time. On June 1, 2009, Mr. Schwartz[2] filed a motion, seeking an award of $16,065.00 in legal fees based on 37.8 hours and an hourly rate of $425. Ms. Edwards subsequently moved for an award of fees. Agency filed objections only to Mr. Schwartz's request.

In October 2009, this matter was reassigned to Senior Administrative Judge Joseph Lim,[3] who considered the fee requests. On February 16, 2010,[4] Judge Lim issued an *Addendum Decision* in which he determined that Employee was the prevailing party and that an award of legal fees was in the interest of justice. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Addendum Decision on Attorney's Fees* (February 16, 2010). Judge Lim found that Mr. Schwartz merited the hourly rate of $425, then the maximum hourly rate on the Laffey Matrix,[5] and awarded to attorneys in practice for more than 31 years who had substantial expertise and experience. He also considered Mr. Schwartz's explanations of how his time was expended to be sufficient.

Judge Lim concluded, however, that Mr. Schwartz's claim of 37.8 hours was "excessive for the degree of difficulty and the amount of legal service time required," pointing out that an attorney awarded the highest hourly rate is presumed to have the "prior experience and expertise" in the area and should expend less time than an attorney with less experience and expertise. He noted that Mr. Schwartz had, "handled numerous appeals before [OEA]." Judge Lim explained that reached this decision by comparing Mr. Schwartz's request with requests filed with this Office by attorneys with "comparable experience" the degree of legal complexity presented in the matter, and also Judge Lim's "years of experience as a plaintiff's attorney." He reduced the hours to 12.1 hours, which resulted an award of $5,142.50 in fees.[6]

Mr. Schwartz filed a *Petition for Review* with the District of Columbia Superior Court on March 17, 2010, claiming that Judge Lim's decision should be reversed because counsel was entitled to the hour claimed and fees sought. He contended that the matter should be considered "under the more stringent *de novo* standard," arguing that he was entitled to a *de novo* review since Judge Lim had not presided over the evidentiary hearing and therefore was not in a position to decide on his fees. In his July 5, 2015 *Order*, the Honorable Erik Christian rejected counsel's arguments, concluding that counsel was not entitled to a *de novo* review. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, Case No. 2010 CA 001732 P(MPA (July 6, 2015). He determined that although Judge Lim did not preside over the evidentiary hearing, his decision was entitled to "deference," because OEA Judges are "in the best position to determine the reasonableness of the ... attorney hours spent on a case, not the reviewing Court."[7] Judge Christian

---

[2] In this *Decision*, for the sake of clarity and expediency, the AJ will again digress from the protocol of identifying Employee as the party or movant, but rather will instead refer to Mr. Schwartz as the movant when referring to attorney fees matters. Unless otherwise stated, "counsel" and "attorney," refer to Mr. Schwartz.

[3] The reassignment was a result of this AJ's decision to recuse herself from all matters in which Agency was a party, following her appointment to chair a Board in which Agency participated.

[4] The *Corrected Addendum Decision* was issued on February 19, 2010. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Corrected Addendum Decision* (February 19, 2010).

[5] *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 den.* 472 U.S. 1021 (1985).

[6] Ms. Edwards also sought an award of attorney fees. Agency did not object to her request. Judge Lim approved the time and hourly rate sought, and awarded her the sum of $5,532.14, as requested.

[7] He noted, however, that "the presiding official ...is more intimately familiar with the circumstances of the appeal, and may be in the best position to determine the reasonableness of the attorney's fee request."

stated, however, that he could not review the matter because there was insufficient support provided for Judge Lim's decision. The Court remanded the matter to OEA for "the limited purpose" of obtaining "substantial evidence" from the AJ to support any reduction of time, stating that the record could be reopened if needed. He stated that the AJ could still conclude that the hours claimed by Mr. Schwartz were "unreasonable," and could leave the award unchanged.

This AJ was again available to hear this matter when it was remanded to this Office. Based in part on the Court's comment that the AJ who presided at the evidentiary hearing may be in the best position to rule on fee requests, and in part on other demands on Judge Lim's time, the remand was reassigned to her on August 12, 2015. By Order dated September 11, 2015, she advised the parties that the matter was reassigned to her and that she would need time to review the entire record in order to determine how to proceed. She directed the parties to use the intervening time to engage in settlement negotiations. Settlement efforts continued over an extended period of time, but proved unsuccessful; and oral argument was scheduled for September 21 2016.

