



STATE OF NEW JERSEY
 OFFICE OF THE ATTORNEY GENERAL
 DEPARTMENT OF LAW & PUBLIC SAFETY
 DIVISION ON CIVIL RIGHTS
 OAL DOCKET NO. CRT 10536-06
 DCR DOCKET NO. EB06HE-52136-E

 J. P.,)
)
 Complainant,)
)
 v.)
)
 CLIFFSIDE PARK BOARD OF)
 EDUCATION,)
)
 Respondent.)
 _____)

ADMINISTRATIVE ACTION
SUPPLEMENTAL ORDER

APPEARANCES:

Sheldon H. Pincus, Esq., for the complainant (Bucceri and Pincus, attorneys).
 Lisa S. Grosskreutz, Esq., for the respondent (Parker McCay, P.A. attorneys).

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) to address two issues left unresolved in the Director's June 23, 3008 order. In that order, the Director concluded that Cliffside Park Board of Education (Respondent) unlawfully discriminated against J.P. (Complainant) based on his disability in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, awarded reinstatement, backpay and compensatory damages to Complainant, and imposed a statutory penalty. The Director left the record open for supplemental submissions regarding tax leveling and counsel fees, and requested that the parties attempt to resolve the amount of counsel fees due.

On June 30, 2008, Complainant submitted a supplemental expert report regarding tax leveling, and on July 14, 2008, Complainant submitted a letter brief and certification in support of

his application for counsel fees.

TAX LEVELING

The Director's order of June 23, 2008 concluded that Complainant would be entitled to a tax leveling payment to compensate him for the higher tax rate that will be imposed on his backpay award, representing his 2006-2008 wages, because he will receive it in a lump sum rather than spread over the years the wages were earned. Because Complainant's expert did not provide evidence or calculations of the precise tax consequences of Complainant's receipt of the \$155,698 backpay award as a lump sum, the Director left the record open for submission of a supplemental expert report, and a response from Respondent.

By letter dated June 30, 2008, Complainant submitted a supplemental report and calculations from Robert P. Wolf, who was qualified as an expert in vocational economics, without objection, at the hearing. Wolf concludes that Complainant would have paid a combined state and federal tax rate of 21.5 percent had he received his wages as they were earned, but will incur a 30 percent combined tax rate because the wages will be received in a lump sum, resulting in additional state and federal taxes of \$21,013. He concludes that a tax leveling payment of \$21,013 will itself be taxed at approximately 33 percent, requiring a tax leveling award of \$27,947 to fully compensate Complainant for the negative tax consequences of receiving his backpay in a lump sum. Respondent has submitted no objection or evidence in opposition to Dr. Wolf's calculation, and the Director finds no basis to reject Dr. Wolf's analysis. Accordingly, the Director awards Complainant \$27,947 to compensate for the higher tax burden he will incur by receiving his backpay in a lump sum.

COUNSEL FEES

A prevailing party in a LAD action may be awarded "a reasonable attorney's fee." N.J.S.A. 10:5-27.1. See also, Rendine v. Pantzer, 141 N.J. 292 (1995). The Director concludes that it is appropriate to make an award of attorney's fees in this case. Complainant's attorney has filed a

certification requesting \$89,687.50 in counsel fees and \$16,821.84. in costs.¹ This is supported by counsel's itemization of professional services rendered, noting the date, service and amount of time expended, and an itemization of disbursements. Respondent has filed no opposition or response to Complainant's fee application.

The New Jersey Supreme Court has determined that the starting point for calculating a reasonable attorney's fee is computation of the "lodestar," which is derived by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. Rendine v. Pantzer, supra, 141 N.J. at 334-35. Here, counsel's fee request is based on a rate of \$350 per hour. He was admitted to the bar in 1977, and as is reflected his roles and affiliations with a number of employment law organizations, he has developed a specialty in employment law. Counsel has submitted certifications from two experienced employment law attorneys, attesting to the reasonableness of his requested rate for an employment lawyer with his level of experience. One of those attorneys, who was admitted to the bar in 1993, states that his own customary hourly rate is \$425, and the other, who was admitted to the bar in 1987, states that his customary hourly rate is \$350. Based on the evidence submitted, the Director concludes that \$350 is a reasonable hourly rate for an attorney with counsel's level of skill and experience in New Jersey.

Here, counsel was retained to represent Complainant through a legal services benefit program provided by Complainant's union (the NJEA). Counsel has provided a copy of the form agreement NJEA members are required to sign to participate in the NJEA legal services program, which provides that if the NJEA member receives a monetary award, he or she is required to reimburse the NJEA for reasonable attorney fees and costs the NJEA expended to recover the award. In the within fee request, counsel argues that it is appropriate to award fees based on the

¹Although the Exhibit A to counsel's certification shows a total of \$16,821.84 for disbursements, which is accurate for the listed expenses, paragraph 16 of counsel's certification refers to "\$12,826.93 for costs and expenses." Counsel has provided no explanation for this lower figure, and since the itemized expert costs alone total \$14,600, the Director finds that the \$16,821.84 figure is accurate.

full lodestar, using his customary hourly rate, despite his receipt of a retainer fee from the NJEA. Counsel cites Robb v. Ridgewood Board of Education, 269 N.J.Super. 394, 407-408 (Chancery, 1993), in which the court awarded his firm the prevailing rate charged by attorneys with his level of experience for another client he represented through the NJEA legal services benefit program. At the time of the Robb decision, the NJEA program paid counsel a discounted hourly rate for his services, which was lower than the prevailing rate. The court noted that Ms. Robb was required to reimburse the NJEA for the attorneys fees it had already paid to counsel, which in that case totaled \$111, 297.50. 269 N.J. Super. at 407-408.

