

#131-14 (OAL Decision: Not yet available online)

DANA GREENE,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF IRVINGTON,	:	
ESSEX COUNTY,	:	
	:	
RESPONDENT.	:	
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SYNOPSIS

Pursuant to *N.J.S.A.* 18A:16-6.1, the petitioner – on February 14, 2012 – requested reimbursement in the amount of \$68,425.79 from the respondent Board for the legal fees and costs expended in the defense of a criminal complaint against him which had been dismissed by the court. The Board denied the reimbursement, on the grounds that the request lacked proof of payment of the legal fees by the petitioner. As petitioner is a member by the New Jersey Education Association (NJEA), his legal fees and expenses were paid by the NJEA pursuant to its practice of providing a legal defense fund for its members. The petitioner filed the within appeal in March 2012, and his attorney subsequently revised the reimbursement amount to \$46,176, representing a calculation of fees based on a reduction in the rates charged to reflect the NJEA unified hourly rate (\$149 or \$150 per hour) for firm associates, and a \$250 per hour rate for services performed by the lead defense attorney. The Board contended, *inter alia*, that petitioner has no standing because the NJEA financed his defense, and as such petitioner has no costs to be reimbursed.

The ALJ found, *inter alia*, that: the petitioner in this matter was charged with a criminal offense that arose out of his official duties as a teacher, which was ultimately dismissed; it is undisputed that petitioner was completely exonerated of the charge; accordingly, under *N.J.S.A.* 18A:16-6.1, the respondent Board is legally obligated to indemnify the petitioner; hours related to both the unfounded investigation by the Institutional Abuse Investigation Unit (IAIU) and the municipal court criminal matter were reasonable for reimbursement; however, the reimbursement rate should be the NJEA rate in effect at the time of performance of the legal services, i.e.: either \$149 or \$150 per hour depending on date of service. The ALJ ordered that respondent reimburse the petitioner for legal fees immediately upon receipt of a revised bill, as follows: \$694.01 for expenses; \$676.78 for investigator fees; and 267.5 hours of attorney fees at the NJEA hourly rate of \$149 for work performed from September 2010 to August 2011, and \$150 for the period from September 2011 to August 2012.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ’s determination that petitioner is entitled to reimbursement of reasonable attorney’s fees from the Board, and found that the billed hours related to the IAIU investigation were part and parcel of the defense of the criminal complaint. However, the Commissioner found that: the ALJ summarily determined that the NJEA unified rate should be the reasonable rate at which the respondent must reimburse; in so doing, the ALJ failed to complete the required analysis of evidence in the record to determine whether the hours billed were reasonable; the record supports that the rates billed by the lead attorney were reasonable, but is devoid of evidence relating to the reasonableness of the billing for associate hours. Accordingly, the Commissioner adopted the decision of the OAL with modification, and directed the Board to reimburse petitioner for expenses and fees as itemized above, and for 47.8 hours of attorney work at \$250 per hour.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

March 20, 2014

OAL DKT. NO. EDU 04772-12
AGENCY DKT. NO. 57-3/12

DANA GREENE,	:	
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PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
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BOARD OF EDUCATION OF THE	:	DECISION
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_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent’s exceptions – filed in accordance with *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

This matter arises out of a claim by petitioner, pursuant to *N.J.S.A.* 18A:16-6.1, for reimbursement of legal fees and costs incurred in the successful defense of a criminal harassment charge filed against him in the Irvington Municipal Court. The criminal complaint was signed on March 8, 2011 and alleged that petitioner had made improper sexual advances toward a student during class at respondent’s Mt. Vernon Avenue School. The allegations that formed the basis of the criminal complaint were also the subject of a related investigation by the Department of Children and Families, Institutional Abuse Investigations Unit (IAIU). Ultimately, the IAIU determined the allegations were unfounded, which determination served as a basis for dismissal of the criminal complaint on January 17, 2012.

Petitioner was represented by Timothy R. Smith, Esq., of the law firm of Caruso Smith Edell Picini, P.C. Smith and various associates of the Caruso firm performed legal services in connection with the matter from December 20, 2010 through January 27, 2012. Itemized billing

records reflect a total of 267.5 hours expended on the matter, including 47.8 hours of work by Smith and 219.7 hours of work by associates. In addition, \$694.01 of expenses and \$676.78 in investigator fees were incurred.

Petitioner is a dues-paying member of the New Jersey Education Association (NJEA). The Caruso firm participates in the NJEA Legal Services Program, pursuant to which NJEA provides a legal defense pool for its members. The fees and expenses associated with the legal services provided to petitioner by the Caruso firm were paid by the NJEA, at the then-applicable unified rate of \$149 per hour for services performed prior to September 1, 2011, and \$150 per hour for services performed from that date forward. The demand for reimbursement seeks a total of \$46,176.00, inclusive of \$694.01 of expenses, \$676.78 in investigator fees, and payment for services at a rate of \$250 per hour for all services performed by Smith, and at the applicable NJEA unified rate for services performed by associates of the Caruso firm.