At the September 21, 2016 proceeding, the parties presented oral argument. In addition, the AJ discussed a number of matters with the parties to ensure they were all in accord. Wither regard to the scope of her review, the AJ determined, and the parties agreed, that given the limited nature of the remand, she would abide by the decisions reached by Judge Lim, and accepted by Judge Christian, *i.e.,* that Employee was the prevailing party and was entitled to an award of attorney fees in the interest of justice, that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix, and that counsel's explanations of his work were sufficient.[8] She also determined, and the parties agreed, that her review was limited to the fees that were the subject of the remand.[9] Mr. Schwartz, who had filed additional fee requests, confirmed that he had withdrawn the request related to work performed before the D.C. Superior Court. He then withdrew the request for fees regarding legal work before OEA postdating the fees that were the subject of the remand. The AJ stated that Mr. Schwartz could file a request for an award for fees after this matter was concluded.

In the *Addendum Decision on Attorney Fees on Remand* (ADR), issued on October 26, 2016, this AJ, for reasons discussed in the ADR, did not award Mr. Schwartz the 37.8 hours claimed, but increased the time awarded from 12.1 to 27 hours. The fees awarded was not $16,512.05, as sought by Mr. Schwartz, but did increase from $5,142.50 as awarded by Judge Lim to $12,015, 00. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09R15, *Addendum Decision on Attorney's Fees on Remand* (February 16, 2010).

On December 22, 2016, Mr. Schwartz filed a motion for an award of fees, seeking $8,520.00 in fees based on 15 hours of legal work performed between October 6, 2015 and September 21, 2016, at an hourly rate of $568.00. Agency filed objections on January 21, 2017. The matter was referred, with the consent of the parties, to mediation in March 2017. When mediation proved unsuccessful, the AJ issued an Order, directing the parties to advise her by July 11, 2017, if they wanted to present oral argument and/or file supplemental pleadings on the matter; and that if they did not, the record would close. Both parties responded in the negative to both options, and the record closed on July 11, 2017

---

[8] The AJ informed the parties that although she might not agree with all of the determinations, she was bound by them, since, given of the limited nature of the remand, they were not subject to review.

[9] The AJ determined, and the parties agreed, that she could review the entire fee request, not just the time reduced since the hours claimed for work performed on one day might relate to a claim on another day.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.08 (2001).

ISSUES

Is Mr. Schwartz entitled to an award of fees? If so, what is the appropriate amount?

ANALYSIS, FINDINGS AND CONCLUSIONS

The decisions made by Judge Lim and accepted by Judge Christian, *i.e.*, that Employee was the prevailing party in the matter before OEA, that an award of legal fees was in the interest of justice, and that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix were not part of the Court's remand and were not reviewed. Agency did not object to the hourly rate sought by Mr. Schwartz of $568.00, which represents the highest rate on the Laffey Matrix for work performed in 2015 and 2016. Mr. Schwartz is awarded the hourly rate of $568.00.

Agency argued that since Mr. Schwartz did not receive the full relief sought before Judge Christian or this AJ, he cannot be considered the prevailing party. Mr. Schwartz disagreed, citing *Settlemire v. District of Columbia*, 898 A2d 902 (D.C. 2006), and *Buchkannon Bd. and Care Home v. West Virginia Department of Health & Human Res.* 532 U.S. 598 (3002), for the proposition that he is entitled to "prevailing party" status since he was successful in some of his arguments.

Judge Christian did not reverse Judge Lim's decision. He denied counsel the *de novo* review that he sought and rejected his argument that Judge Lim could not award fees. The Court stated that Judge Lim's decision was entitled to "deference." Judge Christian ordered a limited remand, directing only that sufficient reasons be given by the AJ to support his decisions to enable the Court to conduct its review. Indeed, the Court stated that the AJ could reach the same decision and leave the fee award unchanged.[10] If Judge Lim had heard the matter on remand, he could have provided the additional explanations sought by the Court, left the award unchanged. However, this AJ could not provide the rationale for another AJ's decisions, and had to undertake her own assessment. Although this resulted in an increased award, this certainly did mean that this AJ determined the remanded award was incorrect. A third AJ could reach yet another decision, since fee awards are not based on a mathematical formula. AJs must adhere to guidance and standards articulated in such cases as *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission*, 123 A.3d 170 (2015), there is still adequate room for different results, since the decisions reflect the experience and expertise of the individual AJ.[11]

---

[10] Counsel's contention that Judge Lim could not assess fees because he had not presided over the hearing was unconvincing for an additional reason. Mr. Schwartz entered his appearance after the evidentiary hearing, but was responsible for the closing brief. He claimed that he was able to thoroughly familiarize himself with the record and prepare the brief in about 12 hours. Since Mr. Schwartz was able to fully familiarize himself with the underlying record and legal issues, which in this matter was neither complex nor lengthy, it is difficult to understand why he was certain that Judge Lim, who has decades of experience and expertise in this area and is a respected Senior Administrative Judge, having presided over countless evidentiary hearings and fee petitions during his tenure at OEA, would be unable to achieve the same result.

