Agenda Item #1

Meeting of April 14, 2014

South Portland City Council
Position Paper of the City Manager

Subject:

ORDER #131-13/14 – Appropriating funds from the Legal Reserve Fund Contractual Services Account to pay an award of attorney's fees in the *Callaghan* litigation. Passage requires majority vote.

Position:

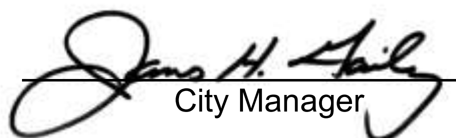
This item is brought forward to appropriate funds from the Legal Reserve Fund Contractual Services Account in order to pay the attorney's fees and costs award in *Karen Callaghan and Burt Edwards v. City of South Portland*, Superior Court (Cumb. Cty.) Docket No. CV-2011-428.

Because this case was brought against the City on federal constitutional grounds, the federal civil rights act allows Karen Callaghan and Burt Edwards to seek recovery of their attorneys' fees and costs. The State of Maine and other municipalities have faced similar payment situations when a federal or state court has found a state statute or local ordinance/policy to have infringed on the constitutional rights of a citizen or citizens.

The City's insurance carrier does not provide coverage for claims that involve declaratory/injunctive relief, even though the two former employees also asserted an attorneys' fee claim. The City maintains a legal reserve fund that is proposed to be used to pay this award.

Requested Action:

Passage of ORDER # 131-13/14.



City Manager

CITY OF SOUTH PORTLAND

GERARD A. JALBERT
Mayor

JAMES H. GAILEY
City Manager

SUSAN M. MOONEY
City Clerk

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District Five
GERARD A. JALBERT

At Large
MAXINE R. BEECHER

At Large
THOMAS E. BLAKE

IN CITY COUNCIL

ORDER # 131-13/14

ORDERED, that the City hereby appropriate $54,771 from the Legal Reserve Fund Contractual Services Account in order to pay the attorney's fees and costs award in *Karen Callaghan and Burt Edwards v. City of South Portland*, Superior Court (Cumb. Cty.) Docket No. CV-2011-428.

Fiscal Note: $54,771 to be debited from to Account #180962628801.

Dated: April 14, 2014

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-11-428

KAREN CALLAGHAN, et al.,

Plaintiffs,

v.

ORDER

CITY OF SOUTH PORTLAND,

Defendant.

Before the court is plaintiffs' application for attorneys fees. Specifically, the plaintiffs are seeking an award of fees and costs in a total amount of $ 85,204.40. This includes their original request for attorney's fees and costs of $ 81,296.90, plus an additional amount of $ 3,907.50 sought for their work in responding to the City's objections to their original fee request.

The parties appear to agree that, as prevailing parties on constitutional claims brought under 42 U.S.C. § 1983, plaintiffs are entitled to their reasonable attorneys fees pursuant to 42 U.S.C. § 1988. What constitutes a reasonable fee is determined through the lodestar method – determining the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Torres-Rivera v. O'Neill-Cancel, 524 F.3d 331, 336 (1st Cir. 2008).[1]

In determining the lodestar, the court may eliminate time that was "unreasonably, unnecessarily, or inefficiently devoted to the case" and may disallow hours claimed "if it determines that the time is insufficiently documented." Torres-

[1] Courts previously also looked to a 12-factor test originally set forth by the Fifth Circuit in Johnson v. Georgia Highway Express, 488 F.2d 714, 717-19 (5th Cir. 1974). However, in more recent fee decisions under 42 U.S.C. § 1988, the Supreme Court has abandoned the Johnson factors in favor of the lodestar approach. See Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 550-52 (2010).

Rivera v. O'Neill-Cancel, 524 F.3d at 336, citing Hensley, 461 U.S. at 433-34; Bangs v. Town of Wells, 2003 ME 129 ¶ 20, 834 A.2d 955. The court must also consider the results obtained and adjust the fee award downward if time was spent on unsuccessful claims. Hensley, 461 U.S. at 434-35. Bangs v. Town of Wells, 2003 ME 129 ¶ 20.

In this case the City contends that the award to plaintiffs for fees and costs should be reduced to somewhere in the neighborhood of $ 16,700 – a reduction amounting to approximately 80 percent of the amount sought. The City contends (1) that many of the hours of work for which fees have been sought were excessive, redundant, or unnecessary, (2) that the time for which fees are sought has been inadequately documented, (3) that the hourly rate sought by plaintiffs is too high, and (4) that the fee award should be reduced by what the City characterizes as plaintiffs' limited success in the lawsuit.

