by Employee during adjudication.

8. September 23, 2022, 0.60 hours – “Draft and send on discovery demands” – **REDUCED by 50% - (\$194.40 Reduced)**
9. October 24, 2022 - 0.20 hours “Email to DL re: reminder her dni responses are due today” **DENIED. (\$129.60 denied)** – Denied as unnecessary – no need to “remind” another party of their responsibility before this OEA. Appropriate action would be to file Motion with the tribunal to address any issue with another party’s lack of responsiveness/timeliness.
10. October 27, 2022 – 0.20 hours – “Follow up email to DL re: still no response” – **DENIED (\$129.60 denied)** – Denied for unnecessary/duplicative. Appropriate action would be to file Motion with the tribunal to address any issue with another party’s lack of responsiveness/timeliness.
11. November 2, 2022 - 0.20 hours “Receipt of discovery response” – **DENIED (\$129.60 Denied)**
12. January 19, 2023 – 4.0 hours “Prepared opposition and cross motion...” **REDUCED by 50% (\$1296 reduced)** – Lacks sufficient detail regarding what “prepared” entailed and what work was actually completed. Further, the brief submitted was a 14-page narrative styled brief, including several pages of charts referring to the exhibits and of which the legal citations were not extensive or inclusive of complex analysis. Additionally, most of the exhibits included with the brief had already been produced by Employee in his Petition for Appeal. Further, the brief cited was filed at OEA on January 19, 2023, at 3:03pm.
13. January 19, 2023 – 1.5 hours “completed collating exhibits, arrange for flash delivery service. **DENIED (\$972 Denied)** – Lacks sufficient detail regarding why amount of time was expended. Further, most of the exhibits included with the brief had already been produced by Employee in his Petition for Appeal. Further, the brief was filed at OEA on January 19, 2023, at 3:03pm.
14. February 19, 2023 - 0.20 hours “Responded to client’s email about testifying at public hearing. Advised against it”- **DENIED (\$129.60 denied)**
15. May 17, 2023 – 1.0 hours “Anticipated, negotiated case resolution, wrapping up the case.” – **REDUCED by 50% (\$324 Reduced).**
16. August 31, 2023 – 2.0 hours - “Prepared two motions (a) backpay issue and (b) attorney fee issue” **Reduced by 50%(\$648 Reduced)**
17. September 1, 2023 - 0.50 hours “Made sure the service of process was completed on back pay issue and made several changes to the attorney fee motion.” – **REDUCED by 50% (\$162 Reduced)**
18. October 25, 2023 – Reply to Agency’s Opposition – 7.0 hours – **REDUCED by 50%. (\$2268 Reduced)** – Reduced as it is excessive time expenditure given the content of the submission and based upon an attorney with 27 years’ experience.

19. Regarding the fees requested for Benjamin Alpert, the law clerk (\$517.50 for 2.5 hours for work completed on October 23, 2023), Employee's counsel asserts that "he generally bills at \$200 an hour... This is totally reasonable and consistent with the Fitzpatrick table, which actually has him at \$207<sup>67</sup> an hour."<sup>68</sup> As was previously noted, in support of these additional requested rates, Employee's counsel failed to provide a Time and Billing journal reflecting those rates, but only provided a narrative table within the body of the brief submitted. Mr. Fischer cites that Mr. Alpert worked on his divorce and with other law firms. However, while the fee petition includes Mr. Fischer's accolades regarding Mr. Alpert's work; there was no affidavit or resume submitted for Mr. Alpert which referenced Mr. Alpert's education, certifications or otherwise. Further, even in the submission of the October 25, 2023, Reply to Agency's opposition, Mr. Fischer again provides praise regarding Mr. Alpert's work, and included an email attachment, wherein a client requested Mr. Alpert's services, but there is no resume, affidavit or CV. In similar matters before this Office, the party requesting fees for paralegals and/or law clerks have provided information such a resumes, CVs or other affidavits to support their skills/qualifications for a fee award. Thus, I find that this request for fees for work by Benjamin Alpert lacks sufficient detail to support an award of fees. As a result, I find that this request for fees (\$517.50) as presented is insufficient for the work done by Benjamin Alpert and should be **DENIED**.<sup>69</sup>