[11] The AJ will not review her experience and expertise in analyzing fee requests since she did so in the ADR.

A separate analysis regarding a claim for the award of attorney fees is required when the "degree of success...obtained on [an] attorney fee motion is not the same as the degree of success...obtained on the underlying appeal." *Guy v. Department of Army*, 2012 MSPB 54 (2012). In this matter, Employee was successful in his appeal, and was awarded all of the relief sought, in the *Initial Decision.* As noted above, Mr. Schwartz did not achieve the same level of success either before Judge Christian or before this AJ. He did, however, achieve "a significant part" of the relief sought in both matters, and is therefore entitled to an award of fees. After completing this "separate analysis" the AJ can either reduce the amount of the award by the number of issues on which counsel did not prevail; or can award the amount she considers to be a "fair result," without reducing the award based on the number of issues on which the claimant was not successful, in whole or in part. *Farrar v. Hobby*, 113 S. Ct. 566 (1973). The AJ has chosen this second option.

The determination of the reasonableness of fees is a balancing act. Although the movant is not required to detail the precise time spent on a matter or even the precise activity, the attorney must provide sufficient detail to allow an informed assessment to be made. In *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983), the Supreme Court directed attorneys to exercise "billing judgment" and stated that fees would not be awarded for time found to be "excessive, redundant or otherwise unnecessary." *See also, Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985). In addition, the Laffey Matrix increases the hourly rate awarded based on the attorney's experience and expertise based on the assumption it will take that attorney less time to complete a task than the attorney with less expertise and experience, who is awarded a lower hourly rate.

In *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission,* 123 A.3d 170 (2015), the District of Columbia Court of Appeals articulated the standard of determining reasonableness of fees, citing a long line of cases beginning with *Hensley*, and including *Hampton Court,* 599 A.2d, 1116 and *Copeland v. Marshall,* 641 F2d 880 (D.D.Cir. 1980). The movant has the burden of establishing the reasonableness of the fees sought, and must submit evidence supporting the claim of hours worked, and excluding unnecessary time... *Casali v. Department of Treasury*, 81 MSPR 237 (1999). The AJ must identify hours that were rejected and "articulate the reasons for their elimination. *Rumsey, v. Department of Justice*, 2016 MSPB 28 (2016). The "application must be sufficiently detailed to permit the [AJ] to make an independent determination whether or not the hours claimed are justified, but also, that "it was not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted." *Copeland*, 63 F.2d at 891.

D.C. Municipal Regulations, Title 6, Section 634.3, places the burden of production on the claimant, who must "submit reasonable evidence or documentation to support the number of hours expended by the attorney on the appeal." During oral argument, the AJ reviewed Mr. Schwartz's fee request with him, explaining why she did not consider it adequate, and advising him of the additional information that would be required if he filed another fee. Despite her directive, the fee request now under consideration mirrored the prior submission, lacking sufficient information. The AJ offered counsel the opportunity to supplement his submission either in writing or at oral argument, but counsel declined both options. *Rumsey v. Department of Justice*, 2016 MSPB 28 (2016). Therefore, the AJ based on her decision on the request which is presented *verbatim* below:

Date	Activity	Hours
10/6, 10/8/2015	Research, draft Post-Remand Memo	3.1
4/6-7/2016	Research Legis. Hist.	3.9
4/23, 4/25/16	Research, draft submission	4.1
9/13/16	Research, draft Responses to ALJ Order	2.4
9/21/16	Prepare for, attend Hearing	1.5

Agency argued that Mr. Schwartz should not be compensated for work related to his Superior Court appeal, since that fee request was withdrawn, and that some of the time claimed "was unreasonable due to their length and [the] fact that they were unnecessary." Finally it contended that the 2.4 hours billed by Mr. Schwartz on September 13, 2016 was "unnecessary and therefore unreasonable," since he submitted "a 14 page document with factual and procedural information despite the fact" that he was only asked to submit the August 22 Order to which he was responding only directed the parties to "outlines of their arguments." Mr. Schwartz maintained that the research and drafting of his October 23 submission was necessary, since "a full review of recent cases in the area especially *Tenants of 701 Jefferson Street, NW v. District of Columbia*" was required.