Each of the City's criticisms is considered below. On all these issues, it bears emphasis that, as the Supreme Court has observed, the essential goal "is to do rough justice, not to achieve auditing perfection." Fox v. Vice, 131 S.Ct. 2205, 2216 (2011).

1. Successful Outcome

The City's first argument that plaintiffs achieved only limited success in this action is based on the Law Court's ruling that the relief should be limited to the two named plaintiffs. Callaghan v. City of South Portland, 2013 ME 78 ¶¶ 35-36.

Plaintiffs originally sought injunctive relief precluding the City from enforcing the challenged personnel policy as against the two plaintiffs and a declaratory judgment declaring the policy unconstitutional as applied to any city employees seeking nomination or election to the School Board or engaging in campaign activity in

connection with School Board elections.[2] This court, in ruling for plaintiffs, granted declaratory and injunctive relief that was not limited to the two named plaintiffs. Such relief was granted because at no point during the original Superior Court proceedings did the City raise an argument that if any relief were awarded, it should be limited to the two named plaintiffs.

The court has reviewed the briefs on appeal as well as the memoranda of law filed in this court and can find no argument or discussion by either plaintiffs or the City relating to whether relief should be limited to the two named plaintiffs. At all times both parties focused solely on the merits of the constitutional claims.

What this means is that none of the time spent by plaintiffs' counsel can be ascribed to the broader relief which the Law Court vacated after affirming the relief awarded to the individual plaintiffs. As a result, the court cannot reduce plaintiffs' award based on time spent on unsuccessful claims.

The City's second argument with respect to lack of success is that since relief ultimately was only awarded to the two named plaintiffs and one of the two named plaintiffs has now left City employment, the societal importance of the rights vindicated here was "virtually absent." City's Opposition to Motion for Attorneys Fees dated January 10, 2014 at 14-15. The problem with this argument is that the City strenuously litigated every aspect of this case, moving for reconsideration before the Law Court even after relief had been limited to the two named plaintiffs and then seeking to have the decision vacated on remand. The court can only assume that this was because of the precedential effect of the Law Court's ruling – even after the only specific relief awarded was limited to the named plaintiffs.

[2] See plaintiffs' complaint and the proposed order submitted by plaintiffs with their motion for summary judgment.

Given that the City defended this case with such vigor, the court cannot agree with its subsequent attempt to downplay the success achieved. No reduction in the attorneys fee award will be made based on the City's contention that only limited success was achieved.

2. Allegedly Redundant or Unnecessary Work

The City challenges certain specific categories of the time spent by David Lourie, trial and appellate counsel for plaintiff, as redundant, duplicative, or unnecessary. According to the court's calculations, Mr. Lourie is seeking compensation for 215.8 hours not including time spent in connection with the fee application, which will be separately addressed below.

First, the City contends that no fees should be awarded for work on plaintiffs' application for a TRO because that motion was denied. The denial was entered after it became evident that no school board seats were going to be contested in the upcoming election – information which Mr. Lourie communicated to the court in an October 14, 2011 letter. The TRO was not denied based on the merits or on any failure of proof by plaintiffs.

The court agrees that it became evident at some point while Mr. Lourie was drafting TRO reply papers that there was no need for a TRO and will therefore reduce the compensable hours spent on the TRO by 10.0 hours. The remaining time on the TRO involved legal and factual work on issues that were eventually litigated on the motion for summary judgment. The time spent on those issues in connection with the TRO necessarily reduced the billable time that Mr. Lourie spent later in the litigation. As a result, the remaining time will not be disallowed.

Second, the City challenges time spent by Mr. Lourie in drafting a response to the City's motion for reconsideration in the Law Court. M.R.App.P. 14(b)(1) specifically provides, "No response to a motion for reconsideration shall be filed unless requested by the Law Court." Mr. Lourie could have waited to see if any response was requested, and his motion for leave to file an unsolicited response was denied. The court will disallow 10.8 hours representing the time spent on the response to the motion for reconsideration.

Third, the City challenges the time spent in responding to the Kevin Adams affidavit. Where the City submitted an affidavit offering new evidence after plaintiffs had responded to the City's initial objection to the order proposed by the court on remand, Mr. Lourie was entitled to submit a supplemental response. Moreover, the court considered and relied on that response to some extent in its November 26, 2013 order. No time will be disallowed on this issue.