The Administrative Law Judge (ALJ) issued an Initial Decision in which she determined that the petitioner was entitled to reimbursement from respondent for all reasonable counsel fees and expenses pursuant to *N.J.S.A.* 18A:16-6.1. In reaching that determination, the ALJ specifically found that the allegations underlying the criminal charge and the IAIU investigation arose out of petitioner's official duties as a teacher, and that petitioner had obtained a favorable result since the IAIU investigation was unfounded and the criminal charges were ultimately dismissed. The ALJ further determined that petitioner's attorney provided adequate proof that 267.5 hours were spent on this matter, and that the number of hours was reasonable; however, in calculating the recoverable fees, the ALJ reduced the hourly rate for services performed by Smith from \$250 to the applicable NJEA unified rate – the same rate at which the associates sought to be reimbursed. In so doing, the ALJ took note of Smith's substantial skill and experience, and acknowledged that a \$250 hourly rate would be warranted in other contexts. Nevertheless, the ALJ concluded that where, as

here, Smith accepted the matter through the NJEA Legal Services Program at the applicable unified rate, the unified rate should also be used for reimbursement purposes.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ's determination that petitioner is entitled to reimbursement of reasonable attorneys' fees from respondent. Respondent does not dispute that petitioner meets the statutory requirements, pursuant to *N.J.S.A. 18A:16-6.1*, for reimbursement of reasonable counsel fees and expenses. Respondent, however, challenges the "reasonableness" of the legal fees at issue. More specifically, respondent argues in its exceptions that the ALJ should have excluded from petitioner's indemnification award those hours that were devoted to the IAIU investigation since they were not "inherently connected to the criminal proceeding." The Commissioner disagrees.

Pursuant to *N.J.S.A. 18A:16-6.1*, the board of education is required to reimburse legal fees associated with the defense of both criminal and quasi-criminal actions. Moreover, the record reflects that the IAIU investigation, and the results thereof, were an integral part of the successful defense of the criminal complaint against petitioner. Accordingly, the Commissioner finds that the hours devoted to the IAIU investigation were part and parcel of the Caruso firm's efforts in defense of the criminal complaint, and the ALJ properly included those hours in the reimbursement calculation.

Respondent further argues that the ALJ failed to consider the appropriate factors in determining that the Caruso firm's fee was reasonable. In analyzing a fee application, it is necessary to begin with the calculation of the "lodestar" – which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Rendine v. Pantzer*, 141 *N.J.* 292, 324 (1995). In order to complete the calculation, the reasonable hourly rate must be evaluated according to prevailing market rates. Therefore the court must compare the hourly rate sought to those of attorneys in the community with "comparable skill, experience, and reputation." (*Id.* at 337, citations

omitted) Although the determination “need not be unnecessarily complex or protracted,” the court must also ensure that the hourly rates are “fair, realistic, and accurate.” (*Id.*)

The Commissioner finds that the ALJ failed to complete the required analysis *vis-à-vis* petitioner’s fee application. In that regard, the ALJ began the analysis by reviewing the number of hours expended, and concluding that the number was reasonable. The ALJ failed, however, to complete the analysis by evaluating the evidence in the record to determine whether it supported a finding that the hourly rates charged by Smith and his associates were reasonable. Instead, the ALJ summarily determined that the NJEA unified rate “should be the reasonable rate at which the respondent must reimburse.”

The notion that the NJEA unified rate must be used for reimbursement purposes where an attorney accepts a matter through the NJEA Legal Services Program has been rejected. *See Salaam v. Bd. of Educ. of the City of Irvington*, Commissioner’s Decision No. 264-12, decided June 25, 2012, *aff’d*, Dkt. No. A-5592-11T4 (App. Div. 2014). Respondent is statutorily obligated to pay “reasonable” counsel fees. That obligation is not altered by the fact that NJEA financed petitioner’s defense. Thus, the ALJ should have completed the analysis, and determined whether the evidence in the record establishes that the billing rate of each attorney that worked on Greene’s case is reasonable considering the rates of other attorneys in the relevant community with comparable skill, experience and reputation.

The Commissioner is satisfied that Smith’s \$250 hourly rate is reasonable, given his considerable skill and experience, as established by information contained in his certification and the affidavit of Paul DaSilva, Esq. However, with respect to the associates who also appear in the time records submitted by petitioner, the Commissioner finds the record devoid of evidence which would allow a determination as to whether their experience, skill and reputation would justify a conclusion that the hourly rates charged for their time was “reasonable.” Accordingly, the charges attributable to these individuals must be excluded from petitioner’s indemnification award. *See Salaam, supra.*

With the exception of an untimely argument that the NJEA should have been joined as an indispensable party¹, the remainder of respondent's exceptions essentially recast and reiterate its arguments advanced below. In that it is determined that the ALJ fully considered and addressed them in her decision, further elaboration on these arguments is unnecessary here.

Accordingly, the recommended decision of the OAL, as modified above, is adopted as the final decision in this matter. The Board of Education of the Township of Irvington is hereby directed to reimburse petitioner for legal fees as follows: 1) expenses of \$694.01; 2) investigator fees of \$676.78; and, 3) 47.8 hours of attorney work at the hourly rate of \$250.

IT IS SO ORDERED.²

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 20, 2014

Date of Mailing: March 21, 2014

¹ Since this affirmative defense was not raised below, it will not be considered by the Commissioner in reaching a final decision in this matter.

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).