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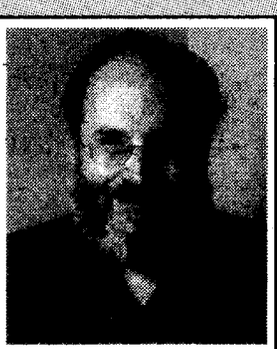
...ve the Legal Community

City Incurs Attorney Fees

On September 26, 2011, current at-large South Portland School Board member and then City librarian Karen Callaghan, sued the City of South Portland 13 days after having been told that her name could not appear on the November ballot for re-election to the School Board unless she resigned her position at the library. Callaghan, who had worked for the City Library since 2001, was appointed to the School Board in December 2007, by the City Council to fill an unexpired term. At the end of that term, she successfully ran for the seat in 2008.

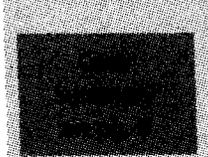
The City revised its personnel policy on Nov. 15, 2010, to expand its prohibition against City employees' serving on the City Council or participating in City Council-related campaigns to School Board service or campaign-related activity. Callaghan was joined in her suit by then part-time City Parks and Recreation Department employee Burton Edwards, who claimed he was told he would have to give up his job in order to serve on the School Board.

On April 17, 2012, Superior Court Justice Thomas Warren issued a summary judgment ruling in favor of Callaghan, Burton, and all similarly-situated City employees. The decision noted that the City Manager has no authority over the School Board and that there is not enough of a relationship between City employees and the School Board to justify the City's restriction of employee First Amendment rights.



David Lourie

While Justice Warren ordered the City to strike its policies preventing municipal employees from running for School Board, circulating petitions, or campaigning on behalf of School Board elections, he upheld the City's rules prohibiting employees from using city facilities, equipment, materials, or supplies in elections; from political activity during work hours, or using the authority of their positions to influence elections. Justice Warren also imposed a temporary restraining order that allowed Callaghan to



—see ATTORNEY FEES page 10

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CIVIL RIGHTS
Attorney Fees and Costs
Lodestar Method

Where plaintiff prevailed in constitutional claim against City and City argued the fees claimed by plaintiff's counsel were excessive, Court agreed with defendant to some extent and reduced total attorney fees and costs due by one third.

Plaintiffs applied for an award of attorney fees and costs related to their successful civil rights claim against the City of South Portland under 42 U.S.C. § 1983. Plaintiffs' attorney, David Lourie, submitted a request for costs and fees totaling $85,204.40, including $3,907.50 for work related to responding to the City's objections to the fee request.

The Court determines the reasonableness of attorney fees using the lodestar method, which multiplies the number of hours reasonably expended on the litigation by a reasonable hourly rate. Noting that the U.S. "Supreme Court has observed the essential goal is to do rough justice, not to achieve auditing perfection," the Court considered the City's arguments in relation to the fee request submitted.

The Court first considered the City's argument that plaintiffs achieved only limited success as the Law Court's decision applied only to the two named plaintiffs and not to the broader class of potentially similarly-situated city employees. The Court declined to reduce the requested fees on those grounds concluding from its review that the briefs and memoranda of law filed by plaintiffs over the course of the proceeding "[a]t all times ... focused solely on the merits of the constitutional claims."

Further, the Court noted 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. ... Given that the City defended his case with such vigor, the court cannot agree with its subsequent attempt to downplay the success achieved."

The Court, however, reduced by 10 hours the time billed by Lourie for TRO drafting, as "it became evident at some point while Mr. Lourie was drafting TRO reply papers that there was no need for a TRO ... [although t]he remaining time on the TRO involved legal and factual work on issues that were eventually litigated in the motion for summary judgment ... which time] will not be disallowed."

The Court disallowed another 10.8 hours of billing for time Lourie spent in drafting a response to the City's motion to the Law Court for reconsideration as "M.R.App.P. 14(b)(1) specifically provides, '[n]o 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 allowed challenged time spent in responding to a City affidavit "offering new evidence after plaintiffs had responded to the City's initial objection to the order proposed by the court on remand [as] Lourie was entitled to submit a supplemental response [and] the court considered and relied on that response to some extent in its November 26, 2013 order."

The Court disallowed four hours of time billed for consultation with ACLU counsel as while "time spent consulting with ACLU counsel should not be disallowed just because the ACLU ended up filing an *amicus* brief." However, the Court noted that "some of that consultation (including a second moot court) appears excessive ... [and] the court cannot discern from the billing summary provided how much time was spent in consulting with ACLU counsel and for what purpose."

The Court also found a pattern of inadequate documentation of billed legal time warranting a 10% reduction in the requested fee, agreeing with the City's criticism of numerous "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."

The Court also agreed with the City that there was some unnecessary duplication of legal expense insofar as Lourie obtained representation from Attorney Richard O'Meara on the fee application. "Courts have questioned the use of new counsel to prosecute a fee request and have suggested that this leads to duplicative work."

The Court rejected Lourie's justification for O'Meara's hiring to the extent he claimed to have limited experience in preparing fee petitions and feared he might have to testify at a hearing with respect to fees noting that, "[a]ccording to his December 20, 2013, affidavit, a considerable portion of Mr. Lourie's practice involves lawsuits under 42 U.S.C. § 1983 and [he] has prosecuted a number of fee applications in the past." Further, the Court found "no basis for Mr. Lourie's suggestion that he might have had to testify."

Nonetheless, the Court agreed the three hours billed by O'Meara in order to explore settlement was reasonable, but otherwise substantially reduced both Lourie's and O'Meara's requested fees related to the fee application, approving but 13.7 of the 23.4 hours billed for O'Meara's time, which it accepted at a $300 per hour rate.

The Court allowed the full 5.2 hours billed at $100 per hour for the paralegal time required to prepare a billing summary from Lourie's handwritten billing records, but disallowed the $4,051.90 billed by Lourie for Westlaw research costs, finding that 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."

Lastly, the Court reduced Lourie's hourly rate from the $325 he claimed to $270, noting Lourie had "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.'" The Court stated that it "will infer from Mr. Lourie's failure to provide [his standard billing] rate that he does not usually charge $325 per hour."

The Court also noted that "[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. 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." The Court further referenced a 2009 case in which Lourie "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. ... [and] 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."

Plaintiffs awarded attorney's fees of $54,421 and costs of $350.

Callaghan et al. v. City of South Portland, (Warren, J.) Cumberland Dkt. No. CV-11-428, 3-31-14

David Lourie for plaintiffs.

Sally Daggett for defendants.

MLR/SC #231-14 — 13 pages

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