In reviewing the fee request, the AJ assessed whether counsel met the burden of establishing that the hours claimed were reasonable and whether the work performed was necessary. DCMR, Title 6, Section 634.3 requires attorneys seeking fees to submit "reasonable evidence or documentation to support the number of hours expended." *See, e.g., Hampton Courts Tenants Association v. D.C. Rental Housing Commission*, 599 A.2d 1113 (D.C. 1991). An AJ must "identify" hours that were reduced based on inadequate documentation, and "articulate the reasons for their elimination." *Crumbaker v. Merit Systems Protection Board*, 781 F.2d 191, 195 (Fed. Cir 1986), modified on other grounds, 827 F.2d 761 (Fed Cir. 1987).

3.1 hours (10/6, 10/8/15) "Research, draft Post-Remand Memo": Mr. Schwartz claimed this time was spent researching and drafting a memorandum which the AJ assumes was the one filed on October 13, 2015. However, in her Order of September 11, 2015, the AJ advised the parties that she had been reassigned the matter and that she would need time to review the record in order to determine how to proceed. She directed the parties to use the intervening time to try to resolve the matter. She did not request that any submissions be filed, stating specifically, that she needed to review the record before deciding how to proceed. The submission was not relevant and was not considered. In addition, it included a request for additional fees, although the only fees considered on remand were those reviewed by Judge Lim. Mr. Schwartz subsequently withdrew the fee request, but even if he had not, it would not have been considered. In sum, the work was unnecessary and submitted despite the AJ's directive to await her instructions after she completed her review. For these reasons, the claim of 3.1 hours is denied.

3.9 hours (4/6-4/7/2016) "Research Legis. Hist:" Mr. Schwartz did not explain the legislative history he was researching, and why the research was necessary. Assuming the research was needed to prepare his April 25 submission, then it appears to be duplicative, since the submission below also claims time for research, and there was no evidence of extensive research. Counsel is required to explain what was researched and its relevance. For these reasons, the AJ concludes that he failed to meet his burden of production because he did not provide "reasonable evidence or documentation to support the number of hours expended" as required by DCMR, Title 6, Section 634.3. For these reasons, the claim for 3.9 hours is denied.

4.1 hours (4/23, 4/25/16) Research, draft submission: This submission focused on three issues: OEA's authority to award fees for work done before the Superior Court, Employee's status as prevailing party, and reasons that an award of fees was warranted in the interest of justice. However, as already discussed, the remand did not include additional fees, and the other two issues had already been resolved. Arguments regarding work performed before the Superior Court were irrelevant, since the remand did not include those fees. However, counsel did reference *Tenants of 710 Street N.W. v. District of Columbia Rental Housing Commission,* which was issued in August 2015. *Infra* at 5. The discussion of this decision was not the primary focus of the submission, and the AJ determines about no more than one-third of the total expended should be awarded for work that was relevant to this matter. For these reasons, she awards 1.4 hours.

2.4 hours (9/13/16) Research, draft Responses to ALJ Order: This submission was in response to the August 22, 2016 Order which directed the parties to "submit outlines" of the arguments that they would present at oral argument. The AJ finds that the submission was responsive, addressing the challenged items and summarizing the arguments counsel would raise. The AJ concludes that the claim for 2.4 hours should be awarded in full.

1.5 hours (9/21/16) prepare for, attend Hearing: The AJ finds that the time claimed to prepare for and attend the September 21, 2016 proceeding was reasonable. She concludes that the 1.5 hours sought should be awarded.

Based on this analysis, counsel will be compensated for 5.3 hours at an hourly rate of $568, for a total award of $3,010.40.[12]

ORDER

It is hereby

ORDERED: Agency pay Employee, within 45 calendar days from the date of issuance of this Addendum Decision, the sum of $3,010.40 for legal fees payable to Frederick Schwartz, Jr..

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge

[12] The AJ will not reduce the award, since she "has discretion to make an equitable judgment as to what reduction is appropriate. *Hensley* at 436-37. The award "does not so shock the conscience" and any further reduction would not "fairly reflect [counsel's] "degree of success." *Rumsey* at 20.