The City also challenges time spent by Mr. Lourie in consulting with ACLU counsel, time spent in a few miscellaneous categories, and a small amount of time spent on what the City characterizes as clerical tasks. The court generally agrees that time spent consulting with ACLU counsel should not be disallowed just because the ACLU ended up filing an amicus briefs although it agrees that some of that consultation (including a second moot court) appears excessive. Part of the difficulty here is that the court cannot discern from the billing summary provided how much time was spent in consulting with ACLU counsel and for what purpose – an issue that will be addressed further below in connection with the City's claim that Mr. Lourie's time was inadequately documented. The court will disallow a total of 4.0 hours in connection

with the City's challenges to consultation with ACLU counsel and in response to City's objections to time allegedly spent on clerical and other non-compensable tasks.[3]

The above reductions result in a figure of 191.0 hours for compensable time spent by Mr. Lourie prior to his work on the fee application.

3. Inadequate Documentation

The City also proposes a 25 percent reduction in the time otherwise deemed compensable because of what the City contends are inadequacies in documentation. In particular, the City notes numerous instances where Mr. Lourie's billing summary includes generic entries such as "legal research" on unspecified issues, "telephone conference" on unspecified subjects, "exchange email with clients" on unspecified subjects, and on at least two occasions "exchange email" with both addressee and subject unspecified.[4]

Where other entries in the billing summary demonstrate that Mr. Lourie was contemporaneously drafting an affidavit for one of his clients, the court is willing to conclude that a generic reference to "email with client" in that same time frame involved the affidavit being drafted. Similarly, when other entries in the billing summary demonstrate that Mr. Lourie was preparing a legal memorandum in connection with a specific motion, the court is willing to conclude that a generic reference to "legal research" in that same time frame involved research on the issues raised in the motion. In other instances, however, the court is left with only the generic

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[3] This includes .1 hour that the plaintiffs concede should not have been sought and .5 hours listed on September 22, 2013 in connection with an FOAA request.

[4] See, e.g., entries for November 22 and December 5, 2011. One problem is that Mr. Lourie's billing summary often records only a daily total of time spent on a number of different activities, making it impossible to determine how much time was spent on a particular task or issue. See Gratz v. Bollinger, 353 F.Supp.2d 929, 939 (E.D. Mich. 2005) (discussing problems with "block billing").

entry and virtually no ability to assess whether the time spent was necessary, reasonable, or redundant.

Where overly generic time records have been offered, the court may discount or disallow the hours claimed. Torres-Rivera v. O'Neill-Cancel, 524 F.3d at 336, 340; Tennessee Gas Pipeline Co. v. 104 Acres of Land, 32 F.3d 632, 634 (1st Cir 1994). Under the circumstances of this case, the court will reduce Mr. Lourie's compensable hours (after the deductions set forth above) by 10 percent. This reduction shall not be applied to the time spent by Mr. Lourie on plaintiffs' fee application because those hours are being separately adjusted on other grounds, and because there are fewer problems with generic entries in connection with Mr. Lourie's time spent on the fee application.

The 10 percent reduction results in 171.9 hours of compensable time for Mr. Lourie, not including time spent on the fee application.

4. Fee Application

Mr. Lourie did not represent plaintiffs on the fee application in this case. Instead he obtained representation from Attorney Richard O'Meara. However, both Mr. Lourie and Mr. O'Meara have sought compensation for the time spent in pursuing the fee application. As far as the court can tell from his billing summary, Mr. Lourie seeks 20.8 hours on the original fee application plus 3.9 hours in responding to the City's objections. Mr. O'Meara seeks compensation for 15.6 hours on the original fee application plus 8.8 hours in responding to the City's objections. Plaintiffs also seek recovery for 5.2 hours of paralegal time (at $100 per hour) in preparing the billing summary attached as Exhibit A to the Lourie Affidavit from the handwritten hourly time records kept by Mr. Lourie.

The City raises a number of objections: (1) that because Mr. Lourie obtained separate counsel, there was a lot of duplicative work, (2) that Mr. O'Meara had to spend unnecessary time familiarizing himself with the case, and (3) that a lower hourly rate should be applied for fee petition work in keeping with decisions suggesting that time spent on fee requests may be compensated at a lower rate than time spent litigating the merits of the case. See Torres-Rivera v. O'Neill-Cancel, 524 F.3d at 340.

