

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TODD RAVEN,)
)
 Petitioner,)
)
 vs.) Case No. 10-0550FC
)
 MANTEE COUNTY SCHOOL BOARD,)
)
 Respondent.)
 _____)

ORDER AWARDING ATTORNEY'S FEES AND COSTS

Pursuant to notice, a final hearing was held in this case before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings, on May 27, 2010, by video teleconference at sites in Tallahassee and Sarasota, Florida.

APPEARANCES

For Petitioner: Mark F. Kelly, Esquire
Melissa C. Mihok, Esquire
Kelly & McKee, P.A.
1718 East Seventh Avenue, Suite 301
Post Office Box 75638
Tampa, Florida 33675-0638

For Respondent: John W. Bowen, Esquire
Manatee County School Board
Post Office Box 9069
Bradenton, Florida 34206-9069

STATEMENT OF THE ISSUE

The amount of attorney's fees and costs to be awarded to Petitioner, pursuant to the order on remand from the Second District Court of Appeal, in Raven v. Manatee County School

Board, 32 So. 3d 126 (Fla. 2d DCA 2009), pursuant to Subsection 120.595(5), Florida Statutes (2009).¹

PRELIMINARY STATEMENT

This case arises from a prior administrative proceeding between the parties conducted before the Division of Administrative Hearings, in Case number 07-3924, addressing whether Petitioner was subject to termination of his employment based upon an allegation of gross insubordination, a failure to cooperate with Respondent's Office of Professional Standards (OPS), and a violation of other code provisions applicable to teachers. On February 5, 2008, a Recommended Order was issued finding that Respondent had not established "just cause" for the termination of Petitioner's employment, because Petitioner was entitled to representation during the OPS investigative interview, pursuant to Subsection 120.62(2), Florida Statutes (2007). Respondent filed exceptions to the Recommended Order, which were heard by the School Board of Manatee County (School Board). On March 25, 2008, the School Board adopted the exceptions; modified or rejected certain Findings of Fact and Conclusions of Law contained in the Recommended Order; found Respondent did not violate Subsection 120.62(2), Florida Statutes (2007); and terminated Petitioner's employment. Petitioner appealed to the Second District Court of Appeal, which, following the filings of briefs and oral argument,

reversed the School Board's adoption of Respondent's exceptions and remanded the case with instructions to enter a final order consistent with the Recommended Order, which it did. In a separate order, dated December 2, 2009, the Second District Court of Appeal awarded Petitioner attorney's fees, pursuant to Subsection 120.595(5), Florida Statutes, which authorizes an award of attorney's fees when an agency is found to have improperly rejected findings of fact by an Administrative Law Judge in a formal proceeding under Subsection 120.57(1), Florida Statutes. Following the issuance of the Mandate, this matter came before the Division of Administrative Hearings for the determination of the amount of attorney's fees and costs. Respondent filed a motion to dismiss for lack of jurisdiction, which was denied. G.E.L. Corp. v. Department of Environmental Protection, 875 So. 2d 1257, 1263-64 (Fla. 5th DCA 2009).

A formal evidentiary hearing was conducted on May 27, 2010, via video teleconference at sites in Tallahassee and Sarasota, Florida. Petitioner called two witnesses, his attorneys, Mark Kelly and Melissa Mihok, and expert witness, Mark Herdman, Esquire. Petitioner also presented two exhibits, a billing statement reflecting the hours of legal work expended on behalf of Petitioner in the original administrative proceeding and the appeal and a composite exhibit consisting of affidavits of Mark Kelly, Esquire; Robert McKee, Esquire; and Melissa Mihok,

Esquire. Respondent presented the testimony of one expert witness, Thomas M. Gonzalez, Esquire. Following a motion for extension of time, the parties timely filed their proposed orders.

FINDINGS OF FACT

1. Petitioner retained the law offices of Kelly & McKee, P.A., to represent him in connection with his dispute over Respondent seeking to terminate his employment. Petitioner was successful in reinstating Petitioner to his position; however, the Administrative Law Judge was without authority to order the School Board to extend his contract beyond the May 25, 2007, expiration date.

2. Petitioner seeks attorney's fees for the underlying proceeding and the appellate proceeding in the amount of \$66,881.25, representing the total number of hours billed to Petitioner. Petitioner is also seeking \$5,074.98 in costs.

3. Melissa Mihok, Esquire, billed 286.75 hours at \$225.00 per hour for legal services performed. The two principals of the firm, Mark Kelly, Esquire, and Robert F. McKee, Esquire, billed 1.75 hours and 5.0 hours, respectively, of legal services, for which they billed at \$350.00 per hour.

4. Petitioner's expert witness, Mark Herdman, Esquire, who has intensive experience in this area, testified that the hourly rate for employment of attorneys in the Tampa Bay Area ranged

from \$200.00 to \$350.00 per hour and that the amount of time expended on this case was reasonable.

5. Respondent's expert witness, Thomas M. Gonzalez, Esquire, testified that the amount of time spent and the fees claimed were not reasonable; that the fee usually charged for an attorney with five years' experience, representing a School Board employee, was between \$150.00 to \$200.00 per hour; that 19 hours of preparation time for an administrative hearing that took three hours was excessive; and, further, that 102 hours to prepare essentially the same brief three times in the form of a proposed order, a one-page exception, a response to Respondent's exception, and the appellate brief was not reasonable.