Accordingly, the undersigned finds that based upon the above-mentioned findings, that **\$9,897.30 shall be deducted/denied from the total of the requested amount of \$27,522.90** (total amount determination as previously cited based upon the record). Consequently, I find that an award of attorney fees in the amount of **\$17,625.60** is reasonable and an appropriate award for this matter based upon the review of the record as previously prescribed in this decision.

#### *Non-Legal Work/Administrative Costs*

Agency avers that there is no provision for payment of costs in OEA rules. As such, Agency argues that the costs ascertained in relation to service of process or otherwise should be reduced from the award. In the instant matter, Employee asserted in the June 15, 2023, Motion for Attorney Fees, that \$50 of costs were incurred. Employee asserted that "*regarding costs, there were three of four mailings that were done and some copy costs. While there are no strict records as to the costs because there were so few of them, its's reasonable to assume that there were about \$50 of costs.*"<sup>70</sup> Additionally, Employee asserted in the September 5, 2023, filing that it incurred \$150 for costs from Capitol Process Service, Inc. and included a receipt. Finally, in the October 25, 2023, filing, Employee added a handwritten segment to the final page, citing that it had incurred \$32.21 "UPS-see receipt".

OEA has held that reasonable litigation expenses incurred in the services of employees can be reimbursed. In *Robert Fogle v. District of Columbia Public Schools*,<sup>71</sup>, OEA held that consistent with

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<sup>67</sup> In the October 25, 2023, brief, the date listed in the narrative table for Benjamin Alpert was October 23, 2023 (p. 15). It should be noted that the Fitzpatrick Matrix for paralegal/law clerk rates for 2023 was \$220/hour.

<sup>68</sup> Employee's Reply at Page 16 (October 25, 2023).

<sup>69</sup> In the narrative on Page 16, counsel asserts a rate of 2.5 hours multiplied by \$207, to equal \$517.50. Wherefore the amount of \$517.50 will be denied.

<sup>70</sup> Employee's Motion for Attorney Fees at Tab 5 Page 4 (June 15, 2023).

<sup>71</sup> OEA Matter No. 2401-0123-04 (March 22, 2011).

the Office's ruling in *Spriggs v. District of Columbia School*<sup>72</sup>, that costs can be reimbursed for matters such as case management and legal research. As a result, I find that costs can be reimbursed. This noted, I further find that Employee's counsel has failed to provide sufficient account to support reimbursement for all costs. Specifically, the \$50 asserted in the June 15, 2023, Motion, is essentially a guess or estimation of costs. Employee noted that strict records were not kept as related to this cost request. As a result, I find that without specific information, the request for \$50 must be denied because sufficient detail for the costs were not included. Receipts were provided for the \$150 fees incurred by Capitol Processing, Inc., and for the \$32.21 incurred at the UPS store on October 24, 2023. Thus, I find that in view of the *Fogle* decision, Employee is entitled to costs in the amount of **\$182.21**. As a result, while I find an award of attorney fees is warranted since Employee prevailed in this matter, it must be reduced as previously noted. Wherefore, I find that an award of **\$17,625.60 in attorney fees and \$182.21 in costs** is the appropriate award for this matter based upon the review of the record in its entirety.

#### ORDER

Based on the foregoing it is hereby **ORDERED** that Agency shall pay, within thirty (30) days from the date on which this Addendum Decision becomes final, **Seventeen thousand, six hundred and twenty-five dollars and sixty cents (\$17,625.60) in Attorney Fees; and One hundred eighty-two dollars and twenty-one cents (\$182.21) in Costs.**

FOR THE OFFICE:

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

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<sup>72</sup> OEA Matter No. 2401-0124-03 (December 6, 2004).