Courts have questioned the use of new counsel to prosecute a fee request and have suggested that this leads to duplicative work and work that would not have been necessary if trial counsel had prosecuted its own fee application. See Rogers v. Okin, 821 F.2d 22, 30 (1st Cir. 1987); Shadis v. Beal, 703 F.2d 71, 73 (3d Cir. 1983).[5]

In this instance Mr. Lourie justifies the need for special fee counsel because, he contends, he has limited experience in preparing fee petitions, because he thought he might have to testify at a hearing with respect to fees, and because he thought new counsel might be able to obtain a settlement as to fees after his own relationship with counsel for the City had deteriorated. January 17, 2014 Lourie Affidavit ¶ 9.

The first two of those contentions do not justify the retention of special fee counsel and the duplication that necessarily results. According to his December 20, 2013 affidavit ¶¶ 3-4, a considerable portion of Mr. Lourie's practice involves lawsuits under 42 U.S.C § 1983 and Mr. Lourie has prosecuted a number of fee applications in the past. See, e.g., Mowles v. Maine Commission on Governmental Ethics, Docket No. AP-06-35 (Superior Ct. Cumberland, order of April 10, 2009), reported at 2009 WL 1747859; Maietta Construction Inc. v. Wainwright, CV-02-59 (Superior Ct. Cumberland) (order of

[5] In Rogers v. Okin, the First Circuit dropped a footnote stating that while specially retained fee counsel may be appropriate in some cases, "such a practice is inherently wasteful in many respects and should not be encouraged by the district courts in the absence of good cause." 821 F.2d at 30 n.4.

July 29, 2003) reported at 2003 WL 23148892. In addition, the court sees no basis for Mr. Lourie's suggestion that he might have had to testify.

The court agrees that there could have been a basis for the retention of special fee counsel in order to explore settlement, but Mr. O'Meara's time records indicate that he had expended only 2.7 hours when he sent a final settlement demand and another .3 hours reviewing the City's response. All of the remainder of Mr. O'Meara's time was spent in litigating the fee request.

The court has reviewed the remaining time sought by Mr. O'Meara and all the time sought by Mr. Lourie in connection with the fee application and concludes that substantial duplication of effort was necessarily involved when both attorneys were working on fee application issues and that the court will therefore deduct 50 percent of the attorney hours sought in connection with the fee application. This means that the court will allow 12.4 of the fee application hours sought by Mr. Lourie, and 13.7 of the hours sought by Mr. O'Meara (which includes the 3.0 hours ascribed to settlement efforts). Both of those figures include time spent in responding to the City's objection to the fee application. The court will allow all 5.2 hours of the paralegal time creating the billing summary.

As set forth below, the court is generally adjusting Attorney Lourie's requested hourly rate. Since it has already halved the time for which fees will be awarded in connection with the fee request, the court will not apply a lower hourly rate for time spent on the fee request and sees no reason to address whether Mr. O'Meara's requested hourly rate should be adjusted.[6]

[6] Applying a lower hourly rate for the fee request could constitute an alternative basis for the court's ruling this issue. See Desena v. LePage, 847 F.Supp.2d 207, 213 (D. Me. 2012) (cutting hourly rate awarded for fee application work in half).

5. Hourly Rate

Mr. Lourie is seeking an hourly rate of $ 325 and has submitted affidavits supporting the position that this falls within the prevailing market rate for an attorney of Mr. Lourie's qualifications litigating § 1983 cases. The City argues that this rate is too high, based on awards in other cases and a document which it contends establishes that Mr. Lourie's usual hourly rate is $250.

Plaintiffs argue that the document in question is inadmissible pursuant to M.R.Evid. 408 because it was provided in the context of settlement negotiations. Rather than resolve that issue, the court will disregard the document. It nevertheless concludes that the hourly rate for the fee award to Mr. Lourie should be adjusted downward for several reasons.

First, Mr. Lourie has not provided any information as to his usual hourly rate, preferring to rely solely on his estimate and the estimate of other lawyers who have provided affidavits as to "a prevailing market rate." First Circuit case law with respect to fee applications states that a party seeking a fee award has the burden of producing materials supporting the request and that this includes "information anent the law firm's standard billing rates." Hutchinson v. Patrick, 636 F.3d 1, 13 (1st Cir. 2011). The court is not bound by a lawyer's standard billing rate but the standard billing rate is a starting point, see Brewster v. Dukakis, 3 F.3d 488, 492 (1st Cir. 1993), and the court will infer from Mr. Lourie's failure to provide that rate that he does not usually charge $ 325 per hour.