6. Based on all the evidence, including the billing statement; the fact that Ms. Mihok testified that her regular hourly rate in representing teachers in administrative hearings was \$100.00 per hour; and the credible and persuasive testimony of Respondent's expert, an hourly rate of \$150.00 is reasonable.

7. The amount of time expended on this matter was excessive and should be reduced by 50 hours, plus a reduction of 35 hours from the time spent on seeking and collecting attorney's fees. The reasonable amount of time spent on this matter is 201.75 hours.

8. Therefore, the reasonable amount of attorney's fees for Ms. Mihok in this matter is \$30,262.50, which is 201.75 hours at an hourly rate of \$150.00.

9. The fee for Mr. Kelly and Mr. McKee should be reduced by 1.5 hours at \$350.00 per hour for the time spent on research for collecting attorney's fees. The total due for their legal services is 5.25 hours at \$350.00 for a total amount of \$1,837.50.

10. Therefore, the lodestar amount for attorney's fees for the firm is \$32,100.00, plus an enhancement of \$5,000.00 for the establishment of new law.

11. As for costs, the expert witness fee for attorney's fees is not recoverable. The amount of costs sought is reduced by \$1,800.00, and \$1,194.70 is awarded for court reporter fees. Therefore, the total recoverable costs are \$4,469.68.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter, pursuant to the terms of the remand order and order granting the Petitioner's request for attorney's fees from the Second District Court of Appeal and Subsection 120.595(5), Florida Statutes.

13. This case is controlled by Subsection 120.595(5), Florida Statutes, which provides, in pertinent part:

Upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court shall award reasonable attorney's fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding.

14. The court awarded fees and costs under this provision and remanded the matter to the Division of Administrative Hearings to determine the amount of fees and costs to be awarded, without any instructions apart from the specific terms of the statute. Generally, in determining reasonable attorney's fees, courts should consider the following factors: (1) the time and labor required, the novelty and difficulty of the issues, and the legal skill required; (2) the likelihood that the representation will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the results obtained; (5) the time limitations imposed by the client or circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyers; and (8) whether the fee is fixed or contingent. Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1150 (Fla. 1985). The Administrative Law Judge should also consider the results obtained by the prevailing party. See,

e.g., Bd. of Regents v. Winters, 918 So. 2d 313, 315 (Fla. 2d DCA 2005).

15. Petitioner has the burden of proof in this proceeding. Petitioner must show by a preponderance of evidence what amount of fees and costs should be awarded. See Department of Transportation v. J.W.C., Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

16. In State Farm Fire & Casualty Co. v. Palma, 629 So. 2d 830 (Fla. 1993), the Florida Supreme Court first resolved a conflict among the districts on whether a party is entitled to attorney's fees in litigating the amount of fees. The attorney's fee award in Palma was based upon Section 627.428, Florida Statutes, which authorizes a fee award against an insurer when judgment is rendered in favor of the insured. Id. The Court held that the insured was entitled to reimbursement of attorney's fees expended in litigating the entitlement to the fees, but not the amount of the fees. Id. at 832-833. The Court reasoned that litigation regarding the amount of fees "inures solely to the attorney's benefit and cannot be considered services rendered in procuring full payment of the judgment," Id. at 833. Palma denied "fees for fees," because the benefit would run only to the attorneys in that case. The facts in this case are similar.

17. At least one apparent purpose of Subsection 120.595(5), Florida Statutes, is to encourage attorneys to provide legal representations to indigents and, also, in accord with the reality that parties to administrative proceedings are often at an economic disadvantage against an agency, often times, a political subdivision of the state.

18. The lodestar, as outlined in Rowe, supra, is the mathematical product of the number of hours reasonably expended multiplied by the reasonable hourly rate, plus a reasonable amount for the results obtained.

19. Some of the costs identified in the billing statement are not recoverable, pursuant to the uniform guidelines on taxing costs.

20. The object of the relevant statutory requirement for attorney's fees is to make Petitioner whole. Nothing in the text of Subsection 120.595(5), Florida Statutes, supports a conclusion that the Legislature intends the fee provisions to be applied in a punitive manner. Winters, 918 So. 2d at 315.

21. Interest on judgments generally accrues at the statutory rates prescribed by Florida's chief financial officer. The interest rates on an award of attorney's fees and costs accrue from the date the judgment became final.

Order

Based on the foregoing Findings of Fact and Conclusions on Law, it is

ORDERED that the attorney's fees and costs are assessed in the respective amounts of \$37,100.00 and \$4,469.68.

DONE AND ORDERED this 23rd day of September, 2010, in Tallahassee, Leon County, Florida.



DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of September, 2010.

ENDNOTE

^{1/} Unless otherwise indicated all references to Florida Statutes are to Florida Statutes (2009).

COPIES FURNISHED:

Melissa C. Mihok, Esquire
Kelly & McKee, P.A.
1718 East Seventh Avenue, Suite 301
Post Office Box 75638
Tampa, Florida 33675-0638

John W. Bowen, Esquire
Manatee County School Board
Post Office Box 9069
Bradenton, Florida 34206-9069

Deborah K. Kearney, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Dr. Eric J. Smith, Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Tim McGonegal, Superintendent
Manatee County School Board
215 Manatee Avenue, West
Bradenton, Florida 34206-9069

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.