Here, the circumstances are slightly different. Counsel states Complainant is required to reimburse the NJEA for attorneys fees and costs expended, but explains that the NJEA no longer pays his firm on an hourly basis for work representing individual members like Complainant. Instead, counsel states that the NJEA now pays his firm a flat annual retainer covering both work for the union and any employment-related litigation that may arise for individual members like Complainant. He states that he no longer receives additional compensation for individual litigation, except for expenditures like expert and transcript fees. In this case, it appears that Complainant will be required to repay to the NJEA \$15,459.10 in transcript and expert fees, which the NJEA already reimbursed to counsel; it is unclear whether Complainant or counsel will be required to repay to the NJEA any portion of the annual retainer that it paid to counsel. Nevertheless, the Director concludes that it is appropriate to award Complainant the full lodestar, subject to the excluded hours discussed below, based on counsel's customary hourly rate, because counsel would have received the same retainer whether he represented Complainant or not. Any issues of reimbursement are appropriately resolved between the NJEA, Complainant and counsel, and those issues provide no basis for reducing the fees due from Respondent.

To be compensable, the hours expended must be supported by a certification of services

that is sufficiently detailed to allow meaningful review and scrutiny. Id. at 335. The certification submitted here meets that requirement. After careful review of the certification, and noting that Respondent has filed no opposition to any aspect of Complainant's fee application, the Director finds that, with the exceptions noted below, the time expended by counsel is compensable at the prevailing rate of \$350 per hour.

As noted above, only those hours which were reasonably expended by the prevailing party's attorney will be included in the lodestar. Rendine v. Pantzer, supra, 141 N.J. at 335. After review of counsel's certification, the Director concludes that the number of hours expended prior to counsel's request to transmit this matter to the Office of Administrative Law for hearing were excessive, and the full amount of billings for those services should not be shifted to Respondent. It may be appropriate for an attorney to be compensated for a reasonable amount of time spent in consultation, preliminary case evaluation, research and settlement negotiations before commencing litigation. See, e.g., Webb v. County Bd. of Educ., 471 U.S. 234, 243 (U.S. 1985)(Fees may be awarded for services typically performed before a complaint is filed, including drafting initial pleadings and developing the theory of the case; fees may be awarded for pre-complaint work that is both useful and of a type ordinarily necessary to advance the litigation to the stage it reached.);see also, H.I.P. v. K. Hovnanian, Inc., 292 N.J.Super. 144, 160 (Law Div. 1996) (awarding fees for time spent in pre-complaint research).

Here, counsel billed for approximately twenty hours prior to the filing of the complaint, none of which reflect any settlement activities, and an additional eleven hours for services rendered while this matter was pending with the Division. Since only work related to a LAD cause of action is compensable, and the Division's staff drafts and files the verified complaint, only minimal attorney time should be compensable for work related to assessment of causes of action and other work related to the substance of the complaint. Moreover, while counsel's assistance and advice may have been helpful to Complainant during the time the Division was processing and investigating the

complaint, the services of an attorney during this period were not necessary to the outcome of this case, and their cost should not be shifted to Respondent. Counsel's certification shows that some of the billings were for work, such as legal research and communication with medical experts, that would have been needed at some point during the litigation. After review of the billings attached to counsel's certification, the Director concludes that, of the 31 hours counsel billed during the period of December 12, 2005 through October 4, 2006, twelve hours were both useful and necessary to advancing Complainant's claims, and would have been reasonably expended by competent counsel in this matter. Accordingly, the Director will subtract 19 hours billed for this period in calculating the lodestar.

After review of counsel's certification for the remainder of his billings, beginning with his October 9, 2006 request to the Division for discovery, the Director concludes that the remaining hours billed were reasonably expended for the services provided. Accordingly, fees will be awarded for 237.25 hours at \$350 per hour, for a total of \$83,037.50.

Counsel has also requested an award for costs relating to this matter, and has submitted an itemization of his firm's disbursements. After review of the itemization, and in the absence of any objection by Respondent, the Director concludes that the expenditures are appropriately designated as compensable costs of this proceeding. Counsel has represented that the expert and transcript fees included in this itemization, which total \$ 15,459.10, have been reimbursed to his firm by the NJEA pursuant to Complainant's participation in its legal services plan, and that Complainant is required to repay those costs to the NJEA. Accordingly, the Director awards Complainant \$16,821.84 in costs, with the understanding that \$ 15,459.10 of that sum will be reimbursed to the NJEA.

ORDER

As provided in the Director's order of June 23, 2008, and based on the supplemental information provided by the parties, the Director orders as follows:

1. Respondent and its agents, employees and assigns shall cease and desist from doing any act prohibited by the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49.
2. Respondent shall re-hire Complainant to his former position, with the same tenure rights, benefits and privileges he had at the time of his termination.
3. Within 45 days from the date of this order, Respondent shall forward to the Division a certified check payable to Complainant in the amount of \$ 308,583.48, representing \$155,698 in backpay, \$24,079.14 in prejudgment interest through September 22, 2008, \$27,947 for tax leveling, \$1,000 as compensation for his pain and humiliation, \$83,037.50 for counsel fees and \$16,821.84 in costs.
4. Within 45 days from the date of this order, Respondent shall forward to the Division a certified check payable to "Treasurer, State of New Jersey," in the amount of \$10,000 as a statutory penalty.
5. The penalty and all payments to be made by Respondent under this order shall be forwarded to Robert Siconolfi, New Jersey Division on Civil Rights, P.O. Box 46001, Newark, New Jersey, 07102.
6. Any late payments will be subject to post-judgment interest calculated as prescribed by the Rules Governing the Courts of New Jersey, from the due date until such time payment is received by the Division.

DATE

J. FRANK VESPA-PAPALEO, ESQ.
DIRECTOR, DIVISION ON CIVIL RIGHTS