Second, disparities in rates, even among the lawyers who submitted affidavits, presumably reflects skill and experience but may also reflect differences in overhead expenses. A lawyer's hourly rate is derived in part from overhead, and Mr. Lourie's

overhead may be significantly lower than that of the affiants.[7] By way of example, Mr. Lourie did not have a computerized billing system – which necessitated the paralegal expenses involved in creating the billing summary annexed to his December 10 affidavit as Exhibit A.

Finally, there is evidence in at least one prior case that undercuts the requested hourly rate of $325. In Mowles v. Maine Commission on Governmental Ethics, AP-06-35 (Superior Ct. Cumberland), Mr. Lourie sought and was awarded attorneys fees at an hourly rate of $235, which was found to be within the prevailing market rate in 2009 for an attorney of Mr. Lourie's qualifications. April 10, 2009 order, reported at 2009 WL 1747859. The court is entitled to rely on its own knowledge of attorneys fees in the relevant area, Andrade v. Jamestown Housing Authority, 82 F.3d 1179, 1190 (1st Cir. 1996), and finds that while billing rates may have increased since 2009, any increases have been closer to 15 percent than the 38 percent required to increase a billing rate of $235 to a rate of $325.

For the above reasons, and based on its knowledge of market rates generally, the court finds that the prevailing rate to be applied to Mr. Lourie's successful efforts in this case is $270 per hour.

6. Westlaw Charges

The last issue in dispute involves plaintiffs' request for an award of $ 4,051.90 for Westlaw research costs. On this issue the court finds that Mr. Lourie's explanation of those expenses and the Westlaw records submitted with Mr. Lourie's reply affidavit are not comprehensible and do not support the request.

[7] The court is also constrained to note that the affiants, who are all involved in fee-generating work, have an incentive to have fee awards set at a rate at which they would seek to be compensated.

The records attached to Mr. Lourie's reply affidavit are strangely formatted and set forth different figures for the amounts charged. By way of example, for March 2012 plaintiffs are seeking $ 198.00, but the printout for that month shows a figure of "24.08 USD" for the Callaghan case in the extreme right hand column. As far as the court can tell from the Westlaw bills that the City submitted for comparison, the extreme right hand column is the actual amount charged.

Mr. Lourie's December 10, 2013 affidavit indicates that his monthly Westlaw fee was capped and that he has "conservatively estimated" that Westlaw research on this case accounted for 75 percent of his usage. However, for October 2011 (a month for which Mr. Lourie is seeking 75 percent of his capped fee), the printout appears to show 29 Callaghan Westlaw transactions out of 135 total Westlaw transactions – which would appear to suggest that this case accounted for 20 percent, not 75 percent, of the Westlaw usage that month.

Finally, plaintiffs are seeking $ 2,301.00 in Westlaw expenses for the twelve months ending December 17, 2013 – even though the Law Court argument took place on December 12, 2012 and the only activity that took place during the ensuing 12 months was the drafting of a response to the City's motion for reconsideration (already disallowed) and certain proceedings commenced by this court's November 7, 2013 order after the Law Court remand. Mr. Lourie does not explain why the $ 2,301.00 figure was selected or why so much Westlaw time was used during the period in question, and the relevant printout sets forth various figures including "0.00 USD" in the extreme right hand column.

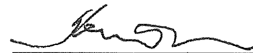
The Westlaw charges are disallowed.

In sum, plaintiffs are entitled to attorney's fees for 171.9 hours of Mr. Lourie's time prior to the fee application and 12.4 hours of Mr. Lourie's time in connection with the fee application at an hourly rate of $270 resulting in a total attorney's fee to Mr. Lourie of $ 49,761.00. Plaintiffs are also entitled to attorney's fees for 13.7 hours of Mr. O'Meara's time at an hourly rate of $300 and 5.2 hours of paralegal time at $100 per hour for an additional amount of $ 4,660.00. Finally, after disallowing the Westlaw expenses requested, plaintiffs are entitled to costs of $ 350.00.

The entry shall be:

Plaintiffs are awarded attorneys fees of $ 54,421.00 and costs of $ 350.00. The clerk is directed to incorporate this order in the docket pursuant to Rule 79(a).

Dated: March 31, 2014



Thomas D. Warren
Justice, Superior Court