CERTIFICATE OF SERVICE

I certify that the attached **CORRECTED ADDENDUM DECISIONON ATTORNEY FEES POST-REMAND** was sent by regular mail on this day to:

Robert Johnson
1826 4th Street NW
Washington, DC 20001

Andrea Comentale, Esq.
Section Chief
Personnel and Labor Relations Section
441 4th St., NW Suite 1180N
Washington, DC 20001

Frederic W. Schwartz, Esq.
1701 Pennsylvania Ave, NW
Suite 200
Washington, DC 20006

Katrina Hill
Clerk

November 6, 2017
Date

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Telephone: (202) 879-1133 • Website: www.dccourts.gov

ROBERT JOHNSON
Vs. C.A. No. 2017 CA 008080 P(MPA)
D.C. OFFICE OF EMPLOYEE APPEALS

INITIAL ORDER AND ADDENDUM

Pursuant to D.C. Code § 11-906 and District of Columbia Superior Court Rule of Civil Procedure ("Super. Ct. Civ. R.") 40-I, it is hereby **ORDERED** as follows:

(1) Effective this date, this case has assigned to the individual calendar designated below. All future filings in this case shall bear the calendar number and the judge's name beneath the case number in the caption. On filing any motion or paper related thereto, one copy (for the judge) must be delivered to the Clerk along with the original.

(2) Within 60 days of the filing of the complaint, plaintiff must file proof of serving on each defendant: copies of the summons, the complaint, and this Initial Order and Addendum. As to any defendant for whom such proof of service has not been filed, the Complaint will be dismissed without prejudice for want of prosecution unless the time for serving the defendant has been extended as provided in Super. Ct. Civ. R. 4(m).

(3) Within 21 days of service as described above, except as otherwise noted in Super. Ct. Civ. R. 12, each defendant must respond to the complaint by filing an answer or other responsive pleading. As to the defendant who has failed to respond, a default and judgment will be entered unless the time to respond has been extended as provided in Super. Ct. Civ. R. 55(a).

(4) At the time and place noted below, all counsel and unrepresented parties shall appear before the assigned judge at an initial scheduling and settlement conference to discuss the possibilities of settlement and to establish a schedule for the completion of all proceedings, including, normally, either mediation, case evaluation, or arbitration. Counsel shall discuss with their clients **prior** to the conference whether the clients are agreeable to binding or non-binding arbitration. **This order is the only notice that parties and counsel will receive concerning this Conference.**

(5) Upon advice that the date noted below is inconvenient for any party or counsel, the Quality Review Branch (202) 879-1750 may continue the Conference **once**, with the consent of all parties, to either of the two succeeding Fridays. Request must be made not less than seven business days before the scheduling conference date.
No other continuance of the conference will be granted except upon motion for good cause shown.

(6) Parties are responsible for obtaining and complying with all requirements of the General Order for Civil cases, each judge's Supplement to the General Order and the General Mediation Order. Copies of these orders are available in the Courtroom and on the Court's website http://www.dccourts.gov/.

Chief Judge Robert E. Morin

Case Assigned to: Judge NEAL E KRAVITZ
Date: December 6, 2017
Initial Conference: 9:00 am, Friday, March 02, 2018
Location: Courtroom 100
500 Indiana Avenue N.W.
WASHINGTON, DC 20001

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

REPLY TO:
955 L'Enfant Plaza, S.W.
Suite 2500
Washington, DC 20024
(202)727-0004
FAX (202)727-5631

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

ROBERT JOHNSON, Petitioner, v. D.C. OFFICE OF EMPLOYEE APPEALS, Respondent.	Case No. 2016 CA 009257 P(MPA) Judge Hiram E. Puig-Lugo

CERTIFICATE OF FILING[1]

I hereby certify that this is the true and correct official case file in the matter of *Robert Johnson v. D.C. Fire and Emergency Medical Services Department,* OEA Matter No. 1601-0016-06AF09R15AF17. The record consists of two volumes containing eight-nine (89) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist

LASHEKA BROWN BASSEY NOTARY PUBLIC DISTRICT OF COLUMBIA MY COMMISSION EXPIRES 6/14/2021

District of Columbia: SS
Subscribed and Sworn to before me
this 23rd day of February, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

[1]At the request of the Superior Court clerk, this record is refiled because the Court was unable to locate the original filing that was submitted on July 6, 2017, which are reflected in Tabs 1-86. This newly filed record includes filings after July 6, 2017, which are reflected in Tabs